

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 11: The Contemporary Era – Criminal Justice/Search and Seizure

Florida v. Jardines, ___ U.S. ___ (2013)

The Miami-Dade Police Department, suspecting that Joelis Jardines was growing marijuana in his house, sent to his residence two detectives and a dog trained to detect the smell of various drugs. The dog's behavior on the front porch of the Jardines residence indicated that the canine sensed contraband inside the house. Relying on the dog sniff, Miami-Dade officers obtained a warrant to search the Jardines's house, where they found marijuana plants. Jardines was immediately arrested and tried for drug trafficking. The trial court granted his motion to suppress the evidence obtained by the police officers on the grounds that the use of the dog sniff violated the Fourth and Fourteenth Amendments. This ruling was reversed by an intermediate Florida Court, but reinstated by the Florida Supreme Court. Florida appealed to the Supreme Court of the United States.

The Supreme Court by a 5–4 vote declared the search unconstitutional. Justice Scalia's majority opinion held that police officers may not physically enter a person's front porch for the purpose of conducting a search without first obtaining a warrant. How did Justice Scalia distinguish the police behavior in this case from the behavior of an ordinary person with a seeing-eye dog who knocked on the Jardines's front door to get directions? Would that be a trespass? Suppose the police officers had simply knocked on the door (with the dog) to inform Jardines that he had left the lights on in his car? Would evidence of the drugs be admissible then? How did the different opinions understand the constitutional status of dogs trained to sniff drugs? Who has the better argument? Jardines is one of many recent Fourth Amendment cases in which Justices Scalia and Thomas take more liberal positions than Justice Breyer. What might explain their votes in these cases?

Justice SCALIA delivered the opinion of the Court.

The Fourth Amendment provides in relevant part that the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” The Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When “the Government obtains information by physically intruding” on persons, houses, papers, or effects, “a ‘search’ within the original meaning of the Fourth Amendment” has “undoubtedly occurred.” . . .

That principle renders this case a straightforward one. The officers were gathering information in an area belonging to Jardines and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.

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[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's “very core” stands “the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.

We therefore regard the area “immediately surrounding and associated with the home” — what our cases call the curtilage — as “part of the home itself for Fourth Amendment purposes.” That principle has ancient and durable roots. Just as the distinction between the home and the open fields is “as old as the common law,” so too is the identity of home and what Blackstone called the “curtilage or homestall,” for the “house protects and privileges all its branches and appurtenants.” This area around the home is “intimately linked to the home, both physically and psychologically,” and is where “privacy expectations are most heightened.”

... While law enforcement officers need not “shield their eyes” when passing by the home “on public thoroughfares,” an officer’s leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment’s protected areas. In permitting, for example, visual observation of the home from “public navigable airspace,” we were careful to note that it was done “in a physically nonintrusive manner.” *Entick v. Carrington* (1765) . . . states the general rule clearly: “[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour’s close without his leave.” As it is undisputed that the detectives had all four of their feet and all four of their companion’s firmly planted on the constitutionally protected extension of Jardines’ home, the only question is whether he had given his leave (even implicitly) for them to do so. He had not.

“A license may be implied from the habits of the country,” notwithstanding the “strict rule of the English common law as to entry upon a close.” We have accordingly recognized that “the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds.” This implicit 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. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation’s Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is “no more than any private citizen might do.”

But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*. An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker. To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to — well, call the police. . . .

Justice KAGAN, with whom Justice GINSBURG and Justice SOTOMAYOR join, concurring.

For me, a simple analogy clinches this case — and does so on privacy as well as property grounds. A stranger comes to the front door of your home carrying super-high-powered binoculars. He doesn’t knock or say hello. Instead, he stands on the porch and uses the binoculars to peer through your windows, into your home’s furthest corners. It doesn’t take long (the binoculars are really very fine): In just a couple of minutes, his uncommon behavior allows him to learn details of your life you disclose to no one. Has your “visitor” trespassed on your property, exceeding the license you have granted to members of the public to, say, drop off the mail or distribute campaign flyers? Yes, he has. And has he also invaded your “reasonable expectation of privacy,” by nosing into intimacies you sensibly thought protected from disclosure? Yes, of course, he has done that too.

That case is this case in every way that matters. Here, police officers came to Joelis Jardines’ door with a super-sensitive instrument, which they deployed to detect things inside that they could not perceive unassisted. The equipment they used was animal, not mineral. . . . Detective Bartelt’s dog was not your neighbor’s pet, come to your porch on a leisurely stroll. [D]rug-detection dogs are highly trained tools of law enforcement, geared to respond in distinctive ways to specific scents so as to convey clear and reliable information to their human partners. They are to the poodle down the street as high-powered binoculars are to a piece of plain glass. Like the binoculars, a drug-detection dog is a specialized

device for discovering objects not in plain view (or plain smell). And as in the hypothetical above, that device was aimed here at a home—the most private and inviolate (or so we expect) of all the places and things the Fourth Amendment protects. Was this activity a trespass? Yes, as the Court holds today. Was it also an invasion of privacy? Yes, that as well.

The Court today treats this case under a property rubric; I write separately to note that I could just as happily have decided it by looking to Jardines' privacy interests. A decision along those lines would have looked . . . well, much like this one. It would have talked about "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." It would have insisted on maintaining the "practical value" of that right by preventing police officers from standing in an adjacent space and "trawl[ing] for evidence with impunity." It would have explained that "privacy expectations are most heightened" in the home and the surrounding area. And it would have determined that police officers invade those shared expectations when they use trained canine assistants to reveal within the confines of a home what they could not otherwise have found there.

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The police officers here conducted a search because they used a "device . . . not in general public use" (a trained drug-detection dog) to "explore details of the home" (the presence of certain substances) that they would not otherwise have discovered without entering the premises. . . . As *Kyllo v. United States* (2001) made clear, the "sense-enhancing" tool at issue may be "crude" or "sophisticated," may be old or new . . . , may be either smaller or bigger than a breadbox; still, "at least where (as here)" the device is not "in general public use," training it on a home violates our "minimal expectation of privacy"—an expectation "that exists, and that is acknowledged to be reasonable." . . .

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Justice ALITO, with whom THE CHIEF JUSTICE, Justice KENNEDY, and Justice BREYER join, dissenting.

The Court's decision in this important Fourth Amendment case is based on a putative rule of trespass law that is nowhere to be found in the annals of Anglo-American jurisprudence.

The law of trespass generally gives members of the public a license to use a walkway to approach the front door of a house and to remain there for a brief time. This license is not limited to persons who intend to speak to an occupant or who actually do so. (Mail carriers and persons delivering packages and flyers are examples of individuals who may lawfully approach a front door without intending to converse.) Nor is the license restricted to categories of visitors whom an occupant of the dwelling is likely to welcome; as the Court acknowledges, this license applies even to "solicitors, hawkers and peddlers of all kinds." And the license even extends to police officers who wish to gather evidence against an occupant (by asking potentially incriminating questions).

According to the Court, however, the police officer in this case, Detective Bartelt, committed a trespass because he was accompanied during his otherwise lawful visit to the front door of respondent's house by his dog, Franky. Where is the authority evidencing such a rule? Dogs have been domesticated for about 12,000 years; they were ubiquitous in both this country and Britain at the time of the adoption of the Fourth Amendment; and their acute sense of smell has been used in law enforcement for centuries. Yet the Court has been unable to find a single case—from the United States or any other common-law nation—that supports the rule on which its decision is based. Thus, trespass law provides no support for the Court's holding today.

The Court's decision is also inconsistent with the reasonable-expectations-of-privacy test that the Court adopted in *Katz v. United States* (1967). A reasonable person understands that odors emanating from a house may be detected from locations that are open to the public, and a reasonable person will not count on the strength of those odors remaining within the range that, while detectible by a dog, cannot be smelled by a human.

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It is said that members of the public may lawfully proceed along a walkway leading to the front door of a house because custom grants them a license to do so. . . . Of course, this license has certain spatial and temporal limits. A visitor must stick to the path that is typically used to approach a front door, such as a paved walkway. A visitor cannot traipse through the garden, meander into the backyard, or take other circuitous detours that veer from the pathway that a visitor would customarily use. . . . Similarly, a visitor may not linger at the front door for an extended period. The license is limited to the amount of time it would customarily take to approach the door, pause long enough to see if someone is home, and (if not expressly invited to stay longer), leave.

As I understand the law of trespass and the scope of the implied license, a visitor who adheres to these limitations is not necessarily required to ring the doorbell, knock on the door, or attempt to speak with an occupant. For example, mail carriers, persons making deliveries, and individuals distributing flyers may leave the items they are carrying and depart without making any attempt to converse. A pedestrian or motorist looking for a particular address may walk up to a front door in order to check a house number that is hard to see from the sidewalk or road. A neighbor who knows that the residents are away may approach the door to retrieve an accumulation of newspapers that might signal to a potential burglar that the house is unoccupied.

As the majority acknowledges, this implied license to approach the front door extends to the police. [P]olice officers do not engage in a search when they approach the front door of a residence and seek to engage in what is termed a “knock and talk,” *i.e.*, knocking on the door and seeking to speak to an occupant for the purpose of gathering evidence. . . . [G]athering evidence—even damning evidence—is a lawful activity that falls within the scope of the license to approach. And when officers walk up to the front door of a house, they are permitted to see, hear, and smell whatever can be detected from a lawful vantage point.

Detective Bartelt did not exceed the scope of the license to approach respondent’s front door. He adhered to the customary path; he did not approach in the middle of the night; and he remained at the front door for only a very short period (less than a minute or two).

The Court concludes that Detective Bartelt went too far because he had the “*objectiv[e]* . . . purpose to conduct a search.” What this means, I take it, is that anyone aware of what Detective Bartelt did would infer that his subjective purpose was to gather evidence. But if this is the Court’s point, then a standard “knock and talk” and most other police visits would likewise constitute searches. With the exception of visits to serve warrants or civil process, police almost always approach homes with a purpose of discovering information. That is certainly the objective of a “knock and talk.” The Court offers no meaningful way of distinguishing the “objective purpose” of a “knock and talk” from the “objective purpose” of Detective Bartelt’s conduct here.

What the Court must fall back on, then, is the particular instrument that Detective Bartelt used to detect the odor of marijuana, namely, his dog. But in the entire body of common-law decisions, the Court has not found 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 on a leash. . . . Dogs’ keen sense of smell has been used in law enforcement for centuries. The antiquity of this practice is evidenced by a Scottish law from 1318 that made it a crime to “disturb a tracking dog or the men coming with it for pursuing thieves or seizing malefactors.” If bringing a tracking dog to the front door of a home constituted a trespass, one would expect at least one case to have arisen during the past 800 years. But the Court has found none.

. . . .

It is clear that the occupant of a house has no reasonable expectation of privacy with respect to odors that can be smelled by human beings who are standing in such places. And I would not draw a line between odors that can be smelled by humans and those that are detectible only by dogs.

Consider the situation from the point of view of the occupant of a building in which marijuana is grown or methamphetamine is manufactured. Would such an occupant reason as follows? “I know that odors may emanate from my building and that atmospheric conditions, such as the force and direction of the wind, may affect the strength of those odors when they reach a spot where members of the public may lawfully stand. I also know that some people have a much more acute sense of smell than others,

and I have no idea who might be standing in one of the spots in question when the odors from my house reach that location. In addition, I know that odors coming from my building, when they reach these locations, may be strong enough to be detected by a dog. But I am confident that they will be so faint that they cannot be smelled by any human being." Such a finely tuned expectation would be entirely unrealistic, and I see no evidence that society is prepared to recognize it as reasonable.

Contrary to the interpretation propounded by the concurrence, *Kyllo v. United States* (2001) is best understood as a decision about the use of new technology. The *Kyllo* Court focused on the fact that the thermal imaging device was a form of "sense-enhancing technology" that was "not in general public use," and it expressed concern that citizens would be "at the mercy of advancing technology" if its use was not restricted. A dog, however, is not a new form of "technology" or a "device." And, as noted, the use of dogs' acute sense of smell in law enforcement dates back many centuries.

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