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ARTICLE

UNITED STATES V. JONES: REVIVING THE PROPERTY FOUNDATION OF THE FOURTH AMENDMENT

*Herbert W. Titus & William J. Olson**

On January 23, 2012, in *United States v. Jones*,¹ the United States Supreme Court handed down the surprisingly unanimous opinion that the warrantless attachment of a GPS tracking device to a private automobile violated the Fourth Amendment.

Just four months prior, following a moot court proceeding conducted at the William and Mary School of Law's annual Supreme Court Preview, a panel of distinguished lawyers, journalists, and law professors voted almost unanimously that, based on current Supreme Court precedent, there was no such violation. How could the panel, said to be selected from the "nation's leading legal scholars . . . [and] lawyers who have argued a combined total of more than 200 cases before the Court,"² have been so wrong? Doubtless the participants

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¹ 132 S.Ct. 945 (2012).

² Institute of Bill of Rights Law, *IBRL Hosts Annual Supreme Court Preview Sept. 23-24*, WILLIAM & MARY LAW SCHOOL (Sept. 20, 2011),

read the U.S. Court of Appeals for the D.C. Circuit panel's August 6, 2010 opinion that favored Mr. Jones, certainly they were privy to the winning arguments that Jones had made before that court,³ and no doubt they had the benefit of the exchange of opinions in the court of appeals which had denied the Government's motion for a rehearing.⁴

Perhaps more importantly, available to the moot court participants was the Government's petition seeking Supreme Court review, and Jones's Response. In its petition, the Government presented only one question for decision: "Whether the warrantless **use** of a tracking device on [respondent's] vehicle to monitor its movements on public streets violated the Fourth Amendment."⁵ The Jones response presented two issues, the first of which was only a more detailed variation of the question presented by the Government. The second question, however, was new: "Whether the government violated respondent's Fourth Amendment rights by **installing** the GPS tracking device on his vehicle without a valid warrant and without his consent."⁶

I. THE SUPREME COURT DEFINES THE ISSUE AT THE PETITION STAGE: PROPERTY, NOT JUST PRIVACY

Jones's claim that the installation of the GPS tracking device was an unreasonable search because the Government agents had trespassed

<http://law.wm.edu/news/stories/2011/ibrl-hosts-annual-supreme-court-preview-sept-23-24.php>.

³ See *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), *reh'g en banc denied sub nom. United States v. Jones*, 625 F.3d 766 (D.C. Cir. 2010). The Court of Appeals decision also resolved the appeal of Lawrence Maynard, a co-defendant of Mr. Jones in the conspiracy case, whose conviction was upheld. The panel consisted of the opinion's author, Judge Douglas H. Ginsburg (appointed by President Ronald Reagan), Judge David S. Tatel (appointed by President Bill Clinton), and Judge Thomas B. Griffith (appointed by President George W. Bush). *Biographical Directory of Federal Judges*, UNITED STATES COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.aspx> (last visited Apr. 10, 2012).

⁴ The United States' Petition for Reconsideration and the Jones opposition brief was appended to the Government's Petition for Certiorari. See Petition for Writ of Certiorari, Appendix at 45a-52a, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 1462758. Although the petition for rehearing *en banc* was denied, Chief Judge David B. Sentelle and Circuit Judges Janice Rogers Brown and Brett M. Kavanaugh would have granted the petition. *Jones*, 625 F.3d at 767.

⁵ Petition for Writ of Certiorari, *supra* note 4, at 1 (emphasis added).

⁶ Brief in Opposition to Petition for Writ of Certiorari at i, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 2263361 (emphasis added). Jones's counsel Stephen C. Leckar, Esq. recruited former acting Solicitor General Walter Dellinger to join him as co-counsel on the briefs at both the petition and merits stages, but Mr. Leckar argued the case for Mr. Jones on November 8, 2011.

onto Jones's private property was only briefly sketched out in the last page and a half of Jones's response brief. However, Jones expressly asked the Court to "also grant review of th[is] alternative argument [which] Jones raised in the D.C. Circuit . . . that the court had no occasion to resolve."⁷ The question whether the installation itself was constitutional, Jones contended, turned on a "'property-based Fourth Amendment argument' . . . antecedent to the question on which the government seeks review."⁸ In support, Jones cited D.C. Circuit Court Judge Kavanaugh who, in dissent to the court of appeals' denial of the Government's petition for a rehearing, had stated that the Fourth Amendment "'protects property as well as privacy,'"⁹ and that the property issue was "'an important and close question.'"¹⁰ The Government's Reply Brief gave even less attention to Jones's second issue, rejecting out of hand the notion that installation could be a search or a seizure, and never even mentioning the word property.¹¹

Despite only passing consideration of this "property-based" Fourth Amendment question from the parties, the Supreme Court had the benefit of an *amicus* brief urging the Court that, if it were to grant the petition, it should do so because the case presented "a historic opportunity to reconsider the rationale for its current Fourth Amendment jurisprudence based upon reasonable privacy expectations, and to restore its earlier Fourth Amendment jurisprudence based upon protecting both the sanctity of private property and the civil sovereignty of the people."¹² In short, the *amicus* brief urged the Court to discard the modern "reasonable expectation of privacy" test, and re-

⁷ *Id.* at 33.

⁸ *Id.*

⁹ *Id.* (quoting *Soldal v. Cook Cnty.*, 506 U.S. 56, 62 (1992)).

¹⁰ Brief in Opposition to Petition for Writ of Certiorari at 33, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 2263361.

¹¹ Reply Brief for the United States at 9-11, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 2326714, http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1259_petitionerreply.authcheckdam.pdf.

¹² Brief for Gun Owners of America, Inc. et. al. as Amici Curiae on Petition for Writ of Certiorari Supporting Neither Party at 3, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 1881813, http://www.lawandfreedom.com/site/constitutional/USvJones_amicus.pdf (This *amicus curiae* brief, the only such brief filed at the petition stage, was filed on behalf of neither party, rejecting Jones's position that the Petition should not be granted, and significantly differing with the Government's position as to why review should be granted. The other amici on the brief were Gun Owners Foundation, Institute on the Constitution, Restoring Liberty Action Committee, U.S. Justice Foundation, Conservative Legal Defense and Education Fund, Free Speech Coalition, Inc., Free Speech Defense and Education Fund, Inc., DownsizeDC.org, Downsize DC Foundation, and Lincoln Institute for Research and Education). *Id.*

turn the Fourth Amendment to the textual and historic protection of private property.¹³ On June 27, 2011, the Supreme Court granted the Government's petition and, in addition, directed the parties "to brief and argue" the property issue sought by Jones in his Brief in Opposition.¹⁴

At the William and Mary moot court proceeding, the arguments of counsel, questions posed by the court, and the court's explanation of its decision all presumed that the case would be decided by application of the Court's privacy test to the Government's first issue. However, that was not to be the basis on which the *Jones* case would be decided.

II. THE TREATMENT OF THE PROPERTY ISSUE AT THE MERITS STAGE

The property question—the second issue on which *certiorari* had been granted—was addressed, after a fashion, in both parties' briefs on the merits. The Government's opening brief trivialized the installation of the tracking device as neither a search nor a seizure—a meaningless interference with Jones's "possessory interest in [his] vehicle."¹⁵ The Government mentioned the word "property" three times in its four page analysis.¹⁶ Jones's Brief for Respondent stressed his common law right to exclude others from any interference with his possessory interest.¹⁷ The Government replied: "[w]hile the GPS device was in place, respondent remained free to use his vehicle however he wanted. He went where he wanted, he transported anyone and anything he wanted, and none of the operational systems of the vehicle were affected in any way."¹⁸

Despite this one exchange, and Jones's discussion of property interests generally, Jones's property claim did not play a major role in either party's merits brief. Rather, both parties were understandably preoccupied with winning their case under established Supreme Court

¹³ See *Id.* at 7-23.

¹⁴ U.S. Supreme Court Docket, *Jones*, 132 S. Ct. 945 (No. 10-1259).
<http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1259.htm>.

¹⁵ Brief for Petitioner at 39, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 3561881.

¹⁶ Brief for Petitioner at 42-46, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 3561881.

¹⁷ Brief for Respondent at 47-48, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 4479076.

¹⁸ Brief for Petitioner at 18, *Jones*, 132 S. Ct. 945 (2012) (No. 10-1259), 2011 WL 3561881.

Fourth Amendment jurisprudence—whether the GPS tracking device infringed upon Jones’s reasonable expectation of privacy.

Such was also the case in all but three of the thirteen *amicus curiae* merits briefs filed. Ten of those briefs focused almost exclusively upon the Fourth Amendment privacy test.¹⁹ Only three, filed by the Fourth Amendment Historians, the Constitution Project, and Gun Owners of America, addressed Jones’s property claim as a substantial one.²⁰ Of these three, only the Gun Owners of America brief urged the revival of the Fourth Amendment text as one designed to protect the people’s private property, rejecting the Court’s revisionist “reasonable expectation of privacy” test.²¹

It came as no surprise that, at oral argument, counsel for the Government began with a citation to *Katz v. United States*,²² the seminal modern Fourth Amendment privacy case, stating “that visual and beeper surveillance of a vehicle traveling on the public roadways infringed no Fourth Amendment expectation of privacy.”²³ What was surprising, however, was how quickly the property question came into play. Just minutes after Government counsel had come to the podium,

¹⁹ Brief for ACLU & ACLU of the Nation’s Capital as Amici Curiae Supporting Respondent, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 4802713; Brief for CATO Inst. as Amicus Curiae Supporting Respondent, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 4614426; Brief for Ctr. on the Admin. of Crim. Law as Amicus Curiae Supporting Petitioner, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 3706106; Brief for Ctr. for Democracy & Tech. et al. as Amici Curiae Supporting Respondent, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 4590838; Brief for Council on Am.-Islamic Relations as Amicus Curiae Supporting Respondent, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 4614428; Brief for Elec. Privacy Info. Ctr. & Legal Scholars and Technical Experts as Amici Curiae Supporting Respondent, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 4564007; Brief for Nat’l Ass’n of Crim. Def. Lawyers et al. as Amici Curiae Supporting Respondent, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 4614427; Brief for Owner-Operator Indep. Drivers Ass’n, Inc. as Amicus Curiae Supporting Respondent, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 4614423; Brief for Rutherford Inst. & Nat’l Motorists Ass’n as Amici Curiae Supporting Respondent, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 4826981; Brief for Yale Law Sch. Info. Soc’y Project Scholars as Amicus Curiae Supporting Respondent, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 4614429.

²⁰ See Brief for Constitution Project as Amicus Curiae Supporting Respondent, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 4614424; Brief for Fourth Amendment Historians as Amicus Curiae Supporting Respondent, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 4642657; Brief for Gun Owners of America, Inc. et al. as Amici Curiae Supporting Respondent, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 4590837.

²¹ See Brief for Gun Owners of America, Inc. et al. as Amici Curiae Supporting Respondent at 8-34, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 4590837.

²² 389 U.S. 347 (1967).

²³ Transcript of Oral Argument at 3, *Jones*, 132 S. Ct. 945 (No. 10-1259), http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1259.pdf.

Justice Scalia interrupted with a revealing historical “prologue” to a simple question:

[W]hen wiretapping first came before this Court, we held that it was not a violation of the Fourth Amendment because the Fourth Amendment says that the . . . people shall be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. And wiretapping just picked up conversations. That’s not persons, houses, papers and effects.

Later on, we reversed ourselves, and, as you mentioned, **Katz** established the new criterion, which is, is there an invasion of privacy? Does -- are you obtaining information that a person had a reasonable expectation to be kept private? I think **that was wrong. I don’t think** that was the **original meaning** of the Fourth Amendment. But nonetheless, it’s been around for so long, we’re not going to overrule that.

However, it is one thing to **add** that privacy concept to the Fourth Amendment as it originally existed, and it is quite something else to use that concept to **narrow** the Fourth Amendment from what it originally meant. And it seems to me that when that device is installed against the will of the owner of the car on the car, that is unquestionably a **trespass** and thereby rendering the owner of the car not secure in his effects -- the car is one of his effects -- against an unreasonable search and seizure. It is attached to the car against his will, and it is a search because what it obtains is the location of that car from there forward. Now, why -- why isn’t that correct? Do you deny that it’s a trespass?²⁴

Government’s counsel readily admitted that “[i]t may be a technical trespass,” but that “the purpose of the Fourth Amendment is to protect privacy interests and meaningful interferences with possessory interests, not to cover all technical trespasses.”²⁵ To which, Justice Scalia responded: “So . . . the privacy rationale doesn’t expand [the Fourth Amendment] but narrows it in some respects.”²⁶ Fudging the question, counsel replied: “It changes it.”²⁷

Just as quickly as the property/privacy issue arose it disappeared, as the Government counsel and various members of the Court wres-

²⁴ Transcript of Oral Argument, *supra* note 23, at 6-7 (emphasis added).

²⁵ Transcript of Oral Argument, *supra* note 23, at 7, 8.

²⁶ Transcript of Oral Argument, *supra* note 23, at 8.

²⁷ Transcript of Oral Argument, *supra* note 23, at 8.

tled with the contours of the Court's privacy test in a search for principled limitations on the use of modern technological developments.²⁸ Although the property issue reappeared at various times in the dialogue between Jones's counsel and the Court,²⁹ Jones's property claim failed to come to focus as it had with Government counsel. Nor did the property issue reappear during Government counsel's rebuttal.³⁰ Indeed, a reading of the transcript might give rise to the impression that the Court would probably stay the course, assessing the constitutionality of the GPS tracking device by the *Katz* privacy test, not by a revitalized private property one. Not surprisingly, in his recap of the oral argument, Lyle Denniston, a seasoned legal reporter now with SCOTUSblog, saw absolutely no chance for the case to be decided on the theory that the installation of the GPS tracking device was a trespass upon private property of the kind forbidden by the Fourth Amendment.³¹

III. THE SUPREME COURT REVITALIZES THE FOURTH AMENDMENT PRIVATE PROPERTY PRINCIPLE

Just two and one-half months after oral argument, the Supreme Court announced its decision. Although all nine Justices voted in favor of Jones, the Court was divided five to four on the reasons why.

Sticking with the modern, *Katz*-based "reasonable expectation of privacy" rationale, four Justices found in favor of Jones because "a reasonable person would not have anticipated" the "degree of intrusion" found here: "four weeks . . . track[ing] every movement that respondent made in the vehicle he was driving."³²

The concurring Justices candidly recognized that they could not draw a firm line as to when GPS tracking would cross over the constitutional privacy line. Indeed, they acknowledged that their test was "not without . . . difficulties," and "involves a degree of circularity," which tempted "judges . . . to confuse their own expectations of priva-

²⁸ See generally Transcript of Oral Argument, *supra* note 23, at 9-11.

²⁹ See, e.g., Transcript of Oral Argument, *supra* note 23, at 28, 30, 36.

³⁰ See generally, Transcript of Oral Argument, *supra* note 23, at 57-61.

³¹ Lyle Denniston, *Argument recap: for GPS, get a warrant*, SCOTUSBLOG (Nov. 8, 2011, 2:12 PM), <http://www.scotusblog.com/?p=131423> (noting that Jones's attorney seemed "to get bogged down, at least early in his argument, on whether the police had engaged in a 'trespass' simply by putting the device on the vehicle in the first place. Most of the members of the Court were not notably impressed with seeing the case through that perspective.").

³² *United States v. Jones*, 132 S. Ct. 945, 964 (2012) (Alito, J., Ginsburg, J., Breyer, J., and Kagan, J., concurring).

cy with those of the hypothetical reasonable person to which the *Katz* test looks.”³³

What appeared to unite the four concurring Justices was not a preference for the *Katz* test, but their anathema toward the private property-based majority opinion, accusing their colleagues of “decid[ing] this case based upon 18th-century tort law” for conduct that might have given rise to “a suit for trespass to chattels.”³⁴

Justice Scalia’s majority opinion met this sharp critique head-on:

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**. The concurrence does not share that belief. It would apply *exclusively* *Katz*’s **reasonable-expectation-of-privacy test**, even when that **eliminates rights that previously existed**.³⁵

This exchange reveals that the five-member majority did not subscribe to its opinion solely to dispose of the case before them (unlike the concurring opinion), but to take a first step toward restoring the Court’s Fourth Amendment jurisprudence to its textual and historic foundation—a foundation rooted in the common law of private property.³⁶ On this point, Justice Scalia and his four colleagues were adamant; after quoting the Fourth Amendment, Justice Scalia observed:

The text of the Fourth Amendment reflects its **close connection to property**, since otherwise it would have referred simply to “the right of the people to be secure against unreasonable searches and seizures”; the phrase “in their persons, houses, papers, and effects” would have been superfluous.³⁷

Immediately preceding this textual analysis, Justice Scalia appealed to history. Citing *Entick v. Carrington*,³⁸ as quoted in *Boyd v. United States*,³⁹ and as affirmed in *Brower v. County of Inyo*,⁴⁰ Justice

³³ *Id.* at 962.

³⁴ *Id.* at 957.

³⁵ *Id.* at 953 (italics original, bold added).

³⁶ For a discussion of Fourth Amendment foundational principles and their emphasis on property rights, see Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593, 1606-07 (1987).

³⁷ *Jones*, 132 S. Ct. at 949 (emphasis added).

³⁸ *Entick v. Carrington* (1765), 95 Eng. Rep. 807 (K.B.).

³⁹ *Boyd v. United States*, 116 U.S. 616 (1886).

Scalia declared *Entick* to be a “‘monument of English freedom’ . . . with regard to . . . the significance of property rights in search-and-seizure analysis”⁴¹ Justice Scalia went on to quote from that decision to say:

“[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbor’s close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbor’s ground, he must justify it by law.”⁴²

In her separate concurrence, Justice Sotomayor (who also joined wholeheartedly with the majority) emphasized the doctrinal significance of the majority’s fresh textual and historic commitment:

Justice Alito’s approach, which discounts altogether the constitutional relevance of the Government’s physical intrusion on Jones’ Jeep, erodes that longstanding protection for **privacy expectations inherent in items of property** that people possess or control. . . . By contrast, the **trespassory test** applied in the majority opinion reflects an **irreducible constitutional minimum**: When the Government physically invades personal property to gather information, a search occurs.⁴³

Having established the property principle as the base standard by which claims of search and seizure under the Fourth Amendment are to be measured, Justice Scalia turned to the role that the *Katz* reasonable-expectation-of-privacy test was to play in the future. First, he noted that the test cannot “narrow the Fourth Amendment’s scope.”⁴⁴ Next, he explained why: “The *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.”⁴⁵ Thus, Justice Scalia’s approach—in contrast to the way Justice Alito portrays it—would apply **both** the *Katz* reasonable-expectation-of-privacy test and the rekindled trespassory test.

⁴⁰ *Brower v. Cnty. of Inyo*, 489 U.S. 593, 597 (1989).

⁴¹ *Jones*, 132 S. Ct. at 949.

⁴² *Id.* (quoting *Entick*, 95 Eng. Rep. at 817).

⁴³ *Jones*, 132 S. Ct. at 955 (Sotomayor J., concurring) (emphasis added).

⁴⁴ *Id.* at 951.

⁴⁵ *Id.* at 952. Justice Sotomayor characterized the majority’s approach as claiming that “*Katz*’s reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it.” *Id.* at 955 (Sotomayor J., concurring).

IV. PROPERTY PRINCIPLES PLUS JUDICIAL EXPEDIENCY

Rather than expressing concern that the *Jones* majority's originalist trespassory theory was too broad, Justice Alito feared it would provide no Fourth Amendment protection against "long-term monitoring [if it] can be accomplished without committing a technical trespass . . ."⁴⁶ Of special concern was the "vexing problems in cases involving surveillance that is carried out by making electronic, as opposed to physical, contact with the item to be tracked"⁴⁷:

Would the sending of a **radio signal** to activate this system constitute a trespass to chattels? Trespass to chattels has traditionally required a physical touching of the property. In recent years, courts have wrestled with the application of this old tort in cases involving unwanted electronic contact with computer systems, and some have held that even the **transmission of electrons** that occurs when a communication is sent from one computer to another is enough. But may such decisions be followed in applying the Court's trespass theory? Assuming that what matters under the Court's theory is the law of trespass as it existed at the time of the adoption of the Fourth Amendment, do these recent decisions represent a change in the law or simply the application of the old tort to new situations?⁴⁸

Apparently for this reason, the four concurring justices opted for the "Katz expectation-of-privacy" as the sole Fourth Amendment test,⁴⁹ relegating "existence of a property right [as] but one element in determining whether expectations of privacy are legitimate."⁵⁰ While not completely confident that this privacy test would be effective in protecting privacy in a changing technological world, Justice Alito was convinced that the majority's property-based approach certainly would not.⁵¹

According to both Justices Scalia and Sotomayor, however, the majority's trespassory test does not displace the *Katz* privacy test, the

⁴⁶ *Id.* at 961 (Alito, J., concurring).

⁴⁷ *Id.* at 962.

⁴⁸ *Jones*, 132 S. Ct. at 962 (emphasis added) (citations omitted).

⁴⁹ *Id.*

⁵⁰ *Id.* at 960 (quoting *Oliver v. United States*, 466 U.S. 170, 183 (1984)).

⁵¹ *See Jones*, 132 S. Ct. at 962–64.

latter having been “added to, not substituted for, the common law trespassory test.”⁵² Thus, both Justices contradicted Justice Alito’s assumption that the majority’s trespassory test would preclude utilization of the *Katz* test where electronic surveillance was conducted without physical trespasses on a person’s property.⁵³ To be sure, Justice Scalia’s opinion acknowledges that *Katz* “deviated from [previous Court opinions’] exclusively property-based approach”⁵⁴ but that does not mean that it “deviated” from the Fourth Amendment text. To the contrary, Justice Scalia makes it clear that he finds the *Katz* holding⁵⁵ to be consistent with the text, namely, “that the Fourth Amendment protects persons and their private conversations”⁵⁶ What concerned Justice Scalia about *Katz* was that its test,⁵⁷ while derived from the property-based text, could be applied to narrow the Fourth Amendment’s protection.⁵⁸ Hence, the *Jones* opinion is designed as a corrective adjustment to ensure that the privacy test does not stray from the “minimum . . . degree of protection it afforded when it was adopted.”⁵⁹

While the majority opinion seeks to marry property and privacy, there is considerable tension in the relationship. Justice Scalia’s originalist return to the textual property foundation of the Fourth Amendment is now joined with an atextual privacy test to be employed whenever the Court chooses to use it to protect the People from electronic surveillance. In short, the majority endorsed a fixed constitutional principle supplemented by a judicially-forged pragmatic balancing test.⁶⁰

The fundamental problem with the *Katz* test is that it is an artificial judicial construct with no connection to the Fourth Amendment.

⁵² *Id.* at 952; *id.* at 955 (Sotomayor, J., concurring) (describing the trespassory test as an “irreducible constitutional minimum”).

⁵³ *See id.* at 953, 955.

⁵⁴ *Id.* at 950.

⁵⁵ *Id.* (observing how in *Katz* 389 U.S. 347, 351 (1967) the Court said that “the Fourth Amendment protects people, not places” thus overruling *Olmstead v. United States*, 277 U.S. 438, 464 (1928), where the Court held that wiretaps on public telephone lines were not a search under the Fourth Amendment because “[t]here was no entry of the houses or offices of the defendants”).

⁵⁶ *Jones*, 132 S. Ct. at 951.

⁵⁷ Justice Scalia makes special note that the “reasonable expectation of privacy test” comes not from the majority opinion in *Katz*, but from Justice Harlan’s concurrence. *Id.* at 950.

⁵⁸ *See id.* at 953 (observing that the concurring Justices would “apply exclusively *Katz*’s reasonable-expectation-of-privacy test, even when that eliminates rights that previously existed.”).

⁵⁹ *Id.*

⁶⁰ *Id.* at 953-54. *See also Id.* at 954-55 (Sotomayor, J., concurring).

The Court did not purport to adopt privacy because of some new insight or scholarship as to the original meaning of the Fourth Amendment in 1791. Indeed it could not have, as the seed of what has become the “right of privacy” was contained in a law review article by Samuel D. Warren and Louis D. Brandeis published nearly a century after the Fourth Amendment’s ratification.⁶¹ In that article, Warren and Brandeis proposed that the “next step” in the development of common law was to create a cause of action for violation of a person’s “right to privacy.”⁶²—a right not then in existence (in the common law or as a right contemplated by the authors of the Constitution), but one that should be fashioned for the future.⁶³ Over the years, the Court has tried to justify the right to privacy as one of the “penumbras, formed by emanations from”⁶⁴ the Fourth Amendment, using the type of analysis which makes sense only to lawyers.⁶⁵ While the Katz reasonable-expectation-of-privacy analysis has been elevated to iconic status, it remains divorced from its Fourth Amendment foundation, and its use actually endangers the protection designed by the Founders against unreasonable searches and seizures.

While Justice Scalia’s decision is exemplary—so far as it goes—the Court has not yet come to grips with rectifying the full measure of damage that was done to the Fourth Amendment’s protection of the People by the reasonable expectation-of-privacy test. The modern test did not just narrow the scope of the Fourth Amendment’s property principle by overriding the common-law trespassory test, it also eviscerated the Fourth Amendment’s protection against “searches and seizures” for “mere evidence” in violation of the private property interests that the Fourth Amendment originally protected. It remains to be seen whether returning the Fourth Amendment to its property foundation in *Jones* will lead to a decision reestablishing the Fourth Amendment’s protection of the people that, as discussed below, long had been known as the “mere evidence rule.”

⁶¹ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

⁶² *Id.* at 195 (“Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right ‘to be let alone.’”).

⁶³ *Id.* at 193 (“That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.”).

⁶⁴ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

⁶⁵ The Court eventually eliminated any reliance on property rights as found in *Katz*, relying only on the “reasonable expectation of privacy” test in *United States v. Knotts*, 460 U.S. 276, 280 (1983).

V. THE NEED TO RETURN TO THE MERE EVIDENCE RULE

Although there is no way to anticipate the future direction of the Court, a principled way of escape from the Court's simultaneous embrace of textual property principles and the atextual privacy test can be found: a complete return to the Founders' Fourth Amendment as generally adhered to by the Court until the late 1960s.⁶⁶ This includes a return to the "mere evidence rule" first comprehensively articulated in a seminal case that Justice Scalia cited only in passing—*Boyd v. United States*.⁶⁷

The first provision of the Fourth Amendment limits the government as follows: "The right of the People to be secure in their persons, houses, papers, and effects, against **unreasonable** searches and seizures, shall not be violated"⁶⁸ From the ratification of the Constitution until 1967, the mere evidence rule provided that certain types of searches were "unreasonable" per se, and could not be cured even by a warrant which met the test of the second provision of the Fourth Amendment. According to the Court, even search warrants:

may not be used as a means of gaining access to a man's house or office and papers **solely** for the purpose of making search to secure **evidence** to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a **primary right** to such search and seizure may be found in the interest which the public or the complainant may have in the **property** to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.⁶⁹

⁶⁶ See Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 816 (2004) ("It is generally agreed that before the 1960s, the Fourth Amendment was focused on the protection of property rights against government interference.").

⁶⁷ *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (mentioning *Boyd v. United States*, 116 U.S. 616 (1886)).

⁶⁸ U.S. CONST. amend. IV (emphasis added). The second provision of the Fourth Amendment states: "and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.*

⁶⁹ *Gould v. United States*, 255 U.S. 298, 309 (1921) (emphasis added), *abrogated by* *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967).

So unquestioned was this rule, that the *Boyd* decision observed that it was not until 1863 that there even was any law in England or the United States:

which authorized the search and seizure of a man's private papers . . . for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property. Even the . . . obnoxious writs of assistance . . . did not go as far as this⁷⁰

The *Boyd* Court "noticed the intimate relation between" the Fourth Amendment and the prohibition against compelled self-incrimination in the Fifth Amendment, both of which were protected by the rule it adopted:

For the '**unreasonable** searches and seizures' condemned in the [F]ourth [A]mendment are almost always made for the purpose of **compelling a man to give evidence against himself**⁷¹

In explaining the property principle undergirding the first freedom, as protected by the Fourth Amendment, the *Boyd* Court warned that, although the evidence seized in that case complied with the warrant requirement:

[I]llegitimate and unconstitutional practices get their first footing . . . by **silent approaches and slight deviations** from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right It is the **duty of courts to be watchful** for the constitutional rights of the citizen, and **against any stealthy encroachments** thereon. Their motto should be *obsta principiis*.⁷²

Thirty-six years later, in *Gouled v. United States*, the Court reaffirmed its belief that such a rule was required "to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by

⁷⁰ *Boyd*, 116 U.S. at 622-23.

⁷¹ *Id.* at 633 (emphasis added).

⁷² *Id.* at 635 (emphasis added) (discussing how constitutional rights can be slowly eroded, and what courts should do to prevent such erosion).

them, by imperceptible practice of courts or by well-intentioned, but mistakenly over-zealous, executive officers.”⁷³ Thus, the *Gouled* Court ruled:

[S]earch **warrants . . . may not be used** as a means of gaining access to a man’s house or office and papers **solely for the purpose of making search to secure evidence to be used against him . . .**⁷⁴

In a day when “over-zealous” and increasingly militarized law enforcement officers make tens of thousands of “dynamic entries” into homes annually,⁷⁵ the full scope of the people’s original Fourth Amendment protections demonstrate the Founder’s prescience.

VI. THE *KATZ* PRIVACY RULE WAS BASED ON A REPUDIATION OF THE PROPERTY PRINCIPLE

Six months prior to *Katz*, the Supreme Court had abandoned its well-established Fourth Amendment jurisprudence based upon proper-

⁷³ *Gouled*, 255 U.S. at 304. *See generally* *Bram v. United States*, 168 U.S. 532, 544 (1897). *See also* *Weeks v. United States*, 232 U.S. 383, 391-92 (1914).

⁷⁴ *Gouled*, 255 U.S. at 309 (emphasis added) (discussing the acceptable use of search warrants).

⁷⁵ *See* RADLEY BALKO, CATO INST., OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA 11 (2006), *available at* http://www.cato.org/pubs/ftp/papers/balko_whitepaper_2006.pdf (indicating that in addition to innumerable news articles and web stories, a series of studies and popular books have focused renewed attention on the militarization of police and the increasing use of “dynamic entry” by SWAT teams into homes and businesses by law enforcement at all levels of government—estimated to be as high as 40,000 per year). Videos detailing abusive SWAT team raids into homes and businesses circulate widely on the Internet. *See, e.g.*, WCCO Television Report, *SWAT Team Honored for Raiding Wrong House*, YOUTUBE (July 29, 2008), <http://www.youtube.com/watch?v=oFnmZKI5WEA> (depicting a SWAT team that mistakenly raided the wrong home). *See also* *Gibson Guitar Corp. Responds to Federal Raid*, GIBSON (Aug. 25, 2011), <http://www.gibson.com/en-us/Lifestyle/News/gibson-0825-2011/> (observing the SWAT style entries utilized at the Gibson guitar factory in order to seize Indian wood that was allegedly improperly imported). *See generally* GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING (Gene Healy, ed., CATO Inst. 2004); IN THE NAME OF JUSTICE, (Timothy Lynch, ed., CATO Inst. 2009); PAUL CRAIG ROBERTS & LAWRENCE M. STRATTON, THE TYRANNY OF GOOD INTENTIONS: HOW PROSECUTORS AND LAW ENFORCEMENT ARE TRAMPLING THE CONSTITUTION IN THE NAME OF JUSTICE, (Forum 2000); PAUL ROSENZWEIG AND BRIAN W. WALSH, ONE NATION UNDER ARREST: HOW CRAZY LAWS, ROGUE PROSECUTORS, AND ACTIVIST JUDGES THREATEN YOUR LIBERTY, (Heritage Foundation 2010); HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT, (Encounter Books 2011); .

ty rights in favor of one rooted in an emerging right of privacy. In *Warden v. Hayden*,⁷⁶ Justice William J. Brennan—writing for a bare majority of five Justices—claimed dissatisfaction with the “fictional and procedural barriers rest[ing] on property concepts,”⁷⁷ and jettisoned the time-honored rule that a search for “**mere evidence**” was *per se* “unreasonable.”⁷⁸ Justice Brennan claimed that the distinction between (i) “mere evidence” and (ii) “instrumentalities [of crime], fruits [of crime] or contraband” was “**based on premises no longer accepted** as rules governing the application of the Fourth Amendment.”⁷⁹ Discarding the notion that the Fourth Amendment requires the Government to demonstrate a “superior property interest”⁸⁰ in the thing to be seized, Justice Brennan promised that his new privacy rationale would free the Fourth Amendment from “irrational,”⁸¹ “discredited,”⁸² and “confus[ing]”⁸³ decisions of the past, and more meaningfully ensure “the protection of privacy rather than property,” which is “the principal object of the Fourth Amendment.”⁸⁴

Joined by Chief Justice Earl Warren, Justice Fortas concurred in the result, but disagreed with “the majority’s broad—and . . . totally unnecessary—repudiation of the so-called ‘mere evidence’ rule.”⁸⁵ Resting his concurrence on the long-established “hot pursuit” exception to the warrant requirement,⁸⁶ Justice Fortas sought to avoid “an **enormous and dangerous hole** in the Fourth Amendment”⁸⁷:

[O]pposition to general searches is a fundamental of our heritage and of the history of Anglo-Saxon legal principles. Such searches, pursuant to “**writs of assistance**,” were one of the matters over which the American Revolution was fought. The very purpose of the Fourth Amendment was to outlaw such searches, which the Court today sanctions. I fear that in **gratuitously striking down the “mere evidence” rule**, which distinguished members of this Court have acknowledged as essential to enforce the Fourth Amend-

⁷⁶ *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967).

⁷⁷ *Id.* at 304.

⁷⁸ *Id.* at 295-97.

⁷⁹ *Id.* at 300-01 (emphasis added).

⁸⁰ *Id.* at 303-04.

⁸¹ *Id.* at 302.

⁸² *Id.* at 306.

⁸³ *Id.* at 309.

⁸⁴ *Id.* at 304.

⁸⁵ *Id.* at 310 (Fortas, J., concurring).

⁸⁶ *Id.* at 312.

⁸⁷ *Id.* (emphasis added).

ment's prohibition against general searches, the Court today **needlessly destroys, root and branch, a basic part of liberty's heritage.**⁸⁸

Had the *Hayden* Court not thrown out the "mere evidence" rule, no warrant could lawfully have been issued to "covertly install and monitor a global positioning system (GPS) tracking device on [Jones's] Jeep Grand Cherokee."⁸⁹ According to the Government, the sole purpose of such an installation was to gather evidence of the movement of the vehicle.⁹⁰ Indeed, by introducing the data obtained by means of such a device, the Government was, in effect, forcibly collecting information about Jones's movements for the sole purpose of using such data as evidence against him. Although some of the movements of Jones's jeep over a month-long surveillance period may have been seen by third parties, including Government investigating agents, the very purpose of the GPS tracking system was to chronicle only that which Jones himself would know—all of the Jeep's movements over that same period. By extracting that information via the GPS device, the Government, in purpose, and in effect, was **compelling the defendant to testify against himself.**

Having abandoned the "mere evidence" rule for the "reasonable expectation of privacy" guideline, the *Hayden* Court opened the door not only to a search warrant authorizing the installation of a GPS device, but to the implantation of such a device **without a search warrant** on the theory that there is **no expectation of privacy** as to a person's movements on a public highway.⁹¹ Under this view, if there were no such privacy expectation, then the Fourth Amendment would cease to apply altogether, the Government having no need for probable cause or even reasonable suspicion to place a tracking device on any automobile or even one's clothing.

VII. EXCHANGING PRIVACY FOR PROPERTY USHERS IN THE DESTRUCTIVE GENERAL WARRANT

⁸⁸ *Id.* (emphasis added).

⁸⁹ Petition for Writ of Certiorari, *supra* note 4, at 3.

⁹⁰ See Petition for Writ of Certiorari, *supra* note 4, at 4 ("Using the device, agents were able to track respondent's Jeep . . .").

⁹¹ If the Government has the right to place a GPS device on a citizen's automobile to gather movement data because no citizen has any reasonable expectation of privacy, why should a citizen not have a reciprocal right to place a GPS on a government official's car? Surely the government official has no different expectation of privacy. No doubt, however, if any citizen were to be so bold, the Government would be quick to indict him, *inter alia*, for trespassing on government property.

Just as Justice Fortas forecast, Justice Brennan's privacy rationale has undermined the "Fourth Amendment's prohibition against general searches."⁹² The Government informed the Court in *Jones* "federal law enforcement agencies frequently use tracking devices **early** in investigations, before suspicions have ripened into probable cause."⁹³ As the Government also argued, applying the Fourth Amendment would "prevent[] law enforcement officers from using GPS devices in an effort to **gather information to establish** probable cause."⁹⁴ And as the Government asserted, as a consequence, "the government's ability to investigate **leads and tips**," will be "seriously impede[d]."⁹⁵ In short, the Government demanded that the Court sanction its unbridled discretion to search suspected driving activities, seizing data as to the movement of vehicles on the public highways, in order to gather enough information to establish probable cause to institute criminal proceedings. The GPS technology, then, serves the Government in the same way as the discredited general warrant—legitimizing intrusions upon property without first having to demonstrate before a judicial magistrate that it has "probable cause." Indeed, if there is no reasonable expectation of privacy, as the Government argued, then the warrant requirement would not even come into play, much less would the Government be required to have "probable cause," or even "reasonable suspicion" to install a GPS on one's automobile.

The expectation of privacy rationale is deeply problematic. If the Government were to announce and make known that it was recording all cell phone calls, preserving copies of all e-mails, intercepting all faxes, using cell phones to monitor conversations in a room even when no call was in progress, and that it had entered into an agreement with OnStar, TomTom, and Garmin to monitor in real time the position of all cars using that GPS equipment, one could say that no American would have any reasonable expectation of privacy. According to the privacy theory then, no American would be able to claim that a Fourth Amendment search or a seizure of those communications or data transmissions was occurring.

Under the reasonable expectation of privacy test the Supreme Court has overridden property rights by allowing warrantless searches of commercial property,⁹⁶ and closely regulated industries,⁹⁷ and a

⁹² See *Hayden*, 387 U.S. at 312 (Fortas, J., concurring).

⁹³ See Petition for Writ of Certiorari, *supra* note 4, at 23.

⁹⁴ See Petition for Writ of Certiorari, *supra* note 4, at 23 (*italics original, bold added*).

⁹⁵ See Petition for Writ of Certiorari, *supra* note 4, at 23 (*emphasis added*).

⁹⁶ See, e.g., *Donovan v. Dewey*, 452 U.S. 594, 602 (1981).

private residence for violations of a housing code,⁹⁸ among others. The Court's "expectation of privacy" test has proven wholly inadequate to the task of protecting the American people against invasions of their privacy through unreasonable searches and seizures. Paradoxically, a return to the text and property basis of the Fourth Amendment would provide the people with the protection envisioned by the Fourth Amendment's authors.

As the *Boyd* Court recalled, the Fourth Amendment's prohibition against "unreasonable searches and seizures" was the direct product of the government practice:

of issuing **writs of assistance** to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, **the most destructive of English liberty and the fundamental principles of law**, that ever was found in an English law book.'"⁹⁹

In his classic *Treatise on Constitutional Limitations*, renowned constitutional scholar, Thomas Cooley, ranked the Fourth Amendment guarantee of "citizen immunity in his home against the prying eyes of the Government, and protection in person, property, and papers against even the process of law" **next in importance to the constitutional ban on personal slavery**.¹⁰⁰

The Fourth Amendment pronounces that "persons," "houses," "papers," and "effects" are equally secured from unreasonable searches and seizures. Each is a right of the people best protected by the enduring, unchanging common law rules of private property, not by a modern privacy chameleon invented by judges.

⁹⁷ See, e.g., *New York v. Burger*, 482 U.S. 691, 712 (1987) (junkyard); *United States v. Biswell*, 406 U.S. 311, 317 (1972) (federal firearms dealers); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (liquor industry).

⁹⁸ See *Camara v. Municipal Court*, 387 U.S. 523 (1967).

⁹⁹ *Boyd v. United States*, 116 U.S. 616, 625 (1886) (emphasis added).

¹⁰⁰ THOMAS COOLEY, *A TREATISE ON CONSTITUTIONAL LIMITATIONS* 365 (5th ed. 1883) (emphasis added).