The Fourth Amendment State Agency Requirement: Some Doubts

David Gray[*]

ABSTRACT: The state agency requirement holds that the "Fourth Amendment restricts the conduct of the Federal Government and the States; [but] does not apply to private actors." As Justice Alito has pointed out, this rule dramatically limits the capacity of the Fourth Amendment to protect the "security of the people . . . against unreasonable searches and seizures" because "today, some of the greatest threats to individual privacy may come from powerful private companies that collect and sometimes misuse vast quantities of data about the lives of ordinary Americans." Thanks to the state agency requirement, cell service providers as well as cellphone application companies like Google, Waze, and Uber that gather, aggregate, and store detailed location information remain at liberty to track each of us and all of us free from Fourth Amendment restraint. Similarly, companies like Amazon that sell home surveillance devices, internet service companies like Verizon, Comcast, Google, and Microsoft that aggregate and exploit details about what we do online, and social media platforms such as Meta, X, and Google that gather and store comprehensive details about our associational networks, all appear immune from Fourth Amendment regulation despite having access to intimate details about our lives and presenting demonstrable threats to our liberty and democratic order.

Must it be this way? Or does the Fourth Amendment have a role to play in protecting us from these private surveillants? This Article argues that it does. An examination of the caselaw shows that the Fourth Amendment state agency requirement's jurisprudential foundations are thin. In fact, the text and history of the Fourth Amendment provide substantial evidence that it was

---

[*] Jacob A. France Professor, University of Maryland, Francis King Carey School of Law. This article is dedicated to Arnold Loewy. We miss you and your remarkable ability to build and sustain community. My thanks to those who offered comments during presentations at the Joel R. Reidenberg Northeast Privacy Scholars Workshop, the University of Basel, the Texas Tech Criminal Law Symposium, the University of Maryland, and the Constitutional Law Schmooze, including Chaz Arnett, Sara Sun Beale, Steve Bellovin, Madiha Choksi, Sherman Clark, Melodi Dincer, Sabine Gless, Mark Graber, Orin Kerr, Arnold Loewy, Michael Mannheimer, Scott Mulligan, Natalie Ram, Andrea Roth, Katherine Sandberg, Matiangai Sirleaf, Joseph Turow, Jeffrey Vagle, Ari Waldman, and Helena Whalen-Bridge. Cogan Rooney provided outstanding research support.

always meant to regulate searches conducted by "private" entities. Given this, it is natural to wonder where the rule came from and why it persists. Like so much of our legal culture, the answer is bound up in longstanding efforts to entrench and defend racial apartheid in the United States. If that is right, then there is more at stake here than questions of doctrine and constitutional interpretation. Modifying or abandoning our views on the Fourth Amendment state agency requirement may be essential to our ongoing efforts both to guarantee the "security of the people . . . against unreasonable searches and seizures" and to pursue a "more perfect union" for all of "the people."

INTRODUCTION

In its landmark 2018 opinion in *Carpenter v. United States*, the Supreme Court held that law enforcement must secure a warrant to access cell site location information gathered and stored by private telecommunication companies.[1] In

1. Carpenter v. United States, 138 S. Ct. 2206, 2217, 2222 (2018).

reaching that holding, the Court set the stage for a potential revolution in Fourth Amendment law by embracing the collective dimensions of Fourth Amendment rights[2] and limiting the scope of the third-party[3] and public observation doctrines.[4] These features of *Carpenter* have been much-discussed, both on and off the Court.[5] There is another facet of *Carpenter* that has received less attention, however: its treatment of the state agency requirement.

The state agency requirement holds that "[t]he Fourth Amendment restricts the conduct of the Federal Government and the States; [but] it does not apply to private actors."[6] Private persons may fall within the compass of the Fourth Amendment if they act at the behest of a government agent—and thereby become government agents themselves[7]—but, by and large, private corporations,[8] spouses,[9] and burglars[10] are not governed by the Fourth Amendment.

As Justice Samuel Alito explained in his trenchant dissenting opinion in *Carpenter*, this state agency requirement dramatically limits the capacity of the Fourth Amendment to guard against threats posed to the security of the people "in their persons, houses, papers, and effects, against unreasonable

2. *See* David Gray, *Collective Rights and the Fourth Amendment After* Carpenter, 79 MD. L. REV. 66, 67–85 (2019). The Court's willingness to embrace the collective dimensions of Fourth Amendment rights are evident in both the majority opinion and dissenting opinions by Justices Anthony Kennedy and Clarence Thomas. *See Carpenter*, 138 S. Ct. at 2211–14, 2218; *id.* at 2227 (Kennedy, J., dissenting); *id.* at 2241–42 (Thomas, J., dissenting). Prior to *Carpenter*, the Court seemed committed to the view that Fourth Amendment rights are purely personal. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 133–40 (1978) ("Fourth Amendment rights are personal in nature . . . ."); Katz v. United States, 389 U.S. 347, 350 (1967) ("[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion . . . ."). This despite the fact that the text of the Amendment guarantees the "right of the people" rather than the "rights of persons." *See* DAVID GRAY, THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE 146–56 (2017) [hereinafter GRAY, AGE OF SURVEILLANCE]; David Gray, *The Fourth Amendment Categorical Imperative*, 116 MICH. L. REV. ONLINE 14, 31–34 (2017) [hereinafter Gray, *Categorical Imperative*]; David Gray, *Fourth Amendment Remedies as Rights: The Warrant Requirement*, 96 B.U. L. REV. 425, 444–56 (2016); David Gray, *Dangerous Dicta*, 72 WASH. & LEE L. REV. 1181, 1181–83 (2015). In addition to rules governing Fourth Amendment "standing," the assumption that Fourth Amendment rights are personal rather than collective underwrites a number of frequently criticized doctrines, including the third-party and public observation doctrines. *See, e.g.*, GRAY, AGE OF SURVEILLANCE, *supra*, at 78–92; David Gray, *Collective Standing Under the Fourth Amendment*, 55 AM. CRIM. L. REV. 77, 77–78, 86–97 (2018); Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1, 4–8 (2013).

3. *Carpenter*, 138 S. Ct. at 2217, 2219–20.

4. *Id.* at 2217–19.

5. *See supra* note 2.

6. *Carpenter*, 138 S. Ct. at 2261 (Alito, J., dissenting); *see also* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991) ("The Constitution's protections of individual liberty and equal protection apply in general only to action by the government.").

7. Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 614 (1989).

8. United States v. Jacobsen, 466 U.S. 109, 113–18 (1984).

9. Coolidge v. New Hampshire, 403 U.S. 443, 487–90 (1971).

10. Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

searches and seizures"[11] by many new and emerging surveillance technologies because "today, some of the greatest threats to individual privacy may come from powerful private companies that collect and sometimes misuse vast quantities of data about the lives of ordinary Americans."[12] Some of these corporations and their technologies have more immediate effects on our lives than government entities and pose greater threats to our privacy, autonomy, and democratic institutions than police and other traditional Fourth Amendment targets.[13] But, by virtue of the state agency requirement, the Fourth Amendment appears to offer no protections at all against these powerful, omnipresent surveillants.

This is certainly true of the cell site location information ("CSLI") at stake in *Carpenter*. That data—which "provides an all-encompassing record of the holder's whereabouts"[14] opening "an intimate window into a person's life, [by] revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations'"[15]—is gathered, aggregated, stored, and analyzed in the first instance by telecommunication companies for their own "commercial purposes."[16] True, the Court's holding in *Carpenter* requires that government agents secure a warrant before accessing these vast reservoirs of detailed location information. But that holding says nothing about the ability of cellphone companies and their corporate partners to track their customers and exploit customers' location information. Verizon, AT&T, Sprint, T-Mobile, and scores of smaller service providers remain at liberty to track us through our phones, to document in intimate detail our locations and movements "achiev[ing] near perfect surveillance, as if [they] had attached an ankle monitor to [each of us]."[17] Cellphone companies retain unfettered discretion to "travel back in time to retrace [our] whereabouts, subject only to [their data] retention [policies]."[18]

There can be no doubt that this kind of broad and indiscriminate surveillance threatens the security of the people against unreasonable search. As Chief Justice John Roberts wrote for the majority in *Carpenter*:

> Although such records are generated for commercial purposes, that distinction does not negate [our] anticipation of privacy in [our] physical location[s]. Mapping a cell phone's location over the course

11. U.S. CONST. amend. IV.

12. Carpenter v. United States, 138 S. Ct. 2206, 2261 (2018) (Alito, J., dissenting).

13. *See generally* FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION (2015) (discussing effects of Big Data and algorithmic decision making on consumers); Lauren E. Willis, *Deception by Design*, 34 HARV. J.L. & TECH. 115 (2020) (explaining the role of "dark patterns" in manipulating consumers).

14. *Carpenter*, 138 S. Ct. at 2217.

15. *Id.* (quoting United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)).

16. *Id.*

17. *Id.* at 2218.

18. *Id.*

> of 127 days provides an all-encompassing record of the holder's whereabouts. . . . These location records "hold for many Americans the 'privacies of life.'" . . .
>
> . . . .
>
> . . . Critically, because location information is continually logged for all of the 400 million devices in the United States . . . this newfound tracking capacity runs against everyone.[19]

And, as Justice Alito warns, cellphone providers and their private collaborators can and do exploit or misuse this information.[20] But, no matter the violations of subjectively manifested and reasonable expectations of privacy, and no matter the threat of broad and indiscriminate surveillance and arbitrary exercises of power, these "private" mass surveillance programs seem to lie beyond the reach of Fourth Amendment regulation by virtue of the state agency requirement.[21]

Cellphone companies are not alone in their capacities to gather, store, and analyze enormous amounts of information about us and our activities. Through various cellphone applications, Google tracks and stores users' location information for eighteen months.[22] Internet service providers like Verizon (again!) and Comcast, as well as companies like Google (Chrome) and Microsoft (Edge)—through whom the vast majority of us access the internet—gather and store comprehensive details about where we go, what

---

19. *Id.* at 2217–18 (quoting Riley v. California, 573 U.S. 373, 403 (2014)); *see also* United States v. Chatrie, 590 F. Supp. 3d 901, 925 (E.D. Va. 2022) (noting that location searches using geofence technology implicate the same concerns raised in *Carpenter*).

20. *See* Jennifer Valentino-DeVries, *How Your Phone Is Used to Track You, and What You Can Do About It*, N.Y. TIMES (Aug. 19, 2020), https://www.nytimes.com/2020/08/19/technology/smartphone-location-tracking-opt-out.html (on file with the *Iowa Law Review*); Lily Hay Newman, *Carriers Swore They'd Stop Selling Location Data. Will They Ever?*, WIRED (Jan. 9, 2019, 7:43 PM), https://www.wired.com/story/carriers-sell-location-data-third-parties-privacy [https://perma.cc/VC9J-BTJT]; Jennifer Valentino-DeVries, Natasha Singer, Michael H. Keller & Aaron Krolik, *Your Apps Know Where You Were Last Night, and They're Not Keeping It Secret*, N.Y. TIMES (Dec. 10, 2018), https://www.nytimes.com/interactive/2018/12/10/business/location-data-privacy-apps.html (on file with the *Iowa Law Review*); Sarah Krouse, *5 Ways Companies Use Your Cellphone Location Data*, WALL ST. J. (July 15, 2018, 9:00 AM), https://www.wsj.com/articles/5-ways-companies-use-your-cellphone-location-data-1531659600 (on file with the *Iowa Law Review*).

21. *Cf. Carpenter*, 138 S. Ct. at 2261 (Alito, J., dissenting) (cautioning that if the Court's "decision encourages the public to think that this Court can protect them from this looming threat to their privacy, the decision will mislead as well as disrupt.").

22. Cullen Seltzer, *Google Knows Where You've Been. Should It Tell the Police?*, SLATE (May 16, 2022, 11:04 AM), https://slate.com/technology/2022/05/google-geofence-warrants-chatrie-location-tracking.html [https://perma.cc/W4TT-26BT]; Valentino-DeVries, *supra* note 20; Daisuke Wakabayashi, *Google Sets Limit on How Long It Will Store Some Data*, N.Y. TIMES (June 24, 2020), https://www.nytimes.com/2020/06/24/technology/google-data-storage.html (on file with the *Iowa Law Review*). Google offers guidance for users who want to exercise some control over their location data. *See Manage Your Android Device's Location Settings*, GOOGLE ACCT. HELP, https://support.google.com/accounts/answer/3467281 [https://perma.cc/R2PN-7DF2].

information we consume, and what we do online.[23] These surveillance programs produce data that, in terms of both its quality and quantity, is at least as revealing as CLSI[24] (many among us would much rather reveal a week's worth of location data than a week of browsing history).[25] Corporate hosts of social media platforms including Meta (Facebook, Instagram), X, and Google (YouTube) track our networks of associations, our communication, and our access to and consumption of information.[26] For many, this information is just as revealing as CLSI, if not more.[27] Justice Alito's warnings about the exploitation of personal information by private entities apply just as forcefully to these companies, with consequences for not only our personal lives, but, demonstrably, for our democratic order.[28]

And then there is the booming population of privately operated surveillance devices we invite into our homes. Consider, as an example, Alexa. Many folks have Alexa-enabled devices in their homes, in their cars, and on

23. *Chatrie*, 590 F. Supp. 3d at 907–11; Natasha Singer & Jason Karaian, *Americans Flunked This Test on Online Privacy*, N.Y. TIMES (Feb. 15, 2023), https://www.nytimes.com/2023/02/07/technology/online-privacy-tracking-report.html (on file with the *Iowa Law Review*); Cecilia Kang, *Broadband Providers Will Need Permission to Collect Private Data*, N.Y. TIMES (Oct. 27, 2016), https://www.nytimes.com/2016/10/28/technology/fcc-tightens-privacy-rules-for-broadband-providers.html (on file with the *Iowa Law Review*) (describing limited scope of F.C.C. rules).

24. Kashmir Hill, *How Your Browsing History Is Like a Fingerprint*, FORBES (Aug. 1, 2012, 2:18 PM), https://www.forbes.com/sites/kashmirhill/2012/08/01/how-your-browsing-history-is-like-a-fingerprint (on file with the *Iowa Law Review*).

25. *Cf.* Alex Marthews & Catherine Tucker, *The Impact of Online Surveillance on Behavior*, *in* THE CAMBRIDGE HANDBOOK OF SURVEILLANCE LAW 437, 444–47 (David Gray & Stephen E. Henderson eds., 2017) (documenting changes in search terms used by Google users after Snowden revelations).

26. Brian X. Chen & Daisuke Wakabayashi, *You're Still Being Tracked on the Internet, Just in a Different Way*, N.Y. TIMES (Apr. 6, 2022), https://www.nytimes.com/2022/04/06/technology/online-tracking-privacy.html (on file with the *Iowa Law Review*) (explaining how social media sites mine user information).

27. *See* Singer & Karaian, *supra* note 23.

28. *See* Mark Harris, *A Peek Inside the FBI's Unprecedented January 6 Geofence Dragnet*, WIRED (Nov. 28, 2022, 7:00 AM), https://www.wired.com/story/fbi-google-geofence-warrant-january-6 [https://perma.cc/43UV-8257]; Shoshana Zuboff, *The Coup We Are Not Talking About*, N.Y. TIMES (Jan. 29, 2021), https://www.nytimes.com/2021/01/29/opinion/sunday/facebook-surveillance-society-technology.html (on file with the *Iowa Law Review*) (explaining threats to democracy posed by ubiquitous public and private surveillance); Jon Swartz, *Justice Department Demand for Data on 1.3M Anti-Trump Protesters Sparks Debate*, USA TODAY (Aug. 16, 2017, 9:44 AM), https://www.usatoday.com/story/tech/2017/08/15/doj-hunt-1-3-m-anti-trump-protesters-online-sparks-debate/568784001 [https://perma.cc/75WF-ET7U] (reporting on Justice Department's efforts to get user information from disruptj20.org).

their persons, including speakers,[29] lighting,[30] televisions,[31] alarm clocks,[32] thermostats,[33] smartphones,[34] dashboard cameras,[35] and earbuds.[36] These devices are equipped with microphones and voice recognition technologies allowing users to play music, operate appliances, order goods and services, make phone calls, control lighting, adjust the air conditioning, and open locks.[37] Wonderful stuff! But these miracles come with a cost.[38] The convenience and control offered by Alexa-enabled devices requires granting to Amazon and its affiliates intimate access to the lives of individual users[39] and the lifeworld we share.[40] The nature and extent of this access makes exploitation inevitable—indeed, it is part of the design.[41] But, by virtue of the state agency requirement, the surveillance that Amazon conducts, the information it gathers, the data it stores, and what it does with it all, stand outside the scope of Fourth Amendment regulation.

Must it be this way? Or does the Fourth Amendment have a role to play in protecting us from our corporate overlords? I think it does. That hope is a consequence of serious doubts about the Fourth Amendment state agency

---

29. *See, e.g.*, Kate Kozuch, *The Best Alexa Speakers in* 2023, TOM'S GUIDE (July 7, 2023), https://www.tomsguide.com/best-picks/best-alexa-speakers [https://perma.cc/8AJK-VG58].

30. *See, e.g.*, *Ring Lighting*, RING, https://ring.com/smart-lighting [https://perma.cc/GX3L-ER6T].

31. *See, e.g.*, *Smart TVs with Alexa Built-In*, BEST BUY, https://www.bestbuy.com/site/amazon/tvs-with-alexa/pcmcat163578985729.c?id=pcmcat163578985729 (on file with the *Iowa Law Review*).

32. *See, e.g.*, *Echo Dot (4th Gen), Smart Speaker with Clock and Alexa*, AMAZON, https://www.amazon.com/dp/B07XJ8C8F7 (on file with the *Iowa Law Review*).

33. *See, e.g.*, *Amazon Smart Thermostat—Energy Star Certified*, AMAZON, https://www.amazon.com/Amazon-Smart-Thermostat/dp/B08J4C8871 (on file with the *Iowa Law Review*).

34. *See, e.g.*, *Alexa Built-In Phones*, AMAZON, https://www.amazon.com/Alexa-Built-in-Phones-Shop/b?ie=UTF8&node=14613304011 [https://perma.cc/6SAV-PV63].

35. *See, e.g.*, Dan Seifert, *Ring Announces New Line of Security Cameras for Cars*, VERGE (Sept. 24, 2020, 12:27 PM), https://www.theverge.com/2020/9/24/21453632/ring-car-alarm-security-camera-connect-tesla-price-specs-features-amazon [https://perma.cc/BA5B-QCBU].

36. *See, e.g.*, *Echo Buds with Active Noise Cancellation*, AMAZON, https://www.amazon.com/dp/B085WTYQ4X [https://perma.cc/2VSA-CCXR].

37. *See, e.g.*, *Schlage Encode Smart WiFi Deadbolt with Camelot Trim*, RING, https://ring.com/products/schlage-encode-deadbolt [https://perma.cc/6MN2-NYDX].

38. As Justice Alito put the point, "[n]ew technology may provide increased convenience or security at the expense of privacy." United States v. Jones, 565 U.S. 400, 427 (2012) (Alito, J., concurring).

39. Many wearable devices monitor menstrual cycles. *See Track Your Period with Cycle Tracking*, APPLE, https://support.apple.com/en-us/HT210407 [https://perma.cc/PK4X-88FK].

40. Consider Ring's monitoring of public spaces. *See* Drew Harwell, *Doorbell-Camera Firm Ring Has Partnered with 400 Police Forces, Extending Surveillance Concerns*, WASH. POST (Aug. 28, 2019, 6:53 PM), https://www.washingtonpost.com/technology/2019/08/28/doorbell-camera-firm-ring-has-partnered-with-police-forces-extending-surveillance-reach (on file with the *Iowa Law Review*).

41. *See* Niraj Dawar, *Marketing in the Age of Alexa: AI Assistants Will Transform How Companies and Customers Connect*, HARV. BUS. REV., May–June 2018, at 80, 80–86 ("A platform serves consumers by constantly anticipating their needs. To do that it must collect granular data on their purchasing patterns and product use and try to understand their goals.").

requirement.[42] This Article explores those doubts. Part I traces the doctrinal history of the Fourth Amendment state agency doctrine and argues that there is no textual or persuasive historical support for the rule. Part II then asks the obvious question: "If there is no firm textual or historical foundation for the Fourth Amendment state agency doctrine, then how did it come to be a cornerstone of Fourth Amendment jurisprudence?" It turns out that the answer, like so much of our legal culture, is bound up with perpetual efforts to entrench and defend racial apartheid. In light of this, modifying or abandoning our views on the Fourth Amendment state agency requirement may be more than a matter of doctrine and constitutional interpretation; it may be essential to our ongoing efforts to pursue "a more perfect union"[43] for all "of the people."[44] Part III explores the consequences of abandoning the Fourth Amendment state agency requirement and charts a path forward for citizens, "private" agents, legislatures, executive agents, and courts.

I. THE ORIGINAL FOURTH AMENDMENT AND THE STATE AGENCY REQUIREMENT

Conventional wisdom holds that the Fourth Amendment applies only to state agents.[45] In this Part, I argue that this traditional view is not well-founded.

A. THE DOCTRINAL ORIGINS OF THE FOURTH AMENDMENT STATE AGENCY REQUIREMENT

The doctrinal foundations for the Fourth Amendment state agency requirement are . . . thin. The first case of note where the Court squarely addresses the question is *Burdeau v. McDowell*, decided in 1921.[46] There, representatives of McDowell's employer broke into his corporate office, desk, and safe during an internal fraud investigation.[47] During their search, investigators seized both business and private papers.[48] They later gave some of McDowell's private papers to a team of federal prosecutors led by Joseph

42. Some technology companies may sometimes be "state agents" under existing doctrine. *See generally* Kiel Brennan-Marquez, *The Constitutional Limits of Private Surveillance*, 66 U. KAN. L. REV. 485 (2018) (arguing that telephone companies, internet companies, and other private agents who routinely gather, aggregate, and share data with law enforcement agencies should be treated as "state agents" for purposes of the Fourth Amendment).

43. U.S. CONST. pmbl.

44. U.S. CONST. amend. IV.

45. *See, e.g.*, THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 4 (3d ed. 2017) ("The Fourth Amendment is applicable only to governmental activity; it does not regulate private searches and seizures.").

46. *Cf.* Walter v. United States, 447 U.S. 649, 656 (1980) (noting that the Fourth Amendment state agent requirement "has . . . been settled since *Burdeau v. McDowell*"). *See generally* Burdeau v. McDowell, 256 U.S. 465 (1921).

47. *Burdeau*, 256 U.S. at 470, 472–73.

48. *Id.* at 473.

Burdeau.[49] McDowell sued Burdeau on Fourth and Fifth Amendment grounds demanding both the return of his private papers and their exclusion at trial.[50] Writing for the Court, Justice William Day denied McDowell relief.[51] Citing the fact that the search and seizure was effected by representatives of a private corporation, Justice Day asserted that:

> The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in . . . previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies . . . .[52]

That's it. Going forward, this brief passage becomes the main source of authority for the Fourth Amendment state agency requirement. But it turns out that what Justice Day regarded as self-evident is not so clear as a matter of doctrine, text, or history.

In *Burdeau*, Justice Day cites seven cases in support of his conclusion that the Fourth Amendment "clearly" applies exclusively to state actors[53]: *Boyd v. United States*,[54] *Adams v. New York*,[55] *Weeks v. United States*,[56] *Johnson v. United States*,[57] *Perlman v. United States*,[58] *Silverthorne Lumber Co. v. United States*,[59] and *Gouled v. United States*.[60] None of these cases squarely addresses the question of state agency or provides textual or historical analysis on the point. *Boyd* does not discuss state agency questions at all and, at any rate, is as much about the Fifth Amendment as it is the Fourth.[61] So, too, *Johnson*, which does not even mention the Fourth Amendment.[62] *Perlman* does not raise or address questions of state action, but instead turns on an early version of the third-party doctrine.[63] Justice Day's own opinions in *Weeks* and *Adams* report the same

---

49. *Id.* at 474.

50. *Id.*

51. *Id.* at 476.

52. *Id.* at 475.

53. *Id.* at 474–75.

54. *See generally* Boyd v. United States, 116 U.S. 616 (1886).

55. *See generally* Adams v. New York, 192 U.S. 585 (1904).

56. *See generally* Weeks v. United States, 232 U.S. 383 (1914).

57. *See generally* Johnson v. United States, 228 U.S. 457 (1913).

58. *See generally* Perlman v. United States, 247 U.S. 7 (1918).

59. *See generally* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

60. *See generally* Gouled v. United States, 255 U.S. 298 (1921).

61. Boyd v. United States, 116 U.S. 616, 630 (1886) ("[A]ny forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.").

62. *Johnson*, 228 U.S. at 458–59.

63. This is evident in the Court's gloss of the facts: "Perlman delivered the exhibits to publicity, made them the means of advantage. They, for the purposes of justice, were taken from his

assumption he stated in *Burdeau*, but do not offer textual or historical support.[64] Justice Oliver Wendell Holmes's opinion in *Silverthorne* similarly assumes a state action requirement in *dicta* and without discussion.[65] In *Gouled*, the only reference to state action is an implicit assumption reflected in Justice John Clarke's framing of the question presented to the Court.[66] But, notably, the *Gouled* Court is careful in its answer not to exclude the possibility that private parties might be bound by the Fourth Amendment.[67] At any rate, none of these cases provides argument or evidence in support of Justice Day's conclusory statement in *Burdeau*. That is because neither the text nor its history offers that kind of clarity.

B. There is No Textual Basis for the Fourth Amendment State Agency Requirement

There is no substantial textual evidence for Justice Day's conclusory claim in *Burdeau* that the Fourth Amendment applies only to government action. Consider the text:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[68]

---

possession and volition into the control and custody of the court. Upon formal motion they were released for the use of the [g]overnment . . . ." *Perlman*, 247 U.S. at 15.

64. Weeks v. United States, 232 U.S. 383, 390 (1914) (asserting that the purpose of the Fourth Amendment was "to protect the people from unreasonable searches and seizures, such as were permitted under the general warrants issued under authority of the Government"); Adams v. New York, 192 U.S. 585, 598 (1904) ("The security intended to be guaranteed by the Fourth Amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted.").

65. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391 (1919) ("[T]he case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the Government planned or at all events ratified the whole performance.").

66. Gouled v. United States, 255 U.S. 298, 305 (1921) (reporting that one question presented to the Court was: "Is the secret taking or abstraction, without force, by a representative of any branch or subdivision of the Government of the United States, of a paper writing of evidential value only belonging to one suspected of crime and from the house or office of such person,—a violation of the 4th amendment?").

67. *Id.* ("The prohibition of the Fourth Amendment is against all unreasonable searches and seizures *and if* for a Government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure . . . ." (emphasis added)).

68. U.S. CONST. amend. IV.

Notice that the Amendment's statement of rights contains no reference whatever to a government entity. It instead provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[69] This is in marked contrast to most other provisions in the Bill of Rights, which explicitly imagine themselves as shields against government oppression. The First Amendment provides that "*Congress* shall make no law respecting an establishment of religion . . . ."[70] Although initially agnostic on who might infringe upon "the right of the people to keep and bear Arms," the Prefatory Clause of the Second Amendment seems to contemplate some state involvement in regulating militias.[71] Who is it the Third Amendment fears will make themselves unwanted house guests: "Soldier[s]"?[72] The Fifth Amendment guarantees rights in "criminal case[s],"[73] the Sixth Amendment "criminal prosecutions,"[74] and the Seventh Amendment in "Suits at common law,"[75] all of which are government operations.[76] Eighth Amendment guarantees against "[e]xcessive bail," "excessive fines," and "cruel and unusual punishments," all contemplate state actions.[77] The Tenth Amendment allocates powers between "the United States," "the States," and "the people,"[78] reflecting a clear awareness that there are differences among them, and the Eleventh Amendment concerns "[t]he Judicial power of the United States."[79]

Although from a later era, there is a similar difference in language among the Thirteenth, Fourteenth, and Fifteenth Amendments. Section I of the Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[80] By its text, this Amendment prohibits enslavement of

69. *Id.* While it is true that the subordinate clause may make oblique reference to a government entity as the source of warrants, nothing in the text suggests only state agents can conduct searches pursuant warrants. As we shall see, there was clear common law precedent in 1792 for private parties conducting searches pursuant to warrants. *See infra* Section I.C.

70. U.S. CONST. amend. I (emphasis added).

71. U.S. CONST. amend. II. Of course, the Court has taken the view that the relationship between these two clauses is loose, at best. *See* District of Columbia v. Heller, 554 U.S. 570, 595–600 (2008). The merit of that reading is beyond the scope of this Article.

72. U.S. CONST. amend. III.

73. U.S. CONST. amend. V.

74. U.S. CONST. amend. VI.

75. U.S. CONST. amend. VII.

76. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 19–20 (1948) (holding that judicial enforcement in civil cases is state action subject to the Fourteenth Amendment's Equal Protection Clause).

77. U.S. CONST. amend. VIII.

78. U.S. CONST. amend. X.

79. U.S. CONST. amend. XI.

80. U.S. CONST. amend. XIII, § 1.

human beings by everyone, whether state or private actor.[81] By contrast, the Fourteenth and Fifteenth Amendments focus explicitly on the conduct of "State[s]" and "the United States."[82] As we shall see in Part II, the Supreme Court has relied on this language to hold that the Fourteenth and Fifteenth Amendments apply only to state actors.[83] By contrast, the Court has maintained that the Thirteenth Amendment governs both state and private conduct that imposes "badges and incidents of slavery."[84] As a matter of *expressio unius est exclusio alterius*, we should reach the same conclusion when reading the Fourth Amendment.[85] If the drafters intended the Fourth Amendment to guarantee the security of the people exclusively from threats of unreasonable search and seizure posed by government agents, then they demonstrably knew how to make their meaning clear.[86] That they did not include any reference to state action in the Amendment's declaration of rights suggests that the Fourth Amendment should, alongside the Thirteenth,[87] be read as protecting "the people" against threats from both state and private actors.

One might argue that the omission of explicit reference to state agents in the Fourth Amendment was mere oversight—a scrivener's error[88]—that obscures the drafters' true intentions. This is dangerous territory and risks judicial fiat.[89] Moreover, there is no evidence to suggest that the Fourth Amendment's notable silence on this critical point is the result of Madison's inkwell going dry at an inopportune moment. None of the extensive legislative

81. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438 (1968) ("As its text reveals, the Thirteenth Amendment 'is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.'" (quoting The Civil Rights Cases, 109 U.S. 3, 20 (1883))).

82. *See* U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. XV.

83. *See infra* Section II.C; *see also* Barron *ex rel.* Tiernan v. Mayor of Balt., 32 U.S. (7 Pet.) 243, 248–50 (1833) (noting that, in contrast with Article I, Section 10, the Fifth Amendment Takings Clause makes no reference to the governments of the individual States and therefore should not be read as binding the States since "in every inhibition intended to act on state power, words are employed which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed").

84. *Jones*, 392 U.S. at 439 (emphasis omitted) (quoting *The Civil Rights Cases*, 109 U.S. at 20).

85. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107–11 (2012) (explaining the canon and discussing its scope); 2A NORMAN J. SINGER & SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION 426, 561–73 (7th ed. 2014) (same).

86. SINGER & SINGER, *supra* note 85, at 263–65.

87. *Jones*, 392 U.S. at 438–40.

88. *See* SCALIA & GARNER, *supra* note 85, at 234 ("No one would contend that the mistake cannot be corrected if it is the sort sometimes described as a 'scrivener's error.'"); SINGER & SINGER, *supra* note 85, at 521–25 (same).

89. SCALIA & GARNER, *supra* note 85, at 18–24; *cf. Jones*, 392 U.S. at 427 ("That broad language [of the Civil Rights Act of 1866 encompassing both state and private discrimination], we are asked to believe, was a mere slip of the legislative pen. We disagree.").

history from the First Congress suggests an editorial error in the final version.[90] More importantly, there is no obvious contradiction in meaning that requires judicial correction, as when a legislature omits a critical "not."[91] The Fourth Amendment is just different.

Relatedly, one might point to the Warrant Clause of the Fourth Amendment, note that only courts and magistrates issue warrants, and then infer that the whole thing is about state agents.[92] This argument does not make sense as a textual matter. The Reasonableness Clause is the predominate clause of the Fourth Amendment, a fact evident in the text[93] and well-established in the Court's caselaw.[94] It would be odd to conclude that the subordinate clause, which deals with one category of searches, limits the scope of the predominate clause.[95] More so because there are two distinct roles being scripted here. One is for the person or entity who conducts a search. The other is for the person or entity who issues warrants.[96] It is perfectly consistent with the text to conclude that a wide variety of actors might conduct searches even if only judicial officers can issue warrants.[97] And, as it turns out, that is precisely what the historical record shows.[98]

---

90. *See, e.g.*, CLANCY, *supra* note 45, at 80–98 (recounting history of the Fourth Amendment's drafting); WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602–1791, at 727–34 (2009) (same).

91. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 624 (1949); SCALIA & GARNER, *supra* note 85, at 234–35.

92. I am in debt to Sara Sun Beale for suggesting this argument.

93. GRAY, AGE OF SURVEILLANCE, *supra* note 2, at 139–44.

94. *See, e.g.*, Ohio v. Robinette, 519 U.S. 33, 39 (1996) ("We have long held that the 'touchstone of the Fourth Amendment is reasonableness.'" (quoting Florida v. Jimeno, 500 U.S. 248, 250 (1991))).

95. GRAY, AGE OF SURVEILLANCE, *supra* note 2, at 143 (discussing the purposes and relationship of the Warrant Clause and the broader Reasonableness Clause). Were it otherwise, then the Fourth Amendment would apply *only* to warranted searches and might even be read as prohibiting unwarranted searches. We need look no further than the Court's stop and frisk cases and its special needs jurisprudence to see the folly of such an interpretation. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 9 (1968) (applying the Fourth Amendment to street encounters); Camara v. Mun. Ct. of S.F., 387 U.S. 523, 534 (1967) (applying the Fourth Amendment to regulatory searches).

96. As the Court has pointed out, the Fourth Amendment requires bureaucratic separation between agents issuing warrants and those conducting searches. *See* Coolidge v. New Hampshire, 403 U.S. 443, 449–53 (1971) (holding that prosecutors and other law enforcement agents cannot issue warrants because they are not "detached" or "neutral").

97. WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE 183–84 (5th ed. 2009).

98. *See infra* Section I.C.

C. FOUNDING ERA CONCERNS ABOUT PRIVATE SEARCHES

The police as we know them today did not exist in eighteenth-century England or its American colonies.[99] The Metropolitan Police Act established the first English police force in 1829.[100] America was a decade behind, with police forces making their first appearances in Boston (1838) and New York (1845).[101] It was not until the late nineteenth century that professionalized, paramilitary police forces with full authority to investigate crime became a familiar feature of American society.[102] By dint of this historical fact, we know the Fourth Amendment was not drafted or adopted with police officers in mind. Instead, the record suggests that its primary targets were overstepping civil functionaries, including government officials such as tax collectors, but also private actors,[103] such as guilds, who enjoyed broad powers to search and seize in defense of their trade monopolies,[104] innkeepers, who were authorized to search their guests for counterfeit and other prohibited goods, tradesmen empowered to search for defective goods, and printers acting on authority of the Star Chambers to search for and seize seditious publications.[105]

Eighteenth-century warrant cases provide additional evidence that the Fourth Amendment's imagination encompasses searches by private actors.

---

99. Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850–1940*, 62 RUTGERS L. REV. 447, 447–48 (2010); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 620–21 (1999) [hereinafter Davies, *Recovering the Original Fourth Amendment*]; Silas J. Wasserstrom, *The Fourth Amendment's Two Clauses*, 26 AM. CRIM. L. REV. 1389, 1395 (1989); Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 TENN. L. REV. 987, 1003–04 (2003); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 824 (1994). There were constables, but, as William Stuntz has noted, they were "more like a private citizen than like a modern-day police officer." William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 401 n.36 (1995); *see also* CUDDIHY, *supra* note 90, at 250–51 ("[C]olonial constables received no salary, served for only a year, and often did not wish to serve at all . . . . A typical colonial search meant letting one's brother-in-law and the blacksmith next door look under the kitchen table for Farmer Brown's stolen pewterware or in the straw of the barn for a few kegs of illicit brew.").

100. VERN L. FOLLEY, AMERICAN LAW ENFORCEMENT: POLICE, COURTS, AND CORRECTIONS 70–71 (3d ed. 1980); DAVID R. JOHNSON, POLICING THE URBAN UNDERWORLD: THE IMPACT OF CRIME ON THE DEVELOPMENT OF THE AMERICAN POLICE, 1800–1887, at 9 (1979); PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF JUST., TASK FORCE REPORT: THE POLICE 43–44 (1967) [hereinafter COMMISSION REPORT].

101. COMMISSION REPORT, *supra* note 100, at 45; JOHNSON, *supra* note 100, at 9; Oliver, *supra* note 99, at 459; *Police Department*, CITY OF BOS. ARCHIVES, https://archives.boston.gov/repositories/2/classifications/6 [https://perma.cc/D2HM-QQFK].

102. COMMISSION REPORT, *supra* note 100, at 45.

103. *See* Oliver, *supra* note 99, at 450–52, 455–56 (indicating that eighteenth century rules of criminal procedure made it risky for officers to make arrests without warrants, that warrants were generally obtained by victims of crimes, and that constables had little incentive to perform any investigation unless a reward was offered).

104. CUDDIHY, *supra* note 90, at 33–37, 54, 58–60, 90–93.

105. TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS 25 (1969).

Modern Fourth Amendment wisdom holds that the warrant requirement protects the security of citizens against threats of unreasonable search and seizure by interposing detached and neutral magistrates between citizens and law enforcement.[106] Professor Laura Donohue has gone further, arguing that the "unreasonable searches" targeted by the Fourth Amendment were searches conducted in the absence of specific warrants.[107] But, as Professor Akhil Amar has pointed out, the eighteenth-century history of warrants is a bit more complicated.[108] Some of those complications highlight the role of private persons in conducting searches and seizures—including the searches and seizures that served as *bêtes noirs* for the Fourth Amendment: those conducted under the authority of general warrants and writs of assistance.

In a world before professional, paramilitary police forces, private individuals bore significant law enforcement responsibilities.[109] In his commentaries, William Blackstone recognized the right of private persons to effect arrests on their own initiative or in response to a hue and cry;[110] and historian William Cuddihy has noted that "general searches and arrests were elemental to the hue and cry."[111] On the investigative side, searches often were initiated by civilians who would go to a justice of the peace to swear a complaint against a suspected thief or assailant.[112] A justice of the peace would, in turn, issue a

106. *See, e.g.*, Johnson v. United States, 333 U.S. 10, 13–14 (1948) ("[The Fourth Amendment's] protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.").

107. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1185 (2016).

108. AKHIL REED AMAR, THE LAW OF THE LAND: A GRAND TOUR OF OUR CONSTITUTIONAL REPUBLIC 232 (2015) ("[A]n implicit warrant requirement for all searches and seizures runs counter to text, Founding-era history, and common sense."); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 770–81 (1994) (arguing that the Fourth Amendment sought to regulate warranted searches because warrants provided immunity against the traditional common law protections afforded by juries in trespass actions).

109. CUDDIHY, *supra* note 90, at 28–31.

110. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *292–93 ("Any private person (and *a fortiori* a peace officer) that is present when any felony is committed is bound by law to arrest the felon . . . . There is yet another species of arrest, wherein both officers and private men are concerned, and that is upon a *hue and cry* raised upon a felony committed."). "Hue and cry" is the common law practice of summoning citizens to join in the pursuit of a felon by shouting, trumpets, or other means of raising an alarm. Upon hearing the "hue and cry," able-bodied men were obliged to join the search and authorized to use force to make an arrest. *See id.*; Babington v. Yellow Taxi Corp., 164 N.E. 726, 727–28 (N.Y. 1928) (reviewing early English history of hue and cry in common law and statutes).

111. CUDDIHY, *supra* note 90, at 244–45.

112. Gerstein v. Pugh, 420 U.S. 103, 116 n.17 (1975); TAYLOR, *supra* note 105, at 24–26; Stuntz, *supra* note 99, at 401; *see also* James Otis, *In Opposition to Writs of Assistance*, *in* 3 THE WORLD'S FAMOUS ORATIONS 27, 29 (William Jennings Bryan & Francis W. Halsey eds., 1906) (describing common law cases "in which the complainant has before sworn that he suspects his goods are concealed," providing grounds for "warrants to search such and such houses, specially named"); Grumon v. Raymond, 1 Conn. 40, 47 (1814) (reporting on *Smith v. Bouchier* in which "[t]he question arouse upon a custom, that a plaintiff making oath that he has a personal action

warrant providing authority for a constable or civilian complainant to conduct a search.[113] In addition to authorizing searches, eighteenth-century warrants provided immunity from civil liability.[114] Warranted searches, including those conducted by private parties, were therefore sources of concern for both eighteenth-century common law[115] and founding-era critiques of general warrants and writs of assistance.[116]

The primary historical targets for the Fourth Amendment are general warrants and writs of assistance.[117] Unlike the particularized warrants described in the Warrant Clause, general warrants and writs of assistance were, well, general. They provided broad, unfettered authority for bearers to search wherever they wanted, for whatever reason, with complete immunity from civil liability.[118] These instruments were reviled by our eighteenth-century forebears because they granted broad, discretionary authority to search and seize, which, in turn, invited arbitrary abuses of power.[119] But those threats did not come exclusively from state agents or only in the context of criminal actions. To the contrary, one of the most pernicious qualities of general warrants and writs of assistance was that they allowed for the delegation of search and

against any person within the precinct[] . . . , and that he believes the defendant will not appear, but run away, the judge may award a warrant to arrest him, and detain him until security is given for answering the complaint").

113. *See, e.g.*, *Grumon*, 1 Conn. at 45–46 (in searches for stolen goods "[t]here must be an oath by the applicant that he has had his goods stolen, and strongly suspects that they are concealed in such a place"); Entick v. Carrington (1765) 95 Eng. Rep. 807, 818, 2 Wils. K.B. 275, 292 (describing then-familiar cases of searches for stolen goods, in which "case the justice and the informer must proceed with great caution; there must be an oath that the party has had his goods stolen, and his strong reason to believe they are concealed in such a place"); CUDDIHY, *supra* note 90, at 117 (discussing a 1473 case in which "[a]cting alone, the owner of a stolen ox had gone into the house of a suspect, found the ox, and arrested the houseowner"); *id.* at 243 (describing a 1723 case in which a New York City shop owner secured a warrant to search for stolen goods that was carried out, in part, by her son); NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 17–18 (Leonard W. Levy ed., De Capo Press 1970) (1937) (recounting how Roman law granted search powers to theft victims).

114. AMAR, *supra* note 108, at 774–78; *see also* Payton v. New York, 445 U.S. 573, 607–08 (1980) (White, J., dissenting) ("Far from restricting the constable's arrest power, the institution of the warrant was used to expand that authority by giving the constable delegated powers of a superior officer such as a justice of the peace. Hence at the time of the Bill of Rights, the warrant functioned as a powerful tool of law enforcement rather than as a protection for the rights of criminal suspects.").

115. *See Payton*, 445 U.S. at 607–08 (discussing founding-era concerns that led to the Fourth Amendment).

116. *E.g.*, Otis, *supra* note 112, at 29–32.

117. *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2213 (2018).

118. Otis, *supra* note 112, at 30–31.

119. *See, e.g.*, Entick v. Carrington (1765) 95 Eng. Rep. 807, 817–18, 2 Wils. K.B. 275, 291 ("[W]e can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society; for papers are often the dearest property a man can have.").

seizure powers to minor functionaries and private persons.[120] This is evident in the signal eighteenth-century cases challenging general warrants and writs of assistance.

The Fourth Amendment was drafted in the shadow of three eighteenth-century cases involving general warrants and writs of assistance that "were not only well known to the men who wrote and ratified the Bill of Rights, but famous throughout the colonial population"[121]: *Wilkes v. Wood*,[122] *Entick v. Carrington*,[123] and *Paxton's Case*.[124] *Wilkes v. Wood* and *Entick v. Carrington* dealt with efforts to persecute two English pamphleteers, John Wilkes and John Entick, who were responsible for writing and printing publications sharply critical of King George III and his policies.[125] In support of cynical efforts to silence them, one of the King's secretaries of state, Lord Halifax, issued general warrants licensing his "messengers" to search homes and businesses associated with the production of the offending publications and to seize private papers.[126] After their premises were searched and their papers seized, Wilkes and Entick sued Halifax and his agents in trespass and won large jury awards.[127] The defendants in those cases claimed immunity, citing the general warrants issued by Halifax.[128] In several sweeping decisions written in soaring prose, Lord Chief Justice Pratt rejected those efforts based on his determination that general warrants were contrary to the common law.[129]

---

120. *See* Otis, *supra* note 112, at 30 ("In the first place, the writ is universal, being directed 'to all and singular justices, sheriffs, constables, and all other officers and subjects'; so that, in short, it is directed to every subject in the king's dominions.").

121. Stuntz, *supra* note 99, at 396–97; *see also* CUDDIHY, *supra* note 90, at 439–87 (discussing the *Wilkes* case). Akhil Amar has disputed the centrality of the writs of assistance cases to the Fourth Amendment. Amar, *supra* note 108, at 772. But his view is against the weight of authority. *See* TAYLOR, *supra* note 105, at 24–44 (discussing history of search warrants and jurisprudential development via the *Wilkes* and *Entick* cases); LASSON, *supra* note 113, at 13–78 (same); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 223–28 (1993) (discussing the history of writs of assistance cases while critiquing the Amar article).

122. *See generally* Wilkes v. Wood (1763) 98 Eng. Rep. 489, Lofft 1.

123. *See generally Entick*, 95 Eng. Rep. 807.

124. *See generally Paxton's Case*, *in* REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, at 51 (Little, Brown, & Co. 1865); *see also* CUDDIHY, *supra* note 90, at app. 829 (discussing "[t]he primary sources for *Paxton's Case*"). *Paxton's Case* is known primarily by way of the speech James Otis famously delivered as the attorney in this case. *See generally* Otis, *supra* note 112.

125. CUDDIHY, *supra* note 90, at 440–58.

126. *Wilkes*, 98 Eng. Rep. at 494; *Entick*, 95 Eng. Rep. at 808.

127. *Wilkes*, 98 Eng. Rep. at 498–99; *Entick*, 95 Eng. Rep. at 810–11, 818; CUDDIHY, *supra* note 90, at 443, 447, 452.

128. *Wilkes*, 98 Eng. Rep. at 490, 493–96; *Entick*, 95 Eng. Rep. at 808, 811, 817; CUDDIHY, *supra* note 90, at 444–45.

129. *Wilkes*, 98 Eng. Rep. at 498–99; *Entick*, 95 Eng. Rep. at 817; *see also* Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931) ("Since before the creation of our government, such [general] searches have been deemed obnoxious to fundamental principles of liberty."); BLACKSTONE, *supra* note 110, at *291 ("A *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its

Paxton's Case was a suit brought by colonial merchants challenging the use of writs of assistance to enforce British customs laws in the American colonies.[130] The merchants were ably represented by former Advocate General of the Admiralty James Otis, Jr.[131] In hours-long orations, Otis condemned writs of assistance as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book."[132] He ultimately lost the case,[133] but colonial fury over the abuse of search and seizure powers played a critical role in fomenting the American Revolution.[134]

General warrants and writs of assistance provided an important source of energizing animus for the American constitutional movement.[135] Courts condemned them;[136] state constitutions banned them;[137] and states cited the absence of a federal ban on general warrants as grounds for reservation during the ratification debates.[138] In order to quiet these concerns, proponents

uncertainty . . . ."); CUDDIHY, *supra* note 90, at 62–63, 439–40, 446–52 (discussing early judicial criticism of general searches); Davies, *Recovering the Original Fourth Amendment*, *supra* note 99, at 655 ("[C]ommon-law treatises clearly disapproved of [general] warrants as a doctrinal matter (even if such warrants had not been entirely eliminated in practice) by the mid-eighteenth century—and any lingering doubt was removed by the Wilkesite cases in the 1760s.").

130. CUDDIHY, *supra* note 90, at 378–81.

131. Otis left his government post in protest when asked to defend writs of assistance. *Id.* at 400–02. He then joined his fellow colonists in challenging parliamentary legislation sanctioning their use. *Id.*

132. Otis, *supra* note 112, at 28.

133. CUDDIHY, *supra* note 90, at 394–95.

134. LASSON, *supra* note 113, at 58–59; Mark A. Graber, *Seeing, Seizing, and Searching Like a State: Constitutional Developments from the Seventeenth Century to the End of the Nineteenth Century*, *in* THE CAMBRIDGE HANDBOOK OF SURVEILLANCE LAW 395, 404–08 (David Gray & Stephen E. Henderson eds., 2017).

135. CUDDIHY, *supra* note 90, at 154; Graber, *supra* note 134, at 407.

136. *See, e.g.*, Frisbie v. Butler, 1 Kirby 213, 214–15 (Conn. 1787); *see also* Grumon v. Raymond, 1 Conn. 40, 43–44 (1814) (noting that "a warrant to search all suspected places, stores, shops and barns in [town]" granted officers discretion that "would open a door for the gratification of the most malignant passions"). As Mark Graber reports: "While the phrasing may seem obscure to the twenty-first-century mind, eighteenth-century colonists understood that general warrants were the instrument 'swarms of Officers' used 'to harass our people.'" Graber, *supra* note 134, at 405–06; *see also* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 117 (1967) ("Unconstitutional taxing, the invasion of placemen, the weakening of the judiciary, plural officeholding, Wilkes, standing armies—these were major evidences of a deliberate assault of power upon liberty. Lesser testimonies were also accumulating at the same time: small episodes in themselves, they took on a large significance in the context in which they were received. Writs of assistance in support of customs officials were working their expected evil . . . .").

137. *See* VT. CONST. art. XII (1786); N.H. CONST. art. XIX (1784); MASS. CONST. art. XIV (1780); N.C. CONST. art. XI (1776); MD. CONST. art. XXIII (1776); PA. CONST. art. X (1776); DEL. CONST. art. I, § 6 (1792); VA. DECLARATION OF RTS. art. X (1776).

138. CUDDIHY, *supra* note 90, at 673–86; LASSON, *supra* note 113, at 88–89. New York provides one such example. *See* 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786–1870, at 193 (1894) (listing New York's statements when ratifying the U.S. Constitution, including: "That every Freeman has a right to be secure from all unreasonable

of the 1787 Constitution agreed that the First Congress would draft and pass an amendment setting limits on search and seizure powers.[139] The Fourth Amendment fulfills that promise.

All of this goes to show that we can look to founding-era experiences with and objections to general warrants and writs of assistance to inform our understanding of the Fourth Amendment.[140] That record indicates that the Fourth Amendment should not be read as applying exclusively to government officials. In their critiques of general warrants and writs of assistance, founding-era courts and commentators often highlighted the fact that these devices provided for delegations of power to civilian functionaries. For example, the *Wilkes* court noted that "[i]f such a power [to issue general warrants] is truly invested in a Secretary of State, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."[141] Across the Atlantic, James Otis inveighed that "by this writ [of assistance], not only deputies, etc., but even their menial servants, are allowed to lord it over us."[142]

But whence these fears? Why were founding-era critics so concerned that general warrants and writs of assistance provided for the unrestricted delegation of authority to search and seize? The answer is that the delegated powers were absolute and without recourse or remedy, providing broad, unfettered discretion to search anywhere, any time, without constraint or accountability.[143] "It is a power," Otis explained, "that places the liberty of every man in the hands of every petty officer."[144] In granting that unfettered authority, general warrants and writs of assistance effectively licensed lawlessness.[145] "What is this," Otis lamented, "but to have the curse of Canaan with a witness on us; to be the servant of servants, the most despicable of God's creation?"[146] The extent of that servitude, he continued, was virtually without limit, so that "[c]ustomhouse officers . . . [and t]heir menial servants may enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court can inquire."[147] Because a writ of assistance "is directed to

searches and seizures of his person[,] his papers or his property, and therefore, that all Warrants to search suspected places or seize any Freeman his papers or property, without information upon Oath or Affirmation of sufficient cause, are grievous and oppressive; and that all general Warrants (or such in which the place or person suspected are not particularly designated) are dangerous and ought not to be granted."). North Carolina and Virginia filed similar reservations. *See id.* at 268, 379.

139. CUDDIHY, *supra* note 90, at 691–92.

140. Carpenter v. United States, 138 S. Ct. 2206, 2213–14 (2018).

141. Wilkes v. Wood (1763) 98 Eng. Rep. 489, 498, Lofft 1, 18.

142. Otis, *supra* note 112, at 30.

143. BLACKSTONE, *supra* note 110, at *288; Amar, *supra* note 108, at 778.

144. Otis, *supra* note 112, at 29.

145. LASSON, *supra* note 113, at 59–60.

146. Otis, *supra* note 112, at 30.

147. *Id.* at 31.

every subject in the king's dominions," he concluded "[e]very one with this writ may be a tyrant."[148] Lest there be any mistake that private citizens bearing general warrants and writs of assistance posed a threat to home and hearth, Otis quoted language common to writs of assistance allowing "any person or persons authorized"[149] including "all other officers and subjects" to conduct searches and seizures.[150] That inclusion of "persons" and "subjects" reflected the fact that writs of assistance and general warrants were issued not just in cases of customs and tax enforcement, but also to assist private litigants in civil actions,[151] searches for fugitives from slavery,[152] and even to vindicate private animosities.[153] On this last point, Otis painted a vivid picture:

> What a scene does this open! Every man prompted by revenge, ill humor, or wantonness, to inspect the inside of his neighbor's house, may get a writ of assistance. Others will ask it from self-defense; one arbitrary exertion will provoke another, until society be involved in tumult and in blood.[154]

Otis elaborated:

> This wanton exercise of this power is not a chimerical suggestion of a heated brain. I will mention some facts. Mr. Pew had one of these writs, and when Mr. Ware succeeded him, he indorsed this writ over to Mr. Ware . . . . Mr. Justice Walley had called this same Mr. Ware before him, by a constable, to answer for a breach of the Sabbath Day Acts, or that of profane swearing. As soon as he had finished, Mr. Ware asked him if he had done. He replied: "Yes." "Well, then," said Mr. Ware, "I will show you a little of my power. I command you to permit me to search your house for uncustomed goods"; and went

148. *Id.* at 30.

149. *Id.* at 32 (quoting from the text of the writ).

150. *Id.* at 30 (quoting from the text of the writ); *see also* 5 THE FOUNDERS' CONSTITUTION 222 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter Kurland & Lerner].

151. *See* CUDDIHY, *supra* note 90, at 37, 195 (discussing private searches by and for creditors in England and the American colonies); Kurland & Lerner, *supra* note 150, at 222 (mentioning the "writs [of assistance] issued by King Edward I. to the Barons of the Exchequer, commanding them to aid a particular creditor to obtain a preference over other creditors"). English courts regularly criticized general searches in service of private interests by the time of *Semayne's Case* in 1602. CUDDIHY, *supra* note 90, at 63–64 (discussing Semayne's Case (1604) 77 Eng. Rep. 194, 5 Co. Rep. 91 a).

152. CUDDIHY, *supra* note 90, at 218–27.

153. Otis, *supra* note 112, at 32; *see also* CUDDIHY, *supra* note 90, at 306–07 (recounting the facts of *Regina v. Noble* (1713) in which a spurned husband secured a general warrant to search for goods allegedly stolen by his wife, executed that warrant out of spite at the home of his wife's paramour, and ended up being killed for his trouble).

154. Otis, *supra* note 112, at 32.

> on to search the house from the garret to the cellar, and then served the constable in the same manner![155]

So, at the heart of this speech that marked the moment of revolution,[156] we see Otis decrying general warrants and writs of assistance precisely because they licensed private lawlessness.

The facts in *Wilkes* and *Entick* provide additional evidence of the potential for general warrants and writs of assistance to facilitate private abuses of power. The searches in these cases aimed to discover evidence of libel against the King.[157] Although nominally criminal in nature because the target was the King, the investigations sounded in tort. In fact, the court in *Entick* characterized the effort as "the first instance of an attempt to prove a modern practice of a private office to make and execute warrants to enter a man's house, search for and take away all his books and papers in the first instance."[158] The *Entick* court went on to suggest that allowing for the issuance of general warrants in search of libels would pose a threat to the sanctity and privacy of everyone in their homes because simple possession of potentially libelous publications was so common.[159]

To be sure, there is a case to be made that the folks conducting searches in *Entick*, *Wilkes*, and *Paxton* were "state agents."[160] Some were designated by state officials. Others were acting under the authority of a warrant issued by an executive agent. In either event, they could well qualify as state agents under current Supreme Court law.[161] But the point here is not that private searches were the sole or predominate concern when the Fourth Amendment was drafted. The goal is to make sense of the conspicuous omission of any reference to state action in the Reasonableness Clause. The facts and rhetoric in these cases explain that omission and encourage us to read the text as meaning what it says. The Fourth Amendment guarantees the right of the people to be secure against threats of unreasonable search and seizure, full stop. There is no reason in the text or history of the Fourth Amendment to suppose that private parties are any less capable of threatening that security than government agents.

Given the foregoing discussion, it is natural to wonder where the Fourth Amendment state agency came from. As the next Part explains, the answer lies in our legal system's long entanglement with racial apartheid.

---

155. *Id.* at 31.

156. Carpenter v. United States, 138 S. Ct. 2206, 2213 (2018) ("In fact, as John Adams recalled, the patriot James Otis's 1761 speech condemning writs of assistance was 'the first act of opposition to the arbitrary claims of Great Britain' and helped spark the Revolution itself.").

157. Wilkes v. Wood (1763) 98 Eng. Rep. 489, 490, Lofft 1, 2–4; Entick v. Carrington (1765) 95 Eng. Rep. 807, 818, 2 Wils. K.B. 275, 292.

158. *Entick*, 95 Eng. Rep. at 818.

159. *Id.*

160. I am in debt to Sara Sun Beale for pressing this point.

161. *See supra* note 42.

II. THE STATE AGENCY REQUIREMENT AND RACIAL APARTHEID

If the text of the Fourth Amendment encompasses private action and founding-era concerns about searches and seizure powers that underwrote the Fourth Amendment included worries about private searches, then whence the Fourth Amendment state agency requirement? The answer, as with so many mysteries of American jurisprudence, is bound up with persistent efforts to entrench white supremacy and enforce racial apartheid. To be sure, the state agency requirement in general, and the Fourth Amendment state agency requirement in particular, are not wholly explained by racist policies and practices.[162] But there is also no doubt that they are deeply intertwined. In an era of renewed energy to combat the contemporary effects of our nation's racist history by, in part, critically engaging legal regimes implicated in the reproduction of racial disparities, the state agency doctrine should be among our targets for reform. Importantly, the Supreme Court appears sympathetic to this project.[163]

A. BARRON V. BALTIMORE *AND THE CONCEPTUAL ORIGINS OF THE STATE AGENCY REQUIREMENT*

The state agency requirement first came to prominence in the late nineteenth century amidst efforts to enforce Reconstruction era legislation, including the Civil Rights Acts of 1866 and 1875;[164] but its conceptual history traces to the Supreme Court's 1833 decision in *Barron v. Baltimore*, which announced the non-incorporation doctrine.[165] In *Barron*, the Court held that protections guaranteed by the Bill of Rights apply to the federal government but not the states. As we shall see in this Section, that decision was bound-up in efforts to protect chattel slavery and racial apartheid. So, to the extent non-incorporation is the rootstock of the state agency requirement, the tree is rotten at its base.

First, a very brief primer on non-incorporation. The original Constitution is primarily an architectural blueprint. Its seven articles establish a strong central government and describe its component units, their functions, and their relationships one to another. In stark contrast with then-contemporary state constitutions, the Constitution of 1787 said next to nothing about the

162. Part of the story involves the emergence of federal law enforcement agencies. *See* LASSON, *supra* note 113, at 106–07. It would be perfectly natural for courts dealing with these new institutions to focus their attention on state agents, which, in turn, may have narrowed their Fourth Amendment imaginations. That narrowing may be particularly understandable in light of the simultaneous emergence of the exclusionary rule as a means of deterring law enforcement malfeasance. *See* LAFAVE ET AL., *supra* note 97, at 141–42. But this de facto myopia does not explain a rule of de jure exclusivity.

163. *See infra* notes 343–48 and accompanying text.

164. *See infra* Section II.B.

165. Barron *ex rel.* Tiernan v. Mayor of Balt., 32 U.S. (7 Pet.) 243, 250–51 (1833). I am in debt to Orin Kerr for pressing this point.

rights of the people, collectively or individually, and certainly did not prescribe rights-based limits on the powers of the new federal government.[166] This was cause for considerable concern during the ratification process. Critics worried that the central government could override rights guaranteed to the people by the common law and to the citizens of the States by their constitutions.[167] As a condition of ratification, several key states secured a commitment that the First Congress would draft and submit for ratification a slate of amendments guaranteeing some of the rights they held most dear.[168] James Madison carried the laboring oar, drafting twenty amendments, which were revised, consolidated, and reduced to a slate of twelve that went to the states.[169] Ten were ratified in 1791 as the Bill of Rights.[170]

This history suggests that the Bill of Rights was designed to bind the federal government and its agents. It seems to follow *eo ipso* that the Bill of Rights binds only government agents. The Supreme Court appeared to affirm this view in *Barron v. Baltimore*. There, the owners of a deep-water wharf sued the City of Baltimore in state court alleging that municipal infrastructure projects caused extensive silt deposition, rendering their facilities inaccessible to cargo ships.[171] The owners prevailed at trial but lost in the Maryland Court of Appeals.[172] The owners then appealed to the Supreme Court claiming violations of their rights under the Fifth Amendment Takings Clause.[173] There, they met none other than future Chief Justice Roger Taney,[174] who

166. There are a few notable exceptions, including Article I, Sections 9 and 10, both of which set limits on the legislative powers of Congress and the States by prohibiting bills of attainder and *ex post facto* laws. *See* THE FEDERALIST NO. 44 (James Madison) (Clinton Rossiter ed., 1961) ("Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation."); LON L. FULLER, THE MORALITY OF LAW 46–62 (2d. ed. 1969) (describing the moral foundations of generality and non-retroactivity in law).

167. *Barron*, 32 U.S. at 250; Adamson v. California, 332 U.S. 46, 70 (1947) (Black, J., dissenting).

168. *Barron*, 32 U.S. at 250.

169. *See The Bill of Rights: How Did it Happen?*, NAT'L ARCHIVES (Apr. 27, 2023), https://www.archives.gov/founding-docs/bill-of-rights/how-did-it-happen [https://perma.cc/2ZBV-9DSD].

170. *Id.* The original first amendment, which provided for expansion of the House of Representatives as the nation grew, was never ratified. *See* Jessie Kratz, *The First Amendments to the U.S. Constitution*, NAT'L ARCHIVES (Sept. 25, 2019), https://prologue.blogs.archives.gov/2019/09/25/the-first-amendments-to-the-u-s-constitution [https://perma.cc/TZ8B-DT35]. The original second amendment, which sets limits on the timing of salary increases for members of Congress, was ratified in 1992 as the Twenty-Seventh Amendment. *Id.*

171. *Barron*, 32 U.S. at 243–44.

172. *Id.* at 244.

173. *Id.* at 246.

174. When he argued *Barron*, Taney was also serving as Attorney General in President Jackson's administration. Although he argued *Barron* in his private capacity, there can be little doubt that the position he maintained was consistent with the views of the Jackson administration. Taney's own views on states' rights and slavery are evident in his infamous opinion in *Dredd Scott v. Sandford*, 60 U.S. (19 How.) 393, 399–454 (1857), and his private communications. MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 20–22 (2006).

argued on behalf of the City of Baltimore that the Supreme Court did not have jurisdiction because the Fifth Amendment did not bind the states.[175]

In his last opinion for the Court, Chief Justice John Marshall sided with Taney. The Court concluded that Barron's petition did not raise a question of federal law because the Fifth Amendment regulated the federal government in its relations to "the people of the United States," but did not bind "the government of the individual states," each of which had "established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated."[176] Since "there [was] no repugnancy between" Maryland, its agents, "and the constitution of the United States," Justice Marshall dismissed the appeal for want of federal jurisdiction.[177]

Barron appears to provide a doctrinal foundation for the state agency requirement. Of course, the issue there was the Fifth Amendment Takings Clause, not the Fourth Amendment. And, as we saw in Part I, there are good textual and historical reasons to conclude that the Fourth Amendment guards against threats from a wider range of actors than are implicated by other provisions of the Bill of Rights.[178] Certainly, the Takings Clause, which governs "private property [being] taken for public use,"[179] explicitly contemplates state action in ways the Fourth Amendment's more general guarantee does not. But let us set these important distinctions aside for the moment to ask some questions about the social and historical context in which *Barron* was decided.

Although Chief Justice Marshall makes no mention of racial discrimination or chattel slavery in *Barron*, he was keenly aware that his Court's holding preserved space for racial apartheid in the United States. The legal status of race-based chattel slavery was a central point of contention among the founders.[180] Representatives to the Constitutional Congress from southern states worried that the proposed federal government would be dominated by northern states, who would exploit their advantage to limit or even outlaw the enslavement of human beings.[181] In order to secure southern acquiescence to the Union, the drafters included both explicit protections for enslavers[182] and

175. *Barron*, 32 U.S. at 246.

176. *Id.* at 247.

177. *Id.* at 251.

178. *See supra* Section I.B.

179. U.S. CONST. amend. V.

180. GRABER, *supra* note 174, at 12–13.

181. *Id.*

182. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 15 ("The Congress shall have Power To . . . provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions . . . ."); *id.* art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."); *id.* art. IV, § 2, cl. 3 ("No Person held to Service or Labor in one State, under the Laws thereof, escaping into another, shall, in Consequence

structural guarantees of pro-enslavement states' political power.[183] Thus, debates about states' rights in 1787 and thereafter were inextricably intertwined with efforts by some states to preserve race-based chattel slavery.[184] One such debate led to the Nullification Crisis of 1832.

Even after the Constitution was ratified, many southern leaders maintained that states retained sovereign authority to nullify federal laws.[185] On November 24, 1832, South Carolina relied on this theory when it adopted the Ordinance of Nullification.[186] Led by Senator John C. Calhoun, South Carolinians asserted their right to nullify a federal tariff on imported goods and, if necessary, secede from the Union.[187] On December 10, 1832, President Andrew Jackson responded with his Proclamation to the People of South Carolina, which rejected the theory of nullification and asserted his willingness to use military force to secure compliance with federal law.[188] South Carolina did not retreat, but instead expanded the scope of its nullification claims to encompass all federal tariffs, effectively refusing to provide any financial support for the Union.[189] The union seemed to be on a course toward dissolution when, in March 1833, President Jackson signed the Compromise Tariff Act,[190] which

---

of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

183. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."); *id.* art. II, § 1, cl. 2 ("Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .").

184. Consider, as an example, South Carolina's Negro Seamen Act of 1822, requiring the temporary imprisonment of all Black sailors aboard ships docking in South Carolina ports out of fear they might foment slave revolts. *See* 1 WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776–1854, at 254 (1990). Sailors failing to abide by the law or whose employers declined to pay for their housing would be enslaved and sold. *Id.* After other states passed similar laws, Justice William Johnson, sitting in the circuit court, struck down the Act on grounds that it conflicted with United States treaties. *Id.* South Carolina declared that federal opinion null and void. Because federal agents never attempted to enforce Johnson's holding, no crisis ensued. *Id.*

185. *See* SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 388 (2005); RICHARD E. ELLIS, THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES' RIGHTS, AND THE NULLIFICATION CRISIS 198 (1987). John C. Calhoun himself connected the issue of nullification to the preservation of race-based chattel slavery. *See* ELLIS, *supra*, at 193.

186. S.C., An Ordinance to Nullify Certain Acts of the Congress of the United States, Purporting to be Laws Laying Duties and Imposts on the Importation of Foreign Commodities (Nov. 24, 1832).

187. *Id.*

188. Proclamation No. 26 (Dec. 10, 1832), *in* 11 Stat. 771 (1832) ("I consider, then, the power to annul a law of the United States, assumed by one State, incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed." (emphasis omitted)).

189. *Id.*

190. ELLIS, *supra* note 185, at 121, 170–74.

attempted to resolve South Carolina's substantive objections, and the Force Bill,[191] which threatened military action against states refusing to recognize the authority of federal law.[192] South Carolina rejected the Force Bill on grounds of state sovereignty, but acceded to the Compromise Tariff Act, thereby defusing the immediate crisis while preserving in theory the rights of nullification and secession.[193]

Though wrapped in abstractions about political legitimacy and states' rights, the primary practical concern at stake in the Nullification Crisis was the preservation of race-based chattel slavery in the United States.[194] As Calhoun wrote in 1830, his objections to the tariffs that occasioned the Nullification Crisis stemmed from his concern that they signaled an end to "the peculiar domestick institution of the Southern States," and threatened to reduce southern whites to a condition of "wretchedness."[195] Even as South Carolina accepted the terms of Jackson's compromise offer, state representative Robert Rhett warned his colleagues that "[a] people, owning slaves, are mad, or worse than mad, who do not hold their destinies in their own hands" because "[e]very stride of this Government, over your rights, brings it nearer and nearer to your peculiar policy."[196]

In February 1833, as the Nullification Crisis threatened to tear asunder the fragile union threatened amidst charges of federal overreach, claims of state sovereignty, assertions of states' rights, and threats of military action, the Supreme Court heard and decided *Barron*. The *Barron* Court could not help but be influenced by the hazards of the moment.[197] In fact, as Marshall was preparing to read the Court's opinion, Calhoun was in the Senate Chamber inveighing against federal threats to state sovereignty.[198] Chief Justice

191. *Id.* at 120–21, 162–63.

192. *See* Donald J. Ratcliffe, *The Nullification Crisis, Southern Discontents, and the American Political Process*, 1 AM. NINETEENTH CENTURY HIST. 1, 1–2 (2000).

193. *Id.* at 2.

194. WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816–1836, at 301–60 (1992).

195. *See* ELLIS, *supra* note 185, at 193 (quoting Letter from John C. Calhoun to Virgil Maxcy (Sept. 11, 1830)).

196. *See* FREEHLING, *supra* note 194, at 297; *see also* FREEHLING, *supra* note 184, at 286 (reporting Rhett's warning that his "northern brethren . . . are in arms against your institutions," and "[u]ntil this Government is made a limited Government . . . there is no liberty—no security for the South").

197. The Court heard oral argument in *Barron* on February 11, 1833 and issued its opinion on February 16, 1833. Barron *ex rel.* Tiernan v. Mayor of Balt., 32 U.S. (7 Pet.) 243, 243 (1833). Both the Court's timing and speed reflect the emergency of the moment and the Court's understanding of its role in defusing the existential crisis for the Union. *See* WILLIAM DAVENPORT MERCER, DIMINISHING THE BILL OF RIGHTS: *BARRON V. BALTIMORE* AND THE FOUNDATIONS OF AMERICAN LIBERTY 159 (2017) ("We must examine and appreciate nullification as the immediate context to Marshall's *Barron* decision."); *id.* at 166 (noting that *Barron* "makes sense as an attempt to provide stability to the federal and state balance" of authority).

198. MERCER, *supra* note 197, at 3–4.

Marshall himself was deeply troubled by nullification and threats of disunion, writing to Joseph Story in 1832 that he was "slowly and reluctantly [yielding] to the conviction that our constitution cannot last."[199] It is therefore perfectly understandable that, at this critical moment, he might avoid issuing a judgment that would stoke the fires of disunion by expanding the scope of federal power over the states.[200] As historian William Mercer has put the point, Marshall's *Barron* opinion "was a shrewd political maneuver that"[201] allowed the federal courts to shield themselves from deciding "problematic questions, including those regarding slavery or abolition[.]"[202] By Mercer's lights, the opinion "represents an instance when popular agitation regarding the proper balance of power between the states and the federal government ultimately translated into formal constitutional jurisprudence."[203] Mercer concludes that "Marshall's refusal to force the states to observe the Bill of Rights is less a product of legal reasoning and more a reaction to popular expressions of constitutionalism that were being expressed across the nation in forceful and frightening ways."[204] The Court's holding in *Barron* was more than just symbolic on this score. It also put an end to the efforts of anti-slavery activists like Alvan Stewart, who were pressing for abolition on Fifth Amendment grounds.[205]

None of this necessarily means *Barron* was wrongly decided. It may well have been. On the other hand, as Professor Mark Graber as shown, our Constitution is amenable to all sorts of evildoing, particularly when it comes to racial justice.[206] What we can say with confidence is that it most surely was not the exclusive product of cool, abstract judicial reasoning—to the extent such a thing exists.[207] It was, instead, of a piece with other efforts at the time to defuse controversies over states' rights by preserving space for race-based chattel slavery in the United States.[208] In the end, that effort failed. Neither *Barron* nor the Compromise Act could resolve controversies over states' rights or immunize the South's "peculiar institution" from political attack. As Calhoun

199. *Id.* at 170 (quoting Letter from John Marshall to Joseph Story (Aug. 2, 1832)).

200. *See id.* at 208 (characterizing *Barron* as "the product of the aging justice's sense that his lifelong work of trying to create a nation out of a collection of regional interests was ending in failure as many had come unmoored from their national attachments").

201. *Id.* at 9.

202. *Id.* at 176–77.

203. *Id.* at 9.

204. *Id.* at 208. Others have noted the stark contrast between Marshall's opinion in *Barron* and previous opinions buttressing a strong federal government. *See, e.g.*, PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 136 (1999); W. Allan Wilbur, Book Review, 20 AM. J. LEGAL HIST. 155, 157 (1976) (reviewing LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW (1974)).

205. Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 185–92 (2011). Ten years after *Barron*, the Court perverted Stewart's argument to uphold the Fugitive Slave Acts. *Id.* at 187.

206. GRABER, *supra* note 174, at 22.

207. MERCER, *supra* note 197, at 208–09.

208. ELLIS, *supra* note 185, at 198.

predicted, and Marshall feared, that would require blood. It was the Civil War that set the stage for Emancipation, Reconstruction, and the Thirteenth, Fourteenth, and Fifteenth Amendments. According to its drafters, one of the primary purposes of the Fourteenth Amendment was to overturn *Barron*.[209] That intent is evident in the Privileges or Immunities and Due Process Clauses,[210] which purport to bring federal constitutional protections to bear on the States as part of a broader effort to combat racial apartheid.[211] Unfortunately, as we shall see in the next Section, those aspirations were soon dashed on the shoals of Redemption, when the Court breathed new life into *Barron* by first revitalizing the non-incorporation doctrine and then announcing the state agency requirement.

B. RECONSTRUCTION, REDEMPTION, AND THE BIRTH OF THE STATE AGENCY REQUIREMENT

Historian Eric Foner has characterized Reconstruction—the period immediately following the American Civil War—as "The Second Founding."[212] His claim is that the Thirteenth,[213] Fourteenth,[214] and Fifteenth[215] Amendments—collectively the "Reconstruction Amendments"—effectively rewrote the Constitution by shifting the focus from political structures to individual rights and equality.[216] For the brief period of Reconstruction, that

209. Butchers' Benevolent Ass'n of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House Co. (Slaughterhouse Cases), 83 U.S. (16 Wall.) 36, 67–69 (1873); Adamson v. California, 332 U.S. 46, 72 (1947) (Black, J., dissenting). John Bingham, who was among the principal drafters of the Fourteenth Amendment, viewed it as guarding against "flagrant[] violat[ions of] the absolute guarantees of the Constitution of the United States to all its citizens." James J. Ward, *The Original Public Understanding of Privileges or Immunities*, 2011 BYU L. REV. 445, 461 (alterations in original) (quoting MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 59 (1986)). Notably, Bingham believed that the Bill of Rights applied to the states, notwithstanding the Court's holding in *Barron*, but viewed the Fourteenth Amendment as a necessary antidote to that accession to the southern states. *Id.* at 461–62; *see also Adamson*, 332 U.S. at 73–74 (Black, J., dissenting) (noting that "Congressman Bingham may, without extravagance, be called the Madison of the first section of the Fourteenth Amendment").

210. *Adamson*, 332 U.S. at 72–75 (Black, J., dissenting).

211. *Slaughterhouse Cases*, 83 U.S. at 67–69.

212. ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019). He is not alone. *See, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 360 (2005) (describing the failure of the original constitution and the break marked by the Reconstruction Amendments); JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION 3–22 (1990) (describing the Reconstruction Amendments as a "second revolution"); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 488–89, 517 (1989) (describing the Reconstruction Amendments as a decisive break from the original constitutional order); Abraham Lincoln, President, Gettysburg Address (Nov. 19, 1863) (predicting that the Civil War would mark a "new birth of freedom").

213. U.S. CONST. amend. XIII, § 1.

214. U.S. CONST. amend. XIV, § 1.

215. U.S. CONST. amend. XV, § 1.

216. *See supra* note 212.

utopian vision was realized as formerly enslaved persons embracing the franchise, African American representatives joined Congress, and Black leaders won elected office across the south.[217] By the early-1870s, however, Reconstruction was giving way to "Redemption," the period of brutal retrenchment that ushered in Jim Crow and de jure racial segregation. "The slave went free," W.E.B. Du Bois would later write, "stood a brief moment in the sun; then moved back again toward slavery."[218]

As Foner notes, "the [Supreme] Court played a crucial role in [this national] retreat from the ideals of Reconstruction."[219] Among the culprits were the non-incorporation doctrine and the state agency requirement, which the Court "elevated . . . into a shibboleth," and used to drastically circumscribe the protections afforded by the Fourteenth Amendment.[220] This project proceeded in three steps. First, in the *Slaughterhouse Cases*, the Court rehabilitated its holding in *Barron* by adopting a highly circumscribed reading of the Privileges or Immunities Clause.[221] Then, in the *Civil Rights Cases*, the Court created the state agency requirement,[222] "overturning efforts to ban racial discrimination by private businesses."[223] Finally, the Court endorsed de jure racial segregation in *Plessy v. Ferguson* by ratifying the separate-but-equal doctrine.[224] Smack in the middle of all this, the Court, apparently by osmosis rather than analysis, adopted the Fourth Amendment state agency requirement.[225]

1. Rehabilitation of *Barron*

Section 1 of the Fourteenth Amendment guarantees that: "No State shall make or enforce any law which shall abridge the privileges or immunities of

217. *See, e.g.*, Becky Little, *The First Black Man Elected to Congress Was Nearly Blocked From Taking His Seat*, HISTORY (Jan. 27, 2021), https://www.history.com/news/first-black-congressman-hiram-revels [https://perma.cc/N72X-D2T2] (discussing Hiram Rhodes Revels's appointment to Congress as Mississippi representative).

218. W. E. BURGHARDT DU BOIS, BLACK RECONSTRUCTION IN AMERICA 30 (1938).

219. FONER, *supra* note 212, at 127.

220. *Id.* at 128.

221. *See generally* Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873).

222. *See generally* The Civil Rights Cases, 109 U.S. 3 (1883).

223. FONER, *supra* note 212, at 128. As Foner recognizes, the golem of states' rights that underwrote Southern secession was reanimated in a series of Redemption-era cases, gutting fundamental protections guaranteed by the Reconstruction amendments. *See generally, e.g.*, United States v. Cruikshank, 92 U.S. 542 (1875) (vacating convictions of white militiamen responsible for the Colfax Massacre of 1873); United States v. Reese, 92 U.S. 214 (1875) (vacating conviction of state officials who conspired to prevent African-American citizens from voting); *Slaughterhouse Cases*, 83 U.S. 36 (limiting protections afforded by the Privileges and Immunities Clause); Blyew v. United States, 80 U.S. (13 Wall.) 581 (1871) (vacating convictions of two white men who murdered an African-American woman).

224. Plessy v. Ferguson, 163 U.S. 537, 548 (1896).

225. As the discussion of *Burdeau* in Part I discloses, the Court traces the Fourth Amendment state agency requirement to *Boyd v. United States*, 116 U.S. 616 (1886), which was decided just three years after the *Civil Rights Cases*, 109 U.S. 3. *See supra* Section I.A.

citizens of the United States."[226] As a matter of plain meaning, it seems obvious that rights secured by the Bill of Rights would rank highly as "privileges or immunities" guaranteed to "citizens of the United States."[227] That interpretation certainly makes sense in context, the country having just fought a war over the exceptionalism of states' rights, nullification, and secession.[228] There is also substantial evidence that those who drafted, passed, and ratified the Fourteenth Amendment understood they were overturning *Barron* precisely because non-incorporation played such an important role in preserving slavery and racial apartheid.[229] For example, Congressman John Bingham, whom Justice Black credited as "the Madison of the first section of the Fourteenth Amendment,"[230] made clear during congressional debates his view that the Fourteenth Amendment would make possible what previously had been impossible under *Barron*: federal suits "to enforce in the United States courts the bill of rights."[231] Reciprocally, Bingham's opponents worried that the Privileges or Immunities Clause would violate state's rights and prerogatives.[232] Bingham won. The Fourteenth Amendment was ratified, guaranteeing to all "the privileges or immunities of citizens of the United States."[233]

---

226. U.S. CONST. amend. XIV, § 1.

227. Justice Black made this case in his *Adamson* dissent, noting that:

> [O]ne of the chief objects [of] the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced.

Adamson v. California, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting) (footnote omitted). In recent years, Justices Thomas and Gorsuch have picked up his torch. *See, e.g.*, Timbs v. Indiana, 139 S. Ct. 682, 691 (2019) (Gorsuch, J., concurring); *id.* at 692 (Thomas, J., concurring in the judgment).

228. *See Adamson*, 332 U.S. at 94–95 (Black, J., dissenting) (quoting Congressman Bingham for the proposition that, "if the grant of power had been originally conferred upon the Congress of the nation, and legislation had been upon your statute-books to enforce these requirements of the Constitution in every State, that rebellion, which has scarred and blasted the land, would have been an impossibility" (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866))).

229. *Id.* at 97 (quoting Congressman John Bingham's report that, "[a]s slaves were not protected by the Constitution, there might be some color of excuse for the slave States in their disregard for the requirement of the bill of rights as to slaves and refusing them protection in life or property . . . . But, sir, there never was even colorable excuse, much less apology, for any man North or South claiming that any State Legislature or State court, or State Executive, has any right to deny protection to any free citizen of the United States within their limits in the rights of life, liberty, and property. Gentlemen who oppose this amendment simply declare to these rebel States, go on with your confiscation statutes, your statutes of banishment, your statutes of unjust imprisonment, your statutes of murder and death against men because of their loyalty to the Constitution and Government of the United States." (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1090–91 (1866))).

230. *Id.* at 73–74.

231. *Id.* at 95 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866)).

232. *Id.*

233. U.S. CONST. amend. XIV, § 1.

Despite the clarity of the language and the record, the Supreme Court virtually eliminated the emancipatory power of the Privileges or Immunities Clause in 1873 with its decision in the *Slaughterhouse Cases*.[234] The principal plaintiffs in the *Slaughterhouse Cases* were butchers in New Orleans who objected to a state law regulating the importation and slaughter of animals.[235] The butchers argued that the state law violated their Fifth Amendment rights, enforceable against Louisiana through the Fourteenth Amendment Privileges or Immunities Clause.[236] Writing for the Court, Justice Samuel Miller worried that the plaintiffs' reading of the Fourteenth Amendment would impinge upon the broad "police powers"[237] enjoyed by states to pass laws and issue regulations for the benefit of their citizens[238] while effectively raising every congressional action to the level of constitutional edict.[239] He argued that this degree of federal supremacy would make "[the Supreme Court] a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights."[240] His Court therefore chose to construe the Privileges or Immunities Clause narrowly, limiting its scope to citizenship rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws,"[241] such as the First Amendment right to assemble and petition the government for redress.[242] The Court recognized that these privileges and immunities were few. Far more numerous were rights afforded to citizens of the States by their state constitutions, which, the *Slaughterhouse* Court held, are beyond federal courts' review.[243]

The *Slaughterhouse* Court revitalized the robust notion of state sovereignty endorsed in *Barron*.[244] Ironically, given the role of *Barron* in preserving chattel slavery, the *Slaughterhouse* Court lauded the goal of abolishing "African slavery"[245] and combating efforts to impose on African-Americans legal "disabilities and

234. *See generally* Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873).

235. *Id.* at 57–59.

236. *Id.* at 65–66.

237. The Court's most forceful elaboration of the general police power came in the *License Cases*, the lead opinions written by none other than Chief Justice Taney. *See generally* Thurlow v. Massachusetts (License Cases), 46 U.S. (5 How.) 504 (1847) (upholding three state statutes regulating the sale of alcoholic beverages brought in from other states on the basis of the states' police powers).

238. *Slaughterhouse Cases*, 83 U.S. at 62–63.

239. *Id.* at 77–78. The congressional record discloses that this is precisely what the drafters of Amendment XIV, Section 1 had in mind. *See* Adamson v. California, 332 U.S. 46, 98 (1947) (Black, J., dissenting).

240. *Slaughterhouse Cases*, 83 U.S. at 78.

241. *Id.* at 79.

242. *Id.*

243. *Id.* at 80.

244. *Id.* at 82.

245. *Id.* at 67–69.

burdens [that] curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value."[246] Despite the obvious tension between states' rights arguments and the Fourteenth Amendment's textual commitments to emancipation and racial equality, the *Slaughterhouse* Court maintained that the Reconstruction Amendments did not really reconstruct anything, and most definitely were not meant to reorder the structural relationship between the States and the federal government.[247] As a consequence, "the great source of power in this country [remained] the people of the States,"[248] with devastating consequences for racial justice.

The *Slaughterhouse* Court's constrained reading of the Privileges or Immunities Clause was controversial at the time.[249] Justice Stephen Field, dissenting, noted that "[t]he question presented is . . . one of the gravest importance . . . whether the recent amendments to the Federal Constitution protect the citizens of the United States against the deprivation of their common rights by State legislation."[250] In his view, "the [F]ourteenth [A]mendment does afford such protection, and was so intended by the Congress which framed and the States which adopted it."[251] Justice Joseph Bradley joined Justice Field's dissent, but wrote separately to explain his view that the protections enumerated in the Bill of Rights were among those "privileges or immunities" guaranteed against state intrusion.[252] So, too, Justice Noah Swayne, who argued that the "intent and purpose" of the Privileges or Immunities Clause was "transparent."[253] That controversy has not abated.[254] Most recently, Justices Clarence Thomas and Neil Gorsuch have both endorsed the view that, contrary to the Court's holding in the *Slaughterhouse Cases*, the Privileges or Immunities Clause incorporated the entirety of the Bill of Rights to the states.[255] Theirs remains a minority view, however.

Although the Court has never endorsed full incorporation, it eventually began incorporating Bill of Rights provisions through the Due Process Clause of the Fourteenth Amendment.[256] This process of "selective incorporation" has not been all that selective in the end. At this stage, all but a few provisions

246. *Id.* at 70.

247. *See id.* at 78.

248. *Id.* at 67.

249. *Id.* at 90, 93–96 (Field, J., dissenting); *id.* at 111–19, 122–24 (Bradley, J., dissenting); *id.* at 126 (Swayne, J., dissenting).

250. *Id.* at 89 (Field, J., dissenting).

251. *Id.*

252. *Id.* at 118–19 (Bradley, J., dissenting).

253. *Id.* at 126 (Swayne, J., dissenting).

254. Justice Black offers the most pointed and detailed attack in a dissenting opinion filed in *Adamson v. California*, 332 U.S. 46, 68–123 (1947) (Black, J., dissenting); *see also* Duncan v. Louisiana, 391 U.S. 145, 162–71 (1968) (Black, J., concurring) (reaffirming views elaborated in *Adamson*).

255. *See supra* note 227 and accompanying text.

256. *See infra* note 258 and accompanying text.

of the Bill of Rights have been incorporated against the states.[257] Importantly, however, the process of selective incorporation did not get started in earnest until well into the twentieth century when the Court embarked on a sustained effort to combat state-based infringements on civil rights.[258] In the intervening years, states notoriously capitalized on their immunity from federal constitutional review to maintain racial apartheid in the United States. It was during this period that the Court announced the state agency requirement.

2. The Emergent State Agency Requirement

Section 5 of the Fourteenth Amendment gives Congress "power to enforce, by appropriate legislation, the provisions of this article."[259] In 1875, Congress exercised that authority by passing its second Civil Rights Act.[260] The first section of that Act gave force to the Fourteenth Amendment by guaranteeing:

---

257. The two most significant of these are the Fifth Amendment Grand Jury Clause, Hurtado v. California, 110 U.S. 516, 519–21, 538 (1884), and the Seventh Amendment, Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 216–17, 223 (1916).

258. With the exception of the First Amendment, which the *Slaughterhouse* Court counted among the privileges or immunities enjoyed by citizens of the United States that were immune from state nullification, the Court persistently refused to incorporate Bill of Rights provisions well into the Twentieth Century. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 319–22, 329 (1937) (declining to incorporate the Fifth Amendment prohibition on double jeopardy); Twining v. New Jersey, 211 U.S. 78, 99, 106 (1908) (rejecting arguments that the Privileges or Immunities Clause achieved full incorporation and holding that "the exemption from compulsory self-incrimination is not a privilege or immunity of National citizenship guaranteed by [Section 1] of the Fourteenth Amendment against abridgement by the States," and also "is regarded as separate from and independent of due process"); *Hurtado*, 110 U.S. at 519–21, 538 (declining to incorporate the Fifth Amendment grand jury requirement to the states). The Court did not really begin to incorporate major provisions of the Bill of Rights until *In re Oliver*, 333 U.S. 257 (1948), which incorporated the Sixth Amendment right to public trial, and *Wolf v. Colorado*, 338 U.S. 25 (1949), which incorporated the Fourth Amendment while rejecting renewed appeals to incorporate the whole of the Bill of Rights. But it was not until the thick of the civil rights era in the 1960s that the Court really got going, incorporating in rapid succession the Fourth Amendment exclusionary rule, Mapp v. Ohio, 367 U.S. 643 (1961), the Eighth Amendment prohibition on cruel and unusual punishments, Robinson v. California, 370 U.S. 660 (1962), the Sixth Amendment right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963), the Fifth Amendment prohibition on compelled witnessing, Malloy v. Hogan, 378 U.S. 1 (1964), the Sixth Amendment right to confront witnesses, Pointer v. Texas, 380 U.S. 400 (1965), the Sixth Amendment right to speedy trial, Klopfer v. North Carolina, 386 U.S. 213 (1967), the Sixth Amendment right to compulsory process, Washington v. Texas, 388 U.S. 14 (1967), the Sixth Amendment right to a jury trial, *Duncan*, 391 U.S. 145, and the Fifth Amendment prohibition on double jeopardy, Benton v. Maryland, 395 U.S. 784 (1969). The process continues, including recent incorporation of the right to a unanimous jury verdict in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the prohibition on excessive fines in *Timbs v. Indiana*, 139 S. Ct. 682 (2019), and the individual right to bear arms in *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

259. U.S. CONST. amend. XIV, § 5.

260. Civil Rights Act of 1875, ch. 114, 18 Stat. 335. Congress passed an earlier Civil Rights Act in 1866. Civil Rights Act of 1866, ch. 31, 14 Stat. 27. There were concerns at the time that Congress did not have the authority to regulate the states. President Andrew Johnson was among them—he vetoed the 1866 Act twice before Congress overrode his veto. *See* Adamson v. California, 332 U.S. 46 app. at 99–103 (1947) (Black, J., dissenting). But even prominent rights advocates

> That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.[261]

Despite the Act's clear prohibition on racial discrimination, many owners and operators of inns, trains, restaurants, theaters, and other areas of public accommodation openly discriminated against African American customers, often denying access altogether. Some were sued for violating the Civil Rights Act of 1875. A collection of those suits came before the Supreme Court in 1883 styled as the *Civil Rights Cases*.[262]

Each of the defendants in the *Civil Rights Cases*—an innkeeper, a train operator, and a theater owner—notoriously denied access to Black patrons based on race in unrepentant defiance of the Civil Rights Act of 1875.[263] None contested their violations. To the contrary, they maintained with pride their right as private citizens to be agents of racial apartheid.[264] In their view, the Fourteenth Amendment applied exclusively to state agents. The Civil Rights Act of 1875 was therefore unconstitutional insofar as Congress had relied on Section 5 as the source of its authority to prohibit racial discrimination by private persons and non-state entities.[265] The Supreme Court agreed.

Writing for the Court, Justice Joseph Bradley held that the Civil Rights Act of 1875 represented an unconstitutional assertion of federal authority because the Fourteenth Amendment applies exclusively to state action and does not reach private conduct.[266] Based on this newly announced state action requirement, the Court concluded that any legislative effort to enforce the

---

like Congressman John Bingham had their doubts. *Id.* at 103. Section 5 of the Fourteenth Amendment was meant, in part, to remedy those concerns. *See id.* at 99–103.

261. Civil Rights Act of 1875, ch. 114, 18 Stat. 335, 335–37.

262. *See generally* The Civil Rights Cases, 109 U.S. 3 (1883).

263. *Id.* at 4–5.

264. *See id.*

265. U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

266. *The Civil Rights Cases*, 109 U.S. at 11, 17. Justice Bradley's judicial views were consistent with his personal views on racial equality. As Charles Fairman reports, Bradley contended in private correspondence that:

> Congress cannot guaranty to the colored people admission to every place of gathering and amusement. To deprive white people of the right of choosing their own company would be to introduce another kind of slavery. . . . Surely a white lady cannot be enforced by Congressional enactment to admit a colored person to her ball or assembly or dinner party. . . . [D]oes freedom of the blacks require the slavery of the whites?"

7 CHARLES FAIRMAN, THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–88, at 564 (Paul A. Freund & Stanley L. Katz eds., 1987).

Fourteenth Amendment against private parties would be unconstitutional.[267] As a result, the Court effectively licensed racial apartheid in the United States, so long as it was enforced by "private" parties.

Unlike *Barron* and the *Slaughterhouse Cases*, the *Civil Rights Cases* dealt directly with the legal status of racial apartheid in the United States. What *Barron* and *Slaughterhouse* accomplished by implication, the *Civil Rights Cases* did directly and explicitly. That is evident in the holding itself, but also by reference to the historical moment in which the case was decided. Recall that *Barron* was decided in the midst of the Nullification Crisis of 1832. By declining to enforce the Bill of Rights against the states, the *Barron* Court assisted in the resolution of that crisis and preservation of the Union.[268] The *Civil Rights Cases* were decided in a similar historical context.

Despite losing the Civil War and acceding to the Thirteenth, Fourteenth, and Fifteenth Amendments, southern states continued to resist the federal yoke during Reconstruction, leading to several crises in national stability. Among them was the election of 1876.[269] When President Ulysses S. Grant unexpectedly decided not to run for a third term, the major political parties scrambled to nominate potential successors. During contested conventions, the Republicans nominated Governor Rutherford B. Hayes of Ohio and the Democrats nominated Governor Samuel J. Tilden of New York.[270] After one of the most heated campaigns in American history, Tilden won the popular vote and 184 electors, with Hayes securing only 166.[271] Twenty electoral votes remained in contest when, amidst claims of racial disenfranchisement, stolen elections, and renewed threats of secession, competing political factions in Florida, Louisiana, South Carolina, and Oregon[272] presented their own slates of electors.[273] The crisis was resolved, and the Union preserved, by the Compromise of 1877, which gave all the disputed electoral votes to Hayes in exchange for, *inter alia*, the withdrawal of federal troops from Florida, Louisiana, and South Carolina and a promise that states would be allowed to govern their own affairs when it came to questions of race.[274] Just as the Court's decision in *Barron* preserved the Compromise of 1833, the Court's decision in the *Civil*

267. *The Civil Rights Cases*, 109 U.S. at 11, 13.

268. *See supra* Section II.A.

269. *See generally* C. VANN WOODWARD, REUNION AND REACTION (1967) (providing a detailed history of the Compromise of 1877).

270. *Id.* at 16.

271. *Id.* at 17.

272. Oregon has a history of black exclusion laws going back to its days as a territory and was admitted to the Union with a state constitution that included specific provisions excluding black settlers. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1394–95 (2020); Greg Nokes, *Black Exclusion Laws in Oregon*, OR. ENCYCLOPEDIA (Apr. 6, 2023), https://www.oregonencyclopedia.org/articles/exclusion_laws [https://perma.cc/6GS3-7MC9]. It is therefore no surprise to find it associated in this context with former members of the Confederacy.

273. WOODWARD, *supra* note 269, at 17–21.

274. *Id.* at 51–67.

Rights Cases preserved the Compromise of 1877 with the fate of the Union seemingly at stake.[275]

3. From De Facto to De Jure Racial Segregation

The Court's decision in the *Civil Rights Cases* paved the way for a new era of racial apartheid in the United States.[276] It licensed exactly the kinds of activities Justice Miller, writing for the Court in the *Slaughterhouse Cases*, identified as the *raison d'etre* of the Fourteenth Amendment: the imposition based on race of "onerous disabilities and burdens" that would have the effect of recreating many of the conditions associated with the Antebellum South.[277] In short order, African American citizens were excluded from places and institutions otherwise open to the public. Though nominally an expression of the independent choices of private actors, the effect was systemic racial apartheid officially licensed by the Supreme Court.[278] Of course the project did not stop there.

Emboldened by the *Slaughterhouse Cases* and the *Civil Rights Cases*, lawmakers in many states licensed and even mandated racial apartheid in "private" facilities.[279] The Court happily approved these efforts in a series of opinions that included, infamously, *Plessy v. Ferguson*, which announced the doctrine of "separate but equal."[280] *Plessy*, in its turn, opened the door for state agents to enforce racial apartheid directly and indirectly, leading to the era of Jim Crow.[281] The state agency requirement served as a critical cornerstone in this shameful edifice. And right smack in the middle of it all is the line of cases that begins with *Boyd*, decided in 1886—just three years after the *Civil Rights Cases*—and ends with *Burdeau v. McDowell*, decided in 1921, wherein the Court concluded, on no discernable argument or evidence, that the Fourth Amendment applies only to searches and seizures conducted by state agents.[282] Although neither *Boyd* nor *Burdeau* involved questions of racial

275. *See id.* at 1.

276. FONER, *supra* note 212, at 128–29, 158–67.

277. Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 70 (1873).

278. *See* FONER, *supra* note 212, at 43–51 (describing exploitation of the Punishment Clause by to diminish liberating effects of the Thirteenth Amendment); Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 928–52 (2019) (recounting exploitation of the Punishment Clause in the history of debt slavery, peonage, and prison labor).

279. *See* FONER, *supra* note 212, at 160–67 (describing the rise of de jure segregation after the *Civil Rights Cases*); Goodwin, *supra* note 278, at 935–41 (recounting history of black codes in the Jim Crow era).

280. Plessy v. Ferguson, 163 U.S. 537, 548 (1896).

281. *See generally* Cumming v. Richmond Cnty. Bd. of Educ., 175 U.S. 528 (1899) (upholding statutory segregation of public schools); Lum v. Rice, 275 U.S. 78 (1927) (same); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (same).

282. *See supra* Section I.A.

discrimination, there can be no doubt that their holdings were wrapped up in the historical moment.

C. THE STATE AGENCY REQUIREMENT AS A PERSISTENT CONSTRAINT ON CIVIL RIGHTS

The states' rights doctrine defended by *Barron* and the *Slaughterhouse Cases*, the state agency requirement advanced in the *Civil Rights Cases*, and the *Plessy* rule of separate but equal constitute an unholy trinity—a succession of judicial doctrines designed to nullify the emancipatory ambitions of the Thirteenth, Fourteenth, and Fifteenth Amendments and to dismantle the achievements of Reconstruction by securing space for racial apartheid in the United States.[283] It is therefore no surprise that the Court was called upon to rethink these doctrines during the Civil Rights era. In response, the Court abandoned *Plessy*[284] and all but abandoned the non-incorporation doctrine.[285] Yet, it has persistently and consciously declined the opportunity to drive a stake through the heart of the state agency requirement, even when faced with unapologetic efforts by "private" agents to preserve racial apartheid.[286]

In a series of mid-twentieth-century cases, the NAACP Legal Defense Fund systematically dismantled *Plessy*.[287] These victories marked the beginning of a critical period of reckoning and reform that included the Civil Rights Acts of 1957,[288] 1960,[289] 1964,[290] and 1968,[291] and the Voting Rights Act of 1965.[292] During that same time period, the Court began to roll back *Barron* and the *Slaughterhouse Cases*. Although the Court maintained its view that the Privileges or Immunities Clause did not incorporate the Bill of Rights in its entirety,[293] the Justices selectively incorporated most criminal procedure rights through the Due Process Clause of the Fourteenth Amendment.[294] The Court's focus

283. FONER, *supra* note 212, at 169–73.

284. *See generally* Mitchell v. United States, 313 U.S. 80 (1941) (denying interstate rail travelers access to first-class accommodations based on race violates the Interstate Commerce Act of 1875); Sweatt v. Painter, 339 U.S. 629 (1950) (criticizing racial segregation in law schools); McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950) (criticizing racial segregation in graduate schools); Henderson v. United States, 339 U.S. 816 (1950) (denying interstate rail passengers access to dining cars based on race violates the Interstate Commerce Act of 1875); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (claiming that de jure segregation of public schools violates equal protection); Boynton v. Virginia, 364 U.S. 454 (1960) (denying dining service to interstate bus passengers at facilities in a bus terminal violates the Interstate Commerce Act).

285. *See supra* note 258 and accompanying text.

286. FONER, *supra* note 212, at 171–72.

287. *See supra* note 284.

288. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634.

289. Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86.

290. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

291. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73.

292. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

293. Duncan v. Louisiana, 391 U.S. 145, 148–49 (1968).

294. *See supra* note 258 and accompanying text.

on criminal procedure rights amidst its broader efforts to advance racial justice was no accident. The criminal law has long been a tool for enforcing racial apartheid in the United States.[295] In fact, the defendants in some of the most significant Civil Rights Era incorporation cases were Black and their cases presented the Court with serious questions about the Constitution and racial justice.[296]

While the Court was busy renouncing these two parts of the unholy trinity, it stubbornly maintained its commitment to the state agency requirement.[297] Take, as an example, *Shelley v. Kraemer*, decided in 1948.[298] There, plaintiffs challenged the constitutionality of racial covenants prohibiting the sale of residential property to African American buyers.[299] Writing for the Court, Chief Justice Frederick Vinson noted that these kinds of racial restrictions on ownership and occupancy of property "could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance."[300] Unfortunately, he sighed, "[s]ince the decision of [the] Court in the *Civil Rights Cases*, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States."[301] "That Amendment," he continued, "erects no shield against merely private conduct, however discriminatory or wrongful."[302] Sad though it might be, he lamented, "the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the

295. *See* FONER, *supra* note 212, at 46–51 (reporting the exploitation of the Thirteenth Amendment's Punishment Clause by southern states bent on recreating conditions of race-based chattel slavery); Goodwin, *supra* note 278, at 928–75 (documenting exploitation of criminal justice system to recreate conditions of race-based chattel slavery). *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (documenting the historical and present use of the criminal justice system to enforce racial apartheid in the United States).

296. *See generally* Daniel S. Harawa, *Whitewashing the Fourth Amendment*, 111 GEO. L.J. 923 (2023) (exploring the impact of race in three Fourth Amendment cases). As Professor Harawa shows, issues of race and racial justice have been "whitewashed" from many of these cases, but at least one attorney situated his client's constitutional claims in the broader context of racial justice. *See* Appellant's Opening Brief at 4–7, Robinson v. California, 370 U.S. 660 (1962) (No. 554), 1962 WL 115380, at *4–7 (documenting that Mr. Robinson was stopped on grounds that he was in a "high crime area" and charged with violating vagrancy laws); Appellant's Reply Brief at 12, *Robinson*, 370 U.S. 660 (No. 554), 1962 WL 115382, at *12 (arguing that the vagrancy laws under which Mr. Robinson were charged were motivated and enforced by racial bias).

297. *See generally* United States v. Morrison, 529 U.S. 598 (2000) (finding unconstitutional a federal statute providing remedy for victims of gender motivated violence based, in part, on the *Civil Rights Cases*).

298. *See generally* Shelley v. Kraemer, 334 U.S. 1 (1948).

299. *Id.* at 4.

300. *Id.* at 11. The Court so held in *City of Richmond v. Deans*, 281 U.S. 704 (1930), *Harmon v. Tyler*, 273 U.S. 668 (1927), and *Buchanan v. Warley*, 245 U.S. 60 (1917).

301. *Shelley*, 334 U.S. at 13 (citation omitted).

302. *Id.*

Fourteenth Amendment."[303] "But [wait,] here there was more[!]" he continued.[304] These private covenants could only have material effect if enforced by a court. Because judicial enforcement constitutes state action, and enforcement of racially discriminatory covenants violates equal protection, the *Shelley* Court concluded that the Fourteenth Amendment prohibits judicial enforcement of racially discriminatory covenants.[305] The fact remained, however, that the Fourteenth Amendment has nothing to say about "private" acts of racial exclusion, including the covenants themselves.

Although the Court in *Shelley* explicitly renewed its commitment to the state agency requirement, Congress decided in 1964 to test the waters. Title II of the Civil Rights Act of 1964 rehabilitated key provisions of the Civil Rights Act of 1875 by prohibiting discrimination based on race in hotels, motels, restaurants, cafeterias, lunch counters, theaters, concert halls, sports arenas, and other places of "public accommodation."[306] Despite the grim history of its previous efforts along these lines, Congress likely found some reassurance in a series of then-recent Supreme Court cases holding that the Interstate Commerce Act, first adopted in 1887, prohibited racial segregation by "common carriers," including railways[307] and interstate buses.[308] The anodyne statutory language at issue in these cases made it "unlawful for any common carrier . . . to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."[309] As adopted in 1887, this language was designed to guard against the exploitation of railway monopolies.[310] It had nothing to do with racial discrimination. But, by 1941, the Court was willing to give the text much broader effect.[311] Congress took the hint.

In contrast with the Civil Rights Act of 1875, which relied on Section 5 of the Fourteenth Amendment, congressional authority for the Interstate

303. *Id.*

304. *Id.*

305. *Id.* at 20. In *Bell v. Maryland*, Robert Bell—who would later become Chief Judge of the Maryland Court of Appeals—advanced a similar argument with respect to racial segregation in privately owned facilities, barring state agents, including police, from enforcing these laws. Bell v. Maryland, 378 U.S. 226, 242 (1964) (Douglas, J., concurring).

306. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

307. *See, e.g.*, Henderson v. United States, 339 U.S. 816, 818 (1950) (prohibiting racial discrimination in railway dining cars); Mitchell v. United States, 313 U.S. 80, 94 (1941) (prohibiting racial discrimination in railway coaches).

308. *See, e.g.*, Boynton v. Virginia, 364 U.S. 454, 457, 463 (1960) (setting aside due process and equal protection claims in favor of Interstate Commerce questions); *Henderson*, 339 U.S. at 826 ("Since § 3(1) of the Interstate Commerce Act invalidates the rules and practices before us, we do not reach the constitutional or other issues suggested.").

309. *See Boynton*, 364 U.S. at 458 (quoting the Interstate Commerce Act, 49 U.S.C. § 3(1)); *Henderson*, 339 U.S. at 820 & n.3 (same).

310. *See Interstate Commerce Act (1887)*, NAT'L ARCHIVES (Feb. 8, 2022), https://www.archives.gov/milestone-documents/interstate-commerce-act [https://perma.cc/N3HE-2VFN].

311. *See supra* notes 307–09 and accompanying text.

Commerce Act of 1887 derives from the Commerce Clause. This gave the Court space to avoid the state agency requirement in the common carrier cases.[312] But, since the Court had just recommitted itself to the state agency requirement in *Shelley*, Congress decided to cover its bases by grounding the Civil Rights Act of 1964 in both the Commerce Clause and the Fourteenth Amendment. The result is a prohibition on "discrimination or segregation on the ground of race, color, religion, or national origin . . . [in an] establishment[] which serves the public" as "a place of public accommodation . . . if its operations affect commerce, or if discrimination or segregation by it is supported by State action."[313]

As they did in response to the Civil Rights Act of 1875, proprietors of private businesses challenged the constitutionality of the Civil Rights Act of 1964. The signal case is *Heart of Atlanta Motel, Inc. v. United States*.[314] There, the owner of a hotel that exclusively served white patrons sought declaratory and injunctive relief on the grounds that Congress did not have the constitutional authority to prohibit private discrimination.[315] Writing for the Court, Justice Thomas Clark recited the history of congressional efforts to ban racial discrimination and segregation by "private businesses," noting that the "Court struck down the public accommodations sections of the 1875 Act in the *Civil Rights Cases*."[316] Would things be different this time? They would. But why? In a particularly revealing paragraph, Justice Clark explained:

> The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." At the same time, however, it noted that such an objective has been and could be readily achieved "by congressional action based on the commerce power of the Constitution." Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power in this regard, and we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone.[317]

312. FONER, *supra* note 212, at 160–63.

313. Civil Rights Act of 1964, Pub. L. No. 88-352, § 201(a)–(b), 78 Stat. 241, 243.

314. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 243–44 (1964).

315. *Id.*

316. *Id.* at 245.

317. *Id.* at 250 (citation omitted) (quoting S. REP. NO. 88-872, at 16–17 (1964)); *see also id.* at 252–61 (explaining that congressional authority for the Civil Rights Act of 1965 derives from the Commerce Clause, not the Fourteenth Amendment).

So, just as it did in *Shelley* and the common carrier cases, the Court in *Heart of Atlanta* declined the invitation to reconsider its holding in the *Civil Rights Cases*.[318] The results were entirely predictable because, as Justice William Douglas would later note, so many "[c]ases which have come to this Court depict a spectacle of slavery unwilling to die."[319]

In the years after *Heart of Atlanta*, stubborn racists provided the Court with multiple opportunities to reconsider the legality and constitutionality of "private" racial segregation. On each of these occasions, the Court held the line on the state agency requirement, fully conscious of its historical and continuing role in maintaining racial apartheid in the United States. Consider, as examples, *Moose Lodge No. 107 v. Irvis*[320] and *Burton v. Wilmington Parking Authority*.[321]

Moose Lodge No. 107 tested the constitutional right of a private club to maintain racial exclusivity. The rules of the Moose Lodge prohibited the admission of African Americans as members and guests.[322] Mr. Irvis was invited to dinner at the Lodge by a member, but was denied access on account if his race.[323] He sued for injunctive relief, prevailed in the lower courts, but eventually lost in the Supreme Court.[324] Writing for the Court, Justice William Rehnquist cited as settled authority the *Civil Rights Cases*.[325] Quoting *Shelley*, he repeated the lament that the Equal Protection Clause "erects no shield" against "private conduct, 'however discriminatory or wrongful.'"[326] Because the "Moose Lodge [was] a private club in the ordinary meaning of that term,"[327] it was not a state agent and, therefore, the Court held, was free to discriminate and segregate based on race as much as it liked.[328] On this point, even the

318. *Id.* at 250–51. Justice Douglas would have upheld the authority of Congress to prohibit racial discrimination in private establishments under Section 5 of Fourteenth Amendment, at least where state agents are called upon to enforce them. *See id.* at 279–91 (Douglas, J., concurring).

319. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 445 (1968) (Douglas, J., concurring); *see also id.* at 447 ("Today the black [citizen] is protected by a host of civil rights laws. But the forces of discrimination are still strong."); FONER, *supra* note 212, at 172 (characterizing the Court's efforts to circumnavigate the *Civil Rights Cases* by appealing to the Commerce Clause as making "the judiciary look ridiculous").

320. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178–79 (1972).

321. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722–24 (1961).

322. *Moose Lodge No. 107*, 407 U.S. at 165–66.

323. *Id.* at 165.

324. *Id.* at 165, 179.

325. *Id.* at 172.

326. *Id.* at 172 (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)).

327. *Id.* at 171.

328. *See id.* at 177. This, despite the Court's admission that "[t]here can be no doubt that the label 'private club' can be and has been used to evade both regulations of state and local liquor authorities, and statutes requiring places of public accommodation to serve all persons without regard to race, color, religion, or national origin." *Id.* at 177–78.

dissenting Justices—William Douglas, William Brennan, and Thurgood Marshall—agreed.[329]

Burton asked whether a privately operated restaurant could deny service to Black customers.[330] The Eagle Coffee Shop leased space from a parking garage in downtown Wilmington, Delaware.[331] Its owner openly refused to serve African American patrons.[332] Burton sued for declaratory relief on equal protection grounds because the parking garage happened to be owned by the Wilmington Parking Authority, which was an agency of the State of Delaware.[333] The restaurant persuaded the Supreme Court of Delaware that it was a private actor, and therefore beyond the reach of state and federal prohibitions on racial discrimination.[334] The Supreme Court reversed.[335] Writing for the Court, Justice Clark held that the leasing arrangement between the restaurant and the Parking Authority necessarily implicated the State in the coffee shop's discriminatory practices.[336] The shop's discriminatory policy therefore offended the Fourteenth Amendment.[337] But, on the way to reaching this salutary result, Justice Clark cited with approval the Court's holding in the *Civil Rights Cases* and reiterated the Court's commitment to the proposition "that private conduct abridging individual rights does no violence to the Equal Protection Clause."[338]

Burton is of a piece with *Shelley*. In both cases the Court chose to circumnavigate the state agency requirement in order to avoid the consequences of the state agency requirement. They are not the sole examples of these kinds of machinations. Time and again, the Court has chosen to weave gossamer webs of state entanglement in particular cases so it can bring the Fourteenth Amendment to bear on private discrimination.[339] But why? Rather than

329. *Id.* at 180 (Douglas, J., dissenting) ("The fact that the Moose Lodge allows only Caucasians to join or come as guests is constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race."); *id.* at 185–86 (Brennan, J., dissenting). Justice Douglas's accession is particularly troubling in that he appeared willing in *Heart of Atlanta* to endorse Congress's authority under Section 5 of the Fourteenth Amendment to prohibit private racial discrimination. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 279–80 (1964) (Douglas, J., concurring).

330. Burton v. Wilmington Parking Auth., 365 U.S. 715, 716 (1961).

331. *Id.*

332. *Id.*

333. *See id.*

334. *See id.* at 716–17.

335. *Id.* at 726.

336. *Id.* at 722–26.

337. *Id.* at 725.

338. *Id.* at 722; *see also* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991) ("Racial discrimination, though invidious in all contexts, violates the Constitution only when it may be attributed to state action.").

339. *See, e.g.*, *Edmonson*, 500 U.S. at 643–44 (discussing how private litigants in private lawsuits are state agents for purposes of equal protection when exercising peremptory challenges during jury selection because courts are government fora); Adickes v. S.H. Kress & Co., 398 U.S. 144,

indulge highly contestable readings of the facts in particular cases, why not revisit the root doctrine? Why not, in an age of renewed commitment to the project of racial justice and anti-discrimination more generally, revisit a rule that was self-consciously designed to preserve space for racial apartheid?[340] The likely answer is the use of the word "State" in Section 1 of the Fourteenth Amendment. That is fair enough, if a bit disappointing. But, as we saw in Part I, the same cannot be said of the Fourth Amendment, which makes no mention of state action. If the Fourth Amendment state agency requirement is, as it appears to be, an accident of the times, those times were defined by efforts to retrench racial apartheid in the United States, and continued commitment to the doctrine results in racial disparities,[341] then might that history alone provide reason to revise, revisit, or abandon the accidental rule? Some of the Supreme Court's recent opinions suggest it should.

D. DOES RACIST HISTORY MATTER WHEN ASSESSING CONSTITUTIONAL DOCTRINE?

Should it matter that the state agency requirement emerged and has persisted as a means to immunize racial apartheid from constitutional scrutiny? At least for some members of the Supreme Court, the answer is "yes."[342] Consider, as an example, *Ramos v. Louisiana* decided in 2020. *Ramos* held that laws allowing for non-unanimous jury verdicts in felony cases violate the Sixth Amendment jury right.[343] Two such laws were at issue in the case, one from

148 (1970) (finding that exclusion of customers from restaurant on the basis of race is state action for purposes of 18 U.S.C. § 1983 and the Fourteenth Amendment to the extent the owner acted in accordance with "a state-enforced custom requiring racial segregation"); Griffin v. Maryland, 378 U.S. 130, 135 (1964) (finding that a deputy sheriff providing security for an amusement park through a contract with a private security firm was a state actor when he enforced the park's policy of racial exclusion); Lombard v. Louisiana, 373 U.S. 267, 268 (1963) (dismissing trespass charges brought against participants in a civil rights sit-in who refused to leave a "refreshment counter" after being ordered to do so by a manager enforcing the store's racial segregation policy).

340. The state agency requirement and its endorsement of "private" discrimination continues to play a role in preserving apartheid in the United States. Consider, for example, *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023). There, the owner of a website design firm argued that a Colorado law prohibiting discrimination against persons based on sexual orientation by private persons offering services to the public violated her individual right to discriminate. *Id.* at 579–80. Although she grounded her claimed right to discriminate in the First Amendment Free Exercise Clause, thereby avoiding explicit reliance on the state agency requirement and the *Civil Rights Cases*, the principle at stake is the same and raises the specter of "private" apartheid.

341. *See infra* Section II.D.

342. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1394 (2020) (explaining the racist roots of non-unanimous jury laws in Oregon and Louisiana); Timbs v. Indiana, 139 S. Ct. 682, 688–89 (2019) (recounting the use of excessive fines to "maintain the prewar racial hierarchy" in southern states after the Civil War).

343. *Ramos*, 140 S. Ct. at 1408.

Louisiana and the other from Oregon.[344] Writing for the Court, Justice Gorsuch began his analysis by highlighting the fact that these laws were part of legislative initiatives designed "to 'establish the supremacy of the white race,'" and "to dilute 'the influence of racial, ethnic, and religious minorities on . . . juries.'"[345] Justice Alito, writing in dissent, charged the majority with violating norms of gentility by highlighting the racist histories of these laws.[346] But, as the majority rightly appreciated, shying away from the racist histories of American laws and institutions does injustice both to the truth and to those wronged.[347] More fundamentally, denying or sublimating racist origins risks perpetuating racially disparate outcomes, even in the absence of explicit contemporary discriminatory intent.[348] We therefore ought to recognize and confront this history and its modern consequences when weighing whether and to what degree to maintain the state agency requirement.

Abstractions aside, there is unmistakable evidence that many of the same groups that have historically been targets of de facto and de jure discrimination are disproportionately subject to surveillance by both government and "private" surveillants, and therefore would benefit from a more expansive view of Fourth Amendment protections. For example, in 2021 the United States Court of Appeals for the Fourth Circuit noted that technologically enhanced surveillance "touches everyone, but its hand is heaviest in communities already disadvantaged by their poverty, race, religion, ethnicity, and immigration

344. *Id.* at 1394. These were two of the holdout states at the heart of the Compromise of 1877. *See Compromise of 1877*, HISTORY (Nov. 17, 2019), https://www.history.com/topics/uspresidents/compromise-of-1877 [https://perma.cc/E4MJ-H3N9].

345. *Ramos*, 140 S. Ct. at 1394 (first quoting OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA 374 (H. Hearsey ed. 1898); then quoting State v. Williams, No. 15-cr-58698, 2016 WL 11695154, at *10 (Or. Cir. Dec. 15, 2016)); *see also id.* at 1417–19 (Kavanaugh, J., concurring) (noting the racist history and effects of non-unanimous jury laws).

346. *Id.* at 1425–26 (Alito, J., dissenting).

347. *Id.* at 1394; *see also id.* at 1417–18 (Kavanaugh, J., concurring) ("In light of the racist origins of the non-unanimous jury, it is no surprise that non-unanimous juries can make a difference in practice, especially in cases involving black defendants, victims, or jurors. After all, that was the whole point of adopting the non-unanimous jury requirement in the first place."); Brief of Amicus Curiae NAACP Legal Def. & Educ. Fund, Inc. in Support of Petitioners at 3–4, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091), 2018 WL 4358109, at *3–4 ("The Framers intended the Fourteenth Amendment to be a bulwark against States infringing on citizens' civil rights, with special attention to the invidious tactics Southern States used to strip African Americans of their rights. As a result, a critical question that the Court should ask during an incorporation inquiry is whether the right at issue protects against the kind of tactics Southern States used to repress Black people in the post-Civil War period. If the right does, then the Framers would have intended for it to be incorporated against the States."); Edwards v. Vannoy, 141 S. Ct. 1547, 1577–78 (2021) (Kagan, J., dissenting) (arguing that the racist history and effects of non-unanimous jury laws augurs in favor of retroactive application of the Court's holding in *Ramos v. Louisiana*).

348. This is among the fundamental insights of critical race theory and contemporary critiques of structural racism. *See generally* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (discussing the shortcomings of colorblind legal reforms in addressing racial disparities in America).

status."[349] This is no accident. As Professor Chaz Arnett has explained, disparities in the deployment and use of contemporary surveillance technologies are a consequence of a long and continuous legacy of surveilling Black communities and Black activists that traces back to, at least, the eighteenth century.[350] Granted, many of these critiques focus on instances of state surveillance, but "private" surveillance is far from innocent. For example, Professor Anita Allen has shown how African Americans are uniquely targeted and exploited online.[351] She is not alone in documenting technological redlining. Numerous scholars and journalists have documented racial disparities in commercial outcomes when "private" companies rely on surveillance technologies to gather information about consumers or make decisions about credit, insurance, and other financial products.[352] As it stands, all of this activity is beyond the reach of the Fourth Amendment by virtue of the state agency requirement.[353]

III. APPLYING THE FOURTH AMENDMENT TO "PRIVATE" PARTIES

Assume the foregoing is right. What would it mean to apply the Fourth Amendment to private parties?[354] The details will vary based on the technology

349. Leaders of a Beautiful Struggle v. Balt. Police Dep't, 2 F.4th 330, 347 (4th Cir. 2021) (quoting Barton Gellman & Sam Adler-Bell, *The Disparate Impact of Surveillance*, CENTURY FOUND. (Dec. 21, 2017), https://tcf.org/content/report/disparate-impact-surveillance [https://perma.cc/B24Y-U27J]).

350. Chaz Arnett, *Race, Surveillance, Resistance*, 81 OHIO. ST. L.J. 1103, 1111–16 (2020); *see also* ANDREW GUTHRIE FERGUSON, THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT 131–42 (2017) ("Big data's claim to objectivity and fairness must confront the racial history of American policing . . . [which] remains colored by explicit and implicit bias.").

351. *See* Anita L. Allen, *Dismantling the "Black Opticon": Privacy, Race Equity, and Online Data-Protection Reform*, 131 YALE L.J.F. 907, 913–28 (2022).

352. *See, e.g.*, SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM 4 (2018) (explaining "the structural ways that racism and sexism are fundamental" to many existing algorithmic decision-making tools); PASQUALE, *supra* note 13, at 38–42 (explaining how Big Data tools developed and deployed by consumer companies and financial institutions produce racially disparate outcomes); Willis, *supra* note 13, at 120, 149, 160 (explaining discriminatory effects of "dark pattern" marketing); Dino Pedreschi, Salvatore Ruggieri & Franco Turini, *The Discovery of Discrimination*, *in* DISCRIMINATION AND PRIVACY IN THE INFORMATION SOCIETY 91, 92–94 (Bart Custers, Toon Calders, Bart Schermer & Tal Zarsky eds., 2013) (documenting discriminatory outcomes in Big Data commercial rating systems); Cade Metz, *There Is a Racial Divide in Speech-Recognition Systems, Researchers Say*, N.Y. TIMES (Mar. 23, 2020), https://www.nytimes.com/2020/03/23/technology/speech-recognition-bias-apple-amazon-google.html (on file with the *Iowa Law Review*) (reporting on racial bias in commercial speech recognition technologies).

353. The Court has been reluctant to consider racial disparities in the Fourth Amendment context. *See* Whren v. United States, 517 U.S. 806, 813 (1996). But that reluctance has been tested in recent years as courts have considered Fourth Amendment challenges to search and seizure programs. *See, e.g.*, *Leaders of a Beautiful Struggle*, 2 F.4th at 347 (expressing concerns about racially disparate impacts of urban surveillance programs). It is easy to see why. If a search program appears, on the numbers, to target a particular racial group, then that may provoke questions about whether the program is serving legitimate interests.

354. I am in debt to Katherine Sandburg for pressing me on these questions.

at issue, its deployment, and its use,[355] but the answer in most cases is that it will give constitutional bite to reasonable notice and consent requirements, provide guardrails against misuse, and preserve space for companies to conduct searches that serve their customers and legitimate business interests. To see how, let us consider an example: Alexa-enabled devices.

The first step in any Fourth Amendment analysis is to determine whether the activity at issue constitutes a "search" or "seizure."[356] Although some surveillance technologies may affect "seizures,"[357] their deployment and use is more likely to constitute a "search." The Supreme Court has endorsed two definitions of "search" in the Fourth Amendment context. The first, derived from its 1928 decision in *Olmstead v. United States*,[358] asks whether the activity involves physical intrusion into a constitutionally protected area for purposes of gathering information.[359] The second, announced by *Katz v. United States* in 1967, asks whether the activity violates a subjectively manifested expectation of privacy that society is prepared to recognize as reasonable.[360] Under either test, Alexa-enabled devices conduct "searches."

Many Alexa devices are physically present in homes, where they gather information. In fact, that is a substantial part of the reason they are there in the first place.[361] They therefore appear to conduct searches under the *Olmstead* physical intrusion test. Separately, the Court has long held that our expectations of privacy are at their zenith when it comes to activities in our homes.[362] By surveilling activities in homes, Alexa therefore appears to

355. *See* David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 101–25 (2013) (explaining how the Fourth Amendment recommends different regulatory approaches based on the technology at issue).

356. *See* STEPHEN A. SALTZBURG, DANIEL J. CAPRA & DAVID C. GRAY, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 40 (12th ed. 2022).

357. "Seizures" of property entail material interference with possessory interests. United States v. Jacobsen, 466 U.S. 109, 113 (1984). Seizures of persons require either physical touching with the objective purpose of effecting a seizure or submission to a show of authority that would cause a reasonable person to believe she is not free to go. Torres v. Madrid, 141 S. Ct. 989, 995 (2021).

358. Olmstead v. United States, 277 U.S. 438, 464 (1928).

359. United States v. Jones, 565 U.S. 400, 404 (2012).

360. Katz v. United States, 389 U.S. 347, 353 (1967); *see also id.* at 361 (Harlan, J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

361. *See* Grant Clauser, *Amazon's Alexa Never Stops Listening to You. Should You Worry?*, N.Y. TIMES: WIRECUTTER (Aug. 8, 2019), https://www.nytimes.com/wirecutter/blog/amazons-alexa-never-stops-listening-to-you (on file with the *Iowa Law Review*) ("When you invite a digital voice assistant like Amazon Alexa into your home, you're inviting a device that records and stores things you say, which will be analyzed by a computer, and maybe by a human."); Geoffrey A. Fowler, *Alexa Has Been Eavesdropping on You This Whole Time*, WASH. POST (May 8, 2019), https://www.washingtonpost.com/technology/2019/05/06/alexa-has-been-eavesdropping-you-this-whole-time (on file with the *Iowa Law Review*) ("Alexa records after it hears its name.").

362. Wilson v. Layne, 526 U.S. 603, 610–11 (1999); Minnesota v. Carter, 525 U.S. 83, 99–100 (1998) (Kennedy, J., concurring); Miller v. United States, 357 U.S. 301, 306–07 (1958).

conduct "searches" of homes under the *Katz* reasonable expectation of privacy test.[363] That is true whether Alexa is surveilling "intimate" activities or the quotidian details of everyday domestic life.[364] Of course, this does not end the Fourth Amendment analysis.

The Fourth Amendment does not guarantee security against all searches. It only guarantees security against *unreasonable* searches.[365] One way to establish the reasonableness of a search under both *Olmstead* and *Katz* is to secure permission to search from a person with lawful authority to consent.[366] Consent to search may be express or implied,[367] limited or unlimited,[368] but must be given voluntarily.[369] Whether and to what extent voluntary consent to search has been given is determined from a reasonable-person point of view,[370] taking into consideration the circumstances and prevailing public norms.[371] For example, in *Florida v. Jardines*, the Court held that entering the curtilage of a home to knock on the front door is reasonable in light of well-established social norms.[372] Absent clear indication to the contrary, having a front door implies consent for visitors to approach, knock, and wait for a reasonable period for someone to answer.[373] But, as every "Girl Scout[]," "trick-or-treater[]," and police officer knows, that consent is limited.[374] It does not extend to loitering, peering through windows, or deploying a magnetometer in the front garden.[375]

In addition to prevailing social norms, the Court has also relied on the way technologies and businesses work when determining the presence and scope of expressed and implied consent.[376] For example, in *Smith v. Maryland*,

---

363. *See* Berger v. New York, 388 U.S. 41, 51 (1967) (holding "that the use of electronic devices to capture" conversations inside offices and homes is "a 'search' within the meaning of the [Fourth] Amendment").

364. Kyllo v. United States, 533 U.S. 27, 37 (2001) ("The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained.").

365. Florida v. Jimeno, 500 U.S. 248, 250 (1991).

366. *Id.* at 250–51.

367. Florida v. Jardines, 569 U.S. 1, 8–9 (2013).

368. *Jimeno*, 500 U.S. at 252.

369. Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

370. *Jimeno*, 500 U.S. at 251.

371. *See Jardines*, 569 U.S. at 8; Georgia v. Randolph, 547 U.S. 103, 111 (2006).

372. *Jardines*, 569 U.S. at 6–8.

373. *Id.*; *see also id.* at 12–14 (Kagan, J., concurring) (pointing out that the same rules and result would be obtained by applying the *Katz* framework).

374. *Id.* at 8 (majority opinion).

375. *See id.* at 9.

376. *See, e.g.*, Smith v. Maryland, 442 U.S. 735, 744–46 (1979) (telephones); United States v. Miller, 425 U.S. 435, 442–43 (1976) (banking); Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 69–70 (1974) (banking). These cases form the core of the Court's much maligned third-party doctrine, which allows government agents to access information from third parties with whom that information has been voluntarily shared. In her influential concurring opinion in *United States v. Jones*, Justice Sotomayor argued that the Court will need to "fundamentally . . . reconsider" the third-party

the Court held that telephone users consent to the disclosure of telephonic metadata—physical location of their phone, numbers called, calls made, duration of calls, etc.—to their telephone companies because these disclosures are necessary from a technical point of view to provide telephone service and accurately charge for those services.[377] The Court was not troubled that telephone companies do not specifically seek permission to gather call information or that most customers do not consciously share call information with their telephone providers.[378] Technical necessity was enough to infer consent.[379] But technical necessity also sets limits on that inference. Specifically, the Court made clear that there is no implied consent for telephone companies to eavesdrop on calls because they do not need to know the contents of calls to provide telephone service.[380]

Applying these standards, Alexa searches probably are reasonable if in response to user commands, but not if they are unbidden or pervasive. Users invite Alexa devices into their homes for limited purposes. Those limitations vary according to the function of a device and user preferences, but in all cases the consent to search is limited. When users actively engage with an Alexa device by uttering the magic phrase "Alexa . . . ," they are consenting to share the information that follows, e.g., "play Sketches of Spain" or "we need more Barrel of Monks Quadraphonic." But if the device persists in listening, then that continued intrusion exceeds users' expressed consent.[381] Continued eavesdropping also exceeds any consent implied by ownership, deployment, and use of the device.[382] Alexa devices do not need to engage in constant

---

doctrine as it contends with new surveillance technologies. United States v. Jones, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring). A few years later, the *Carpenter* Court declined to "extend" the third-party doctrine to cell site location information but went no further. Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018). Bringing the Fourth Amendment to bear on "private" searches in the first instance does not eliminate the third-party doctrine, but it does allow us to ask questions about the reasonableness of an initial private search with far more intensity. At the same time, the fundamental questions about reasonableness, including consent, remain salient. I am in debt to Scott Mulligan for his questions about the third-party doctrine.

377. *Smith*, 442 U.S. at 742–43.

378. *Id.* at 743–45.

379. *Id.* at 745–46.

380. *Id.* at 741; *cf.* Katz v. United States, 389 U.S. 347, 353 (1967) (holding that the Fourth Amendment protects the contents of telephone communications); *Ex parte* Jackson, 96 U.S. 727, 733 (1877) (protecting the contents of sealed letters placed in mail despite the fact that addressee information is voluntarily revealed by the sender); United States v. Ackerman, 831 F.3d 1292, 1304 (10th Cir. 2016) (viewing contents of email attachments is a "search").

381. Apparently, Alexa devices do just this. *See supra* note 361; *see also* Singer & Karaian, *supra* note 23 (reporting on study demonstrating widespread ignorance about how and how much personal data technology companies gather and exploit).

382. Certainly, Alexa users do not expressly consent to this level of domestic surveillance. Even if there is a notice of constant surveillance buried somewhere in an overlong, excruciatingly opaque privacy notices, that would not provide grounds for establishing consent. As is well-established, these notices are singularly ineffective in securing actual consent. *See* Singer & Karaian, *supra* note 23 (citing recent studies documenting that consent regimes are "totally broken" (quoting Joseph

surveillance or eavesdrop unbidden in order to play music, adjust lighting, or populate a shopping list. For an Alexa device to justify this sort of spying on grounds of consent would be akin to a dinner guest who, having secured permission to use the powder room, saunters farther down the hall, enters their host's bedroom, and rifles through a bedside table drawer.[383] Everybody knows this kind of behavior is unreasonably intrusive.[384] If caught, the nosy guest's protest that they "had permission to use the powder room" would avail them nothing.

All of this seems pretty, well, reasonable. But it marks an important and salutary change in the landscape that should not be missed. Technology companies have long faced criticism from scholars, regulators, and customers regarding the way they seek and secure consent from customers to gather, store, and exploit information.[385] This may be because there is neither a clear normative framework for evaluating the adequacy of notice and consent practices nor clear and consistent guidance from legislatures and regulators.[386] Bringing the Fourth Amendment to bear on the question introduces a robust body of law that will provide useful guidance for companies like Amazon while

---

Turow, media studies professor)); *see also* Joel R. Reidenberg et al., *Disagreeable Privacy Policies: Mismatches Between Meaning and Users' Understanding*, 30 BERKELEY TECH. L.J. 39, 46–47 (2015) (documenting how fine print, length, density, and complex language prevent users from understanding privacy notices); Daniel J. Solove, *Introduction: Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1883–85 (2013) (discussing the problem of "uninformed" consent); Paul Ohm, *Branding Privacy*, 97 MINN. L. REV. 907, 930 (2013) (describing "information quality problems" that plague notice and consent regimes); Helen Nissenbaum, *A Contextual Approach to Privacy Online*, DÆDALUS, Fall 2011, at 32, 35–36 (2011) (criticizing notice and consent regimes); Paul M. Schwartz, *Internet Privacy and the State*, 32 CONN. L. REV. 815, 823–25 (2000) (same).

383. One might argue that Alexa is more like a dinner guest who cannot help but overhear a spat between her hosts in the next room. On this view, Alexa is not being nosy. She just cannot help but overhear. This ignores the difference between hearing and listening. While Alexa may need to keep her ears perked in anticipation of hearing her name, she does not need to listen, record, analyze, and report back to Amazon central everything that happens around her.

384. *Cf.* Georgia v. Randolph, 547 U.S. 103, 113–14 (2006) (pointing out that "no sensible person" would rely on consent to enter by one resident if a cotenant is present and objecting).

385. *See supra* text accompanying note 382.

386. *See generally* Scott Jordan, *Strengths and Weaknesses of Notice and Consent Requirements Under the GDPR, the CCPA/CPRA, and the FCC Broadband Privacy Order*, 40 CARDOZO ARTS & ENT. L.J. 113 (2022) (documenting an absence of national privacy regulations and significant differences between model regimes with respect to consent and notice requirements); Richard Warner, *Notice and Choice Must Go: The Collective Control Alternative*, 23 SMU SCI. & TECH. L. REV. 173, 174–75 (2020) (noting that "twenty years of criticism conclusively confirm that Notice and Choice results in 'the worst of all worlds: privacy protection is not enhanced, individuals and business pay the cost of bureaucratic laws'" (quoting Fred H. Cate, *The Failure of Fair Information Practice Principles*, *in* CONSUMER PROTECTION IN THE AGE OF THE 'INFORMATION ECONOMY' 341, 342 (Jane K. Winn ed., 2006))); Robert H. Sloan & Richard Warner, *Beyond Notice and Choice: Privacy, Norms, and Consent*, 14 J. HIGH TECH. L. 370 (2014) (aggregating critiques of notice and consent regimes and noting that "[a] fundamental difficulty is the lack of norms").

also offering users a degree of leverage they have not so far enjoyed in efforts to secure themselves against intrusive surveillance by private corporations.

Of course, consent is not the only way to render a search "reasonable." Another is to secure a warrant issued "by a neutral and detached magistrate" based on probable cause that specifies the place to be searched and the evidence to be seized.[387] However, as a general matter, probable cause warrants are only required if the purpose of the search is to advance law enforcement interests.[388] If police investigators want to coordinate with Amazon to exploit Alexa devices in order to gather information about criminal activities inside a home, then a warrant would be required.[389] This makes good sense in the context of criminal investigations. After all, these are circumstances where the goal is to gather information about a particular subject who is suspected of a specific crime.[390] Courts' long experience with wiretap warrants suggests that they would be perfectly capable of adjudicating these requests. But what about surveillance for purposes other than law enforcement? Say, for example, that Amazon wanted to surveil their customers' homes to advance its own business interests or to serve a public policy goal? On these questions, the Supreme Court's special needs jurisprudence would provide important guidance.

When reviewing the constitutionality of searches conducted for purposes other than law enforcement, courts ask whether a search regime and searches conducted pursuant to that regime strike a reasonable balance among the competing interests at stake.[391] Agents claiming authority to conduct special needs searches must specify their interests, explain why a search is necessary to vindicate those interest, show that those subject to search have adequate notice, and demonstrate that there are regulations in place that limit the discretion of agents when conducting searches.[392] Courts then weigh those interests against the property and privacy interests of those subject to search in order to determine the constitutionality of a search regime and, consequently, searches conducted pursuant to that regime.[393] Applying this special needs

387. Johnson v. United States, 333 U.S. 10, 13–15 (1948).

388. Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 621–24 (1989); LAFAVE ET AL., *supra* note 97, at 257–58 (describing "special needs" searches as "distinct from ordinary law enforcement").

389. *See* Berger v. New York, 388 U.S. 41, 63 (1967) (holding that warrants are required for the placement of eavesdropping devices in homes); *see also* Christopher Mele, *Bid for Access to Amazon Echo Audio in Murder Case Raises Privacy Concerns*, N.Y. TIMES (Dec. 28, 2016), https://www.nytimes.com/2016/12/28/business/amazon-echo-murder-case-arkansas.html (on file with the *Iowa Law Review*) (discussing murder investigation in which police served Amazon with a warrant for recordings from a deceased user's Alexa device).

390. Gray & Citron, *supra* note 355, at 101–23 (arguing for flexibility in Fourth Amendment regulation based on the technology at issue, its function, and its utility).

391. See v. City of Seattle, 387 U.S. 541, 544–46 (1967); Camara v. Mun. Ct. of S.F., 387 U.S. 523, 536–39 (1967).

392. LAFAVE ET AL., *supra* note 97, at 257–63.

393. *Id.*

framework, the Supreme Court has sanctioned, *inter alia*, home inspections conducted to ensure compliance with health and safety regulations,[394] inspections of junk yards,[395] and border searches.[396] It has also declined to endorse, among other endeavors, drug detection road blocks,[397] warrantless strip searches of children,[398] and discretionary inspection of hotel registries.[399]

A "special needs" analysis would accommodate any legitimate surveillance Amazon might like to conduct through Alexa devices while guarding against the kinds of exploitation and abuse Justice Alito and other privacy advocates fear. To start, if Amazon wanted to exploit Alexa devices in order to surveil its customers, then they would have to explain why. This alone would go a considerable distance toward resolving Justice Alito's concerns. His stated fear, recall, was that "powerful private companies . . . [might] collect and sometimes misuse vast quantities of data about the lives of ordinary Americans."[400] There seem to be two distinct worries here. The first is that corporations like Amazon will conduct broad and indiscriminate surveillance for no apparent purpose. The second is that Amazon will conduct broad surveillance in order to gather information for malign purposes of exploitation. Requiring Amazon to identify its reasons for surveilling its customers would go a long way toward resolving both of these concerns in at least two ways. The very requirement to articulate good reasons has a disciplinary effect on action. Companies like Amazon would therefore be far less likely to conduct surveillance for no reason or for bad reasons. Moreover, private surveillants would not have unfettered discretion to decide whether they have good reasons to search their customers' homes. Those customers, legislators, regulators, and courts would have the opportunity to determine whether those reasons are good ones and whether they are sufficient to justify searching customers' homes.

After providing legitimate reasons for surveilling its customers, a special needs analysis would require that Amazon elaborate policies regulating its surveillance of customers' homes. Amazon would then need to explain why those policies strike a reasonable balance between Amazon's interests and those of its customers, guard against arbitrary searches and abuses of power, and provide adequate notice. Importantly, these policies would not be the product of Amazon's largess or even its accession to market forces. Amazon would instead be held directly accountable to their customers under the Fourth Amendment. As a consequence, "the people" would enjoy much greater security against the corporate collection and misuse of information about them and their lives.

---

394. *Camara*, 387 U.S. at 536–39.
395. New York v. Burger, 482 U.S. 691, 713–718 (1987).
396. United States v. Flores-Montano, 541 U.S. 149, 152–56 (2004).
397. City of Indianapolis v. Edmond, 531 U.S. 32, 47–48 (2000).
398. Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 376–77 (2009).
399. City of Los Angeles v. Patel, 576 U.S. 409, 427–28 (2015).
400. Carpenter v. United States, 138 S. Ct. 2206, 2261 (2008) (Alito, J., dissenting).

In addition to existing Fourth Amendment doctrine, corporations, customers, legislatures, regulators, and courts can also take guidance from an emerging literature exploring ways to bring the Fourth Amendment to bear on means and methods of conducting systemic surveillance.[401] Existing Fourth Amendment doctrine has difficulty addressing the deployment and use of tools like aerial surveillance systems,[402] license plate readers,[403] networked video cameras,[404] and facial recognition.[405] These technologies clearly raise concerns about reasonable expectations of privacy. But existing regulatory frameworks, whether a warrant requirement or traditional special needs analysis, do not quite fit. As a result, courts seem to face the choice of either finding that these technologies do not conduct "searches" as defined by Fourth Amendment or shutting down programs that might have real value in advancing legitimate interests. In an effort to resolve these challenges, a number of scholars have proposed more bespoke regulatory frameworks that focus on how technologies work, the interests they serve, and the privacy interests they implicate in order to identify reasonable regulatory interventions throughout the lifecycle of surveillance technologies including design, deployment, information gathering, information aggregation, access to information, information analysis, access to analysis, and information retention.[406] This kind of approach seems to hold promise for corporations like Amazon, their customers, regulators, legislatures, and courts as they think through the concrete consequences of abandoning the Fourth Amendment state agency requirement.

CONCLUSION

There is a tendency in all social enterprises to assume that what is accepted is true. This kind of anchoring has the inevitable effect of fixing our mindsets, blinding us to the contingency of outcomes, and inhibiting change. The Fourth Amendment state agency requirement is one example of this phenomenon.

---

401. *See, e.g.*, GRAY, AGE OF SURVEILLANCE, *supra* note 2, at 249–75; Barry Friedman, *Lawless Surveillance*, 97 N.Y.U. L. REV. 1143, 1204–08 (2022); Andrew Guthrie Ferguson, *Surveillance and the Tyrant Test*, 110 GEO. L.J. 205, 263–90 (2021); Andrew Guthrie Ferguson, *Structural Sensor Surveillance*, 106 IOWA L. REV. 47, 70–112 (2020); Gray, *Categorical Imperative*, *supra* note 2, at 37–38; Gray & Citron, *supra* note 355, at 105–24.

402. *See* Leaders of a Beautiful Struggle v. Balt. Police Dep't, 2 F.4th 330, 333–34 (4th Cir. 2021) (considering "a first-of-its-kind aerial surveillance program operated by . . . the Baltimore Police Department").

403. *See* United States v. Yang, 958 F.3d 851, 857–63 (9th Cir. 2020).

404. *Cf. Leaders of a Beautiful Struggle*, 2 F.4th at 345 (discussing the differences between discrete, fixed pole cameras and technologies capable of pervasive surveillance and "the creation of a retrospective database of everyone's movements across the city").

405. David Gray, *Bertillonage in an Age of Surveillance: Fourth Amendment Regulation of Facial Recognition Technologies*, 24 SMU SCI. & TECH. L. REV. 3, 17–38 (2021).

406. *See, e.g.*, GRAY, AGE OF SURVEILLANCE, *supra* note 2, at 263–75 (describing such an approach to regulating Big Data); Gray, *supra* note 405, at 38–62 (describing such an approach to regulating facial recognition technologies).

This Article has shown that there is no textual foundation for the Fourth Amendment state agency requirement. In fact, when we compare the text of the Fourth Amendment to its Bill of Rights cohabitants and later addenda, such as the Fourteenth Amendment, it seems clear that the Fourth Amendment aims at both state and private conduct—a conclusion that is supported by the historical context in which the Fourth Amendment was drafted and ratified. Instead, the Fourth Amendment state agency requirement seems to have emerged as an artifact of then-contemporary efforts to thwart Reconstruction by preserving space for privately enforced racial apartheid. That revelation should spur us to change.

The Fourth Amendment has a critical role to play in protecting each of us and all of us from threats of unreasonable search and seizure at the hands of new and emerging surveillance technologies. As Justice Alito suggested in his *Carpenter* dissent, that potential will be dramatically reduced if we persist in the view that the Fourth Amendment has nothing to say about the activities of private entities. Particularly worrisome in this regard are large technology companies, which have the means and motive to engage in intrusive surveillance as well as the capacity to dramatically affect our experiences and opportunities in the real world. This Article has suggested a solution: give full meaning to the text of the Fourth Amendment by abandoning the Fourth Amendment state agency requirement. The downstream effects of this doctrinal shift would have salutary effects for the right of the people to be secure against unreasonable search whether those threats come from the government or private corporations.