"*Especially* Against the Government"

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ABSTRACT: David Gray argues that we should scrap the requirement that the Fourth Amendment's restrictions on searches and seizures apply only to the government (the "state agency requirement"). Instead, the Amendment's protections should also be understood to regulate the large technology companies whose actions pose an equal or greater threat to citizens' privacy. Through close attention to eighteenth and nineteenth-century history, he explains that the Amendment's authors were partly inspired by their concern with private searches and asserts that it is therefore reasonable to resuscitate that concern in contemporary constitutional interpretation. In addition, he highlights the racism of the eras that gave rise to the state agency requirement, suggesting that this context should lead us to abandon a standard that has frequently been used to shield private discrimination from government oversight.

Gray is undoubtedly correct both to identify private companies as some of the greatest menaces to privacy today and to claim that private searches were a feature of Founding-era America. However, he appears to place too great an emphasis on that latter point. In fact, as many Fourth Amendment scholars have written, the Amendment's drafters were far more interested in restricting governmental power than they were in eliminating the private use of warrants. As a result, both the historical problem and the historical solution Gray outlines are somewhat less compelling than he suggests. It is less clear than he claims that the state agency requirement was primarily the product of the racial anxiety of the late nineteenth century. Nor is it so obvious that a newly capacious understanding of the Fourth Amendment's reach is to be found in eighteenth-century concerns. Nevertheless, Gray's article performs a crucial service in asking us to consider the distasteful past and contemporary failings of a major restriction on one of our key constitutional protections, while also offering a potentially potent remedy.

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INTRODUCTION

The fact that many of our society's rules and institutions have unsavory pedigrees should shock no one, but it is unfortunately glaringly apparent that people still need reminding of the darkness of much of American legal history. Professor David Gray illuminates one of the shadows of that history by reconstructing the racist origins of the strict condition that the Fourth Amendment's prohibition of unreasonable searches and seizures apply only to government agents, which he terms the "state agency requirement."[1] He argues that both these origins and the racially discriminatory ways in which the requirement has been deployed by courts should lead us to reject this constraint.[2] Gray also looks forward as well as backwards. In addition to pointing out the historical flaws in how the Fourth Amendment has been interpreted, he hopes for a future in which it might be leveraged to protect our privacy against today's greatest threats. The Amendment, he argues, could and should be applied against non-governmental actors, since many of the most egregious infringements on the Amendment's guarantee—"[t]he right of the people to be secure in their persons, houses, papers, and effects"—come from private companies like Google and Amazon.[3] His argument about both what's wrong with the traditional judicial approach to the Fourth Amendment and how it could be fixed relies on a good deal of history (nineteenth and eighteenth century, respectively). Gray's account of that history, though compellingly articulated, sometimes fails to acknowledge the broader context of the legal ideas he cites.

I. HISTORY AS PROBLEM

Gray makes four historical arguments for why we should abandon the state agency requirement. In chronological order, they are: (1) because the Fourth Amendment's authors intended to restrain both private and state action, the requirement does not appear in the text of the Fourth Amendment; (2) the earliest explicit judicial articulation of the requirement,

1. Other scholars more commonly refer to this general principle as the "state action requirement" or "state action doctrine." Gray uses a mix of these and other similar phrases throughout the article.

2. *See* David Gray, *The Fourth Amendment State Agency Requirement: Some Doubts*, 109 IOWA L. REV. 1487, 1539 (2024).

3. *Id.* at 1496.

Burdeau v. McDowell,[4] cites a line of cases that do not support it; (3) those cases were decided at moments when the courts were sacrificing racial equality to national unity; and (4) in contexts beyond the Fourth Amendment, such a requirement has been routinely used to disenfranchise minorities. The first, second, and fourth claims are straightforward. Unlike some other Bill of Rights Amendments, the Fourth makes no mention of the government, so there is no clear textual command to restrict its protections to government action. As Gray explains, *Burdeau*'s citations provide little direct support for the requirement, so we should indeed be suspicious of its jurisprudential solidity. Finally, it is clearly true that efforts to keep the federal government from interfering with private acts have often been motivated by the desire to discriminate. This last fact should always make us wary when considering doctrines that look like the state agency requirement.

The third claim—that the cases giving rise to the requirement were tainted by their racist historical contexts—is knottier and proceeds in several stages. Gray identifies two periods (the early and late nineteenth century) during which the Supreme Court limited the reach of federal laws protecting minorities because the justices feared the civil strife that might result if they decided the other way. These two periods, he claims, laid the foundation for *Burdeau*'s articulation of the state agency requirement in 1921. Gray dates the "conceptual origins" of the state agency requirement to the 1833 case of *Barron v. Baltimore*.[5] In that case, the Supreme Court—fearing a violent clash over federal regulation of state activity, particularly slavery—ruled that the protections of the Bill of Rights Amendments applied only to the federal government and not to the states (the "non-incorporation doctrine").[6] *Barron* was decided during the so-called "Nullification Crisis" of 1832 through1833, in which South Carolina asserted its right to ignore federal tariffs and, more broadly, to resist the dictates of the national government when it believed they represented illegitimate impositions on state sovereignty.[7] Gray describes the crisis as driven at least in part by the fear that the federal government would ultimately assert its authority to bring about an end to slavery.[8] Seen in this light, the Court's articulation of the non-incorporation doctrine should be understood as a tactic aimed at preserving the United States through preserving southern slavery.[9] Gray then argues that it was *Barron*'s logic that underpinned the Court's refusal in the 1873

4. *See generally* Burdeau v. McDowell, 256 U.S. 465, 467 (1921).

5. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833).

6. *See id.*

7. Ernest A. Young, *Marijuana, Nullification, and the Checks and Balances Model of Federalism*, *in* NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT 125, 130–37 (Sanford Levinson ed., 2016).

8. Gray, *supra* note 2, at 1511.

9. *Id.* at 1513.

Slaughterhouse Cases[10] to interpret the Fourteenth Amendment as applying the Bill of Rights against the states.[11] Although the Congressional record indicated that the Amendment was intended specifically to supersede *Barron*'s holding by extending the Bill of Rights to state governments,[12] the Court took the opposite tack, emphasizing that the Amendment should *not* be read as imposing significant limitations on the states' police powers. In this way, "[t]he *Slaughterhouse* Court revitalized the robust notion of state sovereignty endorsed in *Barron*."[13]

Gray next moves to the 1883 *Civil Rights Cases*,[14] which further restricted the application of the Fourteenth Amendment to government agents alone, rather than to the private actors seeking to exclude Black people from their inns and theaters.[15] Like *Barron*, these cases were decided at another moment of potentially existential catastrophe—following the Compromise of 1877, which entailed the retrenchment of federal power in enforcing Reconstruction—and were likewise aimed at sacrificing minority rights to American political unity. Finally, Gray explains that *Plessy v. Ferguson*[16] signaled that the Court approved of the many instances of private discrimination that had been "[e]mboldened by the *Slaughterhouse Cases* and the *Civil Rights Cases*. . . ."[17] It was during the era these decisions defined that the Court began issuing the handful of opinions (between 1886 and 1921, ending with *Burdeau*)[18] on which the Fourth Amendment state agency requirement rests. The logic of the Court's early nineteenth-century constriction of federal protections against discrimination by state governments in *Barron* was thus reified in late nineteenth-century opinions refusing to apply federal laws against racist companies and people. In sum, Gray argues that cases decided at these moments of acute crisis in which minorities were firmly and purposely disenfranchised for reasons of political expediency produced the related notions that federal guarantees of rights should be applied against states only very sparingly and against private persons not at all.[19]

One of the strengths of Gray's work is his attention to the meaning of all this history, and he makes two arguments about why it should matter to lawyers today. First, he cites *Ramos v. Louisiana*[20]—in which the Court dove deep into the racist pasts of Louisiana and Oregon to overturn laws allowing

10. *See generally* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).
11. Gray, *supra* note 2, at 1517.
12. *Id.* at 1516.
13. *Id.* at 1517.
14. *See generally* The Civil Rights Cases, 109 U.S. 3 (1883).
15. Gray, *supra* note 2, at 1520–21.
16. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896).
17. Gray, *supra* note 2, at 1522.
18. *Id.*
19. *See id.* at 1522–23.
20. *See generally* Ramos v. Louisiana, 590 U.S. 83 (2020).

verdicts by non-unanimous criminal juries—to demonstrate that the current Court is receptive to arguments based significantly in previously unconsidered histories of racial discrimination.[21] *Ramos* certainly suggests that approaches like Gray's are tactically well-conceived, likely to catch the attention of at least those justices who are interested in reforming some of those aspects of American law whose origins are most blatantly horrific. Second, he points out, this history is not just history: "More fundamentally, denying or sublimating racist origins risks perpetuating racially disparate outcomes, even in the absence of explicit contemporary discriminatory intent."[22] The minority groups whose interests were disregarded by the cases that restricted the Fourth Amendment's application are largely those who "are disproportionately subject to surveillance by both government and 'private' surveillants, and therefore would benefit from a more expansive view of Fourth Amendment protections."[23] The effects of our greatest national sin are never safely confined to earlier ages. Gray makes a compelling moral and political case that we must care about how Fourth Amendment doctrine got to be this way, given its continuing discriminatory impacts, and a strategic case that the Supreme Court might be persuaded to adopt his view.

As is natural for an ambitious overview of a great deal of history in relatively short order, Gray's account contains some apparent puzzles.[24] One of the biggest is exactly how the cases ostensibly giving rise to the state agency requirement—a series of seven decisions dealing with various applications of the Fourth Amendment, cited in *Burdeau v. McDowell* to establish the requirement[25]—fit into and reflect the undeniable racism of their moment. Gray writes that these opinions were issued "right smack in the middle of it all,"[26] i.e., of the Court's late nineteenth-century commitment to unity over equality manifested in the *Civil Rights Cases* and based on its similar early nineteenth-century commitment as demonstrated in *Barron*. Although Gray asserts of these seven cases that "there can be no doubt that their holdings were wrapped up in the historical moment,"[27] he does not actually attempt to show that they *were* so wrapped up: he does not explain how either they or

21. Gray, *supra* note 2, at 1529–30.

22. *Id.* at 1530.

23. *Id.*

24. One minor mystery in Gray's historical narrative, for example, is precisely how *Barron* and the *Slaughterhouse Cases* are supposed to have influenced the *Civil Rights Cases*. However, Gray's claim echoes the work of other scholars who detect *Barron*'s influence in the *Civil Rights Cases*' limitation of the scope of the Reconstruction amendments. *See, e.g.*, Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643, 697–98 (2000).

25. Gray, *supra* note 2, at 1495–96.

26. *Id.* at 1522.

27. *Id.* at 1523.

Burdeau were tainted by the racist anxieties of their time.[28] But even assuming they were, Gray's analysis creates another problem. He examines each of the opinions cited in *Burdeau* to show that "[n]one of these cases squarely addresses the question of state agency or provides textual or historical analysis on the point,"[29] which is to say that *Burdeau* largely invented the state agency requirement. But if the line of cases on which *Burdeau* relies does not really contain the seeds of that requirement, as Gray argues, it is not entirely clear why the historical context in which they were decided should be treated as hugely significant. If it is true, in other words, that the Court in *Burdeau* "concluded, on no discernable argument or evidence, that the Fourth Amendment applies only to searches and seizures conducted by state agents,"[30] we should *not* be focused on 1886 (the date of the first case it cites, roughly contemporaneous with the *Civil Rights Cases*).[31] Instead, the important year should be 1921—a period Gray does not discuss—when the *Burdeau* opinion ostensibly created the requirement out of whole cloth. The historical problem with the requirement might be *either* that it derives from a line of cases with a racist history *or* that it was largely invented through a misreading of precedents decades later, but (without further elucidation) it is hard to see how it could be both.

II. HISTORY AS SOLUTION

If the nineteenth century—whose efforts to preserve white supremacy laid the groundwork for a Fourth Amendment doctrine that empowers both the government and corporations to disproportionately invade the privacy of non-whites today—highlights the problem, the eighteenth century presents a potential solution. Gray points out that, in the eighteenth-century context of the Amendment's drafting, private citizens sometimes played a role in the execution of search warrants and its authors thus left the text deliberately open to readings restricting private as well as governmental activity.[32] The moments of racial repression that produced the state agency requirement were, therefore, Gray argues, especially dramatic because they represented a

28. It should be noted that very recent work (posted after the publication of Gray's article) by Sophia Lee suggests that they *were*. She argues that the contemporary conception that the Fourth Amendment primarily protects "privacy" dates to *Boyd v. United States*, 116 U.S. 616 (1886), the first case relied on by *Burdeau*. Lee's work gives substantial historical support to Gray's supposition that these cases were infected by the racial politics of the moment, pointing to what she calls "*Boyd*'s Reconciliation Roots." Sophia Z. Lee, *The Reconciliation Roots of Fourth Amendment Privacy*, 91 U. CHI. L. REV. 2139, 2215 (2024).

29. Gray, *supra* note 2, at 1495.

30. Gray notes that this case was decided "just three years after the *Civil Rights Cases*," but it is not clear why that should matter if *Burdeau*'s state action requirement does not actually derive from it. *Id.* at 1522.

31. *Id.* at 1522, 1515 n.225.

32. *Id.* at 1500.

new and significant contraction of the originally more capacious understanding of the Amendment.[33]

In the section titled "Founding Era Concerns About Private Searches," Gray emphasizes the legal and social differences between methods of social control in the eighteenth century and the present day. There were, for example, no professional police forces, so the major focus of Fourth Amendment litigation today (whether the cops can stop or search you or your things) was clearly not its original target.[34] The legal instruments authorizing searches also looked quite different from today's and sparked major controversies that helped produce the Amendment. Professor Thomas McInnis, author of one book on criminal procedure and another on the history of the Fourth Amendment, explains: "Two of the tools that were used to ferret out unlicensed literature or smuggled goods were the general warrant and writs of assistance."[35]

> General warrants allowed government agents broad discretion in the searches they conducted. This was because they required no oath or affirmation to support their claims, no grounds explaining the basis of suspicion as to why someone had broken the law, and placed no limits on the locations to be searched or the objects which could be seized. Each general warrant, however, was limited to a single specific event that created the cause behind the search. Writs of assistance were similar, but had a longer life span since they continued in operation until six months after the death of the sovereign under whom they were issued. As a result, they were not limited to their use being triggered by a specific event to justify each search.[36]

It was these warrants that the Amendment's authors sought to reign in: "The primary historical targets for the Fourth Amendment," writes Gray, "are general warrants and writs of assistance."[37] One feature of these instruments that distinguished them from present-day warrants is the fact that they could empower ordinary people to effect searches of their fellow citizens. Gray explains that "[i]n a world before professional, paramilitary police forces, private individuals bore significant law enforcement responsibilities."[38] While the behavior of state agents, like tax collectors, was obviously on the mind of the Amendment's drafters, they were also worried about private actors like guilds, innkeepers, tradesmen, and printers.[39] In addition, they were

33. *Id.* at 1508.
34. *Id.* at 1500.
35. THOMAS N. MCINNIS, THE EVOLUTION OF THE FOURTH AMENDMENT 15–16 (2009).
36. *Id.*
37. Gray, *supra* note 2, at 1502.
38. *Id.* at 1501.
39. *Id.* at 1500.

concerned with ordinary citizens to whom the power to effect searches could be delegated via general warrants or writs of assistance.[40] Thus, Gray's argument is that in applying the Fourth Amendment's protections against search and seizure to private companies, we would be resurrecting a significant part of its original meaning.

III. "ESPECIALLY AGAINST THE GOVERNMENT"

Gray is undoubtedly correct that the Fourth Amendment's concern with safeguarding the right not to be seized or searched can ultimately be traced to fears about private action. He is also right that some lingering worries over that action persisted until the 1780s and 1790s. But those fears were far older, and had become far weaker, by the Founding than Gray lets on. The late William Cuddihy authored a much-cited and exhaustive work on the Fourth Amendment's history, in which he explains that, by the late eighteenth century, Anglo-American legal opinions regarding searches (particularly of domiciles) had undergone a profound transformation from their seventeenth-century antecedents. In the seventeenth century, English citizens *were* primarily concerned with safeguarding their dwellings against intrusion by private actors. In fact, they did not believe that it was even possible to significantly restrain agents of the king from entering their homes: "Most Englishmen of 1600 understood their houses to be castles only against their fellow subjects and conceded almost absolute powers of search, arrest, and confiscation to the government."[41] But that view had undergone an almost complete transformation by the eighteenth century.

> By 1760, however, public opinion had inverted the relative importance that it assigned to these considerations. Promiscuous searches by the government were now regarded as more onerous than undesired visits by private persons and as also infringing a fundamental and spacious right.[42]

As Cuddihy describes it, this change was reflected in the reversal of the central metaphor still in use to describe the sanctity of the home. According to the older conception, "[a] man's house is his castle (*except* against the government)."[43] By the late eighteenth century, however, "[m]ost Englishmen remembered only that the law had acknowledged their houses as castles, not the companion and overriding doctrine that, in effect, the king's keys opened all doors in all situations of public import."[44] Instead, the walls of the citizen's castle were now specifically meant to repel state intrusion. By

40. *Id.* at 1502–03.

41. WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602 - 1791 lxiii (2009).

42. *Id.* at lxiv.

43. *Id.*

44. *Id.* at lxiv.

1760, the view had become that "[a] man's house is his castle (*especially* against the government)."[45]

Cuddihy's assessment, in other words, is that the animating spirit of the Fourth Amendment was in fact a deep fear that a newly empowered federal government would trample the rights of citizens to control their bodies, houses, and belongings. He explains that "[b]y enhancing the powers available to the central government, the Constitution of 1787 awakened the belief that the right against unreasonable search and seizure required protection from federal as well as state action."[46] Numerous other scholars of the period have characterized the Amendment's origins in the same way. For example, Mark Graber—a prolific author on constitutional law and history, whose book chapter Gray cites in the article, and which appears in a volume Gray himself edited—asserts that "[s]tate capacity," rather than private action, "is best conceptualized as the internal driver of Fourth Amendment law."[47] Laura Donohue, another constitutional law scholar, whose in-depth article on Fourth Amendment history Gray also quotes, argues that expanding governmental use of general warrants and writs of assistance throughout the eighteenth century was "increasing tension and providing a focal point for colonial discontent."[48] In his book on the Fourth Amendment, McInnis makes the same point, identifying various government actions as the source of American antipathy for searches and the legal instruments that enabled them.[49] The outrageous searches McInnis identifies in the eighteenth century were all governmental acts. Other recent works confirm this view that anger over the perceived misuse of British royal power and anxiety over the potential abuses of nascent American constitutional power were the guiding principles behind the Fourth Amendment.[50] Michael Mannheimer, another

45. *Id.* As Cuddihy makes clear in his introduction, this metaphor was employed on both sides of the Atlantic: "American revolutionaries likewise resorted to 'house-as-castle' rhetoric." *Id.* at lxiii.

46. *Id.* at 670.

47. 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, 398 (David Gray & Stephen E. Henderson eds., 2017).

48. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1242 (2016).

49. "The extent of the problems caused by abusive searches fluctuated during the colonial period and did not come to a head in America until the mid-1750s. The crisis at the time resulted from three factors. The first was a change in British trade policy which triggered tougher enforcement of custom laws. In 1760, William Pitt, Secretary of State, ordered strict enforcement of the Molasses Act of 1733 which required high duties on molasses entering the colonies. A second factor was the strengthening of vice-admiralty courts and their power of ruling in forfeiture cases. The third was that due to the increased enforcement of the Molasses Act the colonial courts began issuing writs of assistance. By 1760 their use was common." MCINNIS, *supra* note 35, at 18.

50. ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH & SEIZURE, 1789-1868 47 (2006).

constitutional scholar, emphasizes how *little* power late eighteenth-century citizens had relative to government agents where searches were concerned.[51] In a summary, David Steinberg argues that "[h]istorical sources indicate that the framers were focused on a single, narrow problem—physical invasions of houses by government agents."[52]

In fact, the caselaw Gray cites as evidence of a concern with private searches reflects this focus on state action. Gray references three eighteenth-century cases in which judges or advocates inveighed against general warrants, arguing that one of the features of those warrants that excited the most colonial resentment was their ability to empower ordinary citizens to violate the privacy of their compatriots.[53] In making these references, Gray appears to somewhat conflate antipathy for the mere existence of general warrants—whose overbreadth was a frequent target of judicial ire—with dislike of their specific power to enable private action.

For example, Gray cites *Paxton's Case*, in which the well-known Revolutionary-era lawyer and lawmaker James Otis famously attacked the use of writs of assistance in passionate language that has been credited with helping to inspire the Revolution and the Constitution-making that followed it.[54] Here, Gray presents some of his strongest evidence for eighteenth-century loathing of private searches. If general warrants were allowed to remain a widely available instrument, Otis warned, disastrous consequences would ensue from unscrupulous citizens rushing to take advantage of them. Should general warrants not be outlawed, "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."[55] To

51. "For example, state officers generally enjoyed the power to execute search warrants, whereas private persons did not. In addition, eighteenth-century justice of the peace manuals took pains to differentiate between the arrest powers of government officials and those of private persons. So, for example, one such manual published in the same year of the Militia Act stated that 'all persons' must apprehend a felon if the felony is committed in their presence, but only 'a watchman may arrest a night walker' and only 'a constable may *ex officio* arrest a breaker of the peace in his view.' Likewise, while private persons could halt an ongoing affray, they had no power to break doors to a private home to stop the affray or to arrest the affrayers once the tumult had concluded. Those powers lay exclusively with state officers." MICHAEL J.Z. MANNHEIMER, THE FOURTH AMENDMENT: ORIGINAL UNDERSTANDINGS AND MODERN POLICING 38 (2023).

52. David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 SAN DIEGO L. REV. 227, 230 (2005). Though at least one scholar has challenged Steinberg's conclusions that homes (rather than persons) were the sole focus of the Amendment's drafters, that challenge has not criticized his understanding of the actor the Amendment was intended to restrain, i.e., the government. Fabio Arcila, Jr., *A Response to Professor Steinberg's Fourth Amendment Chutzpah*, 10 U. PA. J. CONST. L. 1229, 1260–62 (2008).

53. Gray, *supra* note 2, at 1503–05.

54. CUDDIHY, *supra* note 41, at 396.

55. Gray, *supra* note 2, at 1506 (quoting James Otis, *In Opposition to Writs of Assistance*, *in* 3 THE WORLD'S FAMOUS ORATIONS 27, 32 (William Jennings Bryan & Francis W. Halsey eds., 1906)).

illustrate his fears, showing that "[t]his wanton exercise of this power is not a chimerical suggestion of a heated brain,"[56] Otis invoked the story of a Mr. Ware, who after being arrested and investigated by a judge, used a general warrant in his possession to exact revenge.

> "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 on to search the house from the garret to the cellar, and then served the constable in the same manner![57]

The specter of defendants turning these legal tools into instruments of private revenge made an eloquent case against their continued existence.[58]

But the roots of fears like Otis's were to be found largely in hostility to governmental rather than private action. In *Paxton's Case*, writs of assistance had been issued "to civil and customs officers in an attempt to halt illegal commerce with French Canada."[59] Massachusetts merchants, who were tired of being fined for their legal and illegal activities by these officers, were suing to free themselves of burdensome regulation: "*Paxton's Case* was only one of a cluster of law suits that were designed to cripple the customs service and neutralize its interference with mercantile activity."[60] Paxton himself was "the most aggressive and effective customs officer in the colony"[61] and "[t]he assault on the writs was part of a larger campaign to manufacture a legal environment in which customs officers could not operate."[62] In other words, this was a case whose plaintiffs hoped to curb *government* action by limiting the scope of general warrants. Private action, though memorably and powerfully invoked, was not its central preoccupation. What Otis was asking for was not primarily that search warrants be issued only to government officers but that the scope of such warrants be narrowed to describe particular people to be searched or things to be searched for. "The pertinence of his brief to the Fourth Amendment," writes Cuddihy, "inhered less in his eloquence than in his categorical repudiation of general warrants and in his tandem insistence on specific warrants as their replacements," i.e., those which limited the

56. *Id.* at 1506 (quoting Otis, *supra* note 55, at 31).

57. *Id.* (quoting Otis, *supra* note 55, at 31).

58. It is worth noting that Cuddihy finds Otis' undated account about the putative Mr. Ware somewhat unreliable, "[F]or . . . several other facts cannot be reconciled as Otis provided them." CUDDIHY, *supra* note 41, at 393 n.86. Gray's claim here, however, is simply that Otis' arguments captured some of the mood against general warrants, which it indeed seems to have done: "*Paxton's Case*," according to Cuddihy, "intensified public antipathy to the writs of assistance and revealed the breadth and depth of that antipathy." *Id.* at 395.

59. CUDDIHY, *supra* note 41, at 378.

60. *Id.* at 397.

61. *Id.*

62. *Id.* at 398.

powers of their bearers, without necessarily restricting who could wield them.[63]

The other two cases Gray cites, *Wilkes v. Wood*[64] and *Entick v. Carrington*,[65] likewise reflect concerns that far outweighed fear of private action. In fact, both arose out of extreme exercises of governmental power, involving senior officials of the English government. In addition, the actions of those officials were particularly focused on protecting what they viewed as state prerogatives, rather than on using police powers to ensure the general welfare: they were trying to identify the authors of what they considered seditious publications, including an article attacking both the Prime Minister and the King.[66] It is true that *Wilkes* involved the use of a search warrant that could be executed by anyone who happened to possess it: "Following precedent, the warrant specified nothing beyond the printer's name; its bearers were free to search, seize, and arrest as their whims dictated."[67] However, the outrage excited by the warrant's use seems to have focused far more on the breadth of the investigations it allowed than on the status of its bearers. Wilkes himself, one of the many targets of the highly invasive and confiscatory searches the warrant enabled, responded with numerous lawsuits against everyone involved, without any regard to whether they were agents of the government: "Within one month of his arrest, Wilkes had filed a dozen separate trespass suits . . . defendants included practically everyone involved in executing Halifax's warrant, high and low. They ranged from the omnipotent secretaries of state to a lowly constable with eight messengers sandwiched in between."[68] Cuddihy explains that the judges in these cases focused their ire on "different dimensions of the general warrant," including "promiscuous arrests, general searches, and, finally, categorical seizures of personal papers,"[69] but *not* on the question of whether private citizens were the ones using them. Arising from the same circumstances, *Entick* also involved private execution of warrants, but the judge's ruling on those warrants likewise concentrated their energies on the sheer scope of invasive behavior authorized by the warrants in question.[70] It was this desire to rein in the latitude of such warrants, rather than to restrict who could wield them, that served as "a diagram for disestablishing [the general] warrant in favor of the specific warrant, an intellectual roadmap to the ideas that the Fourth Amendment embodied three decades later."[71] To sum up, while these cases do touch on private enforcement, that is not the

63. *Id.* at 382.
64. *See generally* Wilkes v. Wood (1763) 98 Eng. Rep. 489.
65. *See generally* Entick v. Carrington (1765) 95 Eng. Rep. 807.
66. *Id.* at 440.
67. *Id.* at 440–41.
68. *Id.* at 443.
69. *Id.* at 444.
70. *Id.* at 453–58.
71. *Id.* at 444.

issue they are fundamentally about. Instead, they reflect far greater worries over governmental action, which is consistent with what other Fourth Amendment scholars describe as the general trend of the period.

To his credit, Gray does nod to this fact,[72] and none of the foregoing is to deny his carefully articulated and modest claim about the concerns reflected in eighteenth-century judicial opinions, pamphlets, and other public utterances. "That record," he reasonably asserts, "indicates that the Fourth Amendment should not be read as applying exclusively to government officials."[73] However, Gray reads a great deal of significance into that lack of exclusivity, perhaps more than it can bear. The absence of an eighteenth-century state agency requirement matters in two ways for Gray's argument: it highlights the role of racial animus in its judicial invention in the late-nineteenth century, and it lays the groundwork for a contemporary solution to the Fourth Amendment's limitations. If the Fourth Amendment (in Gray's telling) is so pointedly silent on the question of governmental action, that silence imbues the moment of the state agency requirement's explicit articulation with considerably greater meaning.

> 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.[74]

Since the original text said nothing about state action, such a restriction must have been at least in large part the latter-day imposition of racist or apologist judges. We should therefore, Gray's argument runs, abandon this imposition in favor of the Amendment's original restriction of private searches.

But Cuddihy, while noting the same textual sparseness, draws a different conclusion: where the Fourth Amendment was silent or (to us) obscure, it was not primarily because its authors were quietly reading in a private-action restriction but rather because their formulation reflected widely understood, and thus unstated, understandings of the real problems with searches. Those understandings—as Cuddihy, drawing on vast quantities of federal and state sources, enumerates in head-spinning detail—almost entirely concerned governmental power. He goes out of his way, in fact, to emphasize that even such worries over private action as existed were definitively subordinated to

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72. "[T]here is a case to be made that the folks conducting searches in *Entick*, *Wilkes*, and *Paxton* were 'state agents.' 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." Gray, *supra* note 2, at 1507.

73. *Id.* at 1505.

74. *Id.* at 1508.

those over the role of the state: while "[a]ny private person" could warrantlessly break into someone's house in pursuit of perpetrators of violence he had personally witnessed,[75] Cuddihy nevertheless concludes that, "[t]he prevention of general warrants at the federal level was the preponderant motivation behind the amendment,"[76] and that, "[t]he amendment succeeded spectacularly in its most obvious purpose, to keep general warrants out of the hands of the federal government."[77] Although Gray is careful to caveat his claims about what he argues are the predominantly racist origins of the requirement,[78] they are nevertheless central to his proposal: "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."[79] This story about nineteenth-century racism becomes somewhat less dramatic if the state agency requirement also emerges out of the orientation against government action that already predominated at the time of the Fourth Amendment's writing fifty or a hundred years prior. Moreover, the historical bona fides of the solution seem somewhat less compelling if the eighteenth-century restrictions on private action it hopes to resuscitate were essentially an afterthought to rules focused largely on governmental power.

CONCLUSION

None of this is to say that Gray misstates any of the facts or history. Rather, his argument downplays the larger historical context so as to highlight the existence of a particular legal concept—the restriction on private searches. This may represent a sensible approach to constitutional challenges: if an argument might have been available to the eighteenth-century disputants who wrote the document, perhaps we should at least give it credence today. It is also a perfectly understandable strategic choice in our present jurisprudential environment. The largely historical focus of Gray's article in identifying both the pitfalls and promises of the Fourth Amendment seems tactically wise for anyone who hopes to effect doctrinal changes, given the current Supreme Court's fascination with certain kinds of appeals to the past.

I confess myself somewhat uncomfortable, however, with placing too much stress on legal perspectives that seem to have been so much against the doctrinal and intellectual tide, at least if those perspectives are to serve as guides to contemporary constitutional interpretation. It is true that some

75. CUDDIHY, *supra* note 41, at 750.

76. *Id.* at 771.

77. *Id.* at 772.

78. "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." Gray, *supra* note 2, at 1508.

79. *Id.* at 1539.

eighteenth-century thinkers were worried about searches by private citizens and that worry may have played a role in shaping the Fourth Amendment's text. But this concern appears to have been decidedly a minor one against the backdrop of much more substantial fears about specifically governmental exercises of search and seizure power. To me, this seems somewhat shaky ground on which to found what would today be considered a revolution in Fourth Amendment doctrine by applying it liberally against some of the world's largest companies.

Nevertheless, the past offers many lessons, and Gray draws our attention to some crucial ones. I do not believe the state agency requirement should be characterized primarily as a latter-day imposition, as the article occasionally seems to imply. However, that doesn't change the persuasiveness of Gray's argument that its *cementing* (rather than inventing) as a rigid threshold question of Fourth Amendment analysis emerges from a nineteenth-century context in which the maintenance of racial hierarchy was of paramount concern to many legislators and judges.

Moreover, his focus on the Amendment's drafting requires us to deeply consider what mattered to the people who wrote it and, more importantly, why. Instead of repurposing a tool crafted to fit a different world—"the amendment," after all, "addressed the problems of 1790 rather than 1990"[80]—Gray's argument might be tweaked to support the more radical proposition that we could draw inspiration from *how* they thought, rather than *what* they thought. If it's difficult to draw from Founding-era thinkers a compelling, specific precedent for the restraint of private searches, we might instead adopt their clear-eyed appraisal of the newest and most fearsome threats to individual privacy. Just as, to them, the nascent federal government represented a potential menace of unknown proportions, so to us does the exponentially expanding reach of technology companies. We might decide, as they did, to apply the Fourth Amendment's intentionally capacious language against these companies not because some eighteenth-century authors cared about private action but because the whole spirit of the Amendment involved the identification and restriction of the biggest danger.[81] Though this view might find less favor with the current Court, it likewise affirms Gray's well-taken and timely point that many constitutional rights matter much more because of what they protect rather than whom they constrain.

80. CUDDIHY, *supra* note 41, at 771.

81. In the terms of Jack Balkin's "living originalism," for example, we might understand the Amendment's target as a Constitutional "principle" requiring reinterpretation "because conditions are always changing, new problems are always arising and new forms of social conflict and grievance are always emerging." JACK M. BALKIN, LIVING ORIGINALISM 10 (2011).