Tennessee Law Review

Volume 81
Issue 4 *Summer 2014*

Article 6

2014

CONSTITUTIONAL TRESPASS

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Available at: https://ir.law.utk.edu/tennesseelawreview/vol81/iss4/6

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CONSTITUTIONAL TRESPASS

LAURENT SACHAROFF*

The Supreme Court has recently created a trespass test for Fourth Amendment searches without explaining what type of trespass it envisions—one based on the common law of 1791, on the specific trespass law of the state where the search occurred, or on some other trespass principles. Indeed Florida v. Jardines, decided in 2013, raises the question whether the Court has created a trespass test at all, a seeming turnabout that largely recapitulates the Court's 125-year history of confusion in which it has embraced, rejected, or simply ignored trespass as a test from era to era or even year to year.

To settle this recent and historical uncertainty, this article proposes and defends a trespass test, as an alternative to a privacy test, in determining whether law enforcement has conducted a "search." Trespass, as Justice Scalia has written, creates a constitutional minimum protection that the Fourth Amendment's traditional privacy test—vague and easily manipulated—fails to supply. Trespass as a test enjoys support from the text and history of the Fourth Amendment. From a practical standpoint, a trespass test will provide more protection within its realm for the core Fourth Amendment value of privacy than the privacy test itself.

More important, this article proposes for the first time a method for courts to ascertain the appropriate trespass rule. In particular, drawing on the Court's Section 1983 jurisprudence for constitutional torts, this article urges courts to adopt a two-step process in developing a test for searches under the Fourth Amendment. First, courts should determine the contemporary majority trespass rule from the states. Second, they should ensure this rule conforms to the text and purposes of the Fourth Amendment. This method avoids the drawbacks of reliance on trespass law from 1791, or the fractured Fourth Amendment that would arise from each individual state supplying its own trespass rule.

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INTRODUCTION

In its 2012 decision in *United States v. Jones*, the Supreme Court created a "trespass" test to determine whether police conduct counts as a Fourth Amendment search.[1] In creating an alternative to the prevailing privacy test, the Court held that any trespass by the government for the purpose of obtaining information is a search.[2] The Court explained it was refocusing on trespass to ensure that the Fourth Amendment protected, at a minimum, what it protected in the common law era of the founding and pointed to precedents using a "common law trespassory test."[3]

But just a year later in its 2013 *Florida v. Jardines* decision, the Court avoided the term "trespass" and substituted "physical

1. United States v. Jones, 132 S. Ct. 945 (2012).
2. *Id.* at 949, 951; *see also* United States v. Katz, 389 U.S. 347 (1967) (creating the privacy test).
3. *Jones*, 132 S. Ct. at 953.

intrusion" to answer the same question.[4] Now, any physical intrusion to obtain information would count as a search. Not only did the Court shrink from the use of the word "trespass," but it also disavowed reliance on the English common law of trespass.[5] If *Jones* had created a trespass test taking its content from the common law of 1791, *Jardines* made clear that's not quite the test the Court envisioned.[6]

These two cases recapitulate the Court's 125-year history of Fourth Amendment confusion, in which it has embraced, rejected, or simply ignored trespass as a test from era to era and even year to year.[7] But never has the confusion been so acute: why expressly create a "trespass" test in 2012 only to avoid it, at least in terminology, in 2013,[8] and why point to the common law circa 1791 only to reject that era as a source of law?[9] Has the Court created a trespass test or not? Indeed, lower courts remain uncertain, with some completely ignoring the trespass test created by the *Jones* Court and continuing to deny protection to homeowners—even in the face of "No Trespassing" signs.[10]

To settle this recent and historical uncertainty, this article proposes and defends a trespass test, as an alternative to a privacy test, in determining whether law enforcement has conducted a "search." Trespass, as Justice Scalia has written, creates a constitutional minimum protection that the Fourth Amendment's traditional privacy test—vague and easily manipulated—fails to supply.[11] Trespass as a test enjoys support from the text and history

4. Florida v. Jardines, 133 S. Ct. 1409 (2013).

5. *Id.* at 1415.

6. In the 2014 term, the Court similarly struggled to identify what test applies to determining consent to search a home when two residents disagree. Fernandez v. California, No. 12-7822, slip op. at 1 (U.S. Feb. 25, 2014). The majority avoided the term "trespass," but Justice Scalia in his concurrence applied a trespass test. *Id.* at 1 (Scalia, J., concurring).

7. *See, e.g.*, *Jones*, 132 S. Ct. at 952–53 (expressly creating a trespass test for searches); *Katz*, 389 U.S. at 353 (rejecting the "trespass doctrine"); Olmstead v. United States, 277 U.S. 438 (1928) (seeming to apply a trespass test and holding that wiretapping does not constitute a Fourth Amendment search); Boyd v. United States, 116 U.S. 616 (1886) (implicitly rejecting a trespass test and holding that the Fourth Amendment applies to compelled disclosure despite the lack of a physical seizure).

8. *Compare Jardines*, 133 S. Ct. at 1417, *with Jones*, 132 S. Ct. 952–53.

9. *Compare Jardines*, 133 S. Ct. at 1420, *with Jones*, 132 S. Ct. 957.

10. United States v. Denim, No. 2:13-CR-63, 2013 WL 4591469, at *4 (E.D. Tenn. Aug. 28, 2013) ("Even in the face of No Trespassing signs, it is not unreasonable for a police officer to intrude upon private property to ask if the resident has any information . . . .").

11. *Jones*, 132 S. Ct. at 953.

of the Fourth Amendment.[12] From a practical standpoint, a trespass test will provide more protection within its realm for the core Fourth Amendment value of privacy than the privacy test itself.

More important, this article proposes for the first time a method for courts to ascertain the appropriate trespass rule. In particular, drawing on the Court's Section 1983 jurisprudence, this article urges courts to adopt a two-step process in developing a test for searches under the Fourth Amendment. First, courts should determine the contemporary majority trespass rule from the states, based upon the Restatement,[13] treatises, and state court decisions or statutes. Second, courts should ensure this rule conforms to the text and purposes of the Fourth Amendment. For example, not any trespass, such as one to open fields, will suffice—the trespass must tread upon an area enumerated in the Fourth Amendment such as houses.[14]

Trespass, in step one, refers to ordinary civil trespass to land or property. This was the trespass rule forming the historical basis of the Fourth Amendment, and today as a baseline, it can provide a kind of neutrality because it derives from adjustments between ordinary people. That is, the police should have no greater right to trespass than an ordinary neighbor—unless that officer has a warrant and probable cause.

This uniform and contemporary rule of trespass will avoid the significant drawbacks of relying on the trespass law of 1791[15] or the trespass law of individual states and yet retain mooring in concrete tort principles that reflect contemporary arrangements between the people and law enforcement. Though novel in the Fourth Amendment context, the Court uses a two-step process in fashioning remedies for constitutional torts under Section 1983,[16] recognizing

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12. *See infra* 0.

13. RESTATEMENT (SECOND) OF TORTS (1965). Technically the Restatement (Third) of Torts applies but for trespass and other intentional torts, the Third Restatement merely provides an umbrella rule and then incorporates the Second Restatement in its entirety. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 5 cmt. a (2005).

14. Hester v. United States, 265 U.S. 57 (1924) ("the Fourth Amendment . . . is not extended to the open fields").

15. *See, e.g.*, David Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1799 (2000) (noting that the trespass law of 1791, particularly as a limit to searches and seizures, was "both hazier and less comprehensive than the Court has suggested . . .").

16. Smith v. Wade, 461 U.S. 30 (1983) (developing a damages remedy for the Eighth Amendment based on common law principles adapted, if necessary, to policies and principles underlying Section 1983); Carey v. Piphus, 435 U.S. 247, 258 (1978) (holding that courts must sometimes adapt common law remedy to the constitutional right at issue).

evidentiary privileges under the Federal Rules of Evidence,[17] and developing a federal law of trespass in cases occurring on Indian land.[18] In these cases, courts draw first upon contemporary state law to identify the majority rule as the initial standard and then, if necessary, modify that rule to conform to the underlying constitutional right or federal interest.[19]

The Court's Section 1983 jurisprudence—which created a "constitutional tort"—provides a particularly ready analogy for the constitutional trespass urged here. Those seeking compensation for constitutional violations, including Fourth Amendment violations, rely upon Section 1983 for civil damages, and the Court has noted that Section 1983 creates a "species of tort liability."[20] The Court has therefore often relied upon contemporary state tort law principles to fashion constitutional remedies.[21] This civil remedy for Fourth Amendment violations bears many similarities to its criminal cousin under consideration here, and indeed, the Court has used many of the same tests for damages in Section 1983 cases and in assessing the exclusionary rule in the Fourth Amendment criminal context.[22]

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17. Swidler v. Berlin, 524 U.S. 399, 403 (1998) (recognizing privileges based upon the "common law" seen in light of "reason and experience" (quoting FED. R. EVID. 501)).

18. United States v. Milner, 583 F.3d 1174 (9th Cir. 2009) (federal courts employ a "federal common law of trespass" modified to accord with polices and principles specific to American Indian lands) (collecting cases).

19. *See supra* notes 16–18.

20. *Piphus*, 435 U.S. at 253 (quoting Imbler v. Pachtman, 424 U.S. 409, 417 (1976)) (alteration in original).

21. *Id.* at 258 (drawing on the common law to fashion a constitutional remedy under Section 1983); James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1620–21 (2011) (discussing how the *Piphus* Court "drew on the common law of tort remedies" in determining a plaintiff's compensation for a violation of constitutional rights); *see also* Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965) (sometimes credited with coining the term "constitutional tort").

22. Both have as a "primary purpose" to deter unlawful police conduct. *See* United States v. Leon, 468 U.S. 897 (1984) (evaluating application of the exclusionary rule in the Fourth Amendment context); Smith v. Wade, 461 U.S. 30, 48–56 (1983) (holding that juries may assess punitive damages in Section 1983 actions "when defendant's conduct is shown to be motivated by evil motive or intent"). Both limit the remedy by the same test of good faith. *See also* Messerschmidt v. Millender, 132 S. Ct. 1235 (2012) (Section 1983 qualified immunity same as exclusionary rule good-faith immunity); Jennifer E. Laurin, *Trawling for* Herring*: Lesson in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670 (2011) (noting but critiquing convergence between the exclusionary rule's good-faith exception and qualified immunity under Section 1983).

This article thus answers the questions raised by *Jones* and *Jardines*. First, those cases should be read to have created an express trespass test, despite *Jardines*' equivocation on this point; second, the source of that trespass law should be neither the common law circa 1791, as *Jones* suggested, nor the trespass law of one individual state, but rather the majority trespass rule from the states—modified to conform to Fourth Amendment purposes.

Some have argued that trespass is a technical or obsolete writ more suitable to protecting the interests of the landed gentry than the Fourth Amendment liberties of the people—a charge Justice Alito leveled in *Jones*.[23] But trespass has always stood for more than protecting farms against intruding cattle or minerals against theft; it protects the values of privacy, autonomy, and, as against the government or the English Crown, the liberties of free speech, free exercise, and dissent.[24] In short, trespass, like privacy, protects the core values underlying the Fourth Amendment but supplies a firmer and clearer boundary against incursion than does a privacy test.

Yet trespass has its limits. It provides little guidance in many of the hardest cases concerning technologically advanced remote surveillance or the gathering and use of personal data.[25] Trespass cannot be the sole Fourth Amendment test; the Court will need to continue to develop the separate privacy test to address these difficult surveillance issues. Indeed, we must admit that no single concept captures the entirety of Fourth Amendment problems.[26] We must acknowledge that the Fourth Amendment, like the Free Speech Clause, represents different types of tests and concepts that will add up, like a bundle, to our notion of what it means to be "secure" in our persons, houses, papers and effects.[27] Trespass can provide one important test, protecting many important Fourth Amendment values including privacy.

Part I reviews the history of Fourth Amendment case law to show the sporadic and confusing role trespass has played as a test for "search." Part II focuses on *Jones* and *Jardines* and on what test

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23. Unites States v. Jones, 132 S. Ct. 945, 957 (Alito, J., concurring).

24. *Infra* 0.

25. *Jones*, 132 S. Ct. at 957 (Alito, J. concurring); United States v. Graham, 846 F. Supp. 2d 384 (D. Md. 2012) (discussing in depth the difference between the physical attachment of a GPS device that discloses real-time location and remotely obtaining historical cell phone tower data).

26. Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503 (2007) (arguing no single model of privacy can address the diversity of police tactics).

27. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (Cambridge Univ. Press 1982).

emerged from these two cases. Part III defends a trespass test, showing how well it furthers the text of the Fourth Amendment, its history, and its practical purposes.

Finally, Part IV develops a concrete test for courts to identify and develop a suitable trespass rule for Fourth Amendment use: the two-part test motivated by the Court's Section 1983 jurisprudence. Part IV also details the advantages of a test based upon the majority state trespass rule over alternatives such as the common law of 1791 or individual state law.

I. A HISTORY OF TRESPASS IN FOURTH AMENDMENT LAW

As noted in the introduction, the Supreme Court's recent muddle reflects much of its 125-year history of addressing trespass under the Fourth Amendment. Scholars reflect this confusion, disagreeing historically as to whether the Supreme Court ever used a trespass test. Under the traditional view, before the Court's 1967 decision in *Katz v. United States*, the Court used a trespass test to assess whether there had been a search.[28] Many continue to adhere to this traditional view, arguing that before 1967, "trespass was king."[29] Others, most prominently Orin Kerr, have argued that before *Jones* there was no "trespass test," and that pre-*Jones* case law relied on numerous principles to establish a search, including one based on "physical penetration."[30]

Orin Kerr largely has the better argument. He has shown that between 1886 and 2012, the Supreme Court did not employ any formal "trespass test," particularly not one that made trespass both a sufficient and necessary condition.[31] On the other hand, trespass appears to have played a greater role than Kerr concedes, either implicitly as the assumed test, or sometimes even somewhat explicitly. The role of trespass has waxed and waned right up to the present, and this article highlights the need to decide once for all whether we should establish an express trespass test.

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28. Arnold H. Loewy, United States v. Jones*: Return to Trespass—Good News or Bad*, 82 MISS. L.J. 879 (2013).

29. *Id.*

30. Orin Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67 (2012).

31. *Id.*

A. Pre-Fourth Amendment History

The key English lawsuits[32] that led in part to the Fourth Amendment ban on general searches[33] *were* trespass cases. Dissenting pamphleteers, publishers, and others sued in trespass as the only available remedy against government officials conducting unlawful, general searches in order to stifle dissent.[34] There was no Fourth Amendment, of course, but lawyers and courts called the objectionable conduct "searches" and seemingly equated trespass with that search.

The remedies in these English cases also point to a close connection between trespass and search. After all, a search is not merely a trespass, but a trespass in order to obtain information. Accordingly, juries in these cases awarded huge exemplary damages not simply for the physical intrusion but to punish the search aspect of the conduct: the government's use of a trespass to obtain information.[35] When the government obtains information to use against dissenters, it involves "a great point touching the liberty of the subject" and becomes "worse than the Spanish inquisition."[36] As discussed more below, in the hands of the English judges, trespass began to protect against not merely private intrusions but also government ones, particularly those seeking information for criminal prosecutions. In other words, the trespass cause of action became protection against government searches.

B. Early to Modern United States Cases

The early United States cases continued to identify trespass with search and seizure. As the Supreme Court of North Carolina said in 1814, "trespass is the only proper form of action" for one complaining about an entry under an allegedly invalid warrant.[37] A Delaware

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32. *E.g.*, Wilkes v. Wood, (1763) 98 Eng. Rep. 489 (C.B.) 499; Entick, v. Carrington, (1765) 19 Howell's State Trials (C.B.) 1029.

33. WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602–1791 (2009); Akil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 773 (1994) (*Wilkes* "was *the* paradigm search and seizure case for Americans"); Sklansky, *supra* note 15.

34. *Entick*, 95 Eng. Rep. 807; *Wilkes*, 98 Eng. Rep. 489.

35. *Wilkes*, 98 Eng. Rep. at 498 ("jury have it in their power to give damages for more than the injury received"; jury awarded £1,000); Huckle v. Money, (1763) 95 Eng. Rep. 768 (K.B.) (jury awarded £400 in damages).

36. *Huckle*, 95 Eng. Rep. at 768–69.

37. Steel v. Fisk, Brayt. 230 (Vt. 1816) (trespass action against customs inspector for breaking and entering a store); Gardner v. Nell, 4 N.C. 104 (1814).

court in 1817 noted in dicta that if government officials failed to satisfy the state Constitution's search and seizure provision, they would be liable in trespass.[38]

Cases nearly equating unlawful searches and seizures with trespass continued throughout the Nineteenth Century[39] and into the Twentieth.[40] For example, in 1891 in *Gindrat v. People*, a police officer entered and searched the defendant's house without a warrant, recovering a stolen diamond.[41] The Illinois Supreme Court rejected any exclusionary remedy but in framing the issue, asked whether the evidence should be excluded under the state constitutional search and seizure provision "merely because he gained possession of it by commission of a trespass."[42] In 1922, the Michigan Supreme Court flatly equated unlawful searches and seizures with trespass, at least on the facts before it: "[t]he action of the officer in searching No. 932 Elwood avenue and seizing liquor therein was an unjustifiable trespass and a violation of defendant's constitutional and legislative rights."[43]

In 1931, the Fourth Circuit went so far as to proclaim trespass to be, essentially, both a necessary and sufficient condition to finding a Fourth Amendment search, presumably excluding only cases involving subpoenas.[44] The Court stated: "Most cases of search in violation of this constitutional provision involve the element of trespass . . . . [but when] there is present no element of trespass or fraudulent invasion . . . there is no reason for excluding evidence . . . ."[45]

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38. Simpson v. Smith, 2 Del. Cas. 285, 291 (High Court of Errors and Appeals 1817).

39. *E.g.*, Commonwealth v. Dana, 43 Mass. 329 (Mass. 1841) (criminal case, dicta rejecting exclusion even if evidence had been in violation of state search and seizure provision but noting government officers would be liable, presumably in trespass); Beaty v. Perkins, 6 Wend. 382 (Sup. Ct. of Jud. of N.Y. 1831).

40. United States v. Burnside, 273 F. 603 (W.D. Wis. 1921) (suggesting trespass sufficient to violate Fourth Amendment though not when done by non-federal officers); Kalloch v. Newbert, 72 A. 736 (Me. 1908) (trespass action against sheriff for unlawful search and seizure); State v. Fuller, 85 P. 369 (Mont. 1906) (rejecting exclusionary rule and noting redress lies in trespass against officers); State v. Peterson, 194 P. 342 (Wyo. 1920) (quoting FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 62 (1877)) (explaining that under the Fourth Amendment, "the sheriff must be furnished with a warrant, and take great care lest he commit a trespass").

41. 27 N.E. 1085 (Ill. 1891).

42. *Id.* at 1087.

43. People v. Musk, 192 N.W. 485 (Mich. 1922).

44. Paper v. United States, 53 F.2d 184 (4th Cir. 1931).

45. *Id.* at 184–85.

Most of these early cases involved straightforward seizures or entries into premises and those courts therefore had no occasion to determine what else might count as a search under constitutional provisions, state or federal. But they show a strong inclination of courts, at least outside the subpoena context, to equate trespass with search throughout the nineteenth and into the twentieth century.

C. Supreme Court Uncertainty

When we restrict our view to Supreme Court cases, an almost comical history of uncertainty with respect to trespass emerges. Roughly speaking, the Court rejected any trespass requirement in 1886 in *Boyd v. United States*,[46] applied a trespass test in 1928 in *Olmstead v. United States*,[47] and rejected the "trespass doctrine" in *Katz v. United States*,[48] before finally adopting a trespass test in *United States v. Jones*[49]—only to then avoid it, possibly, in *Florida v. Jardines*.[50]

This story of reversals begins with one of the Court's earliest Fourth Amendment cases, *Boyd v. United States*.[51] In *Boyd*, the Court held that a subpoena or other compelled document disclosure counted as a Fourth Amendment search even though it did not involve any actual physical intrusion or trespass.[52] Scholars correctly point to *Boyd* as the chief counterexample of any supposed trespass test.[53]

But in 1928, the Court reversed course and came very close to requiring a trespass to trigger a Fourth Amendment search.[54] In *Olmstead v. United States*, prohibition enforcement agents intercepted the defendants' phone conversations, by wiretapping the

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46. 116 U.S. 616 (1886).

47. 277 U.S. 438 (1928).

48. 389 U.S. 347, 353 (1967).

49. 132 S. Ct. 945, 952 (2012).

50. 133 S. Ct. 1409 (2013).

51. 116 U.S. 616 (1886); *see also* Hale v. Henkel, 201 U.S. 43 (1906) (citing Boyd v. United States, 116 U.S. 616 (1886) in the Court's discussion of Fourth Amendment construction and for the connection between the Fourth and Fifth Amendments).

52. The Court historically used the Fifth Amendment to limit compelled disclosures such as subpoenas in addition to or instead of the Fourth Amendment, but that protection has largely evaporated. *See, e.g.*, Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805 (2005) (bemoaning the few limits on subpoenas, even those invading personal privacy, under either the Fourth or Fifth Amendments).

53. Kerr, *supra* note 30.

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

phones outside the home.[55] The Court held this wiretapping did not count as a Fourth Amendment search or seizure.[56]

The precise holding in *Olmstead* evades clear description but the Court primarily held that the Fourth Amendment search provision applies only to tangible things.[57] The wiretapping agents merely listened to voices, which are not tangible, and therefore had not conducted a search.[58] Despite its primary reliance on the intangible nature of voices, the Court also mentioned trespass several times, by way of contrast, noting that there was no trespass or physical invasion in *Olmstead*, unlike in other cases in which the Court found a search or seizure.[59] The lack of trespass thus appears to be a secondary rationale for the Court's holding. Later eavesdropping or wiretapping cases[60] simply cite *Olmstead* without much elaboration, leaving the role of trespass equally unclear.[61]

But in the 1950s and 1960s the Court reversed course again, either rejecting or ignoring any trespass requirement. In *On Lee v. United States*, a wired informant entered the defendant's laundry to chat, and the defendant made incriminating statements.[62] The defendant argued that the informant had trespassed by gaining consent by fraud and had therefore conducted a Fourth Amendment search.[63] The Court rejected this argument as a "fine-spun doctrine."[64] Because fraud ranks as central to the modern concept of trespass, to reject fraud must be to reject a trespass test entirely. In *Silverman v. United States*, the Court found a search had occurred when police "physically encroached," even though the conduct might not have been a "technical trespass" under the local law of the jurisdiction.[65] Finally, in 1967 in *United States v. Katz*, the Court expressly rejected what it called the earlier "trespass doctrine" and announced a new test based upon invasion of privacy.[66]

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55. *Id.* at 457.
56. *Id.* at 466.
57. *Id.* at 465–66.
58. *Id.* at 465.
59. *Id.*
60. Goldman v. United States, 316 U.S. 129 (1942).
61. By 1967, however, the Court decided that the *Olmstead* Court and other cases of that era *had* been using a trespass test all along. Katz v. United States, 389 U.S. 347, 353 (1967) ("the 'trespass' doctrine [in *Olmstead* and *Goldman*] can no longer be controlling"); Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967). *See generally* Kerr, *supra* note 30.
62. 343 U.S. 747, 749 (1952).
63. *Id.* at 753.
64. *Id.* at 752.
65. 365 U.S. 505, 511 (1961).
66. *Katz*, 389 U.S. at 353–55. In subsequent years the formula proposed in

Some have viewed the period between *Katz* in 1967 and *Jones* in 2012 as one marked by a test based solely in privacy, but even this story must be revised somewhat. Trespass, or at least property concepts, played *some* role during this supposed privacy era,[67] as some scholars have pointed out.[68] Indeed, the Court itself expressly pointed to "trespass" in its 2006 case *Georgia v. Randolph*, albeit in dicta.[69] These passing references only further confused the role of trespass.

Then came *Jones*.

II. *JONES*, *JARDINES*, AND PHYSICAL INTRUSION

A. United States v. Jones

The Court in *United States v. Jones* changed everything by creating for the first time an *express* "trespass" test—only to find its handiwork reworked a year later in *Jardines*.[70] Below, I attempt to discern what test these two cases created and whether we can reconcile them.

In *Jones*, law enforcement placed a credit-card size GPS device on the undercarriage of Jones' Jeep Grand Cherokee to track his movements continuously for four weeks.[71] The government argued this conduct did not count as a Fourth Amendment search because it did not invade a reasonable expectation of privacy.[72] The police, the government argued, did no more with the GPS device than they were entitled to do by physically following Jones with traditional stakeout techniques.[73] A person's presence and location on public roads, "visible to all," simply could not give rise to a reasonable expectation of privacy.[74]

Justice Harlan's concurrence became the law: police conduct amounts to a search if it invades a reasonable expectation of privacy. *Id.* at 360–62 (Harlan, J., concurring).

67. *See, e.g.*, Rawlings v. Kentucky, 448 U.S. 98 (1980) (petitioner had no reasonable expectation to privacy in another's purse); Rakas v. Illinois, 439 U.S. 128 (1978) (a passenger lacks a reasonable expectation of privacy in a car largely because he has no "ownership or possessory" interest—he neither owned nor leased the car).

68. Kerr, *supra* note 30; Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979 (2011).

69. 547 U.S. 103, 118 (2006).

70. Florida v. Jardines, 133 S. Ct. 1409 (2013); United States v. Jones, 132 S. Ct. 945 (2012). Notably, Justice Scalia authored both opinions.

71. *Jones*, 132 S. Ct. at 948.

72. *Id.* at 947.

73. *Id.* at 953.

74. *Id.* at 950.

The Court acknowledged the privacy argument but took a different route to resolve the case, reviving, in its view, a test for a Fourth Amendment search based upon trespass.[75] The Court held that a trespass used to obtain information always counts as a Fourth Amendment search, whether or not the conduct invades a reasonable expectation of privacy.[76]

The Court emphasized, however, that its trespass test was a *supplement*, or alternative, to the reasonable expectation of privacy test—it is a sufficient condition.[77] Trespass provides a bright-line test that establishes a bare minimum, or floor, of constitutional protection—a floor upon which a privacy test may build enhanced constitutional protections. It also provides an easier analysis when trespass has occurred, as here, than would a privacy test.[78]

Jones did not elaborate on the trespass test it had created, but its language suggested a test based upon the common law of trespass circa 1791.[79] The Court repeatedly relied upon the common law of trespass, quoted from *Entick*'s language on trespass from 1763, and expressly used the term "common law trespassory test."[80] In addition, the Court's rationale for a trespass test was in part a desire to create a constitutional floor of protection, for enumerated areas, against the type of slow erosion that a privacy test alone would allow.[81] Essentially, the Court said that at a minimum, the Fourth Amendment should protect what it protected when it was originally adopted.[82]

B. Florida v. Jardines *and Beyond*

Even though the Court expressly revived a "trespassory test" in *Jones*, and pointed to the common law of trespass as the key ingredient in assessing the bare minimum of Fourth Amendment protection, only a year later in *Florida v. Jardines*[83] the Court avoided the term "trespass"—an astounding turnabout provided that

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75. *Id.* at 952.

76. *Id.* at 949–53.

77. *Id.* at 952.

78. *Id.* at 953.

79. *Id.* at 949 ("We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted.").

80. *Id.* at 949–53.

81. *Id.* at 950.

82. *Id.* ("At bottom, we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'").

83. 133 S. Ct. 1409 (2013).

the Court had truly created a trespass test drawing its content from the common law. *Jardines* also expressly disclaimed reliance on the common law, at least on the "strict rule of the English common law."[84]

In *Jardines*, the police walked a drug-sniffing dog up Jardines' walkway to his porch, where it sniffed and alerted to marijuana, giving rise to probable cause, a warrant, a full search, recovery of marijuana, an arrest, and a conviction.[85] The parties largely argued whether dog sniffs of the home invade a reasonable expectation of privacy, but the Court decided the case upon the grounds that the police had "physically intruded" upon Jardines' private property.[86] The Court held the police had physically intruded in order to obtain information, without the permission of the homeowner, and therefore conducted an unlawful Fourth Amendment search.[87] The Court never mentioned "trespass."

Similarly, in the recent 2014 decision of *Fernandez v. California*, the Court, in an opinion written by Justice Alito, also avoided the term "trespass" when it could have used it, especially since it largely drew on ordinary trespass and property law principles.[88] The *Fernandez* Court assessed whether one resident's objection to a police search trumps another resident's consent.[89] In deciding that the objections of the resident whom the police then arrest cannot supersede the later consent of the resident who is present, the Court looked to "customary social usage"—a test almost identical to that used in *Jardines*, and one that captures at least general notions of trespass and property law.[90] Justice Scalia in concurrence, however, did apply a trespass test to arrive at the same result, citing property and trespass cases from a variety of states and treatises.[91] *Fernandez* thus continued the confusion over the trespass test; but because it also largely concerned a niche issue of precedent, my focus in the remainder of this article is solely on *Jones* and *Jardines*.

C. *What Test Did* Jones *and* Jardines *Create?*

What tests emerged from *Jones* and *Jardines*, and can we harmonize them? Taking the language from both decisions literally,

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84. *Id.* at 1415, (quoting McKee v. Gratz, 260 U.S. 127 (1922)).
85. *Jardines*, 133 S. Ct. at 1413–14.
86. *Id.* at 1414.
87. *Id.* at 1417–18.
88. No. 12-7822, slip op. at 1 (U.S. Feb. 25, 2014).
89. *Id.* at 1.
90. *Id.* at 11.
91. *Id.* at 1–2 (Scalia, J., concurring).

they point in different directions, using not only different tests—trespass versus physical intrusion—but also differing on whether to rely on the common law of 1791.

But when we look closely at how each decision applied its test, we can read the cases as consistent with each other and with my proposed law of trespass. In *Jones* for example, despite language about 1791, the Court did not actually *apply* a test based on the common law of trespass in 1791.[92] It did not cite any trespass to chattel cases from that era, made no attempt to discern what trespass law was at the time, and eschewed any of the complications that arise in trespass to chattel cases that involve no harm.[93] Nor did the Court rely on the trespass law from Washington D.C. or Maryland—the locations of the search.[94]

Instead, the *Jones* Court relied upon broad and contemporary principles of physical intrusion, an apparently intuitive notion of common law trespass that, at a minimum, barred unconsented physical intrusions upon property, of whatever kind.[95] It relied on the same law that would emerge applying the law I propose here—trespass to chattel as defined in the Restatement (Second) of Torts section 217.[96] Thus *Jones* seems to envision a trespass test based upon contemporary state law trespass principles.

Jardines avoided the term trespass, but it seems to have created a trespass test after all. For example, without any fanfare or accusations of hiding the ball, both Justice Kagan in concurrence and Justice Alito in dissent expressly wrote that the majority had employed a trespass test to find the police had trespassed and thus conducted a search.[97] As Justice Alito put it, "The Court concludes that the conduct in this case was a search because [it exceeded the license] recognized by the law of trespass . . . ."[98]

Other clues further show that the Court in *Jardines* used a trespass test. For instance, the Court assessed not simply whether the police had physically intruded, but whether they had done so

92. *Jones*, 132 S. Ct. at 949–53.

93. *Id.*

94. *Id.*

95. *Id.*

96. RESTATEMENT (SECOND) OF TORTS § 217 (1965) (trespass to chattel involves "intermeddling with a chattel in the possession of another").

97. Florida v. Jardines, 133 S. Ct. at 1418 (Kagan, J., concurring) ("Was this activity a trespass? Yes, as the Court holds today"); *id.* at 1420 (Alito, J., dissenting) ("The Court's decision . . . is based on a putative rule of trespass law that is nowhere found in the annals of Anglo-American jurisprudence.").

98. *Id.* at 1421.

without the owner's permission—a trespass inquiry.[99] In addition, in assessing this permission, it asked whether the owner had provided express consent (obviously no) or implied consent based upon the custom of the land—likewise a trespass question.[100] In asking and answering these questions, the Court cited trespass cases[101] and, indirectly, the first Restatement's trespass provision.[102] Essentially, *Jardines* used a trespass test even if it avoided the term.

Why then did Justice Scalia avoid the term "trespass" in *Jardines*? He may have felt stung by Justice Alito's concurrence in *Jones*, in which Justice Alito leveled numerous sharp critiques of an express trespass test.[103] Scalia may have felt that the term and concept of "physical intrusion" would create less mischief by sidestepping the perceived problems with a technical term such as trespass. This article shows that trespass does not present significant troubles as long as we draw its content from contemporary law. Moreover, it illustrates that Justice Alito's chief critique, that a trespass to chattel requires some harm to the property,[104] is simply wrong, as discussed below in 0.

III. TRESPASS

As outlined above, *Jones* and *Jardines* combined to create a trespass test. This section explains why those cases were right to do so. It elaborates upon the justifications sketched in *Jones*, but goes further to provide a richer rationale based upon the text and history of the Fourth Amendment, as well as practical considerations, including the failure of the existing privacy test. The next section, Part IV, proposes how courts should ascertain the appropriate trespass rule suitable for Fourth Amendment consumption.

"Trespass" of course enjoys numerous meanings. Most generally, though perhaps archaically, it refers to committing an offense, sinning, or exceeding authorized boundaries,[105] and the framers often used the term in this latter meaning when describing how any

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99. *Id.* at 1416 (majority opinion).

100. *Id.*

101. *See, e.g.*, *id.* at 1422 (citing Breard v. Alexandria, 341 U.S. 622, 626 (1951)).

102. *Id.* (quoting *Breard*, 341 U.S. at 626) (citing RESTATEMENT (FIRST) OF TORTS § 167 (1934)).

103. *See* U.S. v. Jones, 132 S. Ct. 945, 957–59 (Alito, J., concurring).

104. *Id.* at 961.

105. NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) (defining trespass as "to pass over the boundary line of another's land"); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1839 (4th ed. 2006) (defining trespass as "[t]o commit an offense or a sin").

government tends to engross itself, enlarge its powers, and trench the people's liberties.[106] In its more technical meaning, however, trespass refers to the common law writ to remedy physical intrusions upon land and personal property as well as intentional torts to persons such as battery or false imprisonment.[107]

In developing a test for a Fourth Amendment search, trespass here simply refers to the contemporary tort of trespass to land or chattel. But as shown below, such a definition of trespass resonates with its cognate intentional torts such as battery and false imprisonment—and indeed with the larger concept of trespass as an instance of government tyranny.

A. The Text of the Fourth Amendment

Even though the text of the Fourth Amendment does not use the term trespass, it nevertheless supports a strong connection to trespass. The text guarantees that the people will be "secure in their persons, houses, papers, and effects . . . ."[108] "Secure" means free from danger, or apprehension of danger,[109] and exhibits an elegant flexibility. Secure applies to searches of houses and searches of persons, yet it also applies to seizures of persons and seizures of effects. To be secure in your person embraces the two quite different activities of being searched and being arrested.

"Trespass" exhibits the same flexibility in describing intrusions upon this security. An unreasonable search of a home is a trespass to land;[110] an unreasonable search or seizure of papers or effects is trespass to chattel;[111] an unreasonable seizure of a person is trespass in the sense of the tort of battery[112] or false imprisonment.[113] Even the definition of secure as including the *apprehension* of danger finds

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106. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 55–59 (Enlarged Ed. 1992) (discussing the interplay of government and power and its encroachment on civil liberties in pre-Revolution America).

107. *See* RESTATEMENT (SECOND) OF TORTS §§ 158, 217 (1965).

108. U.S. CONST. amend. IV.

109. *See* THE OXFORD ENGLISH DICTIONARY 851 (2d ed. 1991) ("Feeling no care or apprehension"; "Protected from or not exposed to danger; safe"); WEBSTER, *supra* note 105 ("Free from danger; safe"; "Free from fear or apprehension of danger").

110. RESTATEMENT (SECOND) OF TORTS § 158 (1965) (providing liability for trespass when one "enters land in the possession of another").

111. *Id.* § 217 (trespass to chattel involves "intermeddling with the property in possession of another").

112. *Id.* § 13 (battery involves "harmful or offensive contact").

113. *Id.* § 35 (false imprisonment involves "confinement").

its analog in the trespass tort of assault.[114] Trespass is an almost perfect obverse, or mirror image, of secure, capturing an unlawful invasion of the interests the Fourth Amendment protects.

This rich notion of "trespass" and "secure" as protecting persons *and* things against searches *and* seizures tracks in many ways John Locke's expansive notion of "property."[115] Though some look to Locke as a way to understand property as a means to create wealth—and of course he does speak of property in this way—he also described and defined property as including personal liberty.[116] For Locke, property included a person's property in himself, and he highlighted a person's natural law right to self-preservation.[117] By use of his expanded definition of property, Locke was able to elide in the same elegant way the right to exclude others from one's land and from one's person, not only to create wealth but also to protect one's self-worth and very survival.[118] To allow another to intrude, however slightly, was the first step in allowing the other to wield power and authority over you, leading to tyranny and death, because once another has power and authority, he has the natural ability and right to kill.[119] For Locke, the premise that we are all equal meant no person may physically hurt another (trespass) or enter his land (also trespass).

This article focuses on trespass to property and its connection to a Fourth Amendment search omitting any detailed discussion of the relationship between the trespass torts of battery, assault, and false arrest and Fourth Amendment seizures.[120] Nevertheless, the

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114. *Id.* § 21 (assault involves an "imminent apprehension" of harmful or offensive contact).

115. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 350 (Peter Laslett ed., 1988) (defining property as "[l]ives, [l]iberties, and [e]states"). Locke sometimes uses property in the narrower sense of land or things, but the overall thrust of his project is to link our natural right to survival, our right in a state of nature to repel force with death, and our natural law right to mix our labor with the earth to create our own property (in the narrower sense). *Id.* at 285–88.

116. *Id.* at 350.

117. *Id.* at 287.

118. *See, e.g.*, MICHAEL P. ZUCKERT, NATURAL RIGHTS AND THE NEW REPUBLICANISM 277 (1994) ("every man has a property in his own person . . . that is, private to themselves, [and] possession a claim of right not to be interfered with"—what we might call the right to exclude under trespass) (citing LOCKE, *supra* note 115, at 287).

119. LOCKE, *supra* note 115, at 279–80 ("This makes it Lawful [outside civil society] for a Man to *kill a Thief*, who has not in the least hurt him" because the thief has used force to take the man's money or property, it is reasonable to assume "when he had [the Man] in his Power, [he would] take away every thing else.").

120. The Court currently defines the seizure of personal property as a

trespass concept can help unify searches and seizures to remind us that many of the harms the Fourth Amendment protects against apply equally to both types of conduct. A stop and frisk involves both a seizure and a search; the harm relates largely to the physical trespass upon the person, the show of authority, the detention, and the physicality of the search, rather than to an invasion of privacy as often understood. Perhaps more importantly, an arrest of a suspect in her home closely links search and seizure, and trespass to land and to person, both conceptually and in the case law.[121]

B. *Original Paradigms of Search*

The Fourth Amendment arose in large part out of a series of famous English cases in the 1760s[122] that support a connection between the Fourth Amendment and trespass.[123] These cases strongly suggest that the founding generation had in mind, as the paradigmatic unlawful and tyrannical government search, a trespass to the home and to the papers and other effects in the home.[124]

"meaningful interference with an individual's possessory interests in that property," Soldal v. Cook County, Ill., 506 U.S. 56, 61 (1992), and the seizure of the person as "the slightest application of physical force," or "*submission* to the assertion of authority," California v. Hodari D., 499 U.S. 621, 625–26 (1991). Show of authority is measured objectively by assessing under the circumstances whether a reasonable person would feel free to leave. *Id.* at 628 (citing United States v. Mendenhall, 446 U.S. 544, 554 (1980)).

121. *See, e.g.*, Payton v. New York, 445 U.S. 573, 603 (1980) (holding that police must obtain a warrant to arrest in the home because they must do so to search the home); United States v. Santana, 427 U.S. 38, 42–43 (1976) (holding that police do not need a warrant to arrest a person after appearing in her doorway since she has no reasonable expectation of privacy there).

122. *See, e.g.*, Wilkes v. Wood, (1763) 98 Eng. Rep. 489 (C.B.) 499; Entick v. Carrington, (1765) 19 Howell's State Trials (C.B.) 1029.

123. Amar, *supra* note 33, at 772 ("*Wilkes* . . . was *the* paradigm search and seizure case for Americans."); Sklansky, *supra* note 15, at 1799 ("[N]o statute, practice manual, or commentator . . . shaped the thinking of late-eighteenth-century Americans on the subject of search and seizure as powerfully as the judicial invalidation in the 1760s of broad warrants executed in London against John Wilkes . . . ."). *But see* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 567 (1999) (arguing that "the reauthorization of the general writ in the Townshend Act" had more influence than the *Wilkes* case).

124. *See, e.g.*, Entick v. Carrington, (1765) 95 Eng. Rep. 807 (C.B.) 1029; *Wilkes*, 98 Eng. Rep. at 489.

The key case involved John Wilkes, who in 1763 had anonymously published several anti-government pamphlets.[125] The King personally asked the Secretary of State to investigate, leading to dozens of general searches of homes, persons, and papers, as well as arrests.[126] Wilkes and others argued these searches were unlawful because they were too general, and because they lacked statutory or common law authority.[127]

Wilkes and the others searched or arrested sought redress through the only mechanism available, the writ of trespass, and in a series of cases the court of common pleas applied trespass to government officials to allow recovery. One of those arrested, journeyman Huckle, for example, sued for the six hours the authorities detained him for "[t]respass, assault, and imprisonment."[128] Wilkes himself sued for the unlawful entry into his house, the "breaking of his locks, and seizing [of] his papers" in "an action of trespass . . . ."[129]

But trespass was not merely the technical writ used to get into court. The court opinions establishing a robust right against government intrusions placed heavy emphasis on "trespass." In *Entick v. Carrington*, for example, in its most commanding phrases, the court extolled trespass and private property and noted that any invasion into private property is prima facie trespass, unless the defendant could show a justification—such as a valid warrant.[130] That is, before turning to the main issue—was the warrant valid?—the court reiterated that the cause of action before it was indeed trespass, and that trespass stands as a sacred protection of rights.[131]

But the *Wilkes* cases represented a more radical development of the writ of trespass than the cases themselves disclose. The courts took an ordinary civil tort, originally used against other intruding persons, or cattle, and radically transformed it into a protection against the government—in short, starting in 1763 the English courts made trespass *constitutional*.

After all, trespass did not originally apply in any strong way against the government. Many often cite *Semayne's Case* from 1604 for its rousing pronouncement that a man's home is "his castle," but in reality the case held that the King's officers may break and enter a home to enforce the King's laws, as long as they seek permission

125. *Wilkes*, 98 Eng. Rep. at 493–94.
126. *See id.* at 489–93.
127. *Id.* at 490.
128. Huckle v. Money, (1763) 95 Eng. Rep. 768 (C.B.) 768.
129. *Wilkes*, 98 Eng. Rep. at 499.
130. Entick v. Carrington, (1765) 95 Eng. Rep. 807, (C.B.) 817–18.
131. *Id.* at 808–09.

first.[132] As William Cuddihy describes this period, "an Englishman's house was the *king's* castle in all instances of public concern."[133] Until 1763, in fact, trespass proved an ineffective remedy for overly broad government searches and seizures, including searches under general warrants.[134]

But in the *Wilkes* and *Entick* cases, the English courts radically altered trespass to apply serious restrictions on government searches, thus transforming trespass from a mere civil tort to a *constitutional* protection. Because lawyers and jurists of the day understood "constitution" to embrace the historic common law limits on the sovereign *vis a vis* the people,[135] and the courts in 1763 thus *portrayed* trespass as a long-existing protection against government incursion and general warrant searches.[136] But in reality the courts created this common law protection, or rather they repurposed the civil writ of trespass to apply limits to *government* intrusions.

In addition, the court armed juries with the power to award outsized exemplary damages to deter future incursions.[137] With these cases, "a beginning had been made to policing limits on search and seizure" through the writ of trespass.[138] As noted in the introduction, the revolutionary generation in America likewise chose "trespass" in its general sense as the "image most commonly used" to describe the "'encroaching nature'" of power.[139]

Even before these changes, trespass already protected not just property value but also the right to exclude for its own sake. But after these changes, it protected more particularly property and papers against government snooping; it also protected information,

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132. (1604) 77 Eng. Rep. 194 (K.B.).

133. CUDDIHY, *supra* note 33, at 593 (emphasis added).

134. *Id.*

135. For the English, "constitutional" had particular meaning. J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY (1987). Throughout the 16th to 18th centuries, English courts and lawyers saw England's "constitution," which was built into the common law, as limiting the sovereign's incursions into the liberty of the individual and in rhetoric at least attributed to this constitution an ancient lineage unchanged and unchangeable in its fundamental outlines. *Id.*; JOHN P. REID, THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY 1, 29 (2005) (examining the American belief in an ancient English constitution protecting individual rights).

136. *See, e.g.*, Wilkes v. Wood, (1763) 98 Eng. Rep. 489 (C.B.) 499; Entick v. Carrington, (1765) 19 Howell's State Trials (C.B.) 1029.

137. CUDDIHY, *supra* note 33, at 594 (noting that Wilkes' lawyer expressly urged juries to award large damages to "deter . . . future Ministers").

138. *Id.*

139. BAILYN, *supra* note 106, at 56.

free speech, and other important liberties by keeping the Crown officials physically away. It created a secure sanctuary against the government in particular.

The *Wilkes* and *Entick* cases became central to the thinking of the revolutionary generation and to those framing the Fourth Amendment and its state antecedents.[140] Consequently, the central role trespass played in those cases must likewise have informed the framers' and ratifiers' thinking.

In addition to the founding generation's reliance on the *Wilkes* and *Entick* cases, those arguing in favor of search and seizure provisions, both in state constitutions and in the federal Bill of Rights,[141] almost always portrayed the physical search of the house and its contents as the paradigmatic evil to guard against.[142] That is, the notion that an unreasonable search involved a trespass arose again by necessity.

But simply noting that the founding generation had trespass in mind as a background assumption of what constituted a search does not commit us to adopt the particularities of trespass law from 1791, as I discuss further below. Our culture shares with the founding era a core commitment to the right to exclude others from our houses and persons, thus justifying reliance on trespass in some form. But how that right to exclude applies to particular human relations must necessarily evolve. I contend that contemporary trespass principles better capture these evolving social arrangements while still furthering the same general goal the founders sought: to preserve certain areas from government intrusion and surveillance.

C. Certainty

Moving quickly away from the founding generation to the present, we can see that, as a practical and policy matter, a trespass

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140. CUDDIHY, *supra* note 33 at 765-67.

141. The arguments relating to the federal bill of rights came largely from Anti-Federalists arguing against the Constitution because it failed to include a bill of rights. *Id.*

142. CUDDIHY, *supra* note 33 at 678 ("The house of every private family that produced any excised commodity from soap to cider would be vulnerable to perpetual invasion, night of day; every door, desk, and chest could be broken open . . . .") (quoting *Essay by a Farmer and Planter*, MD J. & BALT. ADVERTISER, Apr. 1, 1788 at 2); CUDDIHY, *supra* note 33 at 679 ("The dreadful giant Congress storming our domestic castles . . . and searching our cellars, garrets, bed-chambers and closets . . . .") (quoting *Remarks on the Amendments to the Federal Constitution . . . by a Foreign Spectator*, THE FED. GAZETTE, AND PHILA. EVENING POST, Dec. 2, 1788, at p. 2).

test provides more certainty, at least within its realm, than a privacy test.[143] Since trespass provides a bare minimum, certainty counts as a good thing.

The Court has regularly,[144] though not consistently,[145] asserted that its Fourth Amendment jurisprudence should provide bright line rules for officers in the field. A trespass test that merely sets a floor can, to some extent, sidestep this tension. Trespass will err on the side of certainty and inflexibility within its traditional realm—protecting the home, the curtilage, and the person with certainty. What it gains in certainty it concededly loses in flexibility, a flexibility that will, in a sense, be segregated in the separate and remaining privacy test.[146]

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143. *See, e.g.*, Jaque v. Steenberg Homes, Inc., 563 N.W.2d 154, 159–60, 166 (Wis. 1997) (upholding $100,000 in punitive damages for a trespass causing no harm to vindicate bright-line rule of right to exclude); Ben Depoorter, *Fair Trespass*, 111 COLUM. L. REV. 1090, 1129 (2011) (noting the bright-line nature of trespass, justified by the need for certainty for wealth generation, but arguing against an inflexible rule as competing societal interests); Daniel Kearney, *Network Effects and the Emerging Doctrine of Cybertrespass*, 23 YALE L. & POL'Y REVIEW 313, 315 (2005) (arguing that a bright-line trespass rule in cyberspace will promote efficiency and private bargaining).

144. California v. Riley, No. 13-132, slip op. at 22 (U.S. June 25, 2014) (noting the Court's "general preference to provide clear guidance to law enforcement through categorical rules"); Thornton v. United States, 541 U.S. 615, 623 (2004) ("The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within an arrestee's reach at any particular moment, justifies the sort of generalization which *Belton* enunciated."); Kyllo v. United States, 533 U.S. 27, 40 (2001) (stating that the "firm line" of the Fourth Amendment "must be not only firm but also bright . . . ."); Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) ("a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need . . . ."); California v. Acevedo, 500 U.S. 565, 579 (1991) ("it is better to adopt one clear-cut rule to govern automobile searches . . . ."); Michigan v. Summers, 452 U.S. 692, 705 n.19 (1981) ("The rule we adopt today does not depend upon such ad hoc determination, because the officer is not required to evaluate the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure"); *see also* Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341 (2004) (concluding "[f]ourth Amendment determinancy, with the attendant need for bright-line rules, stands in serious tension with Fourth Amendment legitimacy . . . ." based on the general and neutral reasons.)

145. *See* Arizona v. Gant, 556 U.S. 332, 344–45 (2009) (rejecting a bright-line rule for search incident to arrest concerning cars); Ohio v. Robinette, 519 U.S. 33, 39–40 (1996) (eschewing a bright-line test to determine whether consent to search was voluntary); Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (same).

146. The privacy test already reflects a similar two-tiered approach, with certain

First, trespass provides more certainty for judges, who will perform the somewhat straightforward task of discerning the majority trespass rule, usually by consulting the Restatement and treatises.[147] In most cases this majority rule will become the test for a search in the case before it, though occasionally judges will have to modify the rule to conform with the Fourth Amendment (as discussed below). This task, discerning the majority rule, falls squarely within the core expertise of judges. Determining this majority rule will also involve far less political and personal discretion than determining whether an expectation of privacy is "reasonable" or "legitimate."[148] The Court virtually ensures its personal views will dominate the outcome of a privacy test because it refuses to actually consult and assess what society considers reasonable.[149]

Second, the trespass test will provide more certainty for the police for similar reasons. True, the Court in many Fourth Amendment cases has rejected a bright-line rule for searches involving consent,[150] reasonableness,[151] or probable cause,[152] or answering when police questioning ripens into a seizure,[153] or discerning where the police may search incident to arrest[154]—often

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areas such as the home enjoying a *per se* protection of warrant and probable cause.

147. Dripps, *supra* note 144, at 341–42 (noting importance of a bright-line rule for judges).

148. *See* Rakas v. Illinois, 439 U.S. 128 (1978) (finding "the phrase 'legitimately on the premises'" too broad for a Fourth Amendment Test).

149. *See generally* Christopher Slobogin, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727 (1993) (contending that, despite Justices' aim to base the Court's Fourth Amendment decisions on societal understandings, their decisions often do not reflect society's views).

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

151. Safford Unified School Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2639 (2009) (acknowledging that, in school setting, reasonableness does not have to amount to probable cause to comport with the Fourth Amendment).

152. *Id.*

153. *See* Florida v. Royer, 460 U.S. 491, 500 (1983) (determining when police investigative measures rise to the level of "seizure"). *But see* Edwin J. Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining when Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437, 442 (1988) (arguing that when an officer seizes a person, under *Terry* the officer must have reasonable suspicion any time that officer questions a person with the purpose to investigate that person for a crime).

154. Arizona v. Gant, 556 U.S. 332 (2000) (rejecting a bright-line rule that police may always search a vehicle incident to arrest and substituting a rule that police may search a vehicle only if a suspect could reasonably have accessed a weapon in

because these questions inherently incorporate an approach based on the circumstances. But in other cases it has identified the value in bright-line rules for police to apply, both within the Fourth Amendment area,[155] as well as under *Miranda*.[156] In any event, to the extent trespass merely defines for the police a bare minimum area that always enjoys protection—the home, the curtilage, the person—that bright-line rule should enhance police efficiency without sacrificing the flexibility needed to determine subsequent questions such as consent or probable cause. A bright-line trespass rule for the police also accords with the purpose of the Fourth Amendment and the exclusionary rule in particular: to deter unlawful searches.[157] A clear boundary will make deterrence more effective.

Even when trespass does not supply the basic terms of engagement by setting a boundary, such as intrusions in which implicit consent raises uncertainty, trespass still provides a better yardstick than privacy. As a commonsense concept, the police or others can usually assess implicit consent by consulting their conscience.[158] We all know the difference between stepping onto our neighbor's front lawn to retrieve a Frisbee versus stepping onto their lawn to spy into the living room.[159] And to the extent police do not know the law of trespass, it will be fairly straightforward for them and their supervisors to determine it.

Finally, and most importantly, a trespass test will provide certainty to individuals. A key element of being "secure" in one's house, and in other areas, involves not only the right to exclude but also the certainty that there is a boundary and knowing where that boundary lies. Under a privacy test individuals are left at sea in

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the vehicle).

155. Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) ("Fourth Amendment rules 'ought to be expressed in terms that are readily applicable by the police . . .' and not 'qualified by all sorts of ifs, ands, and buts'") (quoting New York v. Belton, 453 U.S. 454, 458 (1981)), *limited by Gant*, 556 U.S. 332.

156. Berghuis v. Thompkins, 560 U.S. 370, 381 (2010) (requiring suspects to invoke the right to remain silent unambiguously); Davis v. United States, 512 U.S. 452, 458–59 (1994) (requiring suspects to invoke the right to counsel during interrogation unambiguously to retain the bright-line nature of the *Edwards* doctrine).

157. *See* United States v. Leon, 468 U.S. 897, 919–20 (1984) (highlighting the exclusionary rule's purpose in deterring "unlawful police conduct").

158. *See* Georgia v. Randolph, 547 U.S. 103, 111 (2006).

159. Florida v. Jardines, 133 S. Ct. 1409, 1418 (2013) (Kagan, J., concurring) (contrasting a stranger entering one's porch to spy through the windows with binoculars with someone who enters to drop off a campaign flyer, calling the former trespass and the latter licensed).

determining when they actually enjoy a reasonable expectation of privacy. In contrast, trespass provides a minimum, but clear, boundary. Of course, the certainty is not absolute since the police may intrude based upon a warrant and probable cause or an exigency or some other exception.[160] But at least individuals know that in their home, on their porch, and in their driveway they enjoy a physical zone into which the police may not ordinarily enter.

D. Economic Interests versus Liberty

In discussing trespass and the Fourth Amendment above, I have spoken of the right to exclude without considering carefully the interests this right protects. Here, I clarify those interests and rebut what might be perhaps an implicit argument against trespass as a suitable test for the Fourth Amendment: that it protects the economic value of property alone.[161]

In most contexts, when we think of trespass, we might think of a tort developed primarily to protect the market value of property and its use in generating wealth. Under this conception, paradigmatic trespass cases do not involve officers conducting searches but rather a neighbor's invading cattle,[162] or flooding water,[163] or law suits for rents for those unlawfully occupying or using the land,[164] or for compensation from those taking valuable things from it, such as timber[165] or minerals. In this view, trespass protects the possessor's

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160. *See Randolph*, 547 U.S. at 118 (suggesting that there is no question that police may enter a dwelling under some circumstances such as "to protect a resident from domestic violence . . . .").

161. Justice Alito in *Jones* evidently had in mind a concept of trespass largely concerned with the monetary value of property, when he criticized the majority's trespass test—he pointed out that the GPS device caused no harm to the Jeep. United States v. Jones, 132 S. Ct. 945, 957 n.2 (2012) (Alito, J., concurring) (asserting that traditionally a claim of trespass to chattels requires damage to the chattel).

162. Noyes v. Colby, 30 N.H. 143, 152 (1855) ("'A man is answerable for not only his own trespass, but that of his cattle also . . . .") (quoting 3 WILLIAM BLACKISTONE, COMMENTARIES *211); *see also* R. H. Coase, *The Problem of Social Cost*, J.L. & ECON. 1–44 (1960) (arguing a smooth and perfect market will allocate resources the same regardless of the trespass rule in effect, using trespassing cattle as the chief example).

163. *See, e.g.*, Sexton v. City of Mason, 883 N.E.2d 1013 (Ohio 2008).

164. *See, e.g.*, County of Oneida, N.Y. v. Oneida Indian Nation of N. Y., 470 U.S. 226 (1985).

165. *See, e.g.*, Jongeward v. BNSF Ry. Co., 278 P.3d 157 (Wash. 2012) (using common law trespass to construe state timber trespass statute).

right to develop the land, enjoy its use, and profit from its fruits.[166] Indeed, many scholars have argued that trespass and the concept of property itself arose historically from the development of agriculture: farmers would only work for months planting and sowing crops if they could be confident they could exclude others from reaping those crops.[167] The right to exclude under trespass afforded them that confidence.[168]

But when we think of the Fourth Amendment, we think of the interests it historically arose to protect—not money[169] or crops but privacy in the home and in one's papers,[170] free speech,[171] dissent,[172] freedom from arbitrary and humiliating searches by lowly government officials,[173] and the liberty of the subject against an overzealous sovereign.[174] Today, the Fourth Amendment protects those same interests[175] plus newer applications of privacy. At least

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166. Richard A. Epstein, *How to Create—or Destroy—Wealth in Real Property*, 58 ALA. L. REV. 741, 750 (2007) ("If each person could enter the land of a neighbor at will, then each person could disrupt the gains that come from clearing the land, planting crops, or building structures."). *But see* Gideon Parchomovsky & Alex Stein, *Reconceptualizing Trespass*, 103 NW. U. L. Rev. 1823, 1824 (2009) (arguing compensatory damages for more than the market value of the land).

167. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 746 (1998) ("'A prehistoric community had to develop a set of land rules that provided incentives for its members to engage in the small events involved in raising crops and animals.'") (quoting Robert Ellickson, *Property in Land*, 102 YALE L. J. 1315, 1365 (1993)).

168. *Id.*

169. It is true that the Boston merchants enlisted James Otis to argue against the writs of assistance to protect their lucrative smuggling activities, but these motives never became part of the rhetoric leading to the Fourth Amendment. Clancy, *supra* note 68, at 980.

170. Entick, v. Carrington, (1765) 95 Eng. Rep. 807 (K.B.); Wilkes v. Wood, (1763) 98 Eng. Rep. 489 (K.B.) 499.

171. CUDDIHY, *supra* note 33, at 686–71.

172. CUDDIHY, *supra* note 33, at 686–71.

173. *See* ANDREW TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH & SEIZURE, 1789–1868 2–4 (N.Y. Univ. Press 2006); Clancy, *supra* note 68, at 994, 1003 n.135.

174. *See generally* CUDDIHY *supra* note 33, at 686–91; NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (The John Hopkins Press 1937); TASLITZ, *supra* note 173.

175. Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303 (2010) (realigning the Fourth Amendment with the First and arguing that the Fourth Amendment has and should protect "political liberty" rather than mere privacy or even police investigations); Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1514 (2010) (arguing Fourth Amendment "search" should apply whenever government tactics are likely to "chill[] free speech, free

indirectly, the Fourth Amendment now protects: privacy for sexual autonomy,[176] free association,[177] privacy in our physical[178] and virtual[179] whereabouts, and privacy in personal data on our own computer.[180]

The text of the Fourth Amendment likewise reflects a provision not primarily concerned with economic interests.[181] For example, the amendment protects "houses," but not agricultural fields, mills, forests for timber, ships, or shipyards—all important sites of economic activity at the founding.[182] The protection of houses but not fields is particularly significant since the colonial economy was "overwhelmingly" agricultural.[183] True, many of the Boston merchants including John Hancock—who hired James Otis to argue against the general searches authorized by the writs of assistance—conducted business in their houses,[184] but this alone does little to

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association, freedom of belief, and consumption of ideas," as well as "inadequately constrained government power").

176. Griswold v. Connecticut, 381 U.S. 479 (1965) (developing privacy for sexual autonomy based in part on the privacy protection of the Fourth Amendment).

177. Alexander A. Reinhert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1485–91 (arguing that Fourth Amendment intrusions "strike[] at the heart of civic participation"); Solove, *supra* note 175, at 1528.

178. United States v. Jones, 132 S. Ct. 945, 957–64 (Alito, J., concurring) (four weeks of continuous GPS tracking constitutes a Fourth Amendment search).

179. Matthew Tokson, *Automation and the Fourth Amendment*, 96 IOWA L. REV. 581 (2011) (noting courts largely reject privacy and Fourth Amendment protection for online surfing under the third-party doctrine but arguing that such persons should retain privacy since a person's virtual whereabouts are exposed to machines, not people).

180. United States v. Otero, 563 F.3d 1127 (10th Cir. 2009) (applying Fourth Amendment particularity requirement to search of a personal computer).

181. U.S. CONST. amend. IV.

182. *See, e.g.*, EDWIN J. PERKINS, THE ECONOMY OF COLONIAL AMERICA 41 (Columbia Univ. Press 1988) ("Up to 85 percent of the population depended on agriculture for their livelihood."). True, merchants conducted some business in their homes, and stored goods there, so perhaps houses, papers, and effects can include protection of business transactions—the Court in *Boyd* certainly reached such a conclusion. Boyd v. United States, 116 U.S. 616 (1886). And most families made goods in their homes for their own use or for extra money. PERKINS, *supra*. Nevertheless, the amendment cannot be read as intended to protect the generation of wealth in general because it excludes the most important areas. Also, even when the founding generation railed against home searches used to discover excisable goods, they argued more against the invasion and search than any imposition on economic activity. *See generally* CUDDIHY, *supra* note 33.

183. *See* PERKINS, *supra* note 182.

184. *See* Davies, *supra* note 123, at 608.

alter the primary thrust of the Fourth Amendment's textual commitment to interests other than commercial.[185]

We thus have on the one hand a conception and perhaps origin of trespass that protects land for the generation of wealth and a Fourth Amendment aimed at far different interests. Can trespass cover these latter values?

The answer, of course, is yes. Trespass is suitable not only for protecting wealth but also these other important but intangible Fourth Amendment interests such as free speech or freedom of religion. Historically the English courts built precisely this version of trespass, transforming an ancient writ protecting against other private individuals into a tool against excessive state incursions upon property and liberty, as discussed above.[186] These courts did so precisely to protect the values discussed above, including political liberty and free speech.

Today trespass allows a person to exclude for any reason[187] or no reason at all; courts scrupulously protect even the abstract right to exclude.[188] As a practical matter, opaque walls, a locked door, and drawn curtains, along with others' duty to stay out, provide sanctuary for numerous activities that we consider important under the Fourth Amendment.[189] The physical barriers allow those within

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185. *See id.* at 706–10 (arguing that the framers likely did not intend the Fourth Amendment to protect commercial activity based in part on their substituting "effects" for the more open "other property").

186. *Supra* Part III.B.

187. We must qualify, of course, "for any reason." For example, the Civil Rights Act of 1964 bans discrimination based on race, color, religion, or national origin in public accommodations. 42 U.S.C. § 2000a (2012). Similarly, under California case law, shopping centers in California cannot exclude people based on their speech. Robins v. Pruneyard Shopping Ctr., 592 P.2d 341 (Ca. 1979). Other exceptions of similar ilk also apply.

188. *See* Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 159–60 (Wis. 1997) ("The United States Supreme Court has recognized that the private landowner's right to exclude others from his property is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' . . . Yet a right is hollow if the legal system provides insufficient means to protect it.").

189. The home can also provide secrecy for unlawful activity, such as domestic violence, drug use, manufacture, and distribution, fraud, and conspiracy to commit any crime. The trespass right to exclude cannot be absolute, therefore, but must yield to law enforcement needs upon an appropriate showing; determining this showing, of course, especially in ongoing criminal activity such as domestic violence, creates a challenge. Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006) (police may enter to "assist persons who are seriously injured or threatened with such injury"); Georgia v. Randolph, 547 U.S. 103 (2006) (wife's consent to search overruled by husband's refusal); *see also* Deborah Tuerkheimer, *Exigency*, 49 ARIZ. L. REV. 801, 801–13

to speak freely and say what they would not say in public, either because of fear of the government or simple social pressure. Others can worship as they please without fear of embarrassment, especially an activity such as prayer.[190] Four walls provide privacy for other important and mundane activities over which society demands we seek separation, such as sex and bathroom activities.[191]

E. Justice Alito's Challenge

One particular instance of the view that trespass protects only the value of property comes in Justice Alito's concurrence in *Jones*. There, Justice Alito argued that trespass to chattel that neither harms the property nor deprives the owner of its use does not lead to a cause of action (even for nominal damages).[192] Since the trespass in *Jones* by the credit-card-size GPS device did not harm the Jeep or deprive Jones of its use, that trespass would not be actionable, and therefore, under the trespass test, not a Fourth Amendment search.[193]

The answer to Justice Alito's challenge follows somewhat straightforward from the Restatement (Second) of Torts, which distinguishes between a "trespass" to chattel and an actionable one.[194] Section 217 defines trespass to include *any* "intermeddling" in another's property,[195] and the GPS device in *Jones* meets this standard.[196] Section 218, however, states that a person may only

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(2007) (considering "whether the doctrine of exigent circumstances, as currently formulated, is flexible enough to allow for effective policing" of domestic violence).

190. *See* Lee v. Weisman, 505 U.S. 577, 594 (1992) (highlighting the "isolation and affront" that can result from the public exercise of religion publically, even where such exercise seeks to be "civic or nonsectarian").

191. Ferdinand D. Schoeman, *Privacy and Intimate Information, in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 403 (Ferdinand David Schoeman ed., 1984) (noting that for some private activities society not only recognizes privacy but requires it).

192. *See generally* United States v. Jones, 132 S. Ct. 945, 957–64 (2012) (Alito, J., concurring).

193. *Id.* at 957 n.2.

194. RESTATEMENT (SECOND) OF TORTS § 217 (1965).

195. *Id.*; *see* Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969) (stating in dicta that copying another's documents constitutes trespass under Section 217 even though not actionable under Section 218 because no harm); Hernandez v. United States, 353 F.2d 624 (9th Cir. 1965) (holding a police officer's harmless squeezing of luggage constituted trespass under § 217). *But see* Glidden v. Szybiak, 63 A.2d 233 (1949) (holding that a girl who had climbed upon another's dog without permission had not trespassed to chattel because she had not harmed the dog).

196. *See Jones*, 132 S. Ct. at 948–51 (majority opinion).

have a cause of action for trespass if that meddling harmed the property or deprived the person of its use.[197] Thus, Justice Alito is right that Jones could not have maintained a lawsuit for the GPS device.[198]

Why does the Restatement define trespass to include any meddling when only a substantial amount will lead to a cause of action? It does so in order to assign rights and to provide possessors of property with a privilege to use reasonable force to repel or terminate a trespass—even an insignificant one.[199] If someone tries to grab my cellphone to quickly look at my text messages, she likely will not harm the phone or deprive me of its use, and I would therefore have no cause of action for trespass. But I can use reasonable force to stop the trespass. This cellphone example, like the GPS one, shows that one not only has the right to use force to end even insignificant trespasses, but also has this right to protect significant interests, in these two cases privacy.

These examples of small intrusions upon property used to leverage potentially huge invasions of privacy, show why the right to exclude *any* intrusion is not merely a technical right but is a right that carries significant consequences.

F. Physicality and Stop and Frisk

A trespass test also highlights the physicality of police searches, and the harms that flow from that physical coercion, in ways often missed by the old privacy test. During a search, the police assert their dominance and control; the physical invasion of personal space invades privacy even if no information is disclosed—it amounts to a violation more akin to battery or even rape.[200] But even when not quite so dramatic, an unlawful search simply exceeds the government's authority and, obversely, trenches a person's autonomy. Trespass at its core arms a person with the right to exclude others for good reason or for no reason at all. Courts, and our society, consider the very choice to exclude, and the autonomy it represents, central to liberty against the government and autonomy

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197. RESTATEMENT (SECOND) OF TORTS § 218 (1965).

198. *See Jones*, 132 S. Ct. at 961 (Alito, J., concurring).

199. RESTATEMENT (SECOND) OF TORTS § 217 cmt. a (1965) ("A trespass, though not actionable . . . may nevertheless be important in determination of the legal relations of the parties. . . . [and] affords the possessor a privilege to use force to defend his interest in its exclusive possession.").

200. *See, e.g.*, Ligon v. City of New York, 925 F. Supp.2d 478, 524–26 (S.D.N.Y. 2013) (highlighting the potentially violating nature of police stops and searches).

vis-a-vis others. In this way, trespass unifies the right to exclude others from our property as well as our persons.

The landmark stop-and-frisk litigation in New York City shows how trespass better captures these face-to-face harms than privacy.[201] That litigation challenged New York City's stop-and-frisk program by surveying the city's 4.4 million stop and frisks over an eight-year period.[202] In detailing the testimony of the class plaintiffs and summarizing that of others, the court in *Ligon v. City of New York* noted that the stop and frisks had made the plaintiffs feel "violated," "disrespected," "angry," and "defenseless"—without any mention of an invasion of privacy.[203] Indeed, the word privacy appears only once in the 84-page opinion.[204] Similarly, the same court in *Floyd v. City of New York* used terms such as "demeaning and humiliating" rather than invasion of privacy in finding New York's general stop and frisk program unconstitutional.[205] These victims of unlawful searches and seizures did not think in terms of privacy specifically but rather in terms of other more direct emotions, arising from the violation of their privacy, when describing not only the stops but also the searches.

Trespass also helps to unify into a single humiliating experience the police course of conduct in stopping, searching, arresting, and interrogating a person without reasonable suspicion. That is, the expectation of privacy test applies only to searches, deracinating the search from the rest of the encounter. The Supreme Court has often separated the search from seizure analysis in such a way as to minimize each.[206] Trespass, by contrast, has the potential to fix this atomized approach.

These same principles relating to stop and frisk apply to home searches as well. The police increasingly use SWAT raids bursting into homes with force and weaponry—physically restraining

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201. Floyd v. City of New York, 959 F. Supp. 2d 668 (S.D.N.Y. 2013); Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) [hereinafter *Floyd 1*]; *Ligon*, 925 F. Supp. 2d 478. The Second Circuit has stayed the district court's injunctions pending appeal, but the City has agreed to drop its appeal. Benjamin Weiser & Joseph Goldstein, *Mayor Says City Will Settle Suits on Frisk Tactics*, N.Y. TIMES, Jan. 31, 2014 at A1.

202. *Floyd 1*, 959 F. Supp. 2d at 556.

203. *Ligon*, 925 F. Supp. 2d at 485.

204. *Id.* at 533 n. 398.

205. *Floyd 1*, 959 F. Supp. 2d. at 557.

206. Illinois v. Caballes, 543 U.S. 405, 417–25 (2005) (Ginsburg, J., dissenting) (arguing the Court should have viewed the stop and the search together because the search expanded the scope of the stop albeit not in duration).

residents while they search the home.[207] Trespass captures the harm these raids inflict far better than invasion of privacy.

William Stuntz had it right when he argued that the Fourth Amendment governs police investigations so we should interpret it, at least in those types of cases, as a restriction on the use of physical force rather than as a protector of privacy.[208] Privacy, he argued, "tends to obscure the more serious harms that attend police misconduct, harms that flow not from information disclosure but from the police use of force."[209]

IV. FOURTH AMENDMENT TRESPASS

Part III showed why trespass law provides an appropriate test for a Fourth Amendment search. This section discusses which trespass law the Court should apply, and how it should ascertain and develop that law.

This article urges a two-step process. First, the Court should determine the majority trespass rule. It may start with the Restatement (Second) of Torts[210] since many states either expressly follow the Restatement, unless they have expressly created a deviation or look to it as persuasive authority.[211] Second, the Court should determine whether it needs to modify this rule to conform it to the text and purpose of the Fourth Amendment.

In defending this proposal below, I first rule out the leading alternatives as a source of trespass law. Part A rejects the common law of trespass circa 1791 that obtained when the states ratified the Fourth Amendment, and Part B rejects the contemporary trespass law of the specific state where the search occurred.

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207. RADLEY BALKO, RISE OF THE WARRIOR COP—THE MILITARIZATION OF AMERICA'S POLICE FORCES (Public Affairs 2013).

208. William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1020 (1995) ("Criminal procedure would be better off with less attention to privacy . . . . [and] more on force and coercion.").

209. *Id.*

210. Technically the Restatement (Third) of Torts applies but for trespass and other intentional torts the Third Restatement states an umbrella rule and then incorporates the Second Restatement in its entirety. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 5 cmt. a (2005).

211. Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969) (following the Restatement under District of Columbia law for trespass); Fendler v. Phoenix Newspapers, Inc., 636 P.2d 1257, 1260 (Ariz. Ct. App. 1981) (acknowledging that Arizona "follow[s the Restatement] in the absence of authority to the contrary); Phillips v. Sun Oil Co., 121 N.E.2d 249 (N.Y. 1954) (following the first Restatement definition of trespass).

Part C defends a unified federal trespass rule derived from the majority, contemporary state rule as better reflecting contemporary norms of trespass, property, privacy, and the right to exclude. Part C then provides additional justification for such an approach by pointing to the Court's Section 1983 jurisprudence as well as other lines of case law. These lines of cases support not only drawing from the majority state rule, but also support the two-step approach that requires courts to modify, if necessary, the state rule to conform with federal goals.[212]

A. *Trespass Circa 1791*

The Court in *Jones* suggested courts should draw upon some common law of trespass circa 1791 when the Fourth Amendment was ratified.[213] This alternative has significant drawbacks. First, by 1791 each state had developed its own property and trespass law, and this law differed from state to state and from the common law of England.[214] Indeed, property law in particular evolved quite differently from the law in England during the 150 years of the

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212. *See* Swidler v. Berlin, 524 U.S. 399 (1988) (for evidentiary privilege, drawing on state law and determining step two—"reason and experience"—do not counsel a different result); County of Oneida, N.Y. v. Oneida Indian Nation of N.Y., 470 U.S. 226 (1985) (in an Indian land case, determining in step two that the state statute of limitations did not conform with the federal right at issue); Smith v. Wade, 461 U.S. 30 (1983) (in step two of Section 1983 analysis, determining state tort remedy was consistent with Eighth Amendment principles); Carey v. Piphus, 435 U.S. 247, 256 (1978) (in Section 1983 claim, noting that courts must sometimes adapt common law remedy to the constitutional right at issue).

213. United States v. Jones, 132 S. Ct. 945, 950 (2014) ("At bottom, we must 'assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'") (quoting Kyllo v. United States, 533 U.S. 27, 34 (2001)). The Court also said: "The concurrence begins by accusing us of applying '18th-century tort law.' That is a distortion. What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide at a minimum the degree of protection it afforded when it was adopted." *Id.* at 953 (internal citations omitted).

214. *See* Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1727–28 (1996) (noting vast range in state laws in colonial era leading to the Fourth Amendment); Bernadette Meyler, *Toward a Common Law Originalism*, 59 STAN. L. REV. 551, 556 (2006) ("The common law of the founding era partook of a number of disparate strands, with the colonies and subsequently the several states, diverging from the British heritage."); *see also* CUDDIHY, *supra* note 33, at 409, 530–36. Michael J.Z. Mannheimer, *The Contingent Fourth Amendment*, 64 EMORY L.J. (forthcoming) ("the common law of search and seizure circa 1791 was virtually never clear nor uniform").

colonial era.[215] Thus, there *was* no single common law of trespass in 1791.[216] Of course, one could draw on the general principles of trespass laws throughout the states in 1791, but this technique would suffer from the ordinary problems of originalism:[217] finding adequate materials to determine the law,[218] properly interpreting the law, understanding its context, etc.[219] Indeed, if the two leading historians of the Fourth Amendment sharply disagree about its original central meaning, originalism, or at least strict originalism,[220] is in trouble.[221]

Second, as discussed above, *Jones* likely did not propose that courts literally determine a common law of trespass circa 1791 since that case itself did not refer to such trespass law, and *Jardines* expressly disavowed reliance on at least the common law of England

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215. STUART BANNER, AMERICAN PROPERTY 4–22 (Harvard Univ. Press 2011) (cataloging differences in the colonies and later the states on the one hand and England on the other in land ownership and in the types of other intangibles that could be owned as property).

216. Meyler, *supra* note 214, at 557.

217. Originalism here describes the most recent iteration of the Court's approach as enunciated in *Heller*: original public understanding. District of Columbia v. Heller, 554 U.S. 570 (2008); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Princeton Univ. Press 1997). However, my critique applies to any version of originalism that would require us to adopt (and not adapt) the trespass law of 1791.

218. Sklansky, *supra* note 15 (noting sparseness of founding era trespass law).

219. *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (principle defect of originalism is "that historical research is always difficult and sometimes inconclusive"); *see also* Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

220. Richard B. Saphire, *Originalism and the Importance of Constitutional Aspirations*, 24 HASTINGS CONST. L.Q. 599, 610 ("According to strict originalism, constitutional meaning must be determined by reference to the specific value judgments of the Founders as they would have understood and applied those judgments.") (internal citation omitted).

221. *Compare* CUDDIHY, *supra* note 33, at lxv-lxvi, 765–66 (arguing that "the Reasonableness Clause" has content independent of the warrant clause, including a probable cause requirement) and 777–82 (refuting Davies) *with* Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common law Criminal Arrest and Search Rules in "Due Process of Law"—"Fourth Amendment Reasonableness" is Only a Modern, Destructive Judicial Myth*, 43 TEX. TECH L. REV. 51, 63 (2010) ("Lasson and Cuddihy have prochronistically imposed the modern conception of an overarching reasonableness standard on historical sources that never expressed any such notion."); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999) (arguing only the Warrant Clause has operational meaning).

and relied upon far more modern trespass concepts in its application.[222]

Third, the common law of trespass circa 1791 reflected sharply different relationships between citizens and certainly a different relationship between individuals and law enforcement. In 1791 the states did not have police forces[223] and only sporadic law enforcement by a patchwork of constables, sheriffs, public watchmen, and the citizenry as part of a hue and cry.[224] In the face of any determined resistance a poorly paid sheriff's deputy, unpaid constable or enlisted citizen would likely cease any efforts.[225] Today, by contrast, the police are instantly available by calling 911, pervasive in many cities conducting stop and frisk, and otherwise virtually ubiquitous, often militarized in equipment and use-of-force tactics. By one estimate the number of SWAT raids has grown from a few hundred in the 1970s to "50,000 in 2005."[226] Constitutional trespass must take account for these differences.

This is not to say we can learn nothing from trespass law in 1791; the very premise of my proposal is that we *should* rely upon trespass in some form in part because the founding generation understood trespass and the Fourth Amendment to have such a close connection. Similarly, we can draw conclusions about the Fourth Amendment today based upon what has changed in trespass law since 1791. Moreover, *constitutional* trespass reflects the particular type of trespass that the English courts in particular were developing to address not wandering cows but overzealous government agents.[227] Thus, we can imagine trespass circa 1791, in its various forms and sources, as "supplying the terms of a debate

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222. Florida v. Jardines, 133 S. Ct. 1409 (2013); United States v. Jones, 132 S. Ct. 945 (2012).

223. Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983) (the colonies used a watch system or customs agents for law enforcement with no police force); David Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999) (the states did not begin to establish police departments until the 1840s—New York in 1845).

224. Sklansky, *supra* note 223, at 1206 ("[I]n the decades following independence '[t]here was a constant chorus of complaints about the constables and watchment.'")(quoting LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 68 (1994)).

225. JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664–1776) 453 (The Commonwealth Fund 1944) (describing regular instances of sheriff's deputies and other officials declining to serve warrants because of laziness or fear).

226. BALKO, *supra* note 207, at 308.

227. *Supra* notes 123 to 133.

about certain concepts," as Bernadette Meyler has put it.[228] But when it comes to a concrete test for "search," I maintain we rely on contemporary trespass principles.

Indeed, Justice Scalia endorsed precisely this approach years before *Jones* and *Jardines*. In *Randolph*, he wrote that the Fourth Amendment has traditionally rested upon common law trespass and property rights, *but* that the content of the Fourth will evolve as the property rights do.[229] "A latter-day alteration of property rights would also produce a latter-day alteration of the Fourth Amendment outcome—without altering the Fourth Amendment itself."[230] He went on to say, more generally, that "our unchanging Constitution refers to other bodies of law that might themselves change . . . . This reference to changeable law presents no problem for the originalist."[231] Perhaps Justice Scalia has described an approach no longer appropriately called "originalism," but his approach nicely describes the view proposed here.

B. State by State Trespass

The Court could draw directly upon the trespass law of the state in which the search occurred, but such a source would enjoy little principled justification and would lead to practical difficulties, not the least of which would be a Fourth Amendment fractured by state.

First, the Fourth Amendment is a federal right, and precedent strongly militates in favor of a uniform national standard. For instance, recognizing a due process right against unwarranted police incursion to the home in *Wolf v. Colorado*, the Court imposed a single fundamental principle upon all states, even those with contrary views.[232] Similarly, when the Court applied the exclusionary rule to the states in *Mapp v. Ohio*, it imposed upon those states with contrary law a uniform federal requirement.[233]

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228. Meyler, *supra* note 214, at 558 (arguing that between originalism and a living constitution lies her proposal, "common law originalism," that will draw together strands of the common law not to answer questions with a particular test but to help pose the right questions).

229. Georgia v. Randolph, 547 U.S. 103, 142–45 (2006) (Scalia, J., dissenting).

230. *Id.* at 143.

231. *Id.* at 144.

232. 338 U.S. 25, 28 (1949) ("[w]e have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment"), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643, 643–60 (1961).

233. *Mapp*, 367 U.S. at 655–60.

In addition, the Court has consistently assessed Fourth Amendment rules according to a national standard, whether those are rules pertaining to probable cause,[234] the need for a warrant,[235] the power to arrest,[236] or, as here, whether conduct involves a search.[237] As the Court wrote in *California v. Greenwood*, "[w]e have never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs."[238] More particularly, neither *Jones* nor *Jardines* relied upon the trespass law where the search occurred.[239]

Second, nearly all provisions of the Bill of Rights create a single uniform federal right under the Supremacy Clause[240] rather than a right dependent upon different state law, even though these other rights, like the Fourth, speak in a language of a pre-existing right.[241] For example, the Free Speech Clause protects "the" right to free speech.[242] Since the clause envisions an existing right, one could, in theory, look to the common law of each state to discern that right.[243] The right to bear and keep arms, the right against cruel and unusual

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234. Maryland v. Pringle, 540 U.S. 366, 370 (2003) (noting at the threshold that Maryland's statute authorizing arrests is "consistent with the Fourth Amendment if the arrest is supported by probable cause" before defining probable cause by a uniform standard).

235. Maryland v. King, 133 S. Ct. 1958, 1969–70 (2013) (using a balancing test to assess reasonableness of a warrantless search for DNA from arrestees).

236. Virginia v. Moore, 553 U.S. 164, 171 (2008) (arrest conformed to Fourth Amendment even though it violated state law).

237. California v. Greenwood, 486 U.S. 35, 39–43 (1988) (holding that police do not conduct a search under the Fourth Amendment when they root through garbage even if such conduct would violate California law).

238. *Id.* at 43.

239. Florida v. Jardines, 133 S. Ct. 1409 (2013); United States v. Jones, 132 S. Ct. 945 (2012).

240. U.S. CONST. art. VI, cl. 2; Martin v. Hunter's Leasee, 14 U.S. 304, 347–48 (1816) (grounding the Supreme Court's power to overrule state supreme courts' interpretation of the federal constitution on the need for uniformity).

241. Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 19 (1975) ("[I]t does not appear appropriate that federally guaranteed rights, particularly when their basis is constitutional, should have materially different dimensions in each of the states when both the source of the right and any ultimate interpretation is unitary."). Though Monaghan here focused on prophylactic rules justified by constitutional rights, his principle would apply all the more a core constitutional right itself.

242. U.S. CONST. amend. I.

243. Mannheimer, *supra* note 214 (arguing the anti-federalists intended the Bill of Rights to limit the federal government by state law).

punishment, and others could in theory differ depending upon the state in which the violation occurred. But none do.[244] True, procedural due process will often depend upon state law to determine whether the state has created a liberty or property interest, but those types of due process rights exist only in virtue of state law or regulations to begin with[245]—the Fourth Amendment, like the First, arises directly as a federal right.

Third, the Court will have to modify any trespass principles to conform to the Fourth Amendment regardless of the source of those principles, so it makes far more sense to begin with a uniform federal law of trespass. Indeed, as discussed more below, the Court already performs precisely this function in developing remedies for Section 1983 actions.[246] In those cases the Court does not start with the state law where the violation occurred but with general tort principles.[247]

Fourth, judicial efficiency militates in favor of uniform law of trespass. The courts, both state and federal, face striking numbers of suppression motions—estimates vary from five to ten percent of all cases.[248] In 2010 there were roughly 20.5 million criminal cases in the states.[249] That means somewhere between 1 and 2 million suppression motions, plus another 750 such motions in the federal system.[250] Often, the outcome of the suppression motion dictates whether a trial will occur. Of course, in many of these cases the facts

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244. McDonald v. City of Chicago, Ill. 130 S. Ct. 3020 (2010) (second amendment); Kennedy v. Louisiana, 554 U.S. 407 (2008) (cruel and unusual punishment); Gitlow v. New York, 268 U.S. 652 (1925) (free speech). *But see* Michael J. Z. Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69 (2012) (arguing that, as applied to the federal government, federal courts should draw caps on prison sentences from individual state law).

245. Matthews v. Eldridge, 424 U.S. 319, 322–35 (1976).

246. *See, e.g.*, Smith v. Wade, 461 U.S. 30, 47–48 (1983) (holding that Section 1983 plaintiffs are entitled to the same remedies as plaintiffs under the general common law of torts).

247. *Id.* at 48–49.

248. COMPTROLLER GEN. OF THE U.S., GGD-79-45, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS (1979); James J. Fyfe, *The NIJ Study of the Exclusionary Rule*, 19 CRIM. L. BULL. 19 253 (1983); Peter F. Nardulli, *The Societal Cost of the exclusionary Rule: An Empirical Assessment*, 8 AM. B. FOUND. RES. J. 585, 593–95 (1983).

249. Nat. Ctr. for State Courts, *Examining the Work of State Courts: An Analysis of 2010 State Court Case Loads*, COURT STATISTICS PROJECT (2012) (20,480,625 total incoming criminal cases).

250. ADMIN. OFFICE OF THE U.S. COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS (2012) (roughly 75,000 criminal cases in 2011).

are in dispute, not the law, but a trespass test, with its ease of application in the cases to which it applies, will drastically simplify at least a portion of these 1 to 2 million motions. A uniform federal trespass rule regarding whether police conduct qualifies as a search will require fewer judicial decisions compared to separate decisions in each state based upon the idiosyncrasies of state law.

Finally and perhaps most important, our culture and customs with respect to the police do not differ widely by state. Rather, they differ by whether a person lives in a city, suburb, or rural area, and whether the person lives in a house or an apartment, and particularly differ based on race.[251] Those who live in affluent suburbs may be more likely to invite the police onto their property than those who live in poorer city areas and have frequent and negative interactions with law enforcement. Thus, to the extent that courts must make modifications to trespass law to ensure fairness, it must do so based not on state identity but on these other factors.

Of course, strictly by necessity, the Fourth Amendment *does* incorporate local law in other contexts. In particular, it incorporates the underlying criminal law that the police seek to enforce.[252] In determining probable cause or reasonable suspicion, the police must weigh the suspect's conduct against some specific state or municipal criminal law. A police officer who smells marijuana emerging from a private home in Colorado will not have probable cause to search the premises since marijuana is now legal in Colorado.[253] The same officer might still have probable cause in other states that criminalize possession of even small amounts of the drug. But this argument need not detain us; probable cause by its very nature must advert to local law. The term "search" in the Fourth Amendment, by contrast, has always taken a uniform national meaning.

Ultimately, unifying the Fourth Amendment search test will not unify all police practices. The police will still remain subject to more restrictive state statutes or state constitutional provisions, local rules and regulations, precinct-specific mandates, and even local custom. Nevertheless, my proposed test will simplify at least one

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251. Richard Delgado, *Law Enforcement in Subordinated Communities: Innovation and Response*, 106 MICH. L. REV. 1193 (2008) ("many whites basically like and trust the police, while many minorities fear and distrust them") (citing RONALD WEITZER & STEVEN A. TUCH, RACE AND POLICING IN AMERICA: CONFLICT AND REFORM 1–6, 70–73 (Cambridge Univ. Press 2006).

252. Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143, 155–56 (2009).

253. Reg. Sess. HB 13-1317 (Colo. 2013).

area of potential inconsistency: the test and subsequent rules for a Fourth Amendment search.

C. *Uniform Federal Trespass*

Having assessed the significant drawbacks of trespass circa 1791 or the law of the individual states, we can begin to understand why a uniform federal law of trespass presents the best foundation for the Fourth Amendment. First, by drawing upon the majority state rule directly, the Court will remain rooted in a somewhat bright-line rule that will cabin discretion. Second, the majority state rule will by default incorporate the wisdom of state court judges and legislatures working out the best arrangements between property possessors and intruders, arrangements developed over years yet reflecting current culture. Third, courts have particular expertise in discerning the majority tort rule as announced by state statute or case law.[254]

In identifying state trespass law, the Court should draw, as it effectively did in *Jones* and *Jardines*, from the general civil trespass law that governs conduct between private citizens,[255] rather than any special trespass doctrine a state has developed for law enforcement. The former law, as a floor, will promote a kind of political neutrality on the question.[256] If two private citizens are largely in equal political bargaining positions, then courts or legislatures adjusting rights between them will be more likely to simply incorporate our ordinary cultural and customary norms *vis-a-vis* trespass.[257]

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254. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 109–10 (Little Brown & Co. 1881) (describing the development of the common law).

255. *See* Florida v. Jardines, 133 S. Ct. 1409 (2013); United States v. Jones, 132 S. Ct. 945 (2012). The Free Speech and Free Press Clauses provide a useful analogy. In *Cohen v. Cowles Media Co.*, the Court held that the media could be held liable under tort law of general applicability. 501 U.S. 663, 670 (1991). Similarly the Court has held laws of general applicability do not require strict scrutiny review even if they affect religious exercise. Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 885 (1990). Both cases illustrate the idea that if the rule applies equally to all there is less reason to believe its motive lies in attacking the content of speech or religion.

256. Richard A. Epstein, *How to Create—or Destroy—Wealth in Real Property*, 58 ALA. L. REV. 741, 750 (2007) ("If each person could enter the land of a neighbor at will, then each person could disrupt the gains that come from clearing the land, planting crops, or building structures."); *see also* Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 600 (2005); Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 2 (1960).

257. HOLMES, *supra* note 254, at 109–10.

The same holds true when private citizens and the government are given largely equal political bargaining positions. For example, it would be easy to imagine a state legislature carving out an exception from the normal trespass to chattel law to allow law enforcement to affix GPS devices upon cars, even without suspicion. If the Fourth Amendment were to draw upon this special trespass law tailored to law enforcement, states could diminish Fourth Amendment rights by creating law enforcement exceptions to any generally applicable trespass law. In contrast, if the court draws its Fourth Amendment trespass from generally applicable trespass rules, it will promote stability and avoid erosion of Fourth Amendment application. After all, legislatures are less likely to enact a general law allowing one individual to put a GPS device (or anything else) on another's property. Again, serving as a floor, such civil trespass rules should avoid at least some of the more contentious partisan disputes so pervasive in determining the right to exclude law enforcement.

My proposal draws from the majority rule of the states, usually state courts, and thus encapsulates the collective wisdom of the common law. But of course this use and description of the common law has its admirers and its critics. Some courts have extoled the collective wisdom of the common law[258] or its "genius."[259] Some scholars have likewise described and at times extoled the wisdom of the common law: stable enough to protect reliance and yet flexible enough to reflect change in society.[260] David Strauss in particular has sought to justify the constitutional jurisprudence of the Warren court as an example of common law constitutionalism, a "living constitution," reflecting the best features of the common law—doctrines rooted in tradition but modified to reflect current social and legal arrangements.[261]

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258. State *ex rel.* Sansone v. Wofford, 20 S.W. 236, 236 (Mo. 1892) ("Common law, the wisdom and propriety of which will not be questioned . . . ."); Christian v. Mills, 2 Walk. 130, 132 (Pa. 1885) ("That great fountainhead of wisdom, the common law . . ."). *But see* Clark v. Joiner, 530 S.E.2d 45, 48 (Ga. Ct. App. 2000) ("Whatever may have been the wisdom at common law . . . . A dog should have no greater right to a first bite than one has to a first murder.").

259. People v. Gersch, 553 N.E.2d 281, 287 (Ill. 1990) ("the evolutionary nature that is the genius of the common law"); In re Adoption of M.M.G.C., 785 N.E.2d 267, 270 (Ind. Ct. App. 2003) ("The strength and genius of the common law lies in its ability to adapt to the changing needs of the society it governs.").

260. HOLMES, *supra* note 254; David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 857–60 (2007) (extolling the common law's flexibility and simultaneous humility in building upon what has come before).

261. Strauss, *supra* note 260.

But many have also criticized common law jurisprudence, especially as adapted to constitutional jurisprudence. In his critique of Strauss' view, for example, Jack Balkin begins with a description of Strauss' rosy view of the common law, in which judges from 50 jurisdictions slowly develop the best rules by keeping "their ear to the ground," that is, based upon custom, which itself evolves rules based upon experience.[262] A common law rule emerges from these 50 jurisdictions, what Balkin calls "polling," representing the best of these decisions, a kind of percolation of wisdom.[263]

Balkin criticizes Strauss's rosy view as an inaccurate portrait of what the Court actually does.[264] Balkin argues that the Supreme Court neither polls nor has its ear to the ground.[265] The Court ignores actual custom and fails to consider what a majority of state courts actually do; rather, its constitutional jurisprudence amounts to a top-down approach, the Court atop a hierarchical federal system.[266] But, while criticizing Strauss, Balkin did not say that Strauss's rosy picture of the common law—polling and adoption of local custom—would be bad if true. Rather, he simply notes that the Court in its constitutional adjudication has not followed this aspirational procedure.[267]

Thus, Balkin's critique should not trouble us. Rather, it lends support to my claim. After all, I argue that the Court's current privacy regime suffers precisely the problems Balkin identified: a top-down approach in which the Court ignores actual custom, namely what people actually consider a reasonable expectation of privacy, and avoids what state courts actually decide under state privacy tort law, in favor of its own view of privacy. My proposal would return the Court to the precise source of law that both Strauss and Balkin apparently agree makes the most sense: polling the majority of state courts and legislatures on trespass questions. State

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262. Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. REV. 1129, 1137 (2012).

263. *Id.* at 1139.

264. *Id.* at 1139–40 (noting the fact that ultimately the Supreme Court's decisions are binding precedent that all lower courts must follow, minimizing the effectiveness of polling).

265. *Id.*

266. Balkin concludes that the living constitution really exists outside court decisions, in the growth and our culture, both in the world and the political culture among the other branches. Court decisions reflect the evolution of these other norms. *Id.* at 1153–60.

267. Balkin's version of a living constitution reflects popular will less through courts and more through other political branches and other institutions. *Id.*

courts and legislatures, in turn, have their ear to the ground, reflecting actual custom.

On the other hand, political judgments can infect even ordinary trespass questions between private citizens. States struggle with the politically contentious issue, for example, of defining when a person may use deadly force against a non-law enforcement intruder or co-occupant.[268] Nevertheless, the common law and legislative view of the 50 states on a rule of trespass should represent an improvement. That law *does* adapt and change as our mode of living changes, as can be seen by the proliferation of electronic trespass cases.[269] And it enjoys a better chance of neutrality and accord with our actual culture than the current privacy test as applied by the Court.

In addition to the foregoing general arguments, the Supreme Court has taken a very similar approach to that urged here in the analogous area of Section 1983 remedies, as well as in developing privileges in federal court, and in creating trespass law for Indian lands. Below I focus on the first two types.

1. Section 1983

Section 1983 provides a cause of action for a person to recover compensatory damages, nominal damages, and punitive damages from state officials who violate their constitutional rights.[270] The Court has repeatedly said that Section 1983 "creates a species of tort liability."[271] Though the underlying constitutional provision, such as the Free Exercise Clause or the Cruel and Unusual Punishment Clause, will provide the substantive rule of decision, the Court must often determine the appropriate remedy, such as whether punitive damages are available for a particular type of constitutional violation.[272]

In crafting a remedy, the Court has started with the most analogous common law tort. For example, in assessing when the

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268. *See, e.g.*, Weiand v. State, 732 So.2d 1044 (Fla. 1999) (no duty to retreat in home from co-occupant before using deadly force), *overruling* State v. Bobbitt, 415 So.2d 724 (Fla. 1982), *superseded by* FLA. STAT. § 776.013 (2014).

269. *See, e.g.*, McLeod v. Quest, 469 F. Supp. 2d 677, 703 (N.D. Iowa 2007) (electrons can trespass); Compuserve Inc. v. Cyber Promotions, Inc., 962 F.Supp. 1015, 1021 (S.D. Ohio 1997) (spammer's electronic signals are "sufficiently physically tangible to support a trespass cause of action"); Intel Corp. v. Hamidi, 71 P.3d 296, 309 (Cal. 2003) (former employee sending bulk email over plaintiff's servers not a trespass since did not impair server's functioning).

270. 42 U.S.C. § 1983 (2012); Monroe v. Pape, 365 U.S. 167, 168–69 (1961).

271. Carey v. Piphus, 435 U.S. 247, 253 (1978).

272. Smith v. Wade, 461 U.S. 30, 48–49 (1983).

constitutional right against unlawful seizure accrues for statute of limitations purposes, the Court has started with false imprisonment.[273] In determining whether a person may sue prosecutors for destroying exculpatory evidence despite a valid conviction, the Court has looked to the tort of malicious prosecution.[274] In developing absolute immunity for judges, prosecutors, and legislators, the Court has looked to the common law immunities these officials enjoyed.[275] In cases involving remedies such as punitive damages, however, the Court will still look to tort law but more specifically to the remedies available under tort law generally.[276]

Of course, in the case of Fourth Amendment violations for unlawful searches, the Court will start with the tort of trespass to land or chattel, as in *Jones*.[277] The big question comes when the Court must identify the source of this common law trespass. In the Section 1983 cases, the Court has largely drawn on the contemporary majority rule from the state courts, but the Court's procedure in this respect is far from clear since at other times it claims to rely upon the common law as it existed in 1871 when Section 1983 was enacted.[278]

In *Smith v. Wade*, for example, the Court addressed what mental state a defendant must have to warrant punitive damages for violating a prisoner's Eighth Amendment right.[279] In doing so, the Court considered the punitive damages rule under the common law of torts "both modern and as of 1871."[280] The Court did not say what it would do if these two sources conflict, in part because it managed to find they did not.[281] But significantly, when the Court did turn to contemporary tort law, it started its analysis with the Restatement (Second) of Torts, explained that "most" states had adopted the same rule, and then in a footnote provided a very long string citation of cases, most only a few years earlier.[282]

In other Section 1983 cases, the Court has continued to draw on contemporary tort law in fashioning remedies. Most recently in

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273. Wallace v. Kato, 549 U.S. 384, 388–89 (2007).
274. Heck v. Humphrey, 512 U.S. 477, 479, 484 (1994).
275. Imbler v. Pachtman, 424 U.S 409, 422–23 (1976).
276. *Wade*, 461 U.S. at 48–49.
277. United States v. Jones, 132 S. Ct. 945, 949 (2012).
278. *See, e.g.*, *Wallace*, 549 U.S. at 589–90.
279. *Wade*, 461 U.S. at 51.
280. *Id.* at 34.
281. *Id.*
282. *Id.* at 46–47, 48 n.13.

Wallace v. Kato, the Court relied not only upon cases from the late 1800s but also upon contemporary tort law treatises.[283]

Were the Court really to rely on the state tort law of 1871 when it conflicts with contemporary state tort law in fashioning a Section 1983 remedy, it would run into difficulties. In particular, it would find that it had chosen a remedy that fit appropriately into a legal regime that itself had changed. In fact, when the legal regime has changed, the Court has actually applied contemporary tort law even while claiming to apply the law of 1871.

For example, in *Heck v. Humphrey*, the Court addressed those who sought remedies for unconstitutional convictions, and the rule it established only makes sense in the larger context of contemporary state law trials and appeals.[284] In *Heck*, a state prisoner sued under Section 1983 claiming his conviction was unconstitutional—not seeking release from prison as under a habeas petition but seeking money damages.[285] The Court admitted Section 1983 would literally permit such an attack but held that if the plaintiff were successful, it would undermine the validity of his conviction.[286] It therefore held that a person may sue under Section 1983 only if his conviction had been reversed on appeal or otherwise nullified.[287] It drew this rule from the tort law of malicious prosecution, which required as a prerequisite that the criminal proceeding had "terminated" in favor of the accused.[288]

Under contemporary tort law, "terminated" in favor of the accused would include reversal on appeal and other methods of nullifying the conviction, such as pardon, consistent with the Court's holding. But as Justice Souter pointed out in concurrence, the tort of malicious prosecution in 1871 defined "terminated" as acquittal *only*.[289] A reversal on appeal did not suffice to permit a malicious prosecution lawsuit on the theory that the initial conviction demonstrated that the prosecutor had at least probable cause.[290] This narrow definition of "terminated" shows that the majority could

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283. 549 U.S. 384, 389–90 (2007).

284. 512 U.S. 477, 486–87 (1994) (holding that to recover damages for unconstitutional conviction or imprisonment under Section 1983, a plaintiff must prove that the conviction has been overturned, expunged, declared invalid, or "called into question" by the issuance of a writ of habeas corpus).

285. *Id.* at 479.

286. *Id.* at 486–87.

287. *Id.* at 489.

288. *Id.* at 486–87.

289. *Id.* at 492 (Souter, J., concurring).

290. *Id.* at 496.

not have been relying on tort law circa 1871 because that law would disallow the very remedy its holding recognized.[291]

Heck therefore stands for a bigger principle: times have changed and we have discovered, for example, that prosecutors sometimes withhold exculpatory evidence.[292] If the exculpatory evidence is significant enough, it could undermine not only the conviction but also probable cause at the outset. In other words, in such cases a conviction would *not* necessarily establish that the prosecutor had probable cause. As a consequence, it now makes sense for a person to have the right to sue for malicious prosecution based upon a reversal as well as an acquittal, and the Court was right to adopt this modern rule for Section 1983 litigation. It simply reflects our contemporary legal system, which includes *Brady* requirements.

Thus, even though some Section 1983 cases have used, or purported to use, the tort law of both today and 1871, when times had wrought such change as to render the 1871 rule obsolete, the Court, silently, used the contemporary rule. The same principle applies to developing a rule of trespass for the Fourth Amendment: we should rely upon the contemporary law of trespass rather then that of 1791 since the contemporary rule reflects contemporary arrangements and rights between people.

In addition, the Section 1983 cases also support drawing on the majority state law rule as opposed to the law of any individual states. In all of the above cases, the Court sought to discover what most courts did. One exception exists: when the Court assesses the appropriate statute of limitations for a Section 1983 action, it *does* draw upon the specific state rule.[293] However, even when the Court determines when the cause of action *accrued*, it will point to general state tort law principles, relying particularly on the Restatement.[294]

Finally, the Section 1983 cases also support using a two-step process. That is, once the Court has determined the closest analogous state law rule, it then ensures that rule conforms to the federal goals of the underlying constitutional right.[295] Thus in *Smith*

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291. *Id.* at 486–87 (majority opinion).

292. Connick v. Thompson, 131 S. Ct. 1350, 1357 (2011) (prosecutors admitted they failed to disclose exculpatory lab report leading Thompson to be imprisoned unjustly for 18 years); Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order at 12, United States v. Theodore F. Stevens, Case 1:09-mc-00198-EGS, (D.D.C. Mar. 15, 2012) ("The investigation and prosecution of U.S. Senator Ted Stevens were permeated by the systematic concealment of significant exculpatory evidence . . . .").

293. Wallace v. Kato, 549 U.S. 384 (2007).

294. *Id.* at 388.

295. Smith v. Wade, 461 U.S. 30, 47–48 (1983) (Court develops damages remedy

v. Wade, for example, the Court found that the underlying state tort rule allowed punitive damages not only for intentionally malicious conduct but also for reckless conduct.[296] In step two of the analysis, the Court determined whether a reckless standard comported with the federal purposes of Section 1983 and found that it did.[297] Both the state tort law of punitive damages and Section 1983 had, as their goals, to deter and punish. That, pretty much, answered the second inquiry.[298]

In surveying the Section 1983 cases, I seek only inspiration, not outright copying. Each area of jurisprudence has its own context and requirements; the remedies the Court fashions in each track those contexts. Jennifer Laurin has shown, for example, that the Court has developed different remedies for a *Brady* violation when it comes in the context of a criminal trial or appeal versus a Section 1983 action: in the former, the defendant needs to show the evidence withheld was materially exculpatory, whereas in a civil action he must also show some fault on the part of the prosecutor who withheld the evidence.[299]

In the Fourth Amendment context, a civil plaintiff bringing a Section 1983 action will face both similarities and differences when it comes to remedies. The similarities in Fourth Amendment law are striking: in both situations the court will apply the same good-faith exception.[300] In the civil context, courts call it qualified immunity, and in the exclusionary rule context, courts refer to is as the good-faith exception. But the Court has recently held they are the same.[301] Trespass is *already* a civil action, it bears a special relationship to the Fourth Amendment in history and precedent, and as we have shown above, it provides a useful test as a matter of policy. Once we have decided to use trespass as the test for a Fourth Amendment search, we have almost by definition made it closely analogous to Section 1983 actions.[302] Indeed, a recent lawsuit

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for Eighth Amendment based on common law principles adapted if necessary to policies and principles underlying Section 1983); Carey v. Piphus, 435 U.S. 247, 256–58 (1978) (courts must sometimes adapt common law remedy to the constitutional right at issue).

296. *Id.*

297. *Id.* at 51.

298. *Id.* at 54.

299. Jennifer E. Laurin, *Rights Translation and Remedial Disequilibration in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1018–19 (2010).

300. Messerschmidt v. Millender, 132 S. Ct. 1235, 1239 (2012) (Section 1983 qualified immunity same as exclusionary rule good-faith immunity).

301. *Id.*

302. But some differences will remain. Once a defendant has shown an officer

against the police for unlawful search of a home applied the same standard and exceptions for both the state trespass claim as well as the Section 1983 claim.[303]

2. Evidentiary Privileges

Federal courts often use a similar two-step process in recognizing or rejecting any particular testimonial privilege, and this two-step process emerges somewhat directly from the underlying rule of evidence. In particular, Rule 501 of the Federal Rules of Evidence allows courts to develop federal rules of privilege based upon "the common law" in light of "reason and experience."[304] In some cases, the Court starts with the majority rule of the states and then determines whether "reason and experience" counsel a different result. In *Swidler v. Berlin*, for example, the Court noted that most states recognize that the attorney-client privilege survives death, and "reason and experience" provide no reason the privilege in federal court should deviate.[305]

On the other hand, some cases rely in large part on the reason and experience prong. For example, in *Jaffee v. Redmond*, the Court faced whether to recognize a federal privilege for client-therapist communications.[306] It rested primarily upon the strong need patients have for the privilege and the modest incursion upon admissible evidence the privilege would produce.[307] A simple cost-benefit analysis supported the privilege.[308] It then looked to the states, noting that all 50 recognized the privilege, not as a source of law but rather as evidence that the privilege accorded with reason and experience.[309] In other words, the Court thought the privilege made sense.[310]

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violated the Fourth Amendment and that the violation does not fall under a good-faith exception, the court will exclude the evidence. In the civil context the person must still figure out whom to sue and get past barriers other than good-faith immunity depending upon the context. Nevertheless, in the run-of-the-mill state case, a person will have a cause of action under Section 1983 against the officer who violated his Fourth Amendment right to a surprisingly similar degree as he will in the exclusionary rule context.

303. Walker v. Jackson, 952 F. Supp. 2d 343, 349, 353 (D. Mass. 2013).

304. Rule 501 requires courts to apply the state law of privilege when state law provides the rule of decision. FED. R. EVID. 501.

305. 524 U.S. 399, 404 (1998).

306. 518 U.S. 1, 4 (1996).

307. *Id.* at 11–12.

308. *Id.*

309. *Id.* at 12, n.11. In *United States v. Jicarilla Apache Nation* the Court did examine the common law but concluded the facts in the case before it did not fit

The method in *Jaffee* does not commend itself as a pattern for developing a law of Fourth Amendment trespass because it gives too much discretion to judges to make free-ranging inquiries based on "reason and experience."[311] Such discretion suits Rule 501 because judges should have wide discretion in determining which evidence should be admitted at trial.[312] In developing Fourth Amendment trespass, by contrast, judges do not exercise a supervisory function over a court's procedure but rather seek to develop, in a politically contentious context, a substantive constitutional rule defining "search." True, a violation of the Fourth Amendment will implicate what evidence the court can admit at trial, but the question of whether the Fourth Amendment even applies comes before any evidentiary question of exclusion. Thus, in developing Fourth Amendment trespass, courts should follow the model of *Swidler v. Berlin*, anchoring the decision in actual state law and avoid the perils that might arise from a free-ranging inquiry permitted in *Jaffe*.[313]

D. *Step Two—Modification*

After the Court has ascertained the appropriate state trespass rule in step one, it must conform that rule to the text and purposes of the Fourth Amendment in step two.

Two such modifications are easy and apply in every case. First, only trespasses to enumerated areas count;[314] a trespass to fields will not.[315] Thus, if the police enter a person's farmlands around a locked gate with "No Trespassing" signs posted, that undoubted trespass under any law would not implicate the Fourth Amendment, and they can seize the marijuana they find. The farmland, as an open field, does not enjoy *any* Fourth Amendment protection because it is not a house, person, paper, or effect.[316]

Second, to be a "search" even under plain meaning, the trespass must be in order to obtain information.[317] In both *Jones* and

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under that rule, based on, apparently, reason and experience. 131 S. Ct. 2313, 2329–30 (2011).

310. *Jaffe*, 518 U.S. at 15–16.

311. *Id.* at 18.

312. *E.g.*, Trammel v. United States, 445 U.S. 40, 47 (1980) (noting Congress' desire not to freeze privileges but to allow courts to develop them).

313. *Compare* Swidler v. Berlin, 524 U.S. 399 (1988) *with Jaffe*, 518 U.S. 1.

314. U.S. CONST. amend. IV; United States v. Jones, 132 S. Ct. 945, 950 (2012).

315. Hester v. United States, 265 U.S. 57, 59 (1924).

316. United States v. Oliver, 466 U.S. 170, 182–84 (1984); *Hester*, 265 U.S. at 59.

317. United States v. Jones, 132 S. Ct. 945, 951 (2012).

Jardines, for example, the police trespassed in order to obtain information.[318] In *Jones*, they sought Jones' location;[319] in *Jardines*, they sought to determine if the smell of marijuana emerged from the home.[320] On the other hand, if the police trespass upon any empty house to seek shelter, for example, this trespass will not count as a search because the police do not seek information.

Beyond these straightforward examples of modification, the Court may face others that are more difficult. For example, the Court in *Jardines* created enhanced protections for those who live in houses with a front porch or curtilage: the police may not enter these areas with drug-sniffing dogs.[321] How does that holding apply to apartment buildings or public housing? Ordinary trespass principles may permit police intrusion into common hallways with drug sniffing dogs.[322] But to hold such intrusions do not count as searches would provide more Fourth Amendment protection to those who live in houses compared to those who live in public housing—an undesirable result.[323] The Court might modify the ordinary trespass rule to harmonize with the house situation.[324]

CONCLUSION

The Court's new Fourth Amendment trespass test announced two years ago in *United States v. Jones* shows great promise. This article has illustrated how trespass can create a more certain and bright-line barrier against police intrusion than the more easily manipulated privacy test. But that certainty can only occur if we also establish a clear rule for ascertaining the appropriate trespass rule—a task the Supreme Court has almost entirely neglected in its

318. *See id.*; Florida v. Jardines, 133 S. Ct. 1409 (2013).

319. *Jones*, 132 S. Ct. at 948.

320. *Jardines*, 133 S. Ct. at 1413.

321. *Id.* at 1414.

322. People v. Graves, 555 N.E.2d 268, 270 (N.Y. 1990) (no trespass if area open to the public); People v. Brown, 254 N.E.2d 755, 756–57 (N.Y. 1969) (same).

323. United States v. Jackson, 728 F.3d 367, 373–37 (4th Cir. 2013) (holding no trespass and therefore no Fourth Amendment search under *Jardines* where police entered common area of apartment complex to search trash can).

324. On the other hand, the Court may be able to find a trespass under ordinary trespass principles after all, without the need for modification. The Court could find, for example, that the police trespass upon the chattel of an apartment-dweller's door simply by knocking on it, a technical trespass that actually represents important substantive protections, erecting the same zone of security and repose that a front yard does.

conflicting cases: *United States v. Jones* and the more recent decision of *Florida v. Jardines*.

This article has not only defended a trespass test but also, for the first time, proposed a clear methodology for courts in determining which trespass law should apply in Fourth Amendment cases. In particular, it proposed a two-step process motivated by the Court's Section 1983 jurisprudence. First, courts should identify the majority state law trespass rule, and second, they should conform that rule to the text and purpose of the Fourth Amendment.

Trespass, though an ancient cause of action, embodies the straightforward physical security in our persons, houses, papers, and effects also protected by the Fourth Amendment. In an age of advancing remote surveillance and data collection, an age increasingly turning the Fourth Amendment into a grand theory of privacy, trespass reminds us of basic protections against the government that remain critical. Trespass, within its realm, offers to provide firmer and more certain protection for all Fourth Amendment values, including privacy itself. Outside its realm, in the world of remote surveillance lacking trespass, courts will continue to rely upon the reasonable expectation of privacy test.

Courts will have to develop more fully a Fourth Amendment law of trespass; this article represents only a first step in that direction. Courts will have to take up Justice Scalia's hint in *Jardines* that an officer's purpose matters in determining whether an intrusion counts as a trespass and therefore a Fourth Amendment search. This recognition that purpose matters could alter the course of many Fourth Amendment cases. Moreover, trespass returns Fourth Amendment analysis to the physicality of police intrusions, better capturing the harm of such police practices as stop and frisk, or warrantless arrests in a person's doorway or porch.