

**ORIGINAL MISUNDERSTANDINGS: THE
IMPLICATIONS OF MISREADING HISTORY IN
*JONES***

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ABSTRACT

This article shines light on a little-noticed but important error in *United States v. Jones*, the recent Supreme Court Fourth Amendment decision. In *Jones*, the majority opinion and Justice Alito's concurrence quibble whether the majority applies "18th-century tort law" in holding that the government's trespass constitutes a search. Both opinions mistakenly assert that any unwanted intrusion on private property was actionable at common law. While true in England, the American law of trespass provided no remedy for unwanted intrusions to unfenced land.

Current Supreme Court Fourth Amendment jurisprudence recognizes the open fields doctrine, which allows the government to search open land without a warrant. There is little indication at present that the Supreme Court or any other court wants to overrule the doctrine, so the Justices' nonchalant approach to history could be of no import to the scope of the Fourth Amendment. But the error could have a serious impact on property law. In recent years, the Supreme Court has exhibited a healthy appetite to both expanding the regulatory takings doctrine and imposing a judicial takings doctrine based on historical nonsense.

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INTRODUCTION

Before *Katz v. United States*,¹ a search under the Fourth Amendment required a trespass. Without a trespass to one’s property, no search took place.² In *Katz*, a 1967 decision, the U.S. Supreme Court abandoned that approach, and instead found a search where the government invaded a “reasonable expectation of privacy.”³ In *Oliver v. United States*,⁴ the Court elaborated on how the two tests relate. The Court found no reasonable expectation of privacy in open fields, and thus no search, even though the defendant had erected “No Trespassing” signs around his property to exclude the public,

1. 389 U.S. 347 (1967).

2. *See id.* at 353 (citing *Olmstead v. United States*, 277 U.S. 438 (1928) and *Goldman v. United States*, 316 U.S. 129 (1942)).

3. *Id.* at 360 (Harlan, J., concurring).

4. 466 U.S. 170 (1984).

consistent with state law.⁵ After *Oliver*, trespass no longer equated a search.

In *United States v. Jones*,⁶ the latest case on Fourth Amendment searches, the Court returned to the notion of trespass as a bar to a warrantless search. The Court held that attaching an electronic tracking device to Jones's car constituted a trespass. Because attaching the device constituted a trespass, it was a search, and the government was required to obtain a warrant.⁷

The majority opinion and concurrences duel on whether reviving trespass in Fourth Amendment jurisprudence is wise, but all agree that landowners always had the right to sue for trespasses on their property, including open fields.⁸ Referencing Prosser and Keeton's treatise, Justice Alito's concurrence asserts that "[a]t common law, any unauthorized intrusion on private property was actionable."⁹ Writing for the majority, Justice Scalia agrees that unauthorized entry in private land constituted a trespass at common law.¹⁰

The justices and the treatise writers are indisputably right about the common law of England.¹¹ The English law of trespass grants the landowner a right to exclude from all private land, including empty fields and standing timber. But, the justices are wrong about American law. Landowners in early America could only exclude others from their homes (and curtilage), and sometimes fenced land. Landowners could not exclude from open land, and therefore, unwanted visitors committed no trespass.

A review of eighteenth century trespass cases shows that unwanted intrusions on open land unaccompanied by theft were not considered trespasses. Additional evidence comes from contemporary hunting

5. *Id.* at 183–84. *See also* *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986) (holding that industrial plants were analogous to open fields, not a home's curtilage).

6. 132 S. Ct. 945 (2012).

7. *Id.* at 949–52.

8. *Id.* at 949, 958.

9. *Id.* at 958.

10. *Id.* at 949.

11. Brian Sawers, *Keeping up with the Joneses: Making Sure Your History Is Just as Wrong as Everyone Else's*, 111 MICH. L. REV. FIRST IMPRESSIONS 21, 22 (2013) [hereinafter Sawers, *Keeping up*].

law. Hunting, especially on horseback with dogs, is more disruptive than fishing or foraging, and so generated more lawmaking. Constitutional and statutory protections for hunting, mining, and resource gathering on open land reinforce the proposition that landowners could not exclude unwanted visitors from unfenced land. Hunting was not an exception to the rule. Instead, hunting was the activity most likely to be restricted since the hunters were armed, killed game the landowners might want for themselves, and hunting dogs could harass livestock.¹²

In the first part, the Article notes that this is not the only historical error in originalist jurisprudence. The second part discusses the scope of the open fields doctrine and how it relates to trespass law. The third part includes a review of American trespass cases from the eighteenth century, the constitutional protections for public access to private land, which necessarily limited trespass law, and colonial statutes that augmented trespass law, thus delimiting its scope and contours. The fourth part discusses the implications of faulty history for Fourth Amendment and Takings jurisprudence. Conflating English and American trespass laws has already produced a distorted regulatory takings doctrine. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,¹³ four justices exhibited an unhealthy appetite to ban judicial takings. If courts are going to decide cases today based on the law in 1791, then it is important to get the history right.

I. HISTORICAL ERRORS IN ORIGINALIST JURISPRUDENCE

Originalism is an approach to constitutional interpretation that “accords binding authority to the text of the Constitution or the intentions of its adopters.”¹⁴ It has been a major theme in the

12. *Id.* at 22.

13. 560 U.S. 702 (2010).

14. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980).

American constitutional jurisprudence since *Marbury v. Madison*.¹⁵ While its importance has ebbed and flowed over the centuries, it has acquired considerable prominence and significance since the 1980s, first with the Reagan administration, and later with the appointment of Justices Scalia and Thomas to the U.S. Supreme Court.

President Reagan's Attorney General Edwin Meese announced that his office would be committed to "a Jurisprudence of Original Intention,"¹⁶ which Meese then described: "Our fundamental law is the text of the Constitution as ratified, not the subjective intent or purpose of any individual or group in adopting the provision at issue."¹⁷ To determine what the text meant at ratification requires historical analysis since many constitutional terms are no longer used or their meaning has evolved.

"The originalist's use of history is goal-directed."¹⁸ Originalists want to understand the past in order to address the present. To echo Professor Powell, "[t]here is nothing wrong with this utilitarian interest in history, but it does pose a serious temptation for the interpreter."¹⁹ Studying the past merely to understand it better presents less temptation, since the student of history does not have a modern ax to grind. Questions with well-defined and certain answers present fewer opportunities for faulty interpretations. Where the zone of uncertainty is large, as is the case with many areas of law, the opportunities for misconduct by motivated lawyers are correspondingly large. The legal zone of uncertainty is large because the original intent as well as original meaning is often indeterminate.

Commentators concerned about originalism often point out that the Framers disagreed on matters, including those of crucial constitutional importance then and now. Even when they did agree,

15. In *Marbury*, Chief Justice Marshall emphasized the significance of the fact that the Constitution is a *written* document. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

16. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 553 (2003) (citations omitted).

17. *Id.* at 554 (citations omitted). More accurately, this approach is textual since the text would trump the original intention of the Framers.

18. H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 669 (1987).

19. *Id.*

the often limited historical record exposes the inherent and inescapable limitations of originalism. The paucity of the historical record does not often reflect lost history, in the same way that many of the classics of antiquity are lost to history. Instead, the thin historical record reflects that most of the questions of most interest to us were not the questions of interest to the Framers. The hope that history could provide the answer to contemporary problems presents “the fundamental historical error of ignoring the past’s essential autonomy. Put more concretely, the founders thought, argued, reached decisions, and wrote about the issues that mattered to them, not about our contemporary problems.”²⁰ Moreover, the “Constitution very wisely precludes very few policy choices,”²¹ it bars anyone younger than thirty-five or born abroad from serving as President.

Where the historical record is limited, originalism cannot supply an answer to a modern problem. But often, originalists have committed historical errors that are entirely avoidable. The historical errors in *Jones* described in Part III are not isolated and lamentable exceptions, but instead lamentably common. The scholarship and jurisprudence of originalism is rife with historical errors; most are the product of shoddy research.²² It is important to recognize that many of the historical errors in originalist jurisprudence and scholarship are not the inevitable result of an opaque and distant past. In Rumsfeldian terms, these errors are not “known unknowns,”²³ but instead simple questions about the past for which the answer is known. Some of the historical errors are so egregious that the most plausible explanation is intellectual dishonesty.

20. *Id.*

21. Lino A. Graglia, *Originalism and the Constitution: Does Originalism Always Provide the Answer?*, 34 HARV. J.L. & PUB. POL’Y 73, 87 (2011).

22. For an excellent taxonomy of errors, see Powell, *supra* note 17.

23. Although the *known known*, *known unknown*, and *unknown known* is generally attributed to Donald Rumsfeld, the typology dates to at least 1969. See, e.g., Harold B. Myers, *For Lockheed Everything’s Coming Up Unk-Unks*, FORTUNE MAG., Aug. 1969, at 77.

The original understanding of the Fourth Amendment is one of the most contested issues in constitutional originalism. Lamentably, Fourth Amendment jurisprudence is marred by historical errors.

The Amendment has two clauses, known as the Reasonableness Clause and the Warrant Clause. Two schools of thought have developed purporting to interpret the original meaning of the Fourth Amendment. The first one, the more textual one, suggests that the first clause of the Amendment declares an existing right—the freedom from unreasonable governmental invasions of privacy—while the second clause interprets the first one, explaining that a search with a warrant would not be “unreasonable” and thus prohibited.²⁴ In contrast, the second school of thought argues that the Fourth Amendment only regulates the use of warrants.²⁵ Telford Taylor argued that the Framers were not concerned with warrantless and oppressive searches, largely because the powers of constables were limited and because government officials did not enjoy sovereign immunity from tort liability as they do now.²⁶ Instead, the Framers wanted to affirm that warrants were a valid exercise of government power.²⁷ Relying on Madison’s writing, Taylor argues that the great evil that the Fourth Amendment was meant to prevent

24. See e.g., WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* (2009); JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 1, 19, 43 (1966) (explaining that the Fourth Amendment was “the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England”); NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 100–03 (1937). Not every scholar falls into one of the two camps. See, e.g., George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1478 (2005) (asserting that four principles emerge from the historical record: 1) the Framers feared government abuse of power; 2) searches generally required “individualized cause or suspicion”; 3) searches of structures always required a warrant; and 4) common law principles influenced regulation of searches and seizures).

25. See Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in “Due Process of Law”—“Fourth Amendment Reasonableness” Is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH. L. REV. 51, 64–65 (2010).

26. See TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 27–28 (1969). If a government official abused their position, their actions were considered *ultra vires* and more importantly private rather than public abuses. Therefore, the government official was liable personally for his wrongdoing. See Davies, *supra* note 25, at 75.

27. See TAYLOR, *supra* note 26, at 41–44.

were general warrants.²⁸ He notes a lack of legislative history about the Reasonableness Clause of the Fourth Amendment and speculates that its purpose “was to cover shortcomings in warrants other than those specified in the second clause” or “other unforeseeable contingencies.”²⁹ According to Taylor, it was not the purpose of Fourth Amendment to prohibit all searches without a warrant.³⁰

Taylor’s book has been widely cited³¹ and inspired many academic responses, two of which have particularly influenced the Supreme Court’s modern Fourth Amendment jurisprudence: Akhil Amar’s and Thomas Davies’s.

Professor Akhil Amar accepts Taylor’s premise that the Fourth Amendment’s reasonableness requirement had no fixed meaning at the time of its adoption.³² Professor Thomas Davies, in contrast, accepts Taylor’s historical argument that the Fourth Amendment was primarily concerned with civil warrants for government searches of customs violations—smuggling.³³ There was no “reasonableness” standard for government searches. Peace officers’ discretionary authority was very limited (and they were subject to private trespass suits), so discretionary searches were not a concern in the late eighteenth century.³⁴ During the twentieth century, peace officers’ discretionary search and seizure authority expanded considerably, well beyond anything the Framers might have imagined, and the

28. *Id.* at 42–43.

29. *Id.* at 43.

30. *Id.* at 46–47.

31. *See, e.g.,* *Virginia v. Moore*, 553 U.S. 164, 169 (2008); *Atwater v. City of Lago Vista*, 532 U.S. 318, 336 (2001); *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596 (1989). Use of a reasonableness test predates Taylor’s book. *E.g.,* *United States v. Rabinowitz*, 339 U.S. 56, 61–63 (1950). But Taylor’s scholarship provided justification for the test by developing a historical argument supporting reasonableness. TAYLOR, *supra* note 26, at 27–29.

32. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 764–65 (1994). Amar’s article has been cited in *Moore*, 553 U.S. at 170, and *Atwater*, 532 U.S. at 332 n.6. For some of the scholarly response to Amar’s theory, see Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. CAL. L. REV. 1 (1994); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994).

33. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 678 (1999).

34. *See id.* at 552, 624–625.

modern reasonableness doctrine is a judicial response to the new threat to privacy that such expansion of authority created.³⁵

Thus, when the Framers debated the Fourth Amendment they considered language proscribing only general warrants, but ultimately rejected it for the more universal language of the Fourth Amendment.³⁶ While some of the Framers like Madison were largely concerned with general warrants, the apparent consensus was a broader concern with government power and individual privacy.³⁷

Although Madison provided a draft of what became the Fourth Amendment, the Fourth Amendment is largely the work of John Adams.³⁸ Adams had experience with warrantless searches for smuggled contraband in Massachusetts and had written extensively on the trials starting in the 1760s. The language of the Fourth Amendment follows the language of Article 14 of the Massachusetts Constitution that Adams drafted in 1779.³⁹

Most of the historical errors related to the Fourth Amendment revolve around the importance and timing of certain English cases involving warrants.⁴⁰ In particular, *Entick's Case* has received outside attention, largely because its reasoning was adopted by the U.S. Supreme Court in *Boyd v. United States*.⁴¹ Whatever the merits of *Entick's Case*, it is surely a historical error to believe the Fourth Amendment was drafted in light of it. The *Boyd* Court asserts:

[E]very American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who

35. *See id.* at 724–26.

36. Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 1060 (2011).

37. *Id.* at 1061.

38. *Id.* at 982.

39. *Id.* at 982, 1004–06, 1018–20.

40. *Id.* at 980–81.

41. 116 U.S. 616, 626–27 (1886).

framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.⁴²

But, the opinion from *Entick's Case* cited in *Boyd* was published in the nineteenth century, decades after the drafting of the Fourth Amendment, so “Justice Bradley’s historical claim is almost certainly incorrect.”⁴³

Just like the broad reasonableness standard in the Fourth Amendment, the exclusionary rule is based on a mistaken understanding of history.⁴⁴ At common law, no rule precluded the use of improperly obtained evidence in a prosecution.⁴⁵ The exclusionary rule is a nineteenth century innovation, and a late one at that.⁴⁶

The Confrontation Clause embodied in the Sixth Amendment has likewise been fertile ground for misreading history. *Crawford v. Washington*,⁴⁷ a 2004 Supreme Court opinion, has generated a scholarship of historical errors. The case decided when hearsay statements could be introduced in a criminal case under the Confrontation Clause, specifically, the wife’s statement to the police in a case against her husband. Because of Washington’s spousal privilege, the wife did not testify at trial, so the prosecution used her statement to the police instead. The majority held that the Confrontation Clause guarantees the criminal defendant the right to confront witnesses and the wife’s inability to testify violated that principle: her statement to the police could not be used.⁴⁸

Justice Scalia’s majority opinion rests on a couple of significant historical errors. First, he concluded that the confrontation right was

42. *Id.*

43. Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment “Search and Seizure” Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 955–56 (2010).

44. Donald E. Wilkes, Jr., *A Critique of Two Arguments Against the Exclusionary Rule: The Historical Error and the Comparative Myth*, 32 WASH. & LEE L. REV. 881, 885 (1975).

45. *Id.* at 885.

46. *See id.* at 887 (offering case law evidence that the rule did not exist until around 1875).

47. 541 U.S. 36 (2004).

48. *Id.* at 40, 68.

limited to testimonial statements that were comparable to framing-era depositions of witnesses of crimes. Second, he concluded that out-of-court testimonies could be admissible only if the defendant had an opportunity to cross-examine the witness.⁴⁹ But he is wrong on both counts, largely as a result of two elementary errors. His treatment of history is spotty and obviously a search for a particular answer rather than the correct one.⁵⁰ He cited to only two individuals from the ratification debates, neither of whom appears to be a lawyer, both of whom were reading long lists of complaints about the Constitution based on “broader political theory,” not specific concerns about trial practice.⁵¹ Specific conclusions that Justice Scalia tries to justify cannot be justified with the evidence he offers.⁵²

In trying to divine the meaning of the Confrontation Clause, Justice Scalia spends much of his opinion in *Crawford* discussing the Marian bail and committal statutes dating to the sixteenth century.⁵³ But the Marian statutes are largely irrelevant as historical evidence for what the Confrontation Clause meant in 1791.⁵⁴ First, there is no evidence that the elites who drafted the Sixth Amendment objected to Marian statutes, since those statutes were generally used to prosecute the poor.⁵⁵ Instead, there is ample evidence that elites, particularly those most active during the War of Independence, were concerned about the efforts taken by the English to prevent smuggling.⁵⁶ A more

49. Thomas Y. Davies, *What Did The Framers Know, And When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 107 (2005) [hereinafter, Davies, *What, When*].

50. See Roger W. Kirst, *Does Crawford Provide a Stable Foundation for Confrontation Doctrine?*, 71 BROOK. L. REV. 35, 77–78 (2005).

51. *Id.* at 81–82.

52. See *id.* at 38, 77–78 (arguing that the evidence presented does not match the conclusions).

53. *Crawford*, 541 U.S. at 43–44, 46, 50, 52–53. Since the statutes were passed while Mary was Queen, the bail and committal statutes are called Marian. 1 & 2 Phil. & M., ch. 13 (1554) and 2 & 3 Phil. & M., ch. 10, 11 (1555). See generally John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313 (1973) (describing the common law before and after the Marian statutes).

54. See Davies, *What, When*, *supra* note 49, at 115–17.

55. Kirst, *supra* note 50, at 78.

56. *Id.*

general problem for this line of inquiry is that there are no references to English common law in the ratification debates.⁵⁷

Professor Kirst argues the historical errors at issue in *Crawford* reflect a general problem in presentist history. It can be misleading for the scholar to look back and identify a historical progression. To the people living in what is later identified as a historical progression, it is impossible to know what will happen. Their perception of the importance of historical antecedents will be substantially different than to someone reading that history centuries later.⁵⁸

II. OPEN FIELDS AND THE FOURTH AMENDMENT

By its terms, the Fourth Amendment protects “persons, houses, papers, and effects.”⁵⁹ Courts have extended the protections of the Fourth Amendment from the home to the curtilage.⁶⁰ Deriving from Old French for court, yard, or garden,⁶¹ the curtilage is the area around the house, often enclosed, so intimately bound up with the house that intruding upon the curtilage is tantamount to entering the home.⁶² Treating curtilage like the home has been a constant in Fourth Amendment jurisprudence.⁶³ The protections afforded the curtilage, however, do not extend to the area beyond, usually referred to as open fields, regardless of whether the land is “neither ‘open’ nor a ‘field’ as those terms are used in common speech.”⁶⁴

57. *Id.* at 82.

58. *Id.* at 84–85.

59. U.S. CONST. amend. IV.

60. S. Bryan Lawrence III, *Curtilage or Open Fields?: Oliver v. United States Gives Renewed Significance to the Concept of Curtilage in Fourth Amendment Analysis*, 46 U. PITT. L. REV. 795, 796 (1985). Curtilage is traditionally the outbuildings and the land surrounding the home. *Id.*

61. *Id.* at 796 n.7.

62. See *United States v. Dunn*, 480 U.S. 294, 301 (1987) (establishing a four-factor test for curtilage).

63. *Dow Chem. Co. v. United States*, 476 U.S. 227, 235 (1986); *Olmstead v. United States*, 277 U.S. 438, 466 (1928).

64. *Dunn*, 480 U.S. at 304 (quoting *Oliver v. United States*, 466 U.S. 170, 180 n.11 (1984)).

A. *From Castle to Phone Booth*

The first articulation of a limit on government authority to search comes from *Semayne's Case* where the case reporter, Sir Edward Coke, described the home as a “castle and fortress.”⁶⁵ By 1765, English courts had applied trespass law as a “ready benchmark” for the proper balance between individual rights and government power, and nineteenth century American courts followed their lead.⁶⁶

In England, trespass was a robust remedy. Under the laws of England, “every invasion of private property, be it ever so minute, is a trespass.”⁶⁷ Entering property without permission constituted trespass and was actionable, even if it caused no actual harm.⁶⁸ The choice of trespass as a “ready benchmark” of a Fourth Amendment search could be a procedural quirk as much as a conscious decision by the English bench.⁶⁹ In similar cases, aggrieved plaintiffs pled other actions, but American jurisprudence has largely followed one case, pleaded in trespass.

*Entick v. Carrington*⁷⁰ is the 1765 decision that is quoted for the proposition that a government search involving trespass requires a warrant. Royal messengers broke into and searched the home of John Entick, a writer suspected of producing “very seditious”

65. *Semayne's Case*, (1604) 77 Eng. Rep. 194 (K.B.).

66. Richard G. Wilkins, *Defining the 'Reasonable Expectation of Privacy': An Emerging Tripartite Analysis*, 40 VAND. L. REV. 1077, 1083 (1987). Although widely accepted, this narrative is somewhat misleading since the plaintiff pleaded trespass in *Entick's Case*; trespass was not a metaphor, but instead the cause of action. *Boyd*, 116 U.S. at 626 (discussing *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (C.P.), 19 Howell's State Trials 1029, 1030). Later cases, however, appear to treat the use of trespass as a metaphor. *See id.* at 627–630 (using trespass law to define the expectation of privacy the Framers intended to protect).

67. *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (C.P.), 19 Howell's State Trials 1029, 1066. The King's messengers had an invalid warrant. *Id.* at 1037, 1074. Note that this case report was not published until the early nineteenth century, so the Framers would have been aware of the trial and some of the arguments made but would not have seen these quotations.

68. *Id.* at 1066. “By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing.” *Id.*

69. In *Wilkes v. Wood*, on facts virtually identical to those of *Entick's Case*, Wilkes sued the King's messengers for false imprisonment. *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (C.P.). *See also* Clancy, *supra* note 36, at 1006–1007. Had the U.S. Supreme Court chosen to elevate *Wilkes* like *Entick's Case*, then Fourth Amendment jurisprudence might borrow from habeas corpus law instead of trespass.

70. 19 Howell's St. Tr. 1029.

newsletters.⁷¹ Entick was arrested and detained, but ultimately released. Although he was released, Entick feared subsequent trial, so he sued the king's messenger for trespass, hoping to avoid conviction based on the content of the documents seized.⁷² Trespass was the appropriate tort action in the eighteenth century for unlawful entry, since other modern torts were unavailable.

While the English authorities were concerned about sedition in England, the colonial governments were more concerned with smuggling. In America, authorities were searching for contraband, not sedition.⁷³ After independence, the government's interest evolved into the search for "moonshine whiskey"⁷⁴ and, more recently, narcotics.⁷⁵ During colonial times, authorities issued warrants to search and recover stolen goods, and to combat smuggling. Unlike now, warrants issued for stolen goods were issued to the victim of the theft. After receiving the warrant, he could go to the place specified with a constable to search for the goods. The only government-initiated searches were those for smuggled goods.⁷⁶

The meaning of the Fourth Amendment has puzzled courts and academics. The U.S. Supreme Court has vacillated between the competing views of the relationship between the Reasonableness and Warrant Clauses. In particular the Court's earlier opinions seem to assume that a warrant complying with the Warrant Clause was always necessary,⁷⁷ though some of the more modern cases reaffirm

71. *Id.* at 1030.

72. *Id.*

73. *See* *Boyd v. United States*, 116 U.S. 616, 625 (1886).

74. *See, e.g.*, *Hester v. United States*, 265 U.S. 57, 58 (1924).

75. *See, e.g.*, *Oliver v. United States*, 466 U.S. 170, 173 (1984).

76. *See* Clancy, *supra* note 36, at 990–92 (noting the disparity between warrant disputes in America and England).

77. *See* *Taylor v. United States*, 286 U.S. 1, 6 (1932) (finding that failure to obtain a warrant before searching a garage, when there was "abundant opportunity" to do so, necessitated suppression of evidence); *Agnello v. United States*, 269 U.S. 20, 32 (1925) ("While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant."); *Amos v. United States*, 255 U.S. 313, 316–17 (1921) (finding that the government could not search a house without a warrant); *Weeks v. United States*, 232 U.S. 383, 393–94 (1914) ("The United States marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution . . ."); *Ex Parte Jackson*, 96 U.S. 727, 733 (1878) (asserting that a warrant based on probable cause was necessary to search a letter in the mail).

the position that warrantless searches and seizures are *per se* unreasonable, with a few well established exceptions.⁷⁸ On other occasions, the Court has taken the opposite position, holding that reasonableness of the government's search depends on the totality of the circumstances.⁷⁹

After ratification, the Fourth Amendment produced little commentary and even less litigation. The first U.S. Supreme Court case to discuss the Fourth Amendment in any depth is *Boyd v. United States*.⁸⁰ In *Boyd*, the U.S. Supreme Court adopted the reasoning of *Entick's Case*.⁸¹ In 1884, the U.S. Attorney for the Southern District of New York sought the forfeit of thirty-five cases of plate glass, imported without the payment of customs duty.⁸² *Boyd* quotes at length from *Entick's Case*, including language where trespass is identified as the measure of governmental invasion.⁸³

In 1924, the U.S. Supreme Court decided that open fields were not protected by the Fourth Amendment—a case of first impression.⁸⁴ In *Hester v. United States*, revenue officers had approached the home of a suspected moonshiner. Seeing the officers, Hester and another moonshiner fled, discarding their bottles of untaxed spirits.⁸⁵ The

78. See, e.g., *Arizona v. Gant*, 556 U.S. 332, 346–47 (2009) (allowing a search without a warrant where the peace officers face an actual and continuing threat to their safety); *California v. Acevedo*, 500 U.S. 565, 580–81 (1991) (allowing police to search a vehicle, including the contents of sealed containers); *Mincey v. Arizona*, 437 U.S. 385, 391, 393 (1978) (allowing a search without a warrant if exigent circumstances exist); *Katz v. United States*, 389 U.S. 347, 357 & n.19 (1967) (referencing the exceptions recognized before 1967).

79. See, e.g., *United States v. Banks*, 540 U.S. 31, 42 (2003) (rejecting the lower court's categorical approach in favor of a totality of circumstances test as a measure of reasonableness); *United States v. Knights*, 534 U.S. 112, 118 (2001) (holding that the “general” approach to measuring reasonableness examines the totality of circumstances); *United States v. Rabinowitz*, 339 U.S. 56, 65–66 (1950) (“The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case.”), *overruled in part by* *Chimel v. California*, 395 U.S. 752 (1969).

80. 116 U.S. 616 (1886).

81. *Id.* at 626–29; see also Thomas K. Clancy, *What is a “Search” Within the Meaning of the Fourth Amendment?*, 70 ALB. L. REV. 1, 14 (2006); Wilkins, *supra* note 66, at 1083.

82. *Boyd*, 116 U.S. at 617.

83. *Id.* at 627.

84. *Hester v. United States*, 265 U.S. 57, 59 (1924); see also Susan Gellman, Comment, *Affirmation of the Open Fields Doctrine: The Oliver Twist*, 46 OHIO ST. L.J. 729, 729, 730 (1985).

85. *Hester*, 265 U.S. at 58.

Court found that the officers did not need a warrant to search open fields. The Court held that the distinction between open fields and “the house is as old as the common law.”⁸⁶ Rather cryptically, the opinion cites Blackstone’s discussion of burglary, possibly because the English law of trespass differed from American law.⁸⁷

In Fourth Amendment jurisprudence, *Hester* is often seen as an anomaly, an exception to the rule of trespass. The opinion itself provides little guidance on whether open fields are an exception to the general rule that any incursion of private land was a trespass or an application of the settled law that access to unenclosed land was not a trespass. The historical research presented in the following sections shows that *Hester* is not an exception. Rather, trespass law did not extend to open fields, and therefore the Fourth Amendment protections could not and do not extend to open fields.

As further evidence that open fields are not an exception to trespass, but instead an application of the doctrine, *Hester* did not mark a retreat from trespass analysis. Four years later, the Court found that wiretapping did not require a search warrant since there was no trespass of the defendant’s property.⁸⁸ Similarly, electronic monitoring of a conversation within the home was not protected so long as the government did not commit a trespass.⁸⁹ However, touching the home required a warrant because it constituted a trespass.⁹⁰ In *Silverman v. United States*, the Court distinguished between eavesdropping that required a physical invasion and that which did not.⁹¹

86. *Id.* at 59.

87. *Id.* (citing “4 Bl.Comm. 223, 225, 226”).

88. *On Lee v. United States*, 343 U.S. 747, 751 (1952) (finding no trespass where government agents wore a wire); *Olmstead v. United States*, 277 U.S. 438, 466 (1928), *overruled by Katz v. United States*, 389 U.S. 347 (1967).

89. *Goldman v. United States*, 316 U.S. 129, 131, 134 (1942) (finding no trespass where government amplified the vibrations emanating through a wall), *overruled by Katz v. United States*, 389 U.S. 347 (1967).

90. *Silverman v. United States*, 365 U.S. 505, 506–507, 512 (1961) (finding a trespass and therefore a search where government attached a device to the home).

91. *Id.* at 511.

In 1967, the U.S. Supreme Court in *Katz v. United States* abandoned its trespass analysis, finding a search when no property interest had been violated. Katz had used a public telephone booth to transmit an illegal wager which was recorded by a device that FBI agents attached to the outside of the booth. The Court nonetheless noted that Katz's privacy "expectation [was one] that society is prepared to recognize as 'reasonable.'"⁹² The Court found that the lack of a trespass had no constitutional relevance to whether a search had occurred. Instead, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."⁹³

Without the clear framework of "technical trespass under local property law,"⁹⁴ the Court has looked for guidance in a variety of places. In *United States v. Chadwick*, the Court considered the probable intention of the Framers.⁹⁵ In *Payton v. New York*, the Court reaffirmed the understanding that the home enjoys special protection.⁹⁶

While *Katz* clearly overruled earlier eavesdropping cases, its effect on *Hester* and the open fields doctrine is less clear. Gellman suggests that *Katz* did not overturn *Hester* because the "facts of *Hester* simply did not meet the *Katz* reasonable expectation of privacy test."⁹⁷ Counsel for both parties in *Katz* argued that open fields were the paradigmatic example of areas lacking constitutional protection, but the Court rejected that reasoning, holding that the "the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.'"⁹⁸

92. *Katz*, 389 U.S. at 348, 353, 361.

93. *Id.* at 351–53 (citations omitted).

94. *Id.* at 353 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

95. 433 U.S. 1, 8–9 (1977).

96. 445 U.S. 573, 596–97 & n.45 (1980).

97. Gellman, *supra* note 84, at 734.

98. *Katz*, 389 U.S. at 350, 351 n.8; *see also* Lawrence, *supra* note 60, at 803.

In 1974, the U.S. Supreme Court reaffirmed *Hester*, holding that a search warrant was not required for entering open fields.⁹⁹ In *Air Pollution Variance Board v. Western Alfalfa*, a state health inspector entered the company's open fields to measure air pollution. The Court noted that the "field inspector did not enter the plant or offices. He was not inspecting stacks, boilers, scrubbers, flues, grates, or furnaces; nor was his inspection related to respondent's files or papers."¹⁰⁰ The Court did not consider whether entering land without landowner permission was a trespass under Colorado law.¹⁰¹

Ten years later, the Court affirmed *Hester* in a longer and more-detailed opinion. In *Oliver v. United States*, the Court clarified that "no expectation of privacy legitimately attaches to open fields" and furthermore that open fields are not "'effects' within the meaning of the Fourth Amendment."¹⁰² Oliver was suspected of cultivating cannabis. Ignoring a locked gate and "No Trespassing" signs, narcotics agents searched Oliver's land and found cannabis cultivation. The Court noted that "[t]he existence of a property right is but one element in determining whether expectations of privacy are legitimate."¹⁰³

Whether a particular government action was a search within the meaning of the Fourth Amendment, and therefore required a warrant, revolved around social expectations, not property law. The Court held that "fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance."¹⁰⁴ The Court concluded by holding that "[t]here is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields."¹⁰⁵ After *Oliver*, a trespass makes a search unreasonable, but not every unreasonable search means that the government trespassed.

99. *Air Pollution Variance Bd. v. W. Alfalfa Corp.*, 416 U.S. 861, 865 (1974).

100. *Id.* at 862–63, 864–65.

101. The word trespass does not appear in the opinion. *Id.*

102. 466 U.S. 170, 176, 180 (1984).

103. *Id.* at 173, 182, 183.

104. *Id.* at 179.

105. *Id.* at 179.

In the absence of trespass, an invasion of a reasonable expectation of privacy makes a search unreasonable.¹⁰⁶

B. Like a Bad Penny

Jones was widely seen as a milestone in Fourth Amendment jurisprudence because it has the potential to be the most important case since *Katz*.¹⁰⁷ The potential impact of *Jones* is uncertain, largely because the three opinions—the majority opinion and two concurrences—take such different approaches.¹⁰⁸ Commentators have reacted with both praise and scorn.¹⁰⁹ Many agree that *Jones* raises at least as many questions as it answers; again, this reaction is hardly surprising given the tripartite outcome.¹¹⁰

Before *Jones*, there were concerns whether the reasonable expectation of privacy test articulated in *Katz* could protect the privacy of citizens in an era of rapidly advancing technology.¹¹¹ One of the few conclusions one can draw from the three opinions is that nine justices agree that citizens' privacy should not shrink in the face of technology.¹¹² Five of the justices interpreted the reasonable expectation of privacy as reasonable in light of social expectations rather than technological possibility. Specifically, five justices held that long-term GPS monitoring conflicted with a reasonable expectation that the public was not under continuous observation and monitoring.¹¹³

106. The Court did not consider whether Oliver had posted his land consistent with Kentucky's posting statute, which would give him a trespass remedy for unwanted invasions. In 1984, Kentucky law made crossing a fence to enter private land a trespass, but allowed entering private land not surrounded by a fence. Act of Mar. 30, 1976, 1976 Ky. Acts 500, 500–501. Today, Kentucky trespass law makes no distinction between fenced and unfenced law. KY. REV. STAT. ANN. § 150.092 (1996).

107. Fabio Arcila, Jr., *GPS Tracking out of Fourth Amendment Dead Ends: United States v. Jones and the Katz Conundrum*, 91 N.C. L. REV. 1, 5 (2012).

108. *Id.* at 17.

109. Daniel T. Pesciotta, Note, *I'm Not Dead Yet: Katz, Jones, and the Fourth Amendment in the 21st Century*, 63 CASE W. RES. L. REV. 187, 230–32 (2012).

110. Lauren Millcarek, Comment, *Eighteenth Century Law, Twenty-First Century Problems: Jones, GPS Tracking, and the Future of Privacy*, 64 FLA. L. REV. 1101, 1108–09 & n.79 (2012).

111. Pesciotta, *supra* note 109, at 189.

112. *Id.* at 190.

113. *Id.* at 213.

Until *Katz*, trespass was the yardstick of Fourth Amendment jurisprudence. Trespass delineated the boundaries of search and thus, when the government needed a warrant. *Jones* appears to have revived trespass as the measure of search, but not current trespass law. Instead, *Jones* looks to trespass law in 1791, but describes that law incorrectly. Writing for the majority, Justice Scalia writes that any unauthorized entry in private land constituted a trespass at common law.¹¹⁴ He describes English trespass law—barring any entry on private property—as a “monument of English freedom” that was “undoubtedly familiar” to the Framers at the time they were drafting the constitution.¹¹⁵ Justice Alito’s concurrence agrees. He refers to Prosser and Keeton’s treatise, saying that “[a]t common law, any unauthorized intrusion on private property was actionable.”¹¹⁶

The remainder of this Article shows that both the majority and the concurrence correctly describe the law of England. They are wrong about the law in colonial America. The next Part describes trespass law in colonial America and the early Republic. The open fields doctrine is consistent with both *Katz* and *Jones* since trespass law in 1791 did not grant the landowner the power to exclude unwanted visitors from open land.

III. TRESPASS IN 1791

Both opinions in *Jones* equate American trespass law in 1791 with English trespass law. This Part describes the distinctly American property law tradition that developed soon after first settlement and continued until long after ratification of the Fourth Amendment. In Part III.A, a review of eighteenth century case law shows that the doctrines identified in *Jones* were not present in American law. Part III.B describes the state constitutional provisions that enshrined a trespass law very different from that of England. Finally, Part III.C

114. *United States v. Jones*, 132 S.Ct. 945, 949, 953 (2012).

115. *Id.* at 949 (quoting *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596 (1989)).

116. *Id.* at 958.

details a variety of colonial and early Republic statutes that shed light on the content of trespass in American common law.

A. Trespass in the Eighteenth Century Case Law

At common law, trespass was used to mean several different wrongs unrelated to land. These now-archaic uses of trespass dominate the eighteenth century case law. The word “trespass” appears in 409 reported cases between 1701 and 1800.

1. A Pleading for All Seasons

During the eighteenth century, trespass actions were most frequently filed to resolve competing claims of ownership. Of these, trespass *quare clausum fregit* was the most common, available to one in lawful possession of the land against unlawful incursions.¹¹⁷ Unlike a suit to resolve title, which was often protracted and messy because of poorly maintained records, a possessory trespass suit was a quicker and simpler way to resolve the dispute.¹¹⁸

Trespass was not merely a suit to determine ownership. An action of trespass was often used for wrongs that now would be litigated as torts. Violent wrongs were pled as trespass *vi et armis*, while other wrongs were pled as trespass on the case.¹¹⁹ Occasionally, trespass was pleaded in cases of sexual misconduct.¹²⁰ Other cases appear to use trespass as a non-specific synonym for wrong, similar to its use centuries earlier.¹²¹

117. *E.g.*, *Bishop v. Bishop*, 1 Del. Cas. 386 (1795) (dispute between heirs). Colonial statutes often regulated or amended the common law action of *quare clausum fregit*. Act of Mar. 27, 1713, ch. 196, 1713 Pa. Laws 89, 91 (allowing defendants to disclaim a property claim where the trespass was involuntary).

118. Responding to the difficulty, states often enacted statutes that regulated trespass suits to try title. *See, e.g.*, Act of Dec. 20, 1791, 1791 S.C. Acts 9, 13 (“trespass brought to try the title to land”); Act of Dec. 21, 1799, 1799 S.C. Acts 49, 55 (“trespass to try titles to lands”).

119. Trespass *vi et armis* and on the case are distinguished in a dispute over a servant who switched employers. *Legaux v. Feasor*, 1 Yeates 586, 587 (Pa. 1795).

120. *E.g.*, *Stout v. Prall*, 1 N.J.L. 79, 79, 80 (1791) (finding exemplary damages appropriate for “seduction and getting with child”).

121. *E.g.*, *State v. Ingles*, 3 N.C. (2 Hayw.) 4 (Super. Ct. 1797) (“The State cannot divide an offense, consisting of several trespasses into as many indictments as there are acts of trespass”); *Town of Somers*

In three eighteenth century trespass cases, someone entered land without claiming ownership and removed something of value. In Massachusetts, the defendants had removed clams without landowner permission.¹²² In Connecticut, one defendant logged without permission, while another removed honey.¹²³ In these cases, the owner pleaded trespass when the real offense was theft. Clams, timber, and honey were all valuable property, all removed without right by the defendants. The dearth of cases does not reflect the paltry damages. Parties were willing to litigate even the smallest trifles.¹²⁴

In no reported eighteenth century case did a landowner sue an unauthorized intruder merely for intruding—the modern meaning of trespass. The paucity of cases does not conform to the conventional wisdom that the colonies inherited the common law from England. Blackstone notes that damages need not be proved to recover for “EVERY unwarrantable entry on another’s soil.”¹²⁵ But Blackstone’s doctrine was not accepted in the American colonies. The absence of trespass cases for mere entry reflects a distinctly American property law tradition.¹²⁶

2. *New Laws for a New Land*

The colonists who settled America left a crowded island with clearly demarcated boundaries and intensive land use. In contrast to

v. Town of Barkhamstead, 1 Root 398 (Conn. Super. Ct. 1792) (stating a foreign pauper “belongs to the state to provide for; Barkhamstead’s sending him to Somers was a trespass, for which this action lies”).

122. Proprietors of Common and Undivided Lands in Ipswich v. Herrick, 75 Mass. (9 Gray) 529, 532–33 (1772).

123. Merrils v. Goodwin, 1 Root 209, 209 (Conn. Super. Ct. 1790) (removing honey without permission); Phelps v. Sanford, 1 Kirby 343, 343 (Conn. Super. Ct. 1787) (logging without permission).

124. See, e.g., Pierson v. Post, 3 Cai. 175, 177 (N.Y. 1805) (appellate litigation over a fox pelt).

125. 3 WILLIAM BLACKSTONE, COMMENTARIES *209 (capitalization in original).

126. Despite the popularity of citing to Blackstone’s treaty, trespass is not the only English common law doctrine that was only partly received in America. In England, all game was owned and there existed qualification statutes. Hunting Act, 1389, 13 Rich. 2, c. 13 (Eng.). In 1831, the qualification system was replaced by licensing and landowner permission for hunting. Game Act, 1831, 1 & 2 Will. 4, c. 32, §§ 1, 6 (Eng.).

In America, however, wild game was “no persons Property till taken in Hunting.” 1744 Conn. Pub. Acts 538. In fact, the presumption in favor of capture was so strong that “many persons suppose they may take them wheresoever they may be found as well in Parks as in the open Woods.” *Id.*

England's plentiful labor and scarce land, America was uncultivated and underpopulated. Within a few years of settlement, every colony rejected the English law of trespass and enacted new laws for a new continent.¹²⁷ Until landowners fenced their land, the public could travel, hunt, fish, and forage on private land without permission.¹²⁸ In addition, stock owners could let their cattle or hogs graze on private land without having to seek permission.¹²⁹ Every state enacted statutes allowing open access to unfenced land.¹³⁰ Decades, and in some cases centuries, later, states abandoned the American rule and introduced the English law of trespass.¹³¹

In the United States, *enclosed* (seen also as *inclosed*) means fenced. In England, land where ancient rights have been extinguished by enclosure is a close, whether fenced or not. Thus, under English common law, "EVERY unwarrantable entry on another's soil the law entitles a trespass by breaking his close."¹³² In contrast, American jurists used the term in a more literal sense: *enclosed* meant fenced, and only incursions on fenced land were considered trespass.¹³³

Early nineteenth century cases can shed light on what rights the landowner had over open land. We can thank John Singleton, a particularly litigious landowner from South Carolina, for two high court opinions that show the limited rights that landowners had to exclude from open land.

In 1818, South Carolina's highest court noted that "the right to hunt on unenclosed and uncultivated lands has never been disputed."¹³⁴ The opinion continued: "it is well known that it has

127. *E.g.*, Act 52, 1 HENING'S STAT. AT LARGE 199 (1632) (replacing the English law of trespass in Virginia).

128. *See, e.g.*, Nashville & Chattanooga R.R. Co. v. Peacock, 25 Ala. 229, 232 (1854) (holding that the common law regarding trespasses by animals had never been adopted in Alabama).

129. Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665, 676–77 (2011) [hereinafter Sawers, *Right to Exclude*].

130. *Id.* at 675.

131. *Id.* at 679–80.

132. 3 BLACKSTONE, *supra* note 125, at *209, *209–10. (capitalization in original).

133. In the late nineteenth century, courts in the United States begin to use *close* in the English sense, as courts import more of the English common law, replacing indigenous traditions.

134. *M'Conico v. Singleton*, 9 S.C.L. (2 Mill) 244, 246 (1818).

been universally exercised from the first settlement of the country up to the present time.”¹³⁵ Even though the landowner was present and refused the hunter permission, there was no trespass. Landowner permission was irrelevant because, as the court held, “it is the right of the inhabitants to hunt on unenclosed lands,” and that right could not be defeated by “mere will and caprice of an individual.”¹³⁶

Two years later, Singleton returned to the South Carolina courts when a group of hunters entered a fallow field enclosed by a dilapidated fence. Again, Singleton lost since landowners were required to maintain their fences to preserve their right to exclude unwanted visitors. Like in the earlier case, landowner permission was irrelevant since the hunters had a right to be there. More explicitly than in 1818, the South Carolina court noted that England was thickly settled, which was not true of South Carolina. The English rule was “wholly impracticable” and “destructive of the interests and peace of the community.”¹³⁷

Similarly, the Georgia Supreme Court explicitly rejected the English rule that owners could exclude from open land, noting that the rule would “require a revolution in our people’s habits of thought and action.”¹³⁸ The Georgia Supreme Court continued: the English rule would mean that a “man could not walk across his neighbor’s unenclosed land . . . without subjecting himself to damages for a trespass. Our whole people, with their present habits, would be converted into a set of trespassers. We do not think that such is the Law.”¹³⁹

The landowner’s right to exclude from open land was so limited that some courts analogized open, but privately owned land to a common. In South Carolina, “[u]nenclosed land, for many purposes,

135. *Id.*

136. *Id.*

137. *Broughton v. Singleton*, 11 S.C.L. (2 Nott & McC.) 338, 338–40 (1820) (“There, almost every foot of soil is appropriated to some specific purpose; here, much the greater part consists in uninclosed and uncultivated forest”). *Id.*

138. *Macon & W. R.R. Co. v. Lester*, 30 Ga. 911, 914 (1860).

139. *Id.*

such as hunting and pasture, is regarded as common.”¹⁴⁰ The court was quick to note the limits of the analogy, since a landowner could “appropriate it to his exclusive use” by fencing it.¹⁴¹

Almost a century later, the U.S. Supreme Court held that it was “customary to wander, shoot and fish” over “large expanses of unenclosed and uncultivated land.”¹⁴² In addition, the U.S. Supreme Court held that the open range governed the public lands. In 1890, the U.S. Supreme Court found no trespass for cattle grazing on private land if “open and unenclosed.”¹⁴³ Landowners overrun with their neighbor’s livestock challenged the constitutionality of these statutes, but none succeeded,¹⁴⁴ which is hardly surprising given how widespread these laws were.

B. State Constitutional Provisions

When the Fourth Amendment was drafted, two state constitutions explicitly guaranteed a public right to hunt on open land. Necessarily, landowners had no right to exclude from unfenced land and thus unwanted intrusions were not actionable.

In 1777, Vermont adopted its first constitution which guaranteed its citizens the “liberty to hunt and fowl, in seasonable times, on the lands they hold, and on other lands (not enclosed).”¹⁴⁵ Additionally, inhabitants had the liberty “in like manner, to fish in all boatable and other waters, not private property.”¹⁴⁶ Vermont adopted new constitutions in 1786 and 1793 which preserved the provision.¹⁴⁷ Since enclosed meant fenced in America, the liberty to hunt extended to unfenced land, regardless of ownership or permission. In 1902, the

140. *Law v. Nettles*, 18 S.C.L. (2 Bail.) 447, 447 (S.C. Ct. App. 1831).

141. *Id.*

142. *McKee v. Gratz*, 260 U.S. 127, 136 (1922).

143. *Buford v. Houtz*, 133 U.S. 320, 326 (1890).

144. *E.g.*, *Wills v. Waters*, 68 Ky. (5 Bush) 351, 352. (1869) (“[W]e entertain no doubt of the constitutionality of the statutes”).

145. VT. CONST. of 1777, ch. II, § 39.

146. *Id.*

147. *Compare* VT. CONST. of 1777, ch. II, § 39, *with* VT. CONST. of 1786, ch. 2, § 37, *and* VT. CONST. of 1793, ch. 2, § 40. The current constitution preserves the provision. VT. CONST. ch 2, § 67.

Vermont Supreme Court held that hunting on unfenced land was not a trespass on account of this provision.¹⁴⁸

Most historical sources treat fenced and enclosed as synonyms without elaboration, but the Vermont Supreme Court provided a more detailed definition. Interpreting a 1797 statute, the Supreme Court of Vermont held that the “word *enclosure* therefore imports, land enclosed with something more than the imaginary boundary line, that there should be some visible or tangible obstruction, such as a fence, hedge, ditch or something equivalent.”¹⁴⁹

Vermont’s constitutional guarantee mimics an earlier constitutional provision from Pennsylvania. In 1776, Pennsylvania adopted a new constitution, which guaranteed: “The inhabitants of this state shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed; and in like manner to fish in all boatable waters, and others not private property.”¹⁵⁰ Pennsylvania first guaranteed the liberty to hunt and fish in 1683.¹⁵¹ The 1683 provision guaranteed a broader right to fish, including the “liberty to draw his or their Fish on shore on any mans *Lands*” providing the water was boatable.¹⁵² After the Fourth Amendment was drafted, but before ratification, Pennsylvania adopted a new constitution without an express provision but continued to endorse a right of access to public and privately owned bodies of water for fishing.¹⁵³

At the Constitutional Convention, members of Pennsylvania’s delegation proposed a parallel provision along with the Bill of Rights. When their proposal was not adopted, the dissenters

148. *Payne v. Gould*, 52 A. 421, 421, 422 (Vt. 1902).

149. *Porter v. Aldrich*, 39 Vt. 326, 331 (1866) (interpreting 1797 fence law, which allowed for the impounding of cattle *damage feasant* in the landowner’s enclosure) (emphasis in original).

150. PA. CONST. of 1776, ch. 2, § 43.

151. PA. FRAME OF GOV’T of 1683, § 22. The third Frame preserved the provision. PA. FRAME OF GOV’T of 1696. The first and fourth Frame (also called the Charter of Privileges) did not include the provision. PA. FRAME OF GOV’T of 1682; PA. CHARTER OF PRIVILEGES of 1701.

152. PA. FRAME OF GOV’T of 1683, § 22 (adding “not to the detriment or annoyance of the Owner thereof, except such *Lands* as do lie upon Inland *Rivulets* that are not Boatable, or which are or may be hereafter erected into Mannors”)

153. PA. CONST. of 1790.

published a tract explaining their objections to the draft constitution.¹⁵⁴

C. Related Colonial and Early Republic Statutes

Only two states, Pennsylvania and Vermont, constitutionalized a public right to use open land. In the other states, unfettered public access to open land was the norm, even if it did not receive constitutional protection.¹⁵⁵ In the eighteenth century, legislatures shaped the boundaries of private property law in law. In particular, statutes defined trespasses and acknowledged the right to hunt and fish on private land.

1. Trespass Statutes

Every statute is drafted in the shadow of existing law, whether common or statutory. Contemporary statutes are evidence of what trespass meant in 1791. In three states, the legislature expanded common law trespass to protect the property rights of landowners. The legislatures both extended the protections of the common law and softened the procedural protections that defendants otherwise enjoyed. After these statutes, landowners had broader rights over their property—rights that were also easier to vindicate. The significance of these statutes is that the statutes show the very limited protections afforded to landowners by common law trespass. Unlike that of England, trespass in eighteenth century American law was a limited protection that applied only to improved land and chattels.

Like in the case law, eighteenth century legislatures used the word *trespass* to mean several different wrongs, none of which included a mere unwanted entry onto private land. Trespass as defined by statute covers wrongs that today would be classified or protected by other doctrines of tort law and, to some extent, criminal law.

154. ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION, OF THE STATE OF PENNSYLVANIA, TO THEIR CONSTITUENTS (1787).

155. Sawers, *Right to Exclude*, *supra* note 129, at 674–76.

The earliest colonial statute expanding trespass allows neighboring property owners to recover in trespass when fires escape from one property and destroy buildings or other valuable improvements on another property.¹⁵⁶ At common law, a plaintiff may not have been able to recover because the defendant did not touch the plaintiff's property. While the plaintiff could have pleaded trespass on the case (often just called *case*), the legislature decided that remedy was ineffective. Negligence as a doctrine did not develop until the nineteenth century, so plaintiffs had no remedy based on defendants' failure to exercise due care.¹⁵⁷

After independence, Connecticut modified the common law of trespass to allow recovery for another type of wrong which today would not be considered a trespass. In 1789, the Connecticut legislature modified the common law rule that owners were only liable if a dog's vicious nature was known, often called the "one bite rule." Allowing each dog to attack at least once before any recovery made sheep rearing more difficult. In response to the threat of dogs killing sheep, the Connecticut legislature enacted a trespass statute to allow sheep owners to recover. The owners of sheep injured by dogs could recover "by action, of trespass."¹⁵⁸

Three states enacted trespass statutes analogous to what wrongs and remedies are considered trespass in current property law. One of the statutes addressed illegal settlement; squatting on open land was a persistent problem during the western expansion of the United States. The remaining statutes cover a variety of wrongs, most of which are some form of theft. None of the trespass statutes penalize or proscribe merely entering land without permission. All require some further act, whether settlement, the removal of some valuable resource, or destroying or damaging some improvement on the land.

156. 1731 Conn. Pub. Acts 407, 408.

157. More than a century later, the Massachusetts Supreme Judicial Court articulated a theory of torts that did not rely on the plaintiff's choice between trespass and case. *Brown v. Kendall*, 60 Mass. (6 Cush.) 292, 296 (1850).

158. 1789 Conn. Pub. Acts 388, 388 (altering the law for those affected by "dogs . . . accustomed to do such mischief" as attacking sheep).

Like other states, New Hampshire struggled to control the frontier with many farmers settling on land they did not own. In 1778, New Hampshire responded to “sundry evil minded persons” who had settled on unclaimed land with an “ACT to prevent trespasses on the waste lands within this State.”¹⁵⁹ The trespasses prevented were settlement: no person could “enter into, or take possession of any of the waste lands.”¹⁶⁰ The contemporary usage of *waste* to describe lands included both land that could not be used and land that had not been put to use.¹⁶¹ The statute did not mean to protect usable land but, instead, to prevent settlement on undeveloped land. The disjunctive phrase “enter into, or take possession” indicates that *enter* is used in its technical sense in property, not in the ordinary sense often used in common language and occasionally other bodies of law. As a term of art in property law, *enter* means to take possession, i.e. to be seized of the property. Thus, trespass did not include crossing private land under the statute.

Early in the eighteenth century, Connecticut enacted a trespass statute to protect landowners from invasions of their property rights.¹⁶² The existing common law provided insufficient remedies for landowners who suffered at the hands of a variety of interlopers who removed valuable natural resources or damaged valuable improvements. In addition to broadening the protection for property, the statute also provided for special procedures to ease recovery. Dissatisfied that trespassers were rarely punished, Connecticut enacted a statute for the “more Effectual Detecting and Punishing Trespass.”¹⁶³ Under the statute, trespass included logging another’s land without permission and damaging fences.¹⁶⁴ Noting that trespass was “very hard and difficult to Detect or Convict,” the statute allowed recovery in cases where the evidence was weak.¹⁶⁵

159. Act of Feb. 15, 1791, 1792 N.H. Laws 261, 261.

160. *Id.* at 262.

161. *Id.* (defining waste as any “unappropriated” or “forfeited” lands).

162. 1723–1730 Conn. Pub. Acts 329, 329.

163. *Id.*

164. *Id.* at 329–30.

165. *Id.* at 330 (allowing uncontroverted oaths to serve as proof).

In 1791, New Hampshire passed a similar statute which borrowed some of the language from Connecticut's earlier statute.¹⁶⁶ In addition, New Hampshire's statute proscribed altering the marks on logs in a river and penalized mining without landowner permission.¹⁶⁷ Someone who changed the markings would be able to sell timber logged and owned by someone else.

In the decade that followed, New Hampshire enacted two more trespass statutes to regulate the harvest and removal of valuable natural resources. One resource was flattsweed, which grew in salt marshes along New Hampshire's coast. In 1794, New Hampshire made the removal of flattsweed from a salt marsh without the landowner's permission a trespass.¹⁶⁸ The other resource was seaweed, which many farmers used for fertilizer. If the seaweed was left somewhere between the ocean and the farm, however, its rotting was a nuisance worthy of state intervention. In 1800, the New Hampshire legislature enacted a statute making it a trespass to leave rotting seaweed near the seashore.¹⁶⁹

In 1787, Vermont enacted a similar statute, making logging without permission a trespass.¹⁷⁰ Like many trespass statutes, Vermont specified penalties greater than damages at common law. For trees less than one foot in diameter, the penalty was five shillings; for one foot trees the penalty was ten shillings; and fifteen shillings for all trees larger than one foot.¹⁷¹ Like in other states, Vermont made it a trespass to "throw down, or leave open, any bars, gates, fence or fences."¹⁷² Also, the statute allowed those harmed by

166. Act of Feb. 15, 1791, 1792 N.H. Laws 259, 259. The preamble is almost identical to the Connecticut statute. *Compare id.*, with 1726 Conn. Pub. Acts 329, 330.

167. Act of Feb. 15, 1791, 1792 N.H. Laws 259, 259-60.

168. Act of Jan. 15, 1794, 1793 N.H. Laws 461 (trespass to remove "Flattsweed" from salt marshes).

169. Act of June 14, 1800, 1800 N.H. Laws 564 (trespass to leave rotting seaweed near shoreline).

170. Act of Mar. 3, 1787, 1787 Vt. Acts & Resolves 160, 160.

171. *Id.* If the court found trespass was by mistake and that the defendant "really believed" he was logging on his own land or land he had permission to log, then the penalty was merely the value of the timber removed. *Id.* at 161. If the timber was used for repairing roads or bridges, penalty was the "just value" of the timber. *Id.*

172. *Id.* The statute imposed double the damages as penalty. *Id.* The statute set a higher penalty for wearing disguises and beating people while damaging fences. *Id.*

fires to recover in trespass.¹⁷³ Finally, the statute allowed landowners to sue for trespass those who removed grass, grain, or fruit.¹⁷⁴

In 1780, Pennsylvania enacted a law to protect absent landowners from unlawful logging.¹⁷⁵ The statute's preamble described logging land without permission as "great trespasses and waste thereon, by felling of timber."¹⁷⁶

In 1806, New York enacted a statute entitled "An ACT to prevent Trespasses on Land."¹⁷⁷ Like other states that enacted a trespass remedy for logging another's land without permission, New York imposed treble damages.¹⁷⁸ If the court, however, was satisfied that it was a "mistake," then the plaintiff landowner could only recover the value of the logs removed plus costs.¹⁷⁹ Where the lumber had been used for making or repairing public roads or bridges, the landowner was limited to the "just value" of the timber logged.¹⁸⁰

In 1721, South Carolina adopted an English statute from 1545 that allowed treble damages in trespass for specified wrongs.¹⁸¹ The proscribed acts included burning another's cart, firewood, construction materials, or cutting cattle tongues or human ears, or barking fruit trees.¹⁸²

Several states allowed turnpikes to plead trespass against those who damaged the turnpike gate when trying to avoid paying the poll. In 1796, Vermont made it a trespass to "cut, break down, or destroy such turnpike gate" or to "forcibly pass, or attempt by force to pass"

173. *Id.* Plaintiffs could not recover for fire damage arising from "inevitable accident." *Id.*

174. *Id.*

175. Act of Mar. 16, 1780, § 1, 1780 Pa. Laws 331, 331.

176. *Id.*

177. Act of Apr. 9, 1805, 1804 N.Y. Laws 247, 247. Generally, post-enactment evidence is considered weaker. This author used "trefpafs" as the dividing line between contemporary and ex post. In the eighteenth century, every other *s* was medial, i.e., rendered as a long *s*. Thrifty colonial printers substituted the *f* type rather than the proper type *ſ*. The Constitution and Bill of Rights were written and printed with the medial *s*, while the Acts of Congress were printed entirely with the modern *s* starting in 1804.

178. *Id.* at 248.

179. *Id.*

180. *Id.*

181. 1721 S.C. Acts 57.

182. *Id.*

without paying.¹⁸³ The turnpike could only recover in trespass if the defendant had damaged the turnpike gate. If the traveler avoided payment without damaging the gate, by passing on the side of the road, then the turnpike company could recover three times the toll by pleading “debt on the case.”¹⁸⁴

Similarly, New York’s legislature enacted a statute making it a trespass to avoid paying the toll on a turnpike.¹⁸⁵ New York penalized those who damaged bridges also; there, the recovery in trespass was treble damages.¹⁸⁶

Perhaps the most important trespass statute from the eighteenth century comes from Rhode Island. Noting that trespass did not deter “evil-minded Persons” who had “wilfully wickedly and wantonly” stolen melons, the legislature declared melon stealing to be larceny.¹⁸⁷ The significance is not that Rhode Islanders were tormented by melon stealers, but that trespass was not a sufficient remedy. The Rhode Island legislature enacted the melon protection act because trespass was insufficient to protect the landowner’s investment-backed expectations in their melons. The inescapable conclusion is that trespass in colonial America is very different than trespass in England. Trespass is not the imagined robust remedy of Blackstone that many American legal scholars have embraced but instead a very limited protection for exclusive property rights.

A colonial statute from South Carolina provides further evidence that trespass was not the imagined robust remedy of Blackstone. Instead, trespass merely enabled landowners to recover any damage done to land. In 1722, the South Carolina legislature organized its courts and granted to courts the power to appoint special masters to

183. Act of Nov. 3, 1796, § 4, 1796 Vt. Acts & Resolves 58, 62.

184. *Id.* “Debt on the case” may be a scrivener’s error since the actions were either debt or trespass on the case, sometimes shortened to “on the case” or “case.” Later turnpike statutes allow recovery under trespass on the case. Act of Feb. 6, 1804, § 7, 1804 Vt. Acts & Resolves 82; Act of Oct. 28, 1799, § 6, 1799 Vt. Acts & Resolves 52, 55.

185. Act of Feb. 22, 1803, § 13, 1803 N.Y. Laws 257, 261.

186. Act of Apr. 9, 1804, § 12, 1804 N.Y. Laws 515, 518.

187. 1783 R.I. Acts & Resolves 32, 32–33 (June adjourned session).

investigate and report back to the courts.¹⁸⁸ The enabling clause indicates that South Carolina's legislature did not understand trespass to be an offense against the sensibilities of the landowner but, instead, one where the interloper had damaged the property of the plaintiff. The statute authorized courts to appoint "sufficient persons to view the said trespass or waste."¹⁸⁹ If the defendant had entered private land without causing damage, there would be nothing for the special master to view. Note that several Pennsylvania statutes from the 1780s use the same binomial.¹⁹⁰

Like in the colonial case law, colonial statutes often used trespass as a catch-all term for tortuous wrongdoing. Perhaps the most interesting example comes from the 1740 South Carolina slave code, which creates a trespass action to allow persons held in bondage to contest their enslavement.¹⁹¹ Any "negro, Indian, mulato or mestizo" could allege their freedom in an "action of trespass, in the nature of ravishment of ward."¹⁹² Similarly, Virginia enacted a statute allowing actions for trespass in the form of ravishment in cases of kidnapping.¹⁹³

More often, statutes did not create a new trespass action, but instead modified the existing body of trespass law. In South Carolina, the legislature enacted a special defense in actions of trespass, allowing the defendant to argue that the plaintiff had forfeited the property upon conviction.¹⁹⁴ After independence, South Carolina modified its laws governing the attachment of property: trespass was one of several actions where attachment was authorized.¹⁹⁵ After the

188. Act of Feb. 13, 1722, § 2, 1722 S.C. Acts 119, 119–120.

189. *Id.*

190. Compare Act of Apr. 5, 1782, § 3, 1781–1782 Pa. Laws 21, 22 ("waste or trespass"), and Act of Mar. 16, 1780, § 3, 1780 Pa. Laws 331, 332 ("trespass and waste"), with Act of Feb. 13, 1722, § 2, 1722 S.C. Acts 119, 120.

191. Act of May 20, 1740, § 1, 1731–1743 S.C. Acts 163, 164. In contrast, New York's slave code used trespass in the more conventional sense of tortious wrongdoing. Act of Oct. 29, 1730, § 11, 1730 N.Y. Laws 157, 160 ("Theft or other Trespass").

192. Act of May 20, 1740, § 1, 1740 S.C. Acts 163, 164. Plaintiffs held the burden of proof, except for "Indians in amity." *Id.*

193. Act of Oct. 31, 1751, § 1, 1751 Va. Acts 156, 156.

194. Act of May 29, 1744, § 1, 1744 S.C. Acts 197, 198.

195. Act of Mar. 12, 1783, § 2, 1783 S.C. Acts 19, 20.

Revolutionary War, South Carolina indemnified General Sumter and his troops for any damage, directing injured parties to approach the legislature.¹⁹⁶ In another trespass statute related to the War of Independence, Vermont addressed property disputes involving “traitor[s]” whose land had been confiscated.¹⁹⁷ The Vermont statute allowed defendants to “plead the general issue” as a defense in suits of trespass.¹⁹⁸

Less than a decade after the ratification of the Fourth Amendment, Tennessee enacted a statute to protect owners’ interests in their chattels.¹⁹⁹ The owners of livestock could bring an action of trespass against one who disfigured, injured, or killed livestock.²⁰⁰ Also, anyone who dug up, cut down, or destroyed fruit trees or corn was liable in trespass.²⁰¹

These statutes indicate two things about trespass law relevant to understanding what trespass law was in 1791. Firstly, existing trespass law did not sufficiently protect landowners from logging, fence damage, or even mining. Thus, legislatures in several states enacted laws to enhance the protections of the common law trespass cause of action. Secondly, entering private property without damaging the land was not penalized. None of the colonial or early Republic statutes proscribed entering private land without permission. None of these statutes challenged or modified the distinctively American common law rules that entering open land without permission was not a trespass. Instead, the statutes penalized impositions on the landowner’s rights much greater and more severe than merely crossing private land.

196. Act of Mar. 21, 1784, 1784 S.C. Acts 29, 29.

197. Act of Oct. 24, 1788, 1788 Vt. Acts & Resolves 26, 26.

198. *Id.* The statute addressed four suits used to decide ownership disputes: trespass, *quare clausum fregit*, ejectment, and “other possessory action[s].” *Id.*

199. Act of Nov. 3, 1803, § 2, 1803 Tenn. Pub. Acts 44, 44. It is worth noting that Tennessee continued to render *trespass* as *tretpafs* in 1803. *Id.* See *supra* text accompanying note 171. Typographic evidence like the medial *s* in this statute suggests that at least Tennessee was still (somewhat) thinking and writing in colonial terms.

200. Act of Nov. 3, 1803, § 2, 1803 Tenn. Pub. Law 44, 44.

201. *Id.* § 3. Corn should be understood to mean any grain crop. See *infra* note 226.

Many colonial and early Republic statutes use trespass in the sense of a wrong with touching. While hardly exceptional, these examples of trespass as a wrong unconnected with entering private land strengthen the conclusions in Part III.A. For example, Kentucky listed “trespass for assault, menace, battery, wounding or imprisonment” in a 1796 statute.²⁰² In the same year, Kentucky enacted new procedural rules allowing information (instead of indictment) for “trespass or misdemeanor.”²⁰³ Five years later, Kentucky authorized actions in trespass for thefts by administrators and executors.²⁰⁴ Kentucky appears to have copied a Virginia statute enacted in 1785 that allowed trespass in cases of theft by administrators and executors.²⁰⁵

2. *Hunting and Fishing on Other People’s Lands*

Similarly, game laws that defined where hunters needed landowner permission are evidence of where landowners had a right to exclude. At ratification, only one state granted landowners any right to exclude hunters from open land; six other states authorized hunting on open land regardless of landowner permission. Hunting was not an exception to a general law of trespass, but was more frequently restricted since hunters were armed, their dogs often harassed livestock, and their horses trampled crops. Virginia’s trespass law restricted both hunting and fishing, the exception that demonstrates a general rule that other public uses were unrestricted.

North Carolina was the only state that allowed landowners to exclude hunters from unfenced land, but even that extraordinary power was contingent on costly steps to notify the public. In 1784, North Carolina imposed a fine on hunting with guns or dogs without

202. Act of Dec. 17, 1796, § 8, 1796 Ky. Acts 32, 34.

203. Act of Dec. 17, 1796, § 38, 1796 Ky. Acts 127, 132–33; *see also* Act of Dec. 17, 1796, § 7, 1796 Ky. Acts 137, 138 (limiting the jurisdiction of district courts in cases of “assault and battery, trespass and actions of slander”).

204. Act of Feb. 24, 1797, § 55, 1797 Ky. Acts 162, 170.

205. Act of Jan. 1, 1787, § 53, 1785 Va. Acts 46, 50.

landowner permission east of the Appalachian Mountains.²⁰⁶ Landowners, however, were required to post their desire to exclude in at least two public places.²⁰⁷ One of the two public places was most often the county courthouse. Note that North Carolina's hunting trespass statute did not grant landowners the power to exclude those who were not hunting. Fishers, foragers, and travelers remained free to use open land, regardless of landowner permission. Fishing, foraging, and even crossing private land were trespasses in England, but none were proscribed by the North Carolina statute.

Pennsylvania's colonial statute restricted hunting on fenced land, but the preamble suggests that colonial Americans understood only hunting on fenced land to impose on landowners. In 1760, the colonial legislature of Pennsylvania responded to "divers abuses, damages and inconveniences . . . by persons carrying, guns and presuming to hunt on other people's lands."²⁰⁸ The statute penalized hunting on "inclosed or improved lands" without permission.²⁰⁹ Hunting on open land was not proscribed, regardless of landowner permission.

The state legislature had been free to ban hunting on unfenced land. Earlier, the legislature would have been unable to ban hunting since the Pennsylvania constitution guaranteed that right. In 1760, Pennsylvania was governed by the Charter of Privileges, also known as the fourth Frame of Government.²¹⁰ The Charter included no guarantee of a liberty to hunt on unfenced land, so the legislature was free to proscribe hunting on private land, yet it chose to do so only in a very limited manner.

In New York, nuisance hunting on fenced land drove the state legislature to act. In New York, it had "long been the Practice of great Numbers of idle and disorderly Persons" to hunt within New York City, damaging crops and improvements to the "great Danger

206. Act of 1784, ch. 33, 1784 N.C. Sess. Laws 364, 365.

207. *Id.*

208. Act of Apr. 9, 1760, § 6, 1760 Pa. Laws 227, 229.

209. *Id.* Fowling in the streets and gardens of Philadelphia was also proscribed. *Id.* § 7.

210. PA. CHARTER OF PRIVILEGES of 1701.

of the Lives of his Majesty's Subjects."²¹¹ In 1763, New York banned hunting in orchards, gardens, and "other inclosed Land whatsoever" within New York City without written landowner permission.²¹² New York is an exception from the colonial norm in that it required written permission, which is considerably more difficult where paper and pencil were rare and some landowners were illiterate. Landowners, lawful possessors, and their "white Servant or Servants" were exempted.²¹³ Like Pennsylvania, the preamble to the New York statute listed a series of harms not limited to fenced land, but limited the statute to fenced land.

Earlier in the eighteenth century, Maryland banned hunting with dogs or guns on "Inclosed Grounds" without landowner permission.²¹⁴ The Act extended to two other areas analogous to fenced land. In addition to fenced land, hunters needed landowner permission on islands or peninsulas "fenced across from Water to Water."²¹⁵

Connecticut banned deer hunting without permission in any "Park or Inclosure."²¹⁶ Deer parks are fenced hunting preserves, which were very popular in England.²¹⁷ To recover under the Connecticut act, courts were allowed to proceed under the looser rules from the "Act for the more Effectual Detecting and Punishing Trespass."²¹⁸

In New Jersey, the colonial statute did not distinguish between fenced and unfenced land, but instead between taxed and untaxed land. In 1771, New Jersey proscribed carrying firearms on "[l]ands not his own, and for which the Owner pays Taxes."²¹⁹ At the time,

211. Act of Dec. 20, 1763, 1763 N.Y. Laws 441, 441.

212. *Id.* at 442 (requiring a "License in Writing").

213. *Id.*

214. 1728 Md. Laws 11, 13. Like many early Maryland statutes, the penalty was set in tobacco since currency was very scarce. *Id.*

215. *Id.*

216. 1744 Conn. Pub. Acts 538, 539.

217. See EVELYN PHILIP SHIRLEY, SOME ACCOUNT OF ENGLISH DEER PARKS 11–12 (1867) (referencing the number and locations of deer parks). The Domesday Book records thirty-one deer parks in 1086. *Id.*

218. 1744 Conn. Pub. Acts 539, 539 (referring to 1726 Conn. Pub. Acts 329, 330).

219. Act of Dec. 21, 1771, 1771 N.J. Laws 343, 344. Driving deer with dogs on taxed land without permission was also banned. *Id.*

New Jersey taxed only improved land.²²⁰ In colonial New Jersey, fenced and improved lands would have been very nearly the same thing. Fencing with split rails or stone is exhausting and expensive work. No landowner would fence in any land that was not cultivated. Since New Jersey was open range like every other colony, livestock could roam freely without committing a trespass. Since landowners had no remedy for crop loss, landowners would fence their crops to protect them. Another provision of the same statute set property qualifications for hunting on “waste and unimproved Lands,”²²¹ indicating the drafters did not think that § 1 proscribed hunting on unimproved land.

Responding to commercial hunters, who took the hides but left the meat to rot, South Carolina enacted a unique rule. Rotting meat attracted wolves and angered Indians, neither of which South Carolina wanted. In 1769, the colonial legislature of South Carolina forbid hunting without landowner permission more than seven miles from home.²²² In 1818, the South Carolina high court interpreted this statute in a dispute between a landowner and an unwanted hunter. The court concluded that no landowner permission was necessary if hunting within seven miles of home.²²³

Before independence, Virginia had revised its laws on landowner permission and hunting several times. Early laws mimicked England, granting the rich greater privileges, but those privileges did not survive the mid-eighteenth century.²²⁴ In 1792, Virginia banned hunting and fishing within the “bounds of another person” without landowner permission.²²⁵ Although other Virginia statutes use the

220. Act of Dec. 6, 1769, 1769 N.J. Laws 317, 320 (setting rates for “[a]ll profitable Tracts of Land held by Deed, Patent or Survey, whereon any Improvement is made”).

221. Act of Dec. 21, 1771, 1763 N.J. Laws 343, 345.

222. Act of Aug. 23, 1769, 1769 S.C. Acts 275–76. More than a century later, the seven-mile rule remained law. S.C. REV. STAT. ch. LXXVII, § 15 at 403 (1873).

223. *Id.* at *M’Conico v. Singleton*, 9 S.C.L. (2 Mill) 244, 246 (1818).

224. *Act of Oct. 4, 1705, ch. 21*, 3 HEN. ST. 304, 328 (1819) (no hunting without permission “upon the lands . . . of any other person” except that owners of six or more slaves may pursue injured game without permission); *Act of Nov. 12, 1738, ch. 14, § 9*, 5 HEN. ST. 60, 62–63 (1819) (no hunting without permission on “patented lands”).

225. *Act of Dec. 4, 1792*, 1 STATUTES AT LARGE OF VA.: CONTINUATION OF HENING 78, 78–79.

terms *bounds* in the modern sense (as a synonym for limit),²²⁶ this statute probably used the term to mean fence. Virginia codified its laws three times before the Civil War, in 1819, 1849, and 1860. All three codes incorporate the 1792 statute, but those in 1849 and 1860 refer to “enclosed bounds.”²²⁷ In 1819, the marginalia refer to the 1792 statute, while the marginalia in 1849 and 1860 refer to the 1819 code. The codifiers of 1849 and 1860 give no indication that they were changing the law. While the addition of “enclosed” might seem to be the codifier’s error, the addition was not removed in 1860. That the term *enclosed* was added, but not removed later, suggests that Virginians understood the law only to restrict hunting on fenced land. In 1866, Virginia enacted a new scheme for regulating hunting on private land.²²⁸ After 1866, the county government would decide whether hunters needed landowner permission to hunt on private land, regardless of whether it was fenced or not. If the county government chose not to restrict hunting on unfenced land, the 1860 code remained in force.²²⁹

Only Virginia restricted fishing on private land. Other states that required landowner permission for hunting did not require it for fishing. Similarly, gathering or foraging was not restricted. Since hunting, fishing, and gathering all remove something from the land, the imposition on the landowner is greater. Merely entering or crossing private land was unrestricted.

Massachusetts allowed the public to cross private land in two colonial statutes. Massachusetts directly authorized people to hunt, liable only for the damage caused. In 1636, the Plymouth Colony enacted a statute that read “[t]hat fishing fowling hawking hunting be

226. Act of Dec. 4, 1795, § 3, 1795 Va. Acts 50, 50 (“all disputes concerning the bounds of lots”). Also, “bounds” was used as a more general synonym for limits. *See, e.g.*, Act of Dec. 24, 1795, § 10, 1795 Va. Acts 3, 4 (“every militia man removing out of the bounds of one company into another”); Act of Oct. 21, 1793, 1793 Va. Acts 8, 13 (“go out of the rules or bounds of the prison”).

227. VA. CODE ch. 101, § 2 (1849); VA. CODE ch. 101, § 2 (1860). Another section of same chapter prohibits hunting on private land near the water in three counties. VA. CODE ch. 101, § 4 (1860) (prescribing fines for hunting and fishing “on the lands, or in the water courses comprehended within the survey of any proprietor”).

228. Act of Feb. 20, 1866, ch. 93, 1865 Va. Acts 202, 202.

229. *Id.* § 3.

freely allowed provided if any damage come to any p[ar]ticular [person] by the prosecu[tion] of such game restitu[tion] be made or the case actionable.’’²³⁰

The other colony that became Massachusetts protected public access slightly differently. In the 1640s, the Massachusetts Bay colony enacted an ordinance that read “[a]nd for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man’s propriety for that end, so they trespass not upon any man’s corn or meadow.”²³¹ “Meadow” should not be understood to describe unimproved land, even if cattle grazed on it. In colonial America, meadow referred to improved land, most often used for making hay for the cattle to overwinter.²³² Crossing a field used for grazing would not damage the grass, but crossing a meadow of hay could damage it, by knocking the grass flat.

Except in North Carolina, landowners could not exclude the public from open land. Even there, North Carolina replaced the English law of trespass which did not require notice with posting statute that required landowners to affirmatively communicate their intentions before any remedy was available. In the remaining states, colonial and early Republic statutes restricted hunting and fishing in a manner as to demonstrate that entering open land without permission was not a trespass in 1791.

230. Act of Nov. 15, 1636, II RECORDS OF THE COLONY OF NEW PLYMOUTH IN NEW ENGLAND 16 (David Pulsifer ed., 1861) [hereinafter COLONIAL NEW PLYMOUTH].

231. Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 68 (1851). It is unclear whether this ordinance was enacted in 1641 or 1647, but the Supreme Judicial Court believes that §§ 1-3 were enacted in 1641, while this section, § 4, was added in 1647. *Id.* at 67-68. Nantucket, Martha’s Vineyard, and the Plymouth Bay Colony (southeastern Massachusetts and Cape Cod) were not part of the Massachusetts Bay Colony. *See id.* at 76. The Supreme Judicial Court has held that the ordinance has become the common law of property for the entire state. *In re* Opinion of the Justices, 313 N.E.2d 561, 566 (Mass. 1974).

232. PERCY WELLS BIDWELL & JOHN IRONSIDE FALCONER, HISTORY OF AGRICULTURE IN THE NORTHERN UNITED STATES 1620-1860 234 (1941). Additionally, corn should not be understood to solely refer to maize, which was called Indian corn in the colonial era. *Id.* at 96, 240. Following the English usage, corn refers to grain, so hunters and fishers were not allowed to cross (and damage) grain crops. Although not strictly within the ordinance, other crops would have been protected.

IV. THE DANGER FROM THIS HISTORICAL ERROR

The previous section has made it abundantly clear that the history imbedded in *Jones*—that every unauthorized entry on land was a trespass at Founding—is nonsense, but is it dangerous nonsense? This final Part argues that the *Jones* historical embarrassment has the potential to be dangerous nonsense, but most probably in fields other than Fourth Amendment jurisprudence.

A. *Open Fields Forever*

The majority opinion and concurrence in *Jones* duel on whether the revival of trespass in Fourth Amendment jurisprudence threatens the continued vitality of the open fields doctrine.²³³ There are several reasons to believe that *Jones* does not threaten the open fields doctrine. Firstly, the majority opinion expressly holds that *Jones* does not overrule *Oliver*.²³⁴ The majority opinion holds that the Fourth Amendment addresses searches and seizures of “persons, houses, papers and effects,” not of land or property generally.²³⁵

But, doctrine is malleable, so the ultimate question is not whether a few sentences in *Jones* point this way or that, but whether there is an appetite to overrule *Oliver*. There is little indication at present that the U.S. Supreme Court or other courts want to overrule the open fields doctrine, so the Justices’ nonchalant approach to history could be of no import to the scope of the Fourth Amendment.²³⁶ But doctrinal innovations often have their largest impact where the experts least expect.

B. *Where Trespass Law Matters*

While it may be surprising that *Jones* could have its largest impact in regulatory takings jurisprudence, it should surprise no one that

233. *United States v. Jones*, 132 S. Ct. 945, 950–51 nn.3–5 (2012).

234. *Id.* at 953.

235. *Id.* at 963 n.8.

236. Interview with Professor Lee Kovarsky, Capital Appellate Litigator (Sept. 21, 2012).

trespass matters most for property law. The same Supreme Court that is willing to constitutionalize erroneous trespass law in Fourth Amendment jurisprudence may be willing to do the same in its takings jurisprudence.

The Fifth Amendment prohibits the government from doing an assortment of things, including taking “private property . . . for public use, without just compensation.”²³⁷ Initially, only actual deprivations of property were proscribed. In the 1920s, however, an anti-regulatory Supreme Court invented the doctrine of regulatory takings in *Pennsylvania Coal Co. v. Mahon*.²³⁸ Writing for the majority, Chief Justice Holmes held that “if regulation goes too far it will be recognized as a taking.”²³⁹ As a doctrine, regulatory takings cannot be justified on originalist grounds. There is ample evidence that the Founders were familiar with regulation that limited land use both to prevent nuisance and to further public goals. As Professor Hart has shown, the reason that the Takings Clause does not mention regulation is that the Framers “did not regard regulation as a form of taking.”²⁴⁰

Colonial land use regulation was intrusive, dictating to landowners how much, how little, and in what ways landowners could use their property. Taken together, colonial governments imposed comprehensive land use planning. In many colonies, landowners who failed to improve their land would forfeit their title to the land, even if the condition of clearing the land and settling on it was not included in the original grant.²⁴¹ Similarly, if a landowner let their

237. U.S. CONST. amend. V.

238. 260 U.S. 393 (1922).

239. *Id.* at 415.

240. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1258 (1996) [hereinafter Hart, *Colonial*]; John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1100–01 (2000) [hereinafter Hart, *Early Republic*]; John F. Hart, *Fish, Dams, and James Madison: Eighteenth-Century Species Protection and the Original Understanding of the Takings Clause*, 63 MD. L. REV. 287, 287–89 (2004) [hereinafter Hart, *Fish*].

241. Hart, *Colonial*, *supra* note 240, at 1260–61 (describing laws in Delaware, Massachusetts, and New York).

land lay fallow, the landowner could forfeit their land.²⁴² Many cities imposed parallel requirements on urban landowners, obligating them to maintain, and in some cases build, their residences.²⁴³ In four colonies, statutes imposed fines on landowners who failed to fence their land.²⁴⁴ The onus on landowners with valuable minerals was even greater. If a landowner failed to exploit minerals, the landowner forfeited the mine and another could work it.²⁴⁵ Connecticut went even further, imposing forfeiture if landowners did not exploit the resource as quickly as possible, allowing another miner to eject the landowner.²⁴⁶

Colonial legislatures treated other natural resources they considered as important and valuable as minerals similarly. At least two colonial legislatures allowed someone to claim a site capable of producing water power if the landowner did not develop the site.²⁴⁷

Laws requiring a particular economic use were not limited to minerals or water power. Many colonies compelled landowners to drain their land, often in a collective enterprise where the costs were shared regardless of individuals' willingness to do so.²⁴⁸ While some landowners benefited from drainage, others were harmed. Riparian meadows produced hay and grazing with minimal effort.²⁴⁹ Compelled drainage reduced the value of marshland and obviously interfered with what the Supreme Court dubbed landowner's

242. *Id.* at 1262–63 (describing laws in North Carolina, South Carolina, and Virginia).

243. *Id.* at 1275–79 (discussing laws in Connecticut, New Jersey, New York, Rhode Island, South Carolina, and Virginia).

244. *Id.* at 1264–65 (describing laws in Connecticut, New Jersey, New York, and South Carolina).

245. *Id.* at 1265 (describing laws in Plymouth Colony).

246. *Id.* at 1265–66.

247. Hart, *Colonial*, *supra* note 240, at 1267 (describing Mill Acts in Maryland and New Hampshire).

248. *Id.* at 1268–69 (describing laws in Connecticut, Massachusetts, New Jersey, New York, Pennsylvania, and South Carolina).

249. *Id.* at 1269–70 & n.111; *see also* JOHN R. STILGOE, COMMON LANDSCAPE OF AMERICA, 1540 TO 1845 46 (1983) (settlements were located near marsh and meadow); *A Brief Account of the Province of East-Jersey, in America*, in SAMUEL SMITH, THE HISTORY OF THE COLONY OF NOVA-CAESARIA, OR NEW JERSEY app. at 540 (Burlington, NJ., James Parker 1765) (marsh and meadow were used to lure settlers).

“reasonable investment backed expectations.”²⁵⁰ Colonial legislatures often chose one use over another.

Like today, cities and towns in colonial times imposed a variety of obligations on landowners to promote development in line with municipal goals. In some colonies, laws required density in towns, but other towns discouraged density.²⁵¹ Many towns imposed vague aesthetic standards, hoping to make the city more attractive.²⁵² Some towns required landowners to remove all the vegetation from their parcels, while others required planting trees.²⁵³

These restrictions and obligations on landowners were so widespread that it is implausible to describe them as exceptions.²⁵⁴ Additionally, it is demonstrably false that landowners faced no limits except nuisance.²⁵⁵ It is also abundantly clear that the Framers did not object to land use regulation practices. After independence, the states (or towns with state approval) continued to regulate in detail the aesthetics of new buildings.²⁵⁶ Towns continued to dictate to landowners whether vegetation was allowed.²⁵⁷

Historical evidence notwithstanding, the Supreme Court has expanded its regulatory takings jurisprudence in the recent decades and came close to constitutionalizing the doctrine of judicial takings. Most famously, in *Kaiser Aetna v. United States*, the U.S. Supreme Court held that the government cannot require a private landowner to

250. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1877).

251. Hart, *Colonial*, *supra* note 240, at 1275 (discussing laws in Connecticut, Massachusetts, New Jersey, and New York).

252. *Id.* at 1275–77 (discussing laws in Connecticut, New York, and Virginia).

253. *Id.* at 1280–81 (discussing laws in New Hampshire, New York, North Carolina, Pennsylvania, South Carolina, and Virginia).

254. *Id.* at 1281.

255. *Id.* at 1281; *see* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992) (describing only limitations on landowners as “background principles of nuisance and property law”).

256. Hart, *Early Republic*, *supra* note 240, at 1108–15 (describing laws in Connecticut, Georgia, Massachusetts, New York, North Carolina, South Carolina, and Virginia). These restrictions did impinge on individual preferences. Jefferson complained of the “disgusting monotony” where every building was the same distance from the street. Jefferson’s Draft of Agenda for the Seat of Government (Aug. 29, 1790), *in* 17 THE PAPERS OF THOMAS JEFFERSON 460, 461 (Julian P. Boyd ed., 1965).

257. Hart, *Early Republic*, *supra* note 240, at 1115–16 (describing laws in Connecticut, North Carolina, New Jersey, South Carolina, and Virginia).

provide public access.²⁵⁸ Like *Mahon*, *Kaiser Aetna* cannot be justified on originalist grounds since every colony allowed the public to enter unfenced private land in 1791.

While *Kaiser Aetna* is now well-settled law, regulatory takings doctrine is poised for a dangerous eruption. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, four justices joined an opinion finding a judicial taking.²⁵⁹ Judicial takings is a doctrine that judicial decisions can take property by changing settled precedents, much like an action by the legislature or the executive. Although it would not be controversial to say that a court cannot expropriate property for its own use, the application of takings doctrine to the common law process of legal evolution is revolutionary.

The combination of judicial takings and ignorance about trespass law in 1791 could destabilize property law in several states. At common law, landowners owned coastal land from the high water mark, and public rights of access to coastal land extended to the wet sand. The Oregon Supreme Court has held that the dry sand is a public highway and therefore open to the public.²⁶⁰ In a subsequent case, the Oregon Supreme Court found no taking since public access was a “background principle[] of state law.”²⁶¹ Justice Scalia (with Justice O’Connor joining) penned a five-page dissent from the denial of certiorari for the case.²⁶² Scalia’s dissent makes it abundantly clear how he would decide the case (*i.e.*, against public access). Additionally, he would have found that the Oregon Supreme Court

258. 444 U.S. 164, 389, 393 (1979). The Court expanded its ruling in *Kaiser Aetna* in two subsequent cases where government required public access in exchange for permission to build. *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831 (1987).

259. 560 U.S. 702, 707–13 (2010). Roberts, Thomas, and Alito concurred in Parts II and III of Scalia’s opinion, which concluded that a court takes property when its decision changes the boundaries of private rights. *Id.*

260. *State ex rel. Thornton v. Hay*, 462 P.2d 671, 673 (Or. 1969) (noting that public had enjoyed use of dry sand “since the beginning of the state’s political history”).

261. *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993) (en banc) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1004 (1992)).

262. *Id.* at 1207 (Scalia, J., dissenting). In addition, Justice Scalia presumed to correct the Oregon Supreme Court on what he deemed a misreading of its own precedent. *Id.* at 1210–11 n.3. Further, he accused Oregon of “invoking nonexistent rules of state substantive law.” *Id.* at 1211.

had effected a judicial taking.²⁶³ Similarly, the Hawaii Supreme Court has interpreted its property law in a way that arguably expands public access at the expense of the landowner's right to exclude.²⁶⁴ Additionally, landowners in Hawaii cannot exclude native Hawaiians from customary use of unimproved land.²⁶⁵

Hawaii and Oregon are not the only states where judicial decisions have created public rights of access to private land. In recent decades, several states have expanded the public right of access. The New Jersey Supreme Court has expanded access to the shoreline, holding that it is "not limited to the ancient prerogatives of navigation and fishing, but extend[s] as well to recreational uses, including bathing, swimming and other shore activities."²⁶⁶ In Arkansas, for example, the state definition of navigability was expanded, enlarging the scope of public access to streams and rivers.²⁶⁷ In South Carolina, the navigable channel includes improvements and artificial expansions.²⁶⁸ In Illinois, the public can boat on lakes too small for navigation.²⁶⁹ In many eastern states, only navigable waters are open to the public because that is the law of England.²⁷⁰ Private landowners own the streambed but have no right to exclude from the waters, arguably restricting their common law rights.

In several western states, public rights are even stronger, since the public can walk through the channel. In Wyoming and South Dakota, the river channel is open to the public, regardless of its navigability

263. *Id.* at 1212.

264. *In re Ashford*, 440 P.2d 76, 78 (Haw. 1968) (delimiting private from public according to native Hawaiian custom).

265. *See Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n*, 903 P.2d 1246, 1259–61, 1267–68 (Haw. 1995).

266. *Neptune City v. Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972).

267. *See State v. McIlroy*, 595 S.W.2d 659, 664–65 (Ark. 1980) (noting that navigability includes both recreation and commerce).

268. *State v. Head*, 498 S.E.2d 389, 394–95 (S.C. Ct. App. 1997) (stating "[a]rtificial lakes along navigable streams" are open to the public). *But see Kaiser Aetna v. United States*, 444 U.S. 164, 178–79 (1979) (stating that improvements do not expand access).

269. *Beacham v. Lake Zurich Prop. Owners Ass'n*, 526 N.E.2d 154, 157 (Ill. 1988).

270. *Neptune City*, 294 A.2d at 51–52.

and even when the seasonal flow has disappeared.²⁷¹ Anyone is free to hike up the streambed, regardless of who owns the land. In Montana and the Dakotas, all water is open to the public.²⁷² Public uses of water, such as fishing, is part of the fabric of Montana culture.²⁷³

In South Dakota, the public retains the right to hunt along section lines, even where there is no recognizable road.²⁷⁴ Section lines divide parcels governed by the general land survey. When landowners acquired the parcels, the section lines were reserved for public roads. Since very few of those roads were built, most of the section lines are boundaries between private landowners or between different parcels of a single landowner. South Dakota allows public hunting along certain roads and extends that right to section lines where a roadway was reserved but never built.²⁷⁵

All of these states expand public access—at the expense of the landowner’s right to exclude. All these laws are threatened by the Supreme Court’s willingness to impose a mistaken view of what trespass law was in 1791.

All of these states’ laws and decisions are also threatened by the doctrine of judicial takings. In each case, substantial time passed between the state’s formation and the first decision announcing the principle of public access. In Oregon, for example, public use of the dry sand was the common practice since first settlement, but no law validated the custom until the 1890s.²⁷⁶ In 1892, the Oregon Supreme Court held that federal patents extended only to the “high-water”

271. See *Parks v. Cooper*, 676 N.W.2d 823, 838–39 (S.D. 2004); *Day v. Armstrong*, 362 P.2d 137, 143 (Wyo. 1961).

272. *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 171 (Mont. 1984); *Roberts v. Taylor*, 181 N.W. 622, 625–26 (N.D. 1921); *Flisrand v. Madson*, 152 N.W. 796, 800–01 (S.D. 1915).

273. See NORMAN MACLEAN, *A RIVER RUNS THROUGH IT* (1976) (depicting a Montana father who relates to his sons through fly fishing).

274. Tom Simmons, Comment, *Highways, Hunters and Section Lines: Tensions Between Public Access and Private Rights*, 2 GREAT PLAINS NAT. RESOURCES J. 240, 241 (1997).

275. *Id.* at 41.

276. *State ex rel. Thornton v. Hay*, 462 P.2d 671, 673–74 (Or. 1969) (noting that the public had enjoyed use of dry sand “since the beginning of the state’s political history”).

line, which was defined as the vegetation line.²⁷⁷ Seven years later, the Oregon legislature confirmed the substance of the decision by holding that Oregon beaches are a public highway.²⁷⁸ But, Oregon was organized in 1848 and admitted to statehood in 1859. That gap between the beginning of the state's political existence and the first legal decisions is the pretext that judicial activists might use. These fears are justified. Dissenting from a denial of certiorari related to the Oregon's beaches, Justice Scalia derides the Oregon Supreme Court for invoking "nonexistent rules" of state law.²⁷⁹ Justice Scalia criticizes the Oregon Supreme Court for misreading Blackstone,²⁸⁰ but omits any reference to the 1894 U.S. Supreme Court case that validated Oregon's beach property laws.

Since the *Jones*-ians assume that every state inherited the law of England *in toto*, every decision adjusting property law is liable to be labeled a judicial taking and thus constitutionally proscribed. Aside from the historical error, there are two great harms that arise when English trespass law is constitutionalized in the United States and combined with the doctrine of regulatory or judicial takings. The first is that the public could lose important rights, rights that we have enjoyed for centuries. In many cases, these rights are an important link to a cultural roots threatened by assimilation.²⁸¹ There is a second harm, since it would represent the federalization of property law. As the most inherently local of all law, the states are generally given great deference in developing their property law. The move

277. *Bowlby v. Shively*, 30 P. 154, 156 (Or. 1892), *aff'd*, 152 U.S. 1 (1894).

278. Act of Jan. 25, 1899, 1898 Or. Laws 3, 3 ("That the shore of the Pacific ocean, between ordinary high and extreme low tides, and from the Columbia river on the north to the south boundary line of Clatsop county on the south, is hereby declared a public highway, and shall forever remain open as such to the public.")

279. *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1211 (1994).

280. *Id.* at 1212 n.5. In addition to Blackstone, Scalia quotes two eighteenth century English cases and one early nineteenth century case from New York. *Id.* at 1212–13 n.5. Scalia does not appear to acknowledge that the Oregon Supreme Court decides what the common law (including the common law of custom) is in Oregon. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 71, 83 (1938).

281. *See, e.g., Pub. Access Shoreline Haw. v. Haw. Planning Comm'n*, 903 P.2d 1246, 1259–61, 1269 (1995) (finding that strictly applying English common law would preclude traditional Hawaiian gathering rights).

would federalize property and mark the second coming of *Lochner*, this time in property, not contract.²⁸²

While *Jones* suggests that some justices are ready to impose their imagined version of eighteenth century tort law on constitutional law, the threat is larger than public access. Regulatory takings have been a vehicle for judicial activism and anti-democratic, regulatory second-guessing since the doctrine's invention in 1922.²⁸³ The true history of property regulation in the eighteenth century indicates that the Founders believed that government could regulate property. Yet, regulatory takings opinions like *Lucas v. South Carolina Coastal Commission* state that landowners faced no restrictions, which is demonstrably false. If the same faux originalism that animates *Jones* combines with ahistorical activism of judicial takings doctrine, much of the property, environmental, and urban regulation that underpins modernity is threatened.²⁸⁴

Property rights at common law are often an argument against environmental protection. While the term may be novel, the practice of environmental regulation is not. Dams were important sources of water power in early America but they obstructed the migration of spawning fish. At common law, the owner of the dam had no obligation to alter their dam to allow fish to pass.²⁸⁵ In 1791, nine states had laws requiring dam owners to modify or remove their

282. See DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 1–2 (2011) (arguing that *Lochner* is unfairly misconstrued and federal courts should restrict regulation to protect or expand private property rights); Eric R. Claeys, Response, *Exclusion and Private Law Theory: A Comment on Property as the Law of Things*, 125 HARV. L. REV. F. 133, 144 (2012) (arguing that the right to exclude does not describe property and that property must include broader rights of use, alienation, and possession); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 440 (2003) (arguing that the right to exclude is a pro-regulation artifact of the Legal Realist movement and arguing that courts should protect broader rights of use, enjoyment, and alienation).

283. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (holding that compensation is required when a regulation “goes too far”).

284. Note that most of the property and environmental regulations from the colonial era and Early Republic would not survive either.

285. Obstructing the passage of fish was not an offense at common law. *Commonwealth v. Knowlton*, 2 Mass. (2 Tyng) 530, 535 (1807). According to Blackstone, only obstructions of navigable waterways were public nuisances at common law. 4 WILLIAM BLACKSTONE, COMMENTARIES *167.

dams to allow fish to pass.²⁸⁶ Some of these laws were quite extreme, requiring that dams be destroyed, and providing for no compensation.²⁸⁷ These laws should not be understood as a limited or incomplete commitment to private property rights generally. Nine states required compensation for land taken for roads.²⁸⁸

James Madison is largely credited with drafting the Fifth Amendment and introducing the amendment, since none of the state ratifying conventions called for it.²⁸⁹ The same James Madison introduced a bill in Virginia to require dams to allow fish passage, without providing for landowner compensation.²⁹⁰ The Framers thus intended to distinguish actual takings of land, where title passes from a private landowner to the government, from regulations that limited the use of that land.

The historical evidence is clear that entering unfenced land was not a trespass and that regulating property was not a taking in 1791. It is equally clear that faux originalism often leads to outcomes directly in conflict with the best historical research. The danger from *Jones*, particularly in light of the novel doctrine of judicial takings, is that a small number of mistaken, but motivated, judges will seize power from the more democratic branches of government.

CONCLUSION

Both the majority and concurring opinions in *Jones* are wrong about the state of the law in 1791. In the United States, landowners had no right to exclude others from open land. No eighteenth century case shows a remedy for mere entry. Two states, Vermont and Pennsylvania, constitutionally guaranteed a right to not only enter but

286. Hart, *Fish*, *supra* note 240, at 313. By 1800, thirteen states had laws requiring dam owners to modify their dams to allow fish to pass. *Id.* at 292.

287. *Id.* at 294 & nn.47–48.

288. *Id.* at 309. Even where the law did not require compensation, payment to affected landowners was common. *See id.* at 313 (“Eight . . . states observed the compensation principle even in taking unimproved land for highways”).

289. Hart, *Early Republic*, *supra* note 240, at 1132.

290. Hart, *Fish*, *supra* note 240, at 305–306.

to hunt on open land. Several other state legislatures authorized hunting on unfenced land, implying that the public had a general right to enter unfenced land.

Regardless of whether a Fourth Amendment search requires a trespass or the violation of a reasonable expectation of privacy, the government can explore open land without a search warrant. While the error in *Jones* does not affect the outcome in the case, it is nonetheless distressing because the Supreme Court does not recognize the limits of its historical knowledge. All but one of the justices joined opinions that relied, at least in part, on historical errors found in a modern treatise. Rather than recognize their limits, the Supreme Court is poised to make the same mistake again and in a case where it will matter: regulatory and judicial takings.

