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Failing To Keep "Easy Cases Easy": Florida V. Jardines Refuses to Reconcile Inconsistencies In Fourth Amendment Privacy Law By Instead Focusing On Physical Trespass

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Failing To Keep "Easy Cases Easy": Florida V. Jardines Refuses to Reconcile Inconsistencies In Fourth Amendment Privacy Law By Instead Focusing On Physical Trespass

Cover Page Footnote

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**FAILING TO KEEP “EASY CASES EASY”:
FLORIDA v. JARDINES REFUSES TO
RECONCILE INCONSISTENCIES IN FOURTH
AMENDMENT PRIVACY LAW BY INSTEAD
FOCUSING ON PHYSICAL TRESPASS**

*George M. Dery III**

This Article analyzes Florida v. Jardines, in which the Supreme Court ruled that a canine sniff of a home from the front porch was a Fourth Amendment search. In reaching this ruling, the Court employed the property-rights definition of a search newly recovered the prior term in United States v. Jones instead of applying the reasonable expectation of privacy test created in Katz v. United States. This work examines the concerns created by Jardines’s ruling. This Article asserts that Jardines refused to resolve a potentially troubling incongruity between Kyllo v. United States, precedent that exalted the privacy of the home, and United States v. Place, a case that deemed a canine sniff to be a Fourth Amendment nonentity. Further, Jardines grafted onto its property-rights test an undefined and complicated implied license analysis. Finally, Jardines intensified the subjectivity of Jones’s property-rights rule by injecting a “purpose” inquiry into its new implied license analysis. The Court’s failure to consider the conflicts between Kyllo and Place, its creation of a new implied license rule, and its infusion of subjectivity into the Fourth Amendment could confuse the police and courts burdened with applying Jardines’s ruling.

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I. INTRODUCTION

Two of the Supreme Court’s most significant Fourth Amendment¹ cases, *Kyllo v. United States*,² and *United States v. Place*,³ are potentially in conflict. *Kyllo*, which deemed “all details” in the home to be “intimate,”⁴ voiced concern over homeowners being “at the mercy of advancing technology” which could discern human activity within a home.⁵ To protect the privacy of the home, the *Kyllo* Court self-consciously drew a firm and bright line “at the entrance to the house.”⁶ *Kyllo* thus held that the government’s employment of a device not generally in public use to explore the inner details of the home amounted to a “search” under the Fourth Amendment.⁷ Meanwhile, in *Place*, the Court lauded the drug-detecting dog, who sniffed baggage at an airport, for pursuing her task without causing the embarrassment and inconvenience occasioned by luggage searches by her human counterparts.⁸ Furthermore, *Place* was impressed by the dog’s ability to focus only on contraband—items which, by definition, are illegal to possess—while maintaining the privacy of noncontraband items.⁹ *Place* therefore concluded that a “canine sniff” was so uniquely limited in the manner in which it obtained information and in the content of the information it gathered that it “did not constitute a ‘search’ within the meaning of the Fourth Amendment.”¹⁰ What would happen if a case presented facts that combined *Kyllo*’s protection of privacy in

1. The Fourth Amendment provides:

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

U.S. CONST. amend. IV.

2. 533 U.S. 27 (2001).

3. 462 U.S. 696 (1983).

4. *Kyllo*, 533 U.S. at 37.

5. *Id.* at 35–36.

6. *Id.* at 40.

7. *Id.*

8. *Place*, 462 U.S. at 707.

9. *Id.*

10. *Id.*

the home with *Place*'s determination that dog sniffs do not even trigger the Fourth Amendment?

Such a case arose when Detective Douglas Bartelt, a canine handler,¹¹ took his drug-detecting dog, Franky,¹² to the front door of Joelis Jardines's home.¹³ When Franky alerted to the smell of marijuana in the house, he would ultimately cause the Court, in *Florida v. Jardines*, to consider "whether using a drug sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' within the meaning of the Fourth Amendment."¹⁴ Curiously, in answering this question, the Court did not even consider, let alone resolve, the conflicting interpretations of privacy presented in *Kyllo* and *Place*. Instead, the *Jardines* Court openly avoided providing any guidance on the question, happily keeping "easy cases easy."¹⁵

The problem with taking the easy route is that it leads one down the wrong path. In its effort to steer clear of the differing interpretations of Fourth Amendment privacy, *Jardines* employed a test it had only recently rescued from nearly forty years of obsolescence and disuse. One year before *Jardines*, the Court in *United States v. Jones*¹⁶ dredged up a common law trespass definition for Fourth Amendment searches championed in the prohibition case, *Olmstead v. United States*.¹⁷ *Jones* defined a Fourth Amendment search as a physical occupation of "private property for the purpose of obtaining information."¹⁸ *Jardines* adopted the *Jones* test¹⁹ in deciding that use of a drug-sniffing dog to investigate a home and its surroundings was a Fourth Amendment "search."²⁰

Such reasoning was not without cost. The Court left the inconsistencies between *Kyllo* and *Place* unresolved. Further, the Court created a new Fourth Amendment test regarding implied and express "licenses," which will engender confusion among the police and courts that will be left to interpret these rules and apply the rigid

11. *Florida v. Jardines*, 133 S. Ct. 1409, 1413 (2013).

12. *Id.* at 1421 (Alito, J., dissenting).

13. *Id.* at 1413 (majority opinion).

14. *Id.*

15. *Id.* at 1417.

16. 132 S. Ct. 945 (2012).

17. *Id.*; *Olmstead v. United States*, 277 U.S. 438 (1928).

18. *Jones*, 132 S. Ct. at 949.

19. *Jardines*, 133 S. Ct. at 1414.

20. *Id.* at 1417–18.

Jones/Olmstead definition to today’s social norms.²¹ Finally, *Jardines* increased the subjectivity of *Jones*’s property-rights rule by making an officer’s intent relevant, not only to the definition of a search but also to the license analysis.²²

In Part II, this Article reviews the Court’s precedent regarding Fourth Amendment privacy in the home, the warrant requirement meant to protect the home, and the definition of a Fourth Amendment search. Part III examines *Jardines*, exploring both its facts and the Court’s opinion. Part IV considers the implications of *Jardines*’s reasoning on the current definitions of a Fourth Amendment “search” and its impact on those who will be called upon to implement these changes.

II. BACKGROUND

A. *The Privacy of the Home and the Primacy of the Warrant Requirement*

The home occupies the center of the Fourth Amendment. At “the very core” of the Fourth Amendment “stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”²³ The home’s special protection under the Fourth Amendment can be traced back to a time before the Amendment itself ever existed. In discussing the Fourth Amendment, the Court has quoted William Pitt’s declaration, “The poorest man may in his cottage bid defiance to all the forces of the Crown,” including the King himself.²⁴ The crucial combination of privacy and autonomy provided to the homeowner is still cherished by the Court, which declared, “A man can still control a small part of his environment, his house; he can retreat from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is a sizeable chunk of liberty—worth protecting from encroachment.”²⁵ It is therefore “beyond dispute that the home

21. *Id.* at 1415–16.

22. *Id.* at 1416–17.

23. *Silverman v. United States*, 365 U.S. 505, 511 (1961).

24. *Id.*; *Miller v. United States*, 357 U.S. 301, 307 (1958).

25. *Silverman*, 365 U.S. at 511, n.4.

is entitled to special protection as the center of the private lives of our people.”²⁶

The Court has recognized the home’s special position in a variety of Fourth Amendment contexts. The Court protected a home from electronic surveillance in *Silverman v. United States*.²⁷ In condemning the insertion of a “spike mike” into the wall of a house, *Silverman* noted that a “sane, decent civilized society must provide some . . . oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man’s castle.”²⁸ In *Payton v. New York*, the Court invalidated a warrantless arrest in a home, finding it “‘a basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable.”²⁹ *Payton* declared that the Fourth Amendment “appl[ied] to all invasions on the part of the government and its employees” into “the sanctity of a man’s home and the privacies of life.”³⁰ In *Wilson v. Layne*, the Court held that police violated the Fourth Amendment when they brought a photographer into a home while executing a search warrant, since the presence of the media was “not in aid of the execution of the warrant.”³¹ *Layne* noted, “The Fourth Amendment embodies [a] centuries-old principle of respect for the privacy of the home”³² In *Georgia v. Randolph*, the Court held that a search pursuant to the consent of one occupant of a home was not valid as to a present inhabitant who expressly refused consent to police.³³ In so holding, *Randolph* referred back to the “ancient adage that a man’s house is his castle”³⁴ which has enjoyed “centuries of special protection.”³⁵

When considering the privacy of the home, the case most pertinent to *Jardines* is *Kyllo v. United States*.³⁶ Justice Kagan said

26. *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring).

27. *Silverman*, 365 U.S. at 511, 512.

28. *Id.* at 511, n.4 (quoting *United States v. On Lee*, 193 F.2d 306, 315–16 (2d Cir. 1951) (Frank, J., dissenting), *aff’d*, 343 U.S. 747 (1952)).

29. *Payton v. New York*, 445 U.S. 573, 586 & n.25 (1980) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 477 (1971)).

30. *Id.* at 585.

31. *Wilson v. Layne*, 526 U.S. 603, 614 (1999).

32. *Id.* at 610.

33. *Georgia v. Randolph*, 547 U.S. 103, 122–23 (2006).

34. *Id.* at 115 (quoting *Miller v. United States*, 357 U.S. 301, 307 (1958)).

35. *Id.* at 115 n.4.

36. *Kyllo v. United States*, 533 U.S. 27 (2001).

as much in her concurring opinion in *Jardines* when she declared, “If we had decided this case on privacy grounds, we would have realized that *Kyllo v. United States* already resolved it.”³⁷ In *Kyllo*, an agent from the United States Department of the Interior, suspecting that marijuana was being grown in a Florence, Oregon triplex, pointed a thermal imager at Danny Kyllo’s home.³⁸ The agent was able to perform this scan while sitting in his vehicle on the street.³⁹ Since the heat imager showed that the roof of Kyllo’s garage was especially hot, the agent concluded that the homeowner was using “halide lights to grow marijuana in his house.”⁴⁰ This information formed part of the probable cause needed to obtain a warrant, the execution of which recovered over one hundred marijuana plants.⁴¹

The Court in *Kyllo* thus needed to determine if the detection of heat using a thermal imager amounted to a “search” under the Fourth Amendment.⁴² Justice Scalia, who wrote the opinion for the *Kyllo* Court, reminisced that the “permissibility of visual surveillance of a home used to be clear because, well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass.”⁴³ This earlier caselaw measured a Fourth Amendment search by looking for an “actual intrusion into a constitutionally protected area.”⁴⁴ Justice Scalia then made an interesting observation, in light of the opinions he later wrote in both *Jones* and *Jardines*: “We have since decoupled violation of a person’s Fourth Amendment rights from trespassory violation of his property.”⁴⁵ The Court had instead applied the standard developed by “Justice Harlan’s oft-quoted concurrence,” which defined a Fourth Amendment search as “when the government violates a subjective expectation of privacy that society recognizes as reasonable.”⁴⁶

37. *Florida v. Jardines*, 133 S. Ct. 1409, 1419 (2013) (Kagan, J., concurring).

38. *Kyllo*, 533 U.S. at 29.

39. *Id.* at 29–30.

40. *Id.* at 30.

41. *Id.*

42. *Id.* at 31–32.

43. *Id.*

44. *Id.* (quoting *Silverman v. United States*, 365 U.S. 505, 510–512 (1961)).

45. *Id.* at 32. In the opinion Justice Scalia wrote for the *Jones* Court, he emphasized, “the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.” *United States v. Jones*, 132 S. Ct. 945, 952 (2012).

46. *Kyllo*, 533 U.S. at 33.

Kyllo deemed the scanner's measurement of heat as revealing "intimate" details simply "because they were details of the home."⁴⁷ Justice Scalia worried that the imager "might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider 'intimate.'"⁴⁸ The Court thus concluded, "Where, as here, the Government uses a device that is not in general public use, to explore the details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search'"⁴⁹

Kyllo not only concluded that thermal imaging of a home amounted to a search, it ruled that such a search "is presumptively unreasonable without a warrant."⁵⁰ The Court has long adhered to such a presumption, declaring that a "search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws."⁵¹ The Court has seen this "warrant requirement" as "a principal protection against unnecessary intrusions into private dwellings."⁵² *Johnson v. United States* explicitly presented the logic behind the warrant requirement:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.⁵³

The Court thus established the warrant requirement with an eye to human nature so that the rights of the Fourth Amendment could be enforced in the real world. The Court candidly acknowledged: "Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the

47. *Id.* at 38.

48. *Id.*

49. *Id.* at 40.

50. *Id.*

51. *Agnello v. United States*, 269 U.S. 20, 32 (1925).

52. *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984).

53. *Johnson v. United States*, 333 U.S. 10, 13–14 (1948).

privacy of the home.”⁵⁴ Thus, “the Constitution requires ‘that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police’”⁵⁵ The warrant mandate has become a Fourth Amendment foundation stone, for, as noted in *Katz v. United States*,

Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial process . . . and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.⁵⁶

Thus, from the time of powdered wigs to the creation of technology that can image heat from within houses, the Fourth Amendment has consistently protected homes from government intrusion. Further, one of the most important tools employed to protect the home has been the requirement that police obtain a warrant seeking a judge’s permission before intruding on the privacy of the home.

B. The Fourth Amendment Definition of a “Search”

The privacy of the home and the warrant requirement enforcing it presupposes a search or a seizure, for the Fourth Amendment does not even apply if neither a search nor seizure occurs.⁵⁷ In other words, if there is no search and there is no seizure, then there is no need for a warrant. The Court’s definitions of “search” and “seizure” under the Fourth Amendment thus take on great significance, for if a particular police action falls outside of both of these definitions, officials will not need to justify the Fourth Amendment “reasonableness” of their behavior. In *Jardines*, where police brought a dog to a home to sniff for marijuana, the Court focused on whether

54. *McDonald v. United States*, 335 U.S. 451, 456 (1948).

55. *Katz v. United States*, 389 U.S. 347, 357 (1967) (quoting *Wong Sun v. United States*, 371 U.S. 471, 481–481 (1963)).

56. *Id.* (citations omitted) (quoting *United States v. Jeffers*, 342 U.S. 48, 51 (1951)) (internal quotation marks omitted).

57. By its own terms, the Fourth Amendment applies only to “searches and seizures.” U.S. CONST. amend. IV.

a “search” occurred, leading it to consider its definition of a Fourth Amendment “search.”⁵⁸

Since 2012, with the advent of *United States v. Jones*, there have been two definitions of a Fourth Amendment “search.”⁵⁹ Any meaningful discussion of the two definitions, however, must begin with the prohibition case, *Olmstead v. United States*, in which federal agents overheard Olmstead’s conversations from his office and home by wiretapping his phone lines.⁶⁰ The Court in *Olmstead* determined that the agents’ eavesdropping occurred “without trespass upon any property of the defendants,”⁶¹ and therefore “[t]here was no searching. There was no seizure.”⁶² The resulting rule, refined over the decades, defined a Fourth Amendment “search” as a “physical intrusion”⁶³ or “physical invasion”⁶⁴ of a “constitutionally protected area,” such as a home.⁶⁵ This test was not without its critics. The Court of Appeals in *Silverman* believed drawing a constitutional line between a device that physically intruded into a home and a device that merely rested on the outside a home to be “too fine a one to draw.”⁶⁶ In response, the *Silverman* Court stuck to its physical intrusion rule, with the concession that it would not go beyond it “by even a fraction of an inch.”⁶⁷

Perhaps such minute measurements contributed the Court’s decision to abandon the *Olmstead/Silverman* rule in *Katz v. United States*.⁶⁸ As previously noted, *Katz* “decoupled” a Fourth Amendment “search” from physical intrusions on constitutionally protected areas in favor of the reasonable expectation of privacy test.⁶⁹ *Katz* gave *Olmstead* a less-than-respectful burial, announcing,

58. *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013). Whether the dog’s or officers’ actions constituted a Fourth Amendment “seizure” is beyond the scope of this Article.

59. *United States v. Jones*, 132 S. Ct. 945 (2012) (defining search by physical intrusion in effect for the purpose of obtaining information); *Katz v. United States*, 365 U.S. 505 (1961) (defining search by reasonable expectation of privacy).

60. *Olmstead v. United States*, 277 U.S. 438, 456–57 (1928).

61. *Id.* at 457.

62. *Id.* at 464.

63. *Silverman v. United States*, 365 U.S. 505, 509 (1961).

64. *Id.* at 510.

65. *Id.* at 512.

66. *Id.*

67. *Id.*

68. *Katz v. United States*, 389 U.S. 347 (1967).

69. *Kyllo v. United States*, 533 U.S. 27, 32 (2001).

“[T]he correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase ‘constitutionally protected area.’”⁷⁰ Further, the *Katz* Court archly intoned, “[T]he Fourth Amendment protects people, not places.”⁷¹ As for creating a new definition for a Fourth Amendment search, the Court in *Katz* gave little guidance, broadly declaring, “Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.”⁷² Ultimately, the *Katz* standard came from a two-part test Justice Harlan fashioned in his concurrence:

My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy, and second, that the expectation be one that society is prepared to recognize as “reasonable.”⁷³

The Court has subsequently relied on this test to decide if searches occurred in a wide variety of contexts, such as when government agents squeezed soft baggage on a bus,⁷⁴ explored banking records,⁷⁵ and rummaged through trash left on the curb for collection.⁷⁶

One case where the Court failed to apply the typical *Katz* analysis was *United States v. Place*. In *Place*, federal narcotics agents took luggage from a deplaning passenger to a drug-detecting dog, who, upon sniffing, “reacted positively” to bags that ultimately proved to hold cocaine.⁷⁷ In considering “if this investigative procedure [was] itself a search,” *Place* harkened to *Katz* in noting that the Fourth Amendment “protects people from unreasonable government intrusions into their legitimate expectations of privacy.”⁷⁸ The Court further recognized that a person has a Fourth Amendment “privacy interest in the contents of personal luggage.”⁷⁹ *Place*’s reasoning then took an interesting turn, focusing not so much

70. *Katz*, 389 U.S. at 350.

71. *Id.* at 351.

72. *Id.* at 359.

73. *Id.* at 361 (Harlan, J., concurring).

74. *Bond v. United States*, 529 U.S. 334, 338–39 (2000).

75. *United States v. Miller*, 425 U.S. 435, 442 (1976).

76. *California v. Greenwood*, 486 U.S. 35, 40–41 (1988).

77. *United States v. Place*, 462 U.S. 696, 699 (1983).

78. *Id.* at 706–07.

79. *Id.* at 707.

on the government intrusion occasioned by a canine sniff, but on the various invasions that did not occur with this investigative technique. A well-trained dog's sniff did not open luggage, expose noncontraband items to public view, or cause embarrassment or inconvenience.⁸⁰ Although the sniff did tell authorities "something about the contents of the luggage," it was "much less intrusive" than the invasive hands of a human and only disclosed evidence of narcotics, something illegal to possess in the first place.⁸¹ Being unaware of any other "investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed," *Place* deemed the exposure of luggage to a trained canine's sniff in a public place to "not constitute a 'search' within the meaning of the Fourth Amendment."⁸² Left unanalyzed was the information that the dog *did* gather—the existence of an item in a location where an individual did possess a Fourth Amendment "privacy interest."⁸³ This analytical omission would ultimately cause a potential conflict between *Place* and *Kyllo*, which came to the fore in *Jardines*.

One more important case, however, would affect the Fourth Amendment's definition of a search before Franky would sniff at Joelis Jardines's front door. In *United States v. Jones*, a drug task force placed a global positioning system (GPS) tracking device onto a nightclub owner's Jeep in the hopes of learning the location of his narcotics stash.⁸⁴ In determining whether attaching the GPS device was a Fourth Amendment "search," the *Jones* Court, in an opinion authored by Justice Scalia, emphasized that the government "physically occupied private property for the purpose of obtaining information."⁸⁵ Despite his earlier assertion that the Court had "decoupled" the Fourth Amendment from a trespassory violation of property, Justice Scalia now brought back the physical intrusion standard, declaring, "Fourth Amendment rights do not rise or fall with the *Katz* formulation."⁸⁶ Indeed, *Jones* characterized *Katz* as

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *United States v. Jones*, 132 S. Ct. 945, 948 (2012).

85. *Id.* at 949.

86. *Id.* at 950.

deviating from the traditional property-based approach that served the Court well into the 20th century.⁸⁷ Still, the Court in *Jones* did not repudiate *Katz*, instead characterizing it as being “*added to*, not *substituted for*, the common-law trespassory test.”⁸⁸ On the eve of the *Jardines* decision, therefore, the Court had two different definitions of a Fourth Amendment “search.”

III. FLORIDA V. JARDINES

A. Facts

On November 3, 2006, Detective William Pedraja of the Miami-Dade Police Department received a tip that Joelis Jardines was growing marijuana in his home.⁸⁹ On December 6, 2006, at 7:00 a.m., Detective Predaja, as part of a Drug Enforcement Agency (DEA) task force, went to Jardines’s home.⁹⁰ While Miami police officers “established perimeter positions around the residence,” the DEA agents provided backup.⁹¹ For fifteen minutes, Detective Predaja observed the home and noted that “there were no vehicles in the driveway, the window blinds were closed, and there was no activity at the residence.”⁹² These observations bolstered Detective Predaja’s suspicions that the residence was a marijuana grow house, because persons running such houses “‘don’t want to be seen by neighbors’ and typically have ‘no traffic’ because ‘[t]hey are not selling or buying from that residence.’”⁹³

Then, Detective Predaja and Detective Douglas Bartelt, along with Bartelt’s police dog, Franky, “walked up the driveway and front

87. *Id.*

88. *Id.* at 952.

89. Detective Pedraja had received “an unverified ‘crime stoppers’ tip that the home of Joelis Jardines was being used to grow marijuana.” *Jardines v. State*, 73 So. 3d 34, 37 (Fla. 2011), *aff’d*, 133 S. Ct. 1409 (2013).

90. Detective Pedraja went to the home “along with a drug task force that included several agents of the United States Drug Enforcement Agency.” Petition for a Writ of Certiorari at 4, *Florida v. Jardines*, 133 S. Ct. 1409 (2013) (No. 11-564), 2011 WL 5254666, at *4.

91. Brief for the United States as Amicus Curiae Supporting Petitioner at 2, *Jardines*, 133 S. Ct. 1409 (No. 11-564), 2012 WL 1561150, at *2.

92. *Id.*; *Jardines*, 133 S. Ct. 1409, 1413 (2013).

93. Brief Supporting Petitioner, *supra* note 91, at 2. Detective Predaja considered such observations to be “consistent with the use of the residence as a ‘grow house’ for marijuana.” *Id.* Detective Predaja was “a 17 year detective” who had spent “the last four years investigating and unearthing marijuana cultivators in urban environments.” Brief for the State of Florida at 3 n.1, *Jardines*, 133 S. Ct. 1409 (No. 11-564), 2012 WL 1594294, at *3 n.1.

walkway of the house” to the front porch.⁹⁴ Detective Bartelt was a “trained canine handler”⁹⁵ while Franky “had been trained to detect marijuana, cocaine, heroin, hashish, methamphetamine, and ecstasy.”⁹⁶ Detective Bartelt kept Franky on a six-foot leash “owing in part due to the dog’s ‘wild’ nature, and tendency to dart around erratically while searching.”⁹⁷ Following his training, Franky began “bracketing” an airborne odor by moving “back and forth, back and forth,” until he homed in on its source.⁹⁸ The dog was so vigorous that Detective Bartelt gave him as much distance as he could and Detective Predaja stood back so as to not “get knocked over.”⁹⁹ Detecting the strongest odor at the front door, Franky sat, indicating he had found the source.¹⁰⁰ Detective Bartelt told Detective Predaja of Franky’s alert and then returned the dog to the car.¹⁰¹

Detective Predaja remained, knocking on the door and receiving no answer.¹⁰² While there, he smelled “live marijuana” and noticed that the house’s air conditioner constantly ran for fifteen minutes, an indication that high intensity light bulbs used for marijuana

94. Brief for the State of Florida, *supra* note 93, at 4; Brief Supporting Petitioner, *supra* note 91, at 2.

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

96. Brief Supporting Petitioner, *supra* note 91, at 2.

97. *Jardines*, 133 S. Ct. at 1413. Detective Bartelt testified as follows regarding his handling of Franky:

I, basically, approached with my canine partner. The way my canine partner works, he is very strongly driven, so he is actually out in front of me. He is one of the dogs that will actually pull me around very dramatically.

So he pulled directly up the front porch as he is trained to do, and immediately upon crossing the threshold of the archway which you see here, upon entering the alcove of the porch, he began tracking and airborne odor. . . .

[Franky’s alert] would have been the head high, tracking the airborne odor. He began tracking that airborne odor by bracketing and tracking back and forth. . . .

Bracketing is a technique that the dog uses once he comes to an odor—which is basically you can think of it as a cloud of odor.

Once he gets into that cloud of odor, he is trained to go to the strongest point. We call that source.

So, he is bracketing back and forth back and forth within the cone of odor or to determine the strongest source. In this particular residence source for him was the base of the door.

Joint Appendix at 94–96, *Jardines*, 133 S. Ct. 1409 (No. 11-564); 2012 WL 1550599, at *94–96.

98. *Id.*

99. Detective Bartelt testified that he tended to give Franky “as much distance as I can.” *Id.*

100. *Id.*

101. Brief for the State of Florida, *supra* note 93, at 4.

102. *Id.*

cultivation could be on inside.¹⁰³ Detective Predaja left to obtain a search warrant while “the task force remained in place in public areas outside to secure the scene.”¹⁰⁴ When officers executed the warrant, they recovered over twenty-five pounds of live marijuana plants and caught Jardines as he tried to flee through a rear door.¹⁰⁵

Police arrested Jardines, who was charged with “trafficking in cannabis.”¹⁰⁶ Jardines moved to suppress the marijuana, contending that the canine sniff amounted to an unreasonable search under the Fourth Amendment.¹⁰⁷ The trial court granted the motion, and the issue worked its way through the state courts until the Court granted certiorari on the question of “whether the officers’ behavior was a search within the meaning of the Fourth Amendment.”¹⁰⁸

B. The Court’s Opinion

To measure the intrusion caused by a canine sniff of a home’s front porch, *Jardines* resorted to a “simple baseline:” whenever “the Government obtains information by physically intruding’ on persons, houses, papers, or effects,” a Fourth Amendment search has occurred.¹⁰⁹ The Court lauded this test as providing the “original meaning” of a search, which “formed the exclusive basis” for the Fourth Amendment’s protections “for much of our history.”¹¹⁰ Nearly four decades of reliance on *Katz*’s reasonable expectation of privacy test for searches did “not subtract anything” from these original protections.¹¹¹

Jardines viewed physical intrusion of the home, which, when it came to the Fourth Amendment, was “first among equals,” as striking at the “very core” of a person’s right to “be free from unreasonable government intrusion.”¹¹² Although the police dog did

103. *Id.* at 4–5.

104. *Id.* at 5.

105. *Id.*

106. *Florida v. Jardines*, 133 S. Ct. 1409, 1413 (2013). Jardines was also charged with “grand theft for stealing over five thousand dollars of electricity from Florida Power & Light to grow the marijuana.” Brief for the State of Florida, *supra* note 93, at 6.

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

108. *Id.*

109. *Id.* at 1414.

110. *Id.*

111. *Id.*

112. *Id.*

not actually physically go into the home, he did invade the home's "curtilage," defined as the area "immediately surrounding and associated with the home."¹¹³ Government dawdling in the curtilage by lingering on the front porch and "trawl[ing] for evidence with impunity" presented the Court with the distressing picture of police observing a citizen in "his repose from just outside the front window."¹¹⁴

The Court recognized that not every physical invasion of the front porch could trigger a "fine-grained" Constitutional analysis; otherwise Girl Scouts and trick-or-treaters would need to be Fourth Amendment scholars.¹¹⁵ Distinguishing between a search and a social visit caused the Court to elaborate on licensed and unlicensed physical intrusions.¹¹⁶ Since "the detectives had all four of their feet and all four of their companion's firmly planted on the constitutionally protected extension of Jardines'[s] home, the only question is whether he had given his leave (even implicitly) for them to do so."¹¹⁷ Any such license could be "implied from the habits of the country."¹¹⁸ One implied license "typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."¹¹⁹ This license not only imposes the two limits of place (arrive by front path) and time (leave after brief wait), but also the limit as to "specific purpose."¹²⁰ The detectives in *Jardines* outstripped any license when they brought a "trained police dog to explore the area around the home in hopes of discovering incriminating evidence."¹²¹

The mention of "purpose" exposed the Court to criticism that it was injecting an element of "subjective intent" into its Fourth Amendment analysis, an approach counter both to Court precedent¹²² and the explicit reasonableness language of the Fourth

113. *Id.*

114. *Id.*

115. *Id.* at 1415.

116. *Id.*

117. *Id.*

118. *Id.* (quoting *McKee v. Gratz*, 260 U.S. 127, 136 (1922)).

119. *Jardines*, 133 S.Ct. at 1415.

120. *Id.* at 1416.

121. *Id.*

122. *Whren v. United States*, 517 U.S. 806 (1996).

Amendment.¹²³ *Jardines* rejected such a characterization, arguing that the cases forbidding inquiry into subjective intent held only that “a stop or search *that is objectively reasonable* is not vitiated by the fact that the officer’s real reason for making the stop or search has nothing to do with the validating reason.”¹²⁴ In contrast, the question in *Jardines* was “whether the officer’s conduct was an objectively reasonable search” in the first place.¹²⁵

The Court ultimately ruled that Franky’s visit was a search because *Jardines* himself never gave an implied license to enter his porch to sniff for drugs.¹²⁶ To reach this result, *Jardines* eschewed *Katz*’s reasonable expectation of privacy analysis, adopted *Jones*’s recent return to a property-rights test, and opened the Fourth Amendment up to discussions of licenses for entry and the subjective purposes of intruding officers. Thus, the Court, in returning to the hoped-for clarity of a physical trespass, created a host of new issues for future courts to consider.

IV. CONCERNS CREATED BY *JARDINES*

A. *By Refusing to Consider a Canine Sniff’s Impact on the Reasonable Expectation of Privacy of a Home, Jardines Failed to Eliminate the Inconsistencies Between Kyllo and Place*

The *Jardines* Court congratulated itself on its efficiency in avoiding *Katz*’s “expectation of privacy” issue when analyzing a canine sniff of the home.¹²⁷ The Court exulted, “One virtue of the Fourth Amendment’s property-rights baseline is that it keeps easy cases easy.”¹²⁸ Such an approach left police and courts with the

123. The Fourth Amendment provides in part: “The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated.” U.S. CONST. amend. IV (emphasis added).

124. *Jardines*, 133 S. Ct. at 1416.

125. *Id.* at 1417.

126. See *id.* at 1417, where in answer to the question “whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered,” the Court concluded, “Here, [the officers’] behavior objectively revealed a purpose to conduct a search, which is not what anyone would think he had license to do.” See also *id.* at 1415, in which the Court, in assessing the officers’ physical intrusion on “the constitutionally protected extension of *Jardines*’ home,” declared, “the only question is whether he had given his leave (even implicitly) for them to do so. He had not.”

127. *Id.* at 1417.

128. *Id.*

nagging inconsistency between *Kyllo* and *Place* that will sow confusion when assessing canine sniff cases. The *Jardines* Court missed an opportunity to revisit some troubling assumptions underlying *Place*'s determination that a police dog's sniff was not a search.

The *Place* Court reached some curious conclusions about canine sniffs. While acknowledging that "a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment," *Place* still found a canine sniff identifying some of the contents of that luggage—cocaine—to be an act that did not amount to a Fourth Amendment search.¹²⁹ Even though the government was indeed gaining information from the canine sniff, the information apparently was not of a *kind* that could be legitimately kept private from the government. Since the information only concerned the existence of contraband, an item illegal to possess in the first place, it intruded on no privacy expectation that was "legitimate."¹³⁰ If a "legitimate expectation" was the equivalent of *Katz*'s "reasonable expectation," then it could be argued that there was no intrusion on a "reasonable expectation of privacy," and therefore no Fourth Amendment search. Further, *Place* found that the *manner* of obtaining this information was less objectionable than that of a human being rummaging through luggage. The *Place* Court was so impressed with the dog's ability to seek his quarry without opening bags and exposing them to public view and the luggage owner's attendant embarrassment and inconvenience, that it deemed this less intrusive "search" to be no search at all.¹³¹

Place's assumptions regarding the kind of information revealed by a dog sniff are dubious. Justice Harlan's rule in *Katz* required that the privacy expectation for a search "be one that society is prepared to recognize as 'reasonable.'"¹³² In a wide variety of cases following *Katz*, the Court devotedly adhered to this formulation by explicitly focusing on whether a "reasonable" privacy expectation existed.¹³³ In

129. *United States v. Place*, 462 U.S. 696, 707 (1983).

130. *Id.* at 707–06.

131. *Id.* at 707.

132. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

133. *E.g.*, *Bond v. United States*, 529 U.S. 334, 337 (2000) (measuring the reasonable expectation of privacy against physical manipulation of carryon luggage); *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (assessing whether there was a reasonable expectation of privacy from

cases where the Court did mention both “reasonable” and “legitimate,” it used these terms interchangeably, as when it noted in *Dow Chemical Co. v. United States*, “Dow plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings.”¹³⁴ *Place*, however, distanced “legitimate” from “reasonable” by distinguishing between contraband, which the dog is meant to detect, and noncontraband, which the sniff “does not expose.”¹³⁵ *Place* explicitly lauded the dog’s ability to limit its investigation by content, noting that the sniff disclosed *only* whether narcotics were present.¹³⁶ *Place*’s novel use of “legitimate” switched the focus from *Katz*’s question of whether a person concealed the contents of his bag or “knowingly expose[d] it to the public,”¹³⁷ to whether the contents of the bag were something a person was not supposed to have in the first place. In shifting focus, *Place* had forgotten that “[t]he door of a court is not barred because the plaintiff has committed a crime.”¹³⁸ The Fourth Amendment “provides no exception in its guarantee of protection,” for “[i]ts benefits are illusory indeed if they are denied to persons who may have been convicted with the evidence gathered by the very means which the Amendment forbids.”¹³⁹ The Fourth Amendment “extends to all alike, worthy and unworthy, without distinction,” because “[r]ights intended to protect all must be extended to all, lest they so fall into

observations from a plane flying over a yard); *New York v. Class*, 475 U.S. 106, 114 (1986) (weighing the reasonable privacy expectations in a vehicle’s VIN number); *Maryland v. Macon*, 472 U.S. 463, 469 (1985) (considering reasonable privacy expectations in an adult book store); *Oliver v. United States*, 466 U.S. 170, 177 (1984) (contemplating the reasonableness of privacy expectations in an open field); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (debating the reasonableness of privacy expectation in a damaged package of freight); *Michigan v. Clifford*, 464 U.S. 287, 292 (1984) (considering the reasonable expectation of privacy in fire-damaged premises); *United States v. Knotts*, 460 U.S. 276, 281 (1983) (assessing the reasonable privacy expectations of a person being tracked on public streets by use of a beeper); *Couch v. United States*, 409 U.S. 322, 336 (1973) (looking at the reasonableness of privacy in tax records).

134. *Dow Chem. Co. v. United States*, 476 U.S. 227, 236 (1986). *See also* *Smith v. Maryland*, 442 U.S. 735, 743 (1979) (in which the Court referred to both a “reasonable” and “legitimate” expectation of privacy).

135. *Place*, 462 U.S. at 707.

136. *Id.*

137. *Katz*, 389 U.S. at 351.

138. *Olmstead v. United States*, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting).

139. *Goldman v. United States*, 316 U.S. 129, 142 (1942) (Murphy, J., dissenting).

desuetude in the course of denying them to the worst of men as to afford no aid to the best of men in time of need.”¹⁴⁰

Another concern raised by *Place*'s assumptions regarded the manner in which a dog sniff revealed information about the contents of a container. *Place* measured the intrusion a dog causes when he or she sniffs a bag by contrasting it with the more intrusive human rummage of luggage.¹⁴¹ *Place*'s logic boiled down to the notion that, although a dog does commit a limited intrusion on a bag, it is certainly less offensive than the prospect of a human fumbling through luggage and exposing it to the public for embarrassment and humiliation.¹⁴² The problem with *Place*'s analysis was its frame of reference—the Court chose to contrast the dog's sniffing with a greater intrusion, when it should have analyzed it in terms of the Fourth Amendment baseline, which is no intrusion at all. The Fourth Amendment is a command that government *not* act unless and until it can offer some basic protections such as reasonableness and, in some circumstances, a warrant. It explicitly warns that people have a right “*against* unreasonable searches and seizures” and mandates this protection “shall *not* be violated.”¹⁴³ In *Jardines*, the Court lauded the *Olmstead* rule as a “simple baseline.”¹⁴⁴ The Fourth Amendment's true baseline is much more basic—“the right to be let alone.”¹⁴⁵ *Place* should have measured the canine's intrusion against this fundamental right to be free from government interference in the first place.

Place's problems surfaced in *Jardines* when they collided with *Kyllo*'s “right of a man to retreat into his own home.”¹⁴⁶ If a canine sniff was so surgically precise that it only obtained information about contraband—something that should not be possessed in the first place, and if reliance upon a dog's nose did not even amount to a Fourth Amendment search, then a dog's visit to the front porch of a home should cause no consternation for the Court. On the other hand, what Franky told his handler was more than nothing. The

140. *Id.*

141. *Place*, 462 U.S. at 707.

142. *Id.*

143. U.S. CONST. amend. IV (emphasis added).

144. *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013).

145. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

146. *Kyllo v. United States*, 533 U.S. 27, 31 (2001).

canine provided the government with information about the contents of a home—the “core” of the Fourth Amendment.¹⁴⁷

This is the quandary *Jardines* sidestepped in keeping easy cases easy.¹⁴⁸ Of course, the very fact that the Court recognized the bind exposes the conflict between two lines of its precedent. The Court has effectively told police and courts that although *Place* and *Kyllo* are in fundamental conflict, they should continue to apply both as Constitutional gospel until the problem is solved. Government officials are tasked with treating dogs as Fourth Amendment nonentities until they cross into a “constitutionally protected area,” once criticized by *Katz* as an incantation.¹⁴⁹ *Jardines*, in spite of *Katz*’s efforts, has made a “constitutionally protected area” a “talisman” that can transform the legal nature of man’s best friend.¹⁵⁰

*B. Jardines’s Injection of Implied License Rules into Its
Property-Rights Analysis Will Create Confusion for
Criminal Justice Officials*

The *Jardines* Court refined its property rights definition of a Fourth Amendment search with a discussion of “unlicensed physical intrusion.”¹⁵¹ To interpret license law, the Court turned to two cases, *McKee v. Gratz*,¹⁵² and *Breard v. Alexandria*.¹⁵³ *McKee* was a 1922 civil case in which a landowner sued the defendant for removing mussels “taken alive from the bottom of what seems to have been at times a flowing stream, at times a succession of pools.”¹⁵⁴ To determine whether the defendant trespassed on the plaintiff’s land when he took the mussels, the *McKee* Court noted, “The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts at least of this country.”¹⁵⁵ In such lands, “it is customary to wander, shoot

147. *Id.*

148. *Jardines*, 133 S. Ct. at 1417.

149. *Katz v. United States*, 389 U.S. 347, 350 (1967).

150. *Id.* at 352, n.9.

151. *Jardines*, 133 S. Ct. at 1415.

152. *McKee v. Gratz*, 260 U.S. 127 (1922).

153. *Breard v. Alexandria*, 341 U.S. 622 (1951).

154. *McKee*, 260 U.S. at 135.

155. *Id.* at 136.

and fish at will until the owner sees fit to prohibit it.”¹⁵⁶ In the context of such wandering, hunting, and fishing, a “license may be implied from the habits of the country.” Although *McKee* concluded that evidence existed that the collection of muscles was a “practice [that] had prevailed in this region,” the Court left it to the jury to decide whether those who took the mussels were entitled to rely on such an implied license and “whether, if entitled to rely upon it for occasional uses, they could do so to the extent of the considerable and systematic work that was done.”¹⁵⁷ Thus, while *McKee* mentioned a rule regarding an implied license and suggested it be interpreted by reference to the “habits of the country,” it did not perform this analysis, and therefore offered little guidance on applying implied license law to facts.

Breard offered facts much closer to those in *Jardines*, for it involved a door-to-door salesman who was arrested for soliciting magazine subscriptions in violation of an ordinance requiring “prior consent of the owners of the residences solicited.”¹⁵⁸ The *Breard* Court apparently disfavored salesmen knocking on doors, for it refused to allow solicitors, whom it deemed “opportunists[] for private gain,”¹⁵⁹ to “arm themselves with an acceptable principle” and “proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose.”¹⁶⁰ *Breard* concluded, “This case calls for an adjustment of constitutional rights in the light of the particular living conditions of the time and place.”¹⁶¹ The Court then described the various, and to it unwelcome, changes in living conditions occasioned by the boom in door-to-door sales:

Door-to-door canvassing has flourished increasingly in recent years with the ready market furnished by the rapid concentration of housing. The infrequent and still welcome solicitor to the rural home became to some a recurring nuisance in towns when the visits were multiplied. Unwanted knocks on the door by day or night are a

156. *Id.*

157. *Id.*

158. *Breard*, 341 U.S. at 624.

159. *Id.* at 625.

160. *Id.* at 626.

161. *Id.*

nuisance, or worse, to peace and quiet. The local retail merchant, too, has not been unmindful of the effective competition furnished by house-to-house selling in many lines. As a matter of business fairness, it may be thought not really sporting to corner the quarry in his home and through his open door put pressure on the prospect to purchase. As the exigencies of trade are not ordinarily expected to have a higher rating constitutionally than the tranquility of the fireside, responsible municipal officers have sought a way to curb the annoyances while preserving complete freedom for desirable visitors to the homes.¹⁶²

Breard held the ordinance prohibiting such sales without prior consent did not violate due process¹⁶³ because, “The Constitution’s protection of property rights does not make a state or a city impotent to guard its citizens against the annoyances of life because the regulation may restrict the manner of doing a legitimate business.”¹⁶⁴ The Court in *Jardines* read *Breard* as allowing “solicitors, hawkers, and peddlers of all kinds” so long as they “approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.”¹⁶⁵ Since “introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence” exceeded this “traditional invitation,” it fell outside the implied license.¹⁶⁶

Broad language plucked from a mussel-poaching case and a decision from a time when door-to-door sales were a disturbing new phenomenon provide little guidance for police and courts attempting to apply *Jardines*’s newly-minted license rules under the Fourth Amendment. Further, *Jardines*’s own ruling provided scant direction beyond conclusory statements about the offensiveness of dogs sniffing within the curtilage.¹⁶⁷ Thus, *Jardines* created a new Fourth

162. *Id.* at 626–27.

163. *Id.* at 633.

164. *Id.* at 632.

165. *Florida v. Jardines*, 133 S. Ct. 1409, 1415 (2013).

166. *Id.* at 1415–16.

167. *Jardines*’s reference to “background social norms” may provide a clue as to a way forward. *Id.* Ironically, a rule that frequently refers to social norms and habits of the country is *Katz*’s reasonable expectation of privacy definition of a search. Although *Jardines*, in exalting the simplicity of its “baseline” property-rights test, meant to distinguish its rule from the standard in *Katz*, in crafting an “implied license” limit, the Court might have unwittingly brought in much of

Amendment rule without providing any manual on how it works to those who will enforce it. *Jardines* complicated matters further by adding to its license test an entirely separate element regarding the subjective intent of the officer.¹⁶⁸ Specifically, the Court decided that the “scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose.”¹⁶⁹ The full implications of this subjective analysis will be explored in the next section.

*C. Jardines Doubled Down on Jones’s “Purpose” Inquiry,
Multiplying the Flaws of Its Property-Rights Test*

In fleshing out its property-rights test, *Jardines* relied on the subjective intent of the officer to inform to two distinct inquiries: 1) the application of *Jones*’s definition of a Fourth Amendment “search,”¹⁷⁰ and 2) the determination of the scope of a license to enter a homeowner’s property.¹⁷¹ For the first inquiry, *Jardines* adopted *Jones*’s definition of a Fourth Amendment “search”¹⁷²: a physical occupation by government of private property “for the purpose of obtaining information.”¹⁷³ Such subjectivity has received rough treatment from the Court in the past. The Court has

Katz’s analytical tools through the back door. *Id.* at 1414. In other words, if *Jardines* offered a test based on property rights that was informed by reference to societal norms, *Katz* offered a societal norm test (what one could reasonably expect to be private) that was interpreted at times by reference to property rights. In applying the *Katz* standard in *Rakas v. Illinois*, the Court declared,

Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others...and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of his right to exclude.

Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978). In his concurring opinion, Justice Powell echoed this point, noting, “[P]roperty rights reflect society’s explicit recognition of a person’s authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individuals’ expectations of privacy are reasonable.” *Id.* at 153 (Powell, J., concurring). Moreover, Justice Marshall noted that a factor considered in determining the reasonableness of a privacy expectation is “whether the expectation at issue is rooted in entitlements defined in positive law,” such as property law. *Oliver v. United States*, 466 U.S. 170, 189–90 (1983).

168. *Jardines*, 133 S. Ct. at 1416.

169. *Id.*

170. *Id.* at 1414.

171. *Id.* at 1416.

172. *Id.* at 1414.

173. *United States v. Jones*, 132 S. Ct. 945, 949 (2012).

emphatically declared, “[T]he subjective intent of the law enforcement officer is irrelevant in determining whether that officer’s actions violate the Fourth Amendment . . . the issue is not his state of mind, but the objective effect of his actions.”¹⁷⁴ A particular act is reasonable under the Fourth Amendment “regardless of the individual officer’s state of mind, ‘as long as the circumstances, viewed *objectively*, justify [the] action.’”¹⁷⁵ Since subjective motivations “have no bearing,”¹⁷⁶ are “irrelevant,”¹⁷⁷ and are “of no moment,”¹⁷⁸ any argument proposing that the actual motivation of officers affects “constitutional reasonableness” has been foreclosed.¹⁷⁹ The Court’s adamancy here is based on sound reasoning:

The reasons for looking to objective factors, rather than subjective intent, are clear. Legal tests based on reasonableness are generally objective, and this Court has long taken the view that “evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.”¹⁸⁰

The Court has deemed such an objective standard “imperative” because an “officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.”¹⁸¹

When the *Jardines* Court was presented with its holdings deeming subjective intent irrelevant, it aimed to distinguish them as involving a separate issue.¹⁸² *Jardines* characterized *Whren* as “merely hold[ing] that a stop or search *that is objectively reasonable*

174. *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (quoting *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000)).

175. *Id.* (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)).

176. *Id.*

177. *Id.*

178. *Gustafson v. Florida*, 414 U.S. 260, 266 (1973); *United States v. Robinson*, 414 U.S. 218, 236 (1973).

179. *Whren v. United States*, 517 U.S. 806, 814 (1996).

180. *Kentucky v. King*, 131 S. Ct. 1849, 1859 (2011) (citing *Horton v. California*, 496 U.S. 128, 138 (1990)).

181. *Graham v. O’Connor*, 490 U.S. 386, 397 (1989).

182. *Florida v. Jardines*, 133 S. Ct. 1409, 1416 (2013).

is not vitiated by the fact that the officer's real reason for making the stop or search has nothing to do with the validating reason."¹⁸³ Unlike *Whren*, the Court in *Jardines* had to decide "*whether* the officer's conduct was an objectively reasonable search."¹⁸⁴

The problem that *Jardines* cannot avoid, however, is the simple fact that both the earlier caselaw and *Jardines* are assessing whether an officer was acting in an objectively reasonable manner. As we have seen, nearly forty years of caselaw has explicitly rejected any consideration of an officer's inner thoughts when weighing the Fourth Amendment reasonableness of official action. For an example of the bind *Jardines* had placed itself in, one need look no further than the facts of *Jardines*. Walking a dog, even up to someone's porch, is perfectly reasonable. The common law lacks even "a single case holding that a visitor to the front door of a home commits a trespass if the visitor is accompanied by a dog."¹⁸⁵ The "traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing" has previously carried great weight with the Court because "an examination of the common-law understanding of an officer's authority" can shed "light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable."¹⁸⁶

Walking a dog to the front door can only become unreasonable using *Jardines*'s intent analysis. The deeper inquiry—what, exactly, is the purpose for the dog's presence, and why did the person bring the dog to the door—unmasks the true nature of the government action. One could argue that such questions should be perfectly proper areas of inquiry, but they directly conflict with the prohibition against subjectivity that the Court has imposed on Fourth Amendment litigation. If *Jardines* wished to include such subjective investigation in the Fourth Amendment, it should have openly admitted the significant change it was making. Concern for the

183. *Id.*

184. *Id.* at 1416–17.

185. *Id.* at 1424 (Alito, J., dissenting).

186. *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2000) (citing *Payton v. New York*, 445 U.S. 573, 591 (1980)).

officials burdened with carrying out criminal investigations on a daily basis demands such clarity and forthrightness.

Moreover, *Jardines* caused subjectivity to take on even more importance than it had in *Jones* by having it inform a newly added second inquiry—license to enter property. The Court declared that the “scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose.”¹⁸⁷ This doubling down on subjective intent came in spite of the Court’s condemnation of subjectivity as late as 2011 in the case *Ashcroft v. Al-Kidd*,¹⁸⁸ which explained:

We ask whether “the circumstances, viewed objectively, justify [the challenged] action.” If so, that action was reasonable “*whatever* the subjective intent” motivating the relevant officials. This approach recognizes that the Fourth Amendment regulates conduct rather than thoughts, and it promotes evenhanded, uniform enforcement of the law.¹⁸⁹

Jardines, in the face of clear language declaring that what matters for Fourth Amendment analysis is “conduct rather than thoughts,” then proceeded to measure an official conduct *by thoughts*.

The errant turn to subjectivity could accordingly cost *Jardines* evenhanded enforcement of the Fourth Amendment because of the great difficulty in divining the real intent of government actors. Creative officers will waste little time in inventing ways to circumvent the “purpose” part of the license analysis. Police could walk drug-detecting canines on residential streets, claiming to be introducing the police dogs to neighborhood children or to be sniffing out contraband stashes left in public by street sellers who do not wish to be found holding contraband. Since the curtilage of many homes can be quite small, due to “the rapid concentration of housing” the *Breard* Court described,¹⁹⁰ dogs could detect contraband by passing by some curtilage’s outer limits. This

187. *Jardines*, 133 S. Ct. at 1416.

188. 131 S. Ct. 2074 (2011).

189. *Id.* at 2080 (internal citations omitted) (emphasis in original).

190. *Breard v. Alexandria*, 341 U.S. 622, 626–27 (1951) (*abrogated by* Vill. of Schaumburg v. Citizens for a Better Env’t, 444 U.S. 620 (1980)).

possibility would be particularly prevalent for those who live in low-income housing, where yard size can be modest.

The resulting canine sniffs of curtilage might fall outside of both the *Jardines/Jones* property-rights definition of a search and *Katz*'s reasonable expectation of privacy test. After *Jardines*, the Court would find no physical trespass on a constitutionally protected area—and hence no search—since none of the canine's four feet actually invaded the curtilage.¹⁹¹ *Katz* would likely find no search as well, due to a combination of the pass *Place* gave dogs (in deeming their sniffs not to constitute a Fourth Amendment "search")¹⁹² and the Court's over-flights precedent.¹⁹³ In the over-flight cases of *California v. Ciraolo*¹⁹⁴ and *Florida v. Riley*,¹⁹⁵ the Court failed to protect the curtilage, even though it described this area as "intimately linked to the home" and a haven for the "protection of families and personal privacy."¹⁹⁶ In *Ciraolo*, the Court deemed an officer's naked-eye observation of marijuana from a plane flying over curtilage not to constitute a Fourth Amendment search.¹⁹⁷ One of the reasons given for this lack of Fourth Amendment protection of curtilage was that police acted "in a physically nonintrusive manner."¹⁹⁸ While a homeowner's curtilage was protected from an officer stepping on curtilage, "it is unreasonable for [a homeowner] to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet."¹⁹⁹ The Court followed the same reasoning three years later in *Riley*, where it found another government collection of evidence involving "no physical invasion"²⁰⁰ of curtilage not to be a Fourth Amendment search.²⁰¹

According to *Ciraolo* and *Riley*, a dog sniffing around for evidence, even if detecting information *inside* the cherished

191. *Jardines*, 133 S. Ct. at 1415.

192. *United States v. Place*, 462 U.S. 696, 707 (1983).

193. *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Ciraolo*, 476 U.S. 207 (1986).

194. 476 U.S. 207 (1986).

195. 488 U.S. 445 (1989).

196. *Ciraolo*, 476 U.S. at 213.

197. *Id.* at 218.

198. *Id.* at 213.

199. *Id.* at 218.

200. *Riley*, 488 U.S. at 449.

201. *Id.* at 451.

curtilage, would not trigger Fourth Amendment protection so long as he or she does not physically touch protected land. While *Ciraolo* and *Riley* gathered information in an intimate area from the physically nonintrusive sense of sight, the canine would gather such information with the physically nonintrusive sense of smell. The incongruity of condemning a canine sniff of a home while ignoring the same intrusion of the curtilage—an area that shares the intimacies of the home—is a vestige of *Jardines*’s failure to resolve the inherent conflict between *Kyllo* and *Place*. This failure, in turn, is exacerbated by *Jardines*’s recourse to subjectivity.

V. CONCLUSION

During World War II, the Court, in *Goldman v. United States*,²⁰² decided an electronic surveillance issue by applying *Olmstead*’s physical trespass test.²⁰³ In *Goldman*, federal investigators placed a “detectaphone”—essentially an electronic bug—against a wall in order to overhear conversations in the office next door.²⁰⁴ The Court held that “the use of the detectaphone by Government agents was not a violation of the Fourth Amendment.”²⁰⁵ When asked to overrule *Olmstead*, *Goldman* refused, declaring that “[t]o rehearse and reappraise the arguments pro and con, and the conflicting views exhibited in the opinions, would serve no good purpose.”²⁰⁶

This weary refusal to assess the privacy implications of electronic eavesdropping came two decades before the Court’s historic decision in *Katz*. Some members of the Court, however, had already recognized the independent significance of privacy for purposes of the Fourth Amendment. In his dissent, Justice Murphy identified as “[o]ne of the great boons secured to the inhabitants of this country” the “right of personal privacy guaranteed by the Fourth Amendment.”²⁰⁷ Mindful of the terrible cost to the country of the global war then raging, he noted that,

At a time when the nation is called upon to give freely of life and treasure to defend and preserve the institutions of

202. 316 U.S. 129 (1942), *overruled in part by* *Katz v. United States*, 389 U.S. 347 (1967).

203. *Id.* at 135.

204. *Id.* at 131–32.

205. *Id.* at 135.

206. *Id.* at 136.

207. *Id.* at 136 (Murphy, J., dissenting).

democracy and freedom, we should not permit any of the essentials of freedom to lose vitality through legal interpretations that are restrictive and inadequate for the period in which we live.²⁰⁸

The *Jardines* Court, in choosing to decide a Fourth Amendment case by focusing on property rights rather than resolving pressing questions of privacy, failed to heed Justice Murphy's warning. By returning to a Fourth Amendment doctrine that Justice Murphy warned, back in 1942, might "become obsolete,"²⁰⁹ *Jardines* did not keep "easy cases easy."²¹⁰ Instead, the *Jardines* Court left unresolved a glaring incongruity between *Kyllo*, precedent which exalted the privacy of the home, and *Place*, a case that deemed a canine sniff to be a Fourth Amendment nonentity. Further, *Jardines* grafted an undefined and potentially complicated implied license analysis²¹¹ onto its property-rights test, a rule that it esteemed as a "simple baseline."²¹² Finally, *Jardines* intensified the subjectivity of *Jones*'s property-rights rule by injecting a "purpose" analysis into its new license rule.²¹³ Future police and courts, burdened with trying to apply *Jardines*'s rule, will hardly agree that the Court kept their tasks easy.

208. *Id.* at 142.

209. *Id.* at 138.

210. *Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013).

211. *Id.* at 1415–16.

212. *Id.* at 1414.

213. *Id.* at 1416–17.