

THE “OPEN FIELDS” DOCTRINE AND THE RIGHT TO BE SECURE

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INTRODUCTION

More than a century has passed since the U.S. Supreme Court first held that the Fourth Amendment of the U.S. Constitution is not implicated by entries onto “open fields.”¹ The term “open fields” encompasses those areas of privately owned fields and woods that are not “immediately surrounding and associated with the home.”² The upshot of the “open fields” doctrine is that the Fourth Amendment does not forbid government agents from entering “open fields” without a warrant or recognized exception to the warrant requirement. The doctrine leaves a substantial degree of discretion

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¹ *Hester v. United States*, 265 U.S. 57, 59 (1924).

² *Oliver v. United States*, 466 U.S. 170, 180 (1984) (“At common law, the curtilage is the area to which extends the intimate activity associated with the ‘sanctity of a man’s home and the privacies of life,’ and therefore has been considered part of the home itself for Fourth Amendment purposes.”) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

with government officials, as nearly ninety-six percent of privately owned land in the United States qualifies as “open fields.”³

This Article situates criticisms of the Court’s “open fields” doctrine within a larger discourse on Fourth Amendment interpretation. The Fourth Amendment protects “[t]he right of the people to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures.”⁴ Good-faith judicial engagement with the Amendment’s right to be secure would almost certainly help curb the undue practical discretion presently afforded government agents by the “open fields” doctrine. First, it would lead to expedited standing for plaintiffs and criminal defendants, thereby reducing the “regulatory gap” in search-and-seizure law. Second, it would likely prompt the formation of additional restrictions on the terms of the “open fields” doctrine.

I. THE “OPEN FIELDS” DOCTRINE

The “open fields” doctrine was first recognized by the U.S. Supreme Court in 1924.⁵ In *Hester v. United States*,⁶ the Court considered the constitutionality of the petitioner’s conviction for violating federal laws related to the concealment of distilled spirits.⁷ While investigating a suspected bootlegging enterprise, federal agents “went toward the house of Hester’s father.”⁸ The agents positioned themselves “fifty to one hundred yards away, and saw Hester come out and hand Henderson a quart bottle.”⁹ The central question before the Court was whether the agents violated the Fourth Amendment when they entered privately owned land without a warrant or consent. Writing for the Court, Justice Holmes observed:

³ Joshua Windham & David Warren, *Good Fences? Good Luck*, 47 REGUL. 10, 12 (Spring 2024).

⁴ U.S. CONST. amend. IV (emphasis added).

⁵ *Hester*, 265 U.S. at 59.

⁶ *Id.* at 57. *Hester* has been cited in thirty-one U.S. Supreme Court cases. In its immediate aftermath, *Hester* was cited frequently by the Court. See *Carroll v. United States*, 267 U.S. 132, 151 (1925); *Lee v. United States*, 274 U.S. 559, 563 (1927); *Olmstead v. United States*, 277 U.S. 438, 465 (1928). After *Olmstead*, *Hester* was not cited by the Court until 1952. See *On Lee v. United States*, 343 U.S. 747, 766 (1952).

⁷ *Hester*, 265 U.S. at 58.

⁸ *Id.*

⁹ *Id.*

The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester’s father’s land. As to that, it is enough to say that, apart from the justification, *the special protection accorded by the Fourth Amendment to the people in their “persons, houses, papers, and effects,” is not extended to the open fields.* The distinction between the latter and the house is as old as the common law.¹⁰

The Court in *Hester* established a bright-line rule: Entries onto privately owned “open fields” do not implicate the Fourth Amendment.¹¹

¹⁰ *Id.* at 59 (emphasis added) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *223, *225, *226). For a discussion of Justice Holmes’s reasoning in *Hester*, see Justice Powell’s majority opinion in *Oliver v. United States*:

As Justice Holmes, writing for the Court, observed in *Hester*, the common law distinguished “open fields” from the “curtilage,” the land immediately surrounding and associated with the home. The distinction implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home. At common law, the curtilage is the area to which extends the intimate activity associated with the “sanctity of a man’s home and the privacies of life,” and therefore has been considered part of the home itself for Fourth Amendment purposes.

466 U.S. 170, 180 (1984) (internal citations omitted) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

¹¹ *Hester*, 265 U.S. at 59; see also *United States v. Dunn*, 480 U.S. 294, 300 n.3 (1987) (“In the section of Blackstone’s [*Commentaries*] which the [*Hester*] Court cited, Blackstone described the elements of common-law burglary, and elaborated on the element that a breaking occur in a mansion or dwelling house. In defining the terms ‘mansion or dwelling-house,’ Blackstone wrote that ‘no distant barn, warehouse, or the like are under the same privileges, nor looked upon as a man’s castle of defence’ Blackstone observed, however, that ‘if the barn, stable, or warehouse, be parcel of the mansion-house, and within the same common fence, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenances, if within the curtilage or homestall.” (internal citations omitted) (quoting BLACKSTONE, *supra* note 10, at *225)); *Oliver*, 466 U.S. at 180. Justice Holmes’s opinion in *Hester* is often criticized for its brevity and breezy reasoning, which rests on a contestable construction of Fourth Amendment text and a strained reading of Blackstone’s *Commentaries*. The *Hester* opinion is 498 words long. By way of comparison, the syllabus of *Carpenter v. United States* is 1218 words long. 585 U.S. 296, 296-99 (2018). For criticisms of Justice Holmes’s reasoning, see Joshua Windham, *The Open Fields Doctrine Is Wrong*, 32 GEO. MASON L. REV. F. 1, 12-16 (2024).

Fast forward forty-three years, to the landmark 1967 decision of *Katz v. United States*.¹² In *Katz*, the U.S. Supreme Court reoriented Fourth Amendment jurisprudence, identifying privacy as a first-order value.¹³ Although *Katz* did not involve an entry onto the petitioner's property, its two leading opinions reference the "open fields" doctrine in dicta. Justice Stewart's majority opinion states: "In support of their respective claims, the parties have compiled competing lists of 'protected areas' for our consideration. It appears to be common ground that a private home is such an area, but that an open field is not."¹⁴ In his influential concurring opinion, Justice Harlan reiterated the majority's point, but in even stronger language: "I join the opinion of the Court, which I read to hold only . . . that an enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy"¹⁵

Dicta in *Katz* aside, the "open fields" rule set forth in *Hester* was not formally addressed by the Court in the *Katz* "privacy era" until the mid-1980s.¹⁶ Finding that there are no "reasonable expectations of privacy" against entries onto "open fields," the Court in *Oliver v. United States*¹⁷ reaffirmed the rule of *Hester*, but through the *Katz* privacy rubric. Writing for a 6-3 majority, Justice Powell explained:

¹² 389 U.S. 347 (1967).

¹³ *Id.* at 350-51.

¹⁴ *Id.* at 351 n.8 (internal citations omitted).

¹⁵ *Id.* at 360 (Harlan, J., concurring) (internal citations omitted).

¹⁶ *Dunn*, 480 U.S. at 294; *Oliver*, 466 U.S. at 170.

¹⁷ 466 U.S. at 170.

[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter, these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or "No Trespassing" signs effectively bar the public from viewing open fields in rural areas. And both petitioner *Oliver* and respondent Thornton concede that the public and police lawfully may survey lands from the air. For these reasons, the asserted expectation of privacy in open fields is not an expectation that "society recognizes as reasonable."¹⁸

Justice Powell also observed that "the common law of trespass furthers a range of interests that have nothing to do with privacy,"¹⁹ writing that "[c]riminal laws against trespass are prophylactic: they protect against intruders who poach, steal livestock and crops, or vandalize property."²⁰ In addition to re-emphasizing the distinction between "curtilage" and "open fields," *Oliver* provides guidance on where to draw the line. The determinative question, wrote Justice Powell, is whether the property at issue harbors the "intimate activity associated with the 'sanctity of a man's home and the privacies of life.'"²¹

¹⁸ *Id.* at 179 (footnotes omitted); see also *United States v. Oliver*, 686 F.2d 356, 360 (6th Cir. 1982) (en banc) ("The Fourth Amendment and other laws protecting privacy create the conditions and the context for many relationships based on intimacy, friendship and trust. These laws establish an environment in which individual emotional and mental processes can develop freely without surveillance or interference. The legal principles that protect privacy, therefore, do not protect the desert island, the mountain top or the open field – even one the owner has posted with a 'no trespass' sign. The human relations that create the need for privacy do not ordinarily take place in these settings. The only significant interest at stake here – a property owner's interest in excluding others from his possessions – is not sufficient alone to bring into play legal principles protecting privacy." (footnote omitted)).

¹⁹ *Oliver*, 466 U.S. at 183 n.15.

²⁰ *Id.*

²¹ *Id.* at 180 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

Only three years after *Oliver*, the Court revisited the “open fields” doctrine in *United States v. Dunn*.²² In *Dunn*, the Court addressed “whether the area near a barn, located approximately 50 yards from a fence surrounding a ranch house, is, for Fourth Amendment purposes, within the curtilage of the house.”²³ Reiterating the central tenets of *Oliver*, the *Dunn* majority identified four factors to be weighed in a “curtilage” analysis:

[W]e believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.²⁴

II. THE RIGHT TO BE SECURE

Although resting on a century of precedent, the “open fields” doctrine appears unstable when situated within a larger colloquy over constitutional meaning. Gazing upward at first principles, one finds the Fourth Amendment does not simply protect the right to be *spared* unreasonable searches and seizures. Indeed, the Amendment protects something much greater: the right to be *confident* against such government actions.²⁵ The main thrusts of

²² 480 U.S. 294 (1987).

²³ *Id.* at 296.

²⁴ *Id.* at 301 (“We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a ‘correct’ answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration – whether the area in question is so intimately tied to the home itself that it should be placed under the home’s ‘umbrella’ of Fourth Amendment protection.”).

²⁵ See Luke M. Milligan, *The Forgotten Right to Be Secure*, 65 HASTINGS L.J. 713, 732-50 (2014). The confidence-interpretation of the Fourth Amendment has gained momentum in recent years. See, e.g., *State v. Wilson*, 968 N.W.2d 903, 912 n.3 (Iowa 2022); *Rainwaters v. Tenn. Wildlife Res. Agency*, No. 20-CV-6, 2022 WL 17491794, at *12 (Tenn. Cir. Ct. Mar. 22, 2022), *aff’d in part, rev’d in part, and remanded*, No. W2022-00514-COA-R3-CV, 2024 WL 2078231 (Tenn. Ct. App. May 9, 2024); David Gray, *Collective Standing Under the Fourth Amendment*, 55 AM. CRIM. L. REV. 77, 100-03 (2018); Jed Rubinfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 126-31 (2008). Professor Thomas Clancy has closely studied the right to be secure. See, e.g., Thomas K. Clancy, *The Importance of James Otis*, 82 MISS. L.J. 487, 496-506 (2013); Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE

the confidence-argument are as follows. The Fourth Amendment protects “[t]he right of the people to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures.”²⁶ At the time of the founding, “secure” was defined as it is today: “free from fear or anxiety” and, alternatively, “sure, not doubting.”²⁷ These definitions closely approximate that of the term “confidence”: “faith or belief that one will act in a right, proper, or effective way.”²⁸

The confidence-reading of the Fourth Amendment is substantiated by founding-era discourse. In the wake of *Paxton’s Case*,²⁹ it was written anonymously (most likely by James Otis)³⁰ that “every hous[e]holder in this province, will necessarily become less *secure* than he was before this writ had any existence among us”³¹ The author’s choice of the terms “less secure” and “every hous[e]holder” is instructive. When he wrote that “every hous[e]holder . . . will necessarily become less secure,” he did not mean that every householder will necessarily be subjected to more arbitrary searches and seizures. Rather, he meant that every householder will necessarily have less confidence in regard to such searches and seizures.

A review of Fourth Amendment text in its entirety further supports the confidence-reading. The Amendment’s second clause – the Warrant Clause – prohibits the *issuance* of general warrants.³² Yet the mere issuance of a general warrant does not necessarily result in actual unreasonable searches or seizures. The Framers’ reliance on the concept of “issuance” (rather than, say, “execution”) suggests the Warrant Clause seeks not simply to prevent general searches and seizures, but also to instill a high degree of confidence against such government actions. This, in turn, further

FOREST L. REV. 307, 345-67 (1998). For a discussion of how Professor Clancy’s approach differs from mine, see Donald A. Dripps, *Eavesdropping, the Fourth Amendment, and the Common Law (of Eavesdropping)*, 32 WM. & MARY B. RTS. J. 721, 747-54 (2024).

²⁶ U.S. CONST. amend. IV (emphasis added).

²⁷ See Milligan, *supra* note 25, at 738-41.

²⁸ *Confidence*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/confidence> [<https://perma.cc/3BQ8-MDWP>]; see also Milligan, *supra* note 25, at 745 n.187.

²⁹ 1 Quincy 51 (Mass. 1761).

³⁰ See Milligan, *supra* note 25, at 736 n.141.

³¹ See *id.* (emphasis added).

³² U.S. CONST. amend. IV.

substantiates the confidence-reading of the right to be secure in the Amendment's first clause.³³

III. ANALYZING THE "OPEN FIELDS" DOCTRINE

A confidence-reading of the Fourth Amendment would inevitably curb the undue practical discretion presently afforded government agents by the "open fields" doctrine. First, a confidence-reading would generate earlier standing for plaintiffs and criminal defendants, thereby reducing the "regulatory gap" in search-and-seizure law. Second, good-faith judicial engagement with the confidence-reading would likely prompt the formation of new restrictions on the terms of the "open fields" doctrine.

A. Reducing the "Regulatory Gap"

Search-and-seizure jurisprudence in the United States is marked by a well-documented "regulatory gap," whereby government agents strategically evade judicial review of surveillance activities by exploiting constitutional limitations on standing.³⁴ This gap can be substantially reduced through judicial animation of the right to be secure, as demonstrated by a high-profile case in the Tennessee courts, *Rainwaters v. Tennessee Wildlife Resources Agency*.³⁵

The *Rainwaters* litigation addressed the constitutionality of a Tennessee statute authorizing wildlife agency enforcement personnel to "go upon any property, outside of buildings, posted or otherwise," in the performance of their duties.³⁶ In declaring the statute violative of the plaintiffs' rights under the Tennessee Constitution, the Circuit Court panel majority explained:³⁷ "[T]he harm from which Plaintiffs seek relief is not simply an

³³ See Milligan, *supra* note 25, at 741-46.

³⁴ See *id.* at 720-32.

³⁵ No. 20-CV-6, 2022 WL 17491794 (Tenn. Cir. Ct. Mar. 22, 2022), *aff'd in part, rev'd in part, and remanded*, No. W2022-00514-COA-R3-CV, 2024 WL 2078231 (Tenn. Ct. App. May 9, 2024).

³⁶ TENN. CODE ANN. § 70-1-305 (West 2021). The Tennessee Constitution provides: "That the people shall be *secure* in their persons, houses, papers and possessions, from unreasonable searches and seizures . . ." TENN. CONST. art. I, § VII (emphasis added).

³⁷ Civil actions in Tennessee courts involving a constitutional challenge to a state statute are heard and determined by a three-judge panel at the trial court level. TENN. CODE ANN. § 20-18-101 (West 2021).

unconstitutional search that may or may not happen; Plaintiffs seek relief from the ‘intolerable risk’ of abusive searches created by the Tennessee Code Annotated subsections 70-1-305(1) and (7). *While the statute remains, so does Plaintiffs’ injury.*”³⁸

Writing separately, the third member of the panel, Judge Parish, observed:

[T]he real harm at issue in this case is the “intolerable risk” of abusive searches created by the statute authorizing the [Tennessee Wildlife Resources Agency’s] entries onto Plaintiffs’ properties. I reiterate that this injury to Plaintiffs is neither speculative nor something off in the future. Plaintiffs are subject to it at this moment.³⁹

Quoting from recent commentary on the constitutional right to be secure, Judge Parish’s opinion elaborates on this point:

[T]he Fourth Amendment guarantees not simply a right to be spared unreasonable searches and seizures, but moreover a right to be confident against such government illegalities. In other words, the government does not fully comply with the Fourth Amendment by simply not undertaking intrusive searches or seizures (and providing remedies when it does). It must do more. It must not behave in a way that makes the people anxious or fearful about being subjected to such searches or seizures.⁴⁰

The Circuit Court opinions in *Rainwaters* provide a roadmap for reducing the “regulatory gap” in search-and-seizure law. The *Rainwaters* complaint points to two distinct sources of harm: actual entries onto plaintiffs’ properties, and the continued existence of a statute authorizing such entries.⁴¹ The Circuit Court panel agreed with the plaintiffs here, acknowledging that the statute *itself* was an independent source of harm.⁴² Put differently, the panel deemed

³⁸ *Rainwaters*, 2022 WL 17491794, at *12 (emphasis added) (internal citation omitted).

³⁹ *Id.* at *15 (Parish, J., concurring in part and dissenting in part) (internal citations omitted).

⁴⁰ *Id.* (quoting Luke M. Milligan, *The Right “to Be Secure”*: Los Angeles v. Patel, 2014-2015 CATO SUP. CT. REV. 251, 269 (2015)).

⁴¹ *Rainwaters*, 2022 WL 17491794, at *12.

⁴² *Id.*

the authorizing statute a sufficient source of harm and the insecurity it generated – the “intolerable risk” of abusive searches – a sufficient injury.⁴³

The *Rainwaters* opinions are particularly intriguing when studied in the light of the U.S. Supreme Court’s decision in *Clapper v. Amnesty International USA*.⁴⁴ In *Clapper*, the Court wrote: “Because respondents do not face a threat of certainly impending interception under §1881a [of the Foreign Intelligence Surveillance Act (FISA)], the costs that they have incurred to avoid surveillance are simply the product of their fear of surveillance, and . . . *such a fear is insufficient to create standing.*”⁴⁵

This passage from *Clapper* should be studied carefully, as it can easily mislead when read out of context. Article III standing requires, among other things, that an injury be “fairly traceable to the challenged action.”⁴⁶ *Clapper* stands for the proposition that an injury is not fairly traceable to a challenged action as a matter of law if the challenged action is not at least “certainly impending.”⁴⁷ In *Clapper*, the “challenged action” was the surveillance of plaintiffs’ communications pursuant to a new FISA amendment.⁴⁸ And the plaintiffs cited two types of injuries: the acquisitions of their communications, and the expenditures they undertook to protect the privacy of their communications.⁴⁹ The Court in *Clapper* held that the injuries identified by the plaintiffs could not be fairly traced back to the challenged action (i.e., surveillance pursuant to the FISA amendment) because the plaintiffs could not demonstrate that the challenged action was at least “certainly impending.”⁵⁰

But when “challenged action” in these kinds of cases is recast – from surveillance to *acts generating a well-founded fear of surveillance* – the government actions at issue are more likely to be at least “certainly impending,” and injuries such as “expenditures to protect privacy” are therefore more likely to be “fairly traceable.”

⁴³ *Id.*

⁴⁴ 568 U.S. 398 (2013).

⁴⁵ *Id.* at 417 (emphasis added) (internal footnote omitted).

⁴⁶ *Id.* at 409.

⁴⁷ *Id.* at 415-17 (explaining that “present costs” are not “fairly traceable” to a challenged action that is not “certainly impending”).

⁴⁸ *Id.* at 406.

⁴⁹ *Id.* at 407.

⁵⁰ *Id.* at 415-17.

Had the "challenged action" in *Clapper* been framed as "the acts of the federal government generating a well-founded fear of surveillance" (rather than "surveillance"), then the injury and causation requirements of Article III standing would likely have been satisfied, freeing up for the *Clapper* Court the critical but ultimately unaddressed question of whether there exists a constitutional right to be free from fear against unreasonable searches and seizures.⁵¹ The question left open in *Clapper* was of course addressed and answered in the affirmative by the *Rainwaters* panel.

The confidence-interpretation of search-and-seizure clauses reflected in the *Rainwaters* opinions serves to expand the range of "challengeable actions," thereby authorizing courts to assess the constitutionality of a particular method of surveillance even when plaintiffs are unable to show the surveillance at issue is at least "certainly impending." Plaintiffs may prompt judicial review of a particular surveillance method based on a challenge to government action (or "certainly impending" government action) generating a reasonable fear that they will be subjected to such surveillance. On this point, the existence of an authorizing statute (or, say, a news story about a particular surveillance technique) will oftentimes prove sufficient.

The *Rainwaters* opinions demonstrate how a confidence-reading of the Fourth Amendment would invite earlier judicial review of surveillance methods and reduce the "regulatory gap" in search-and-seizure law. In the context of the "open fields" doctrine, reductions in the "regulatory gap" would lead to increases in the percentage of trespasses and concerned property owners documented in court filings. Enhanced transparency through litigation would, in turn, serve to further deter government agents from abusing the discretion presently afforded them by the "open fields" doctrine.

⁵¹ Similarly situated plaintiffs should emphasize the harm of "expenditures" (rather than mere "fear" or "anxiety") in order to more convincingly satisfy the "concreteness" requirement of injury-in-fact. See *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424-30 (2021) (discussing "intangible harms").

B. Limiting the Doctrinal Terms

In addition to reducing the “regulatory gap,” a confidence-reading of the Fourth Amendment would likely prompt the formation of new restrictions on the terms of the “open fields” doctrine. To understand how the right to be secure impacts the scope of the “open fields” doctrine, it is instructive to think of the right as a sort of “link,” connecting an injury to an otherwise attenuated government action.

We find one instance of this linking dynamic in the *Rainwaters* litigation. The Circuit Court panel in *Rainwaters* utilized the right to be secure to link an “authorizing statute” to an “unreasonable search.” One of the challenged actions at issue (the enactment of the authorizing statute), while not itself an unreasonable search, was nonetheless found to be in violation of the Tennessee Constitution because it generated a well-founded fear of an unreasonable search.⁵²

The linking dynamism of the right to be secure reveals itself in other ways. The *Hester-Oliver-Dunn* framework provides that an entry onto “open fields” is not a Fourth Amendment “search,” and, as a result, government agents are not prohibited by the U.S. Constitution from entering “open fields” without a warrant or recognized exception to the warrant requirement.⁵³ But upon due consideration of the right to be secure, we can identify a link. The *Hester-Oliver-Dunn* framework can be understood as generating a well-founded fear of certain types of unreasonable searches and seizures. To my mind, the discretion afforded government agents by the “open fields” doctrine leaves property owners insecure against (1) unreasonable searches of dwellings and vehicles on “open fields,” as well as (2) unreasonable seizures of property situated on “open fields,” such as vehicles, crops, and livestock.

⁵² *Rainwaters v. Tennessee Wildlife Res. Agency*, No. 20-CV-6, 2022 WL 17491794, at *12 (Tenn. Cir. Ct. Mar. 22, 2022), *aff'd in part, rev'd in part, and remanded*, No. W2022-00514-COA-R3-CV, 2024 WL 2078231 (Tenn. Ct. App. May 9, 2024). Before addressing the implications of the right to be secure, the majority explained that the Tennessee Constitution prohibits state agents from entering at least certain areas of “open fields” without a warrant or recognized exception to the warrant requirement. *Id.* at *11.

⁵³ *See supra* Part I.

The historical underpinnings of trespass law are instructive here. Justice Powell’s majority opinion in *Oliver* observes that trespass laws do not further privacy interests, but simply property interests: “[T]he common law of trespass furthers a range of interests that have nothing to do with privacy Criminal laws against trespass are prophylactic: they protect against intruders who poach, steal livestock and crops, or vandalize property.”⁵⁴

By clarifying that trespass laws are prophylactic, protecting against poachers, thieves, and vandals, *Oliver* acknowledges that trespass laws help keep the people *confident* against illegal searches and seizures of property on “open fields.” This, in turn, raises a question. If *Oliver* is correct that trespass laws help keep us *secure* against illegal searches and seizures of property on “open fields,” then why doesn’t a rule permitting government agents to make arbitrary and unmonitored entries onto “open fields” leave us *insecure* against those very types of searches and seizures? The answer seems clear. When government agents are permitted to enter “open fields” at their pleasure, without notice or scrutiny, it seems reasonable for property owners to be concerned that agents will go further and conduct covert unreasonable searches and seizures of property.⁵⁵ As a result, the Fourth Amendment’s right to be secure demands the formation of new restrictions on the terms of the “open fields” doctrine.

⁵⁴ *Oliver v. United States*, 466 U.S. 170, 183 n.15 (1984).

⁵⁵ See, e.g., Complaint ¶ 2, *Highlander v. Virginia Dep’t of Wildlife Res.*, No. CL23-4100 (Va. Cir. Ct. June 7, 2023) (alleging that a state wildlife officer unlawfully entered plaintiff’s land and seized a game camera).

CONCLUSION

The U.S. Supreme Court's long-standing "open fields" doctrine should be reassessed in the light of a larger discourse on the meaning of the Fourth Amendment. Good-faith judicial engagement with the right to be secure would elevate the concept of confidence to a first-order value in Fourth Amendment jurisprudence, thereby reducing the "regulatory gap" in search-and-seizure law and prompting the formation of new restrictions on the terms of the "open fields" doctrine.