

FOURTH AMENDMENT FOR SALE: HOW INCOME AND LIVING IN A MULTI-UNIT DWELLING IMPACT YOUR FOURTH AMENDMENT RIGHTS

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“At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”¹

ABSTRACT

The Fourth Amendment is arguably one of the most important amendments in the U.S. Constitution. It protects citizens from unreasonable searches and seizures in areas that most would consider private, such as the home. The Supreme Court has ruled on numerous cases regarding Fourth Amendment protections over the years, and the Court has explained the Fourth Amendment analysis and how it should be applied by the lower courts. This Note specifically explores how the Fourth Amendment analysis has been applied in the Second Circuit when it comes to apartment buildings. New York is a state that is within the Second Circuit, and apartment buildings and other types of multi-unit dwellings are extremely common there. When examining whether someone has a reasonable expectation of privacy in the common areas of his or her apartment building, the Second Circuit has applied what this Note refers to as the “exclusive control” test. This Note argues that through the use and application of this test, the Second Circuit will likely create a disparity in terms of how Fourth Amendment rights are distributed based on where a person can afford to live. This Note explains that those who can afford to reside in more

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

luxurious and expensive apartment buildings could have a higher expectation of privacy because of the amenities and security measures these abodes offer. This is clearly an unfair result, as the Fourth Amendment should apply equally to all and no one should be able to buy his or her way to privacy. Because of the unequal distribution of Fourth Amendment rights based on income likely to result from the current test that the Second Circuit applies, this Note proposes expanding the Katz “reasonable expectation of privacy test,” as well as expanding the curtilage doctrine so that it extends to common areas of multi-unit dwellings. These solutions would ensure that all are afforded the privacy they deserve, regardless of where they can afford to live.

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INTRODUCTION

“The world’s most powerful address.”² These are the words used to describe 15 Central Park West, an “ultra-luxury” condominium building in New York City.³ Fifteen Central Park West is not only known for being extremely expensive, but also for being extremely exclusive. It is no secret that many celebrities and other wealthy individuals have lived or continue to reside in this building, including Sting, Alex Rodriguez (also known as “A-Rod”), and Denzel Washington.⁴ The units vary in price, but they are *always* in the multi-million-dollar range.⁵

What drives celebrities to this particular building? There are many high-rises all over New York City, but it is doubtful that there are many high-rises that offer what these luxury buildings boast about. The website for 15 Central Park West advertises a “rich amenities package” to residents and their guests, such as a private dining service, private wine rooms, exclusive access to an outdoor terrace, a game room, and a private movie theater.⁶ When glancing at 15 Central Park West’s website, the words “private” and “privacy” are used to describe many amenities the building offers.⁷ Based on this advertising, it is fair to say that the wealthy are attracted to this building not only because of its great amenities, but also because of the building’s private

2. Julie Zeveloff et al., *Meet the Residents of 15 Central Park West, the World’s Most Powerful Address*, INDEP. (Jan. 26, 2016, 5:00 PM), <http://www.independent.co.uk/news/world/americas/meet-the-residents-of-15-central-park-west-the-worlds-most-powerful-address-a6835006.html>.

3. *Id.*

4. *Id.*

5. *For Sale*, FIFTEEN CENT. PARK WEST, <http://15centralparkw.com/15cpwprices.htm> (last visited Dec. 16, 2018). The least expensive unit currently for sale is slightly over \$5 million.

6. *The Amenities*, FIFTEEN CENT. PARK WEST, <http://15centralparkw.com/15cpwamenities.htm> (last visited Dec. 16, 2018); Zeveloff et al., *supra* note 2.

7. *The Amenities*, *supra* note 6.

nature.⁸ This makes sense; surely celebrities do not want any person off the street having the ability to access different parts of the building, and these celebrities probably would prefer that any visitors legitimately on the premises be filtered by security before gaining entry to the building.

Now imagine this scenario. The police show up at 15 Central Park West to execute a valid search warrant for Sting's apartment unit. They are able to bypass all of the building's security because they have a valid warrant. The police take the elevator up to the fifteenth floor, which is where Sting's unit is located. Denzel Washington, just about to go downstairs to get his mail, is in the hallway and passes by the police officers. The police smell what they believe to be marijuana emanating from Denzel's clothing. Does Denzel have an expectation of privacy under the Fourth Amendment in this situation, or is the expectation significantly lower, or perhaps non-existent, because Denzel and the police were both in a common area of the luxury building? If the police search Denzel, has there been a search under the Fourth Amendment? Or would this be classified as a non-search because Denzel did not have a reasonable expectation of privacy in the hallway of his apartment building?⁹

Many authors have written on whether people have an expectation of privacy in the common areas of multi-unit dwellings, as well as whether people should have that expectation of privacy. Authors have also explored the inequality between single-family home owners and multi-family apartment dwellers in terms of Fourth Amendment protection. These articles, however, have not specifically focused on the Second Circuit's analysis, and none have addressed how the analysis might be conducted when it is applied to situations involving luxury buildings where

8. Zeveloff et al., *supra* note 2.

9. This scenario is purely hypothetical and not in any way based on true or actual events; it is merely used to demonstrate the problem with the Second Circuit's current Fourth Amendment analysis when it comes to expectations of privacy in common areas of luxury apartment buildings.

celebrities and other wealthy individuals pay millions of dollars to live because they believe these buildings will protect their privacy.¹⁰ That question is at the heart of this Note: it explores how the Fourth Amendment analysis might differ depending on the type of apartment building a person lives in, as well as what that person can afford.

Based on how the Second Circuit is currently conducting its Fourth Amendment analysis when it comes to multi-family dwellings, it would seem that individuals with higher incomes who can afford the luxurious high-rises that New York has to offer may have a higher expectation of privacy in the common areas of their buildings than average and below-average income citizens have. This Note therefore suggests that the Second Circuit should consider changing its exclusive control analysis to ensure that the Fourth Amendment applies equally to all citizens, regardless of income or the type of dwelling a person chooses (or can afford) to reside in. As this Note will later point out, the exclusive control test is problematic because of its focus on whether a resident is able to exclude others from the common areas of the multi-unit dwelling. Rather than continuing to apply this test, the Second Circuit should instead consider expanding the curtilage doctrine and should also consider expanding the second prong of the *Katz* test pertaining to whether society would deem the expectation of privacy reasonable.¹¹

Part I of this Note introduces the Fourth Amendment framework governing privacy in multi-family dwellings. Part II then focuses on the Second Circuit, which is the circuit that New York belongs to, and examines how the courts have been dealing with the expectation of privacy issue in multi-family dwellings such as apartment buildings. Part II goes on to discuss flaws within the Second Circuit's analysis and explains

10. Madeline Stone, *Meet the Big Shots Who Live at 15 Central Park West, the World's Most Powerful Address*, BUS. INSIDER (Nov. 28, 2017, 11:05 AM), <https://www.businessinsider.com/15-central-park-west-residents-2016-1> (“[Fifteen Central Park West’s] amenities and private nature are also a major draw for celebrities.”).

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

how continuing to apply the Second Circuit's current analysis could lead to an unequal distribution of Fourth Amendment rights, leaving the rich with a higher expectation of privacy than the average American citizen or a person with below-average income. Part III concludes with solutions and proposes that the Fourth Amendment analysis should be changed to ensure that the Fourth Amendment's right to privacy is not something to be bought; rather, this right should apply equally to everyone, regardless of income.

I. BACKGROUND: THE LAW SURROUNDING THE FOURTH AMENDMENT

A. *The Origins of the Fourth Amendment*

The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹²

At its core, the Fourth Amendment protects people from searches and seizures deemed "unreasonable."¹³ It is also worth noting, however, that when the Fourth Amendment was drafted and ratified, the Founding Fathers probably never would have considered some of the ways in which the Fourth Amendment

12. U.S. CONST. amend. IV.

13. Sean M. Lewis, Note, *The Fourth Amendment in the Hallway: Do Tenants Have a Constitutionally Protected Privacy Interest in the Locked Common Areas of Their Apartment Buildings?*, 101 MICH. L. REV. 273, 275 (2002); Michael Price, *Remember Why We Have the Fourth Amendment*, JUST SECURITY (Nov. 25, 2015), <https://www.justsecurity.org/27907/remember-why-fourth-amendment/>.

is applied today.¹⁴ For example, it is doubtful that the Founding Fathers ever imagined the advances in technology that have occurred.¹⁵ Furthermore, the Founders probably never would have imagined that the United States would someday have the organized police forces that it currently employs.¹⁶ Around the time the Constitution was adopted, policing was left up to the citizens.¹⁷ There were some sheriffs and constables, but they did not have the ability or the tools to do what we expect the police to do today.¹⁸

The Fourth Amendment was ratified in 1791 due to the Founding Fathers' concerns about "general warrants" and "writs of assistance."¹⁹ In Britain, the Crown (otherwise known as the King) used general warrants so that his messengers could search the people and their homes, regardless of whether there was a reason to believe that someone committed a crime.²⁰ These searches were conducted so that the Crown could identify any "political enemies," or people that opposed or criticized the Crown.²¹ The Crown would also use writs of assistance, which were similar to general warrants except that there were no time restrictions on them, "to search for goods on which taxes had not been paid."²² The language of the Fourth Amendment thus encompasses the idea that searches or seizures should be approved ahead of time by a judge or magistrate, and that in order to obtain a warrant, the police need to establish that there

14. See Barry Friedman & Orin Kerr, *The Fourth Amendment*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/amendments/amendment-iv> (last visited Dec. 16, 2018).

15. *Id.*

16. *Id.*

17. *Id.*; *The Early Days of American Law Enforcement*, NAT'L L. ENFORCEMENT MUSEUM, <http://www.nleomf.org/museum/news/newsletters/online-insider/2012/April-2012/early-days-american-law-enforcement-april-2012.html> (last visited Dec. 16, 2018).

18. Friedman & Kerr, *supra* note 14.

19. *Id.*; see also Kathryn E. Fifield, Note, *Let This Jardines Grow: The Case for Curtilage Protection in Common Spaces*, 2017 WIS. L. REV. 147, 156 (2017); Price, *supra* note 13.

20. Friedman & Kerr, *supra* note 14.

21. *Id.*; Price, *supra* note 13.

22. Friedman & Kerr, *supra* note 14.

is “probable cause” to justify the search or seizure that will take place.²³

B. *Olmstead and Boyd: Shifts in the Supreme Court’s Fourth Amendment Analysis*

But how does someone know if he or she has been “searched”? The term is not defined within the language of the Constitution or the amendment itself. The Fourth Amendment has had a lengthy history, and the Supreme Court has changed its analysis concerning what a “search” is over time.²⁴ The earliest case that discussed whether a search occurred under the Fourth Amendment was *Boyd v. United States*.²⁵ The Supreme Court in this case held that “a court order requiring an individual to produce incriminating business invoices qualified as a search and was therefore protected under the Fourth Amendment umbrella.”²⁶ This was true even though there was not a physical invasion in order to gain access to the invoices.²⁷

The *Boyd* Court’s analysis was deemed to be expansive and broad because the opinion relied heavily on abstract notions of privacy, security, and personal liberty.²⁸ The Court stated:

The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its

23. *Id.*

24. See Jeremy J. Justice, Note, *Do Residents of Multi-Unit Dwellings Have Fourth Amendment Protections in Their Locked Common Area After Florida v. Jardines Established the Customary Invitation Standard?*, 62 WAYNE L. REV. 305, 311 (2017).

25. 116 U.S. 616 (1886).

26. Justice, *supra* note 24, at 311; see also *Boyd*, 116 U.S. at 622 (“It is our opinion, therefore, that a compulsory production of a man’s private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the [F]ourth [A]mendment to the [C]onstitution, in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure.”).

27. Fifield, *supra* note 19, at 157.

28. *Id.*; Justice, *supra* note 24, at 311.

employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense²⁹

This would change, however, with *Olmstead v. United States*, in which the Court created a "narrower, property-based threshold."³⁰ The Court in *Olmstead* held that wiretapping did not constitute a search or seizure under the Fourth Amendment.³¹ As part of its analysis, the Court found that the Fourth Amendment was not violated unless there was "an official search and seizure of [the defendant's] person or such a seizure of his papers or his tangible material effects or an actual *physical invasion* of his house 'or curtilage' for the purpose of making a seizure."³² In other words, in order for there to be a search under the Fourth Amendment, there needs to be a physical invasion of the person, house, papers, or effects.³³

The Court reinforced *Olmstead's* physical intrusion standard in *McDonald v. United States*.³⁴ There, McDonald was under police surveillance while living in a rooming house.³⁵ One day, police surrounded the rooming house without a warrant.³⁶ The police thought they heard an adding machine, which is commonly used for illegal gambling.³⁷ One of the officers

29. *Boyd*, 116 U.S. at 630.

30. Justice, *supra* note 24, at 311 (citing *Olmstead v. United States*, 277 U.S. 438 (1928)); see also Fifiield, *supra* note 19, at 158.

31. 277 U.S. at 466.

32. *Id.* (emphasis added).

33. Fifiield, *supra* note 19, at 158; Justice, *supra* note 24, at 311–12.

34. *McDonald v. United States*, 335 U.S. 451, 456 (1948); Justice, *supra* note 24, at 312 ("[T]he Supreme Court [in *McDonald*] held that tenants' Fourth Amendment protection is based upon the narrow view of common law trespass as applied to real property.').

35. *McDonald*, 335 U.S. at 452.

36. *Id.*

37. *Id.*; Justice, *supra* note 24, at 312.

opened a window to the landlady's room, climbed in, identified himself to the landlady, and proceeded to let the other officers into the house.³⁸ They began searching the rooming house, and while on the second floor, one of the officers stood on a chair, peered into McDonald's room, and saw evidence of gambling.³⁹

The issue before the Court was whether the evidence should be suppressed because it was obtained in violation of the Fourth Amendment.⁴⁰ The Court found that the evidence should be suppressed, and stated that "absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police."⁴¹ Due to the fact that there was no emergency here, the Court determined there was a violation of the Fourth Amendment and that the police should have obtained a warrant.⁴² Some authors believe the Court's opinion could be interpreted as meaning "the Fourth Amendment protects residents from unlawful government intrusion into [a] building" because of Justice Jackson's concurrence.⁴³

C. *The Katz Test: Do You Have a "Reasonable Expectation of Privacy"?*

The courts applied *Olmstead's* physical intrusion analysis for decades until a landmark Supreme Court case finally changed how to determine if there was a search under the Fourth Amendment: *Katz v. United States*.⁴⁴

In *Katz*, the defendant was convicted in a California district court after being charged with placing telephonic bets in a public phone booth from Los Angeles to Miami and Boston,

38. *McDonald*, 335 U.S. at 453.

39. *Id.*; Justice, *supra* note 24, at 312.

40. *McDonald*, 335 U.S. at 453.

41. *Id.* at 455–56.

42. *Id.*; Lewis, *supra* note 13, at 293. Although this case might seem on point at first glance, the reason there is likely a circuit split is because the Court never explicitly stated whether McDonald had a reasonable expectation of privacy in the locked common area of the rooming house. This case is not widely explored in this Note for that reason. *See id.* at 295 (explaining that the Court did not consider whether the defendant's right to privacy was violated).

43. Justice, *supra* note 24, at 312–13.

44. Fifiield, *supra* note 19, at 158.

which violated a federal law.⁴⁵ The FBI attached an electronic listening and recording device to the outside of the phone booth that Katz had been using to make the phone calls.⁴⁶ The FBI did not have a warrant when it attached the device.⁴⁷ At trial, the government introduced evidence of the defendant's end of the conversation, despite the fact that the defendant objected to the evidence.⁴⁸ The Ninth Circuit affirmed the conviction because the court did not believe that the recordings were obtained unlawfully under the Fourth Amendment.⁴⁹ The court's reasoning rested on the fact that there was no physical intrusion into the phone booth that Katz had been using.⁵⁰ Katz then appealed to the Supreme Court, which granted certiorari.⁵¹

The government argued that the phone booth was surrounded by glass, and that Katz had been visible inside of the booth.⁵² Nevertheless, the Court found that what Katz wanted to exclude when he went inside the booth was not his physical visibility; he wanted to exclude people from eavesdropping on his conversations.⁵³ It was in this case that Justice Potter Stewart, writing for the majority, famously stated: "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."⁵⁴ The Court also found, however, that a person may be able to "invoke Fourth Amendment protections when the intention is to remain private, even in public areas."⁵⁵ The Court stated that

45. *Katz v. United States*, 389 U.S. 347, 348 (1967).

46. *Id.*; Fifield, *supra* note 19, at 158; see also Megan Gordon, Note, *The Dog Days Should Be Over: The Inequality Between the Rights of Apartment-Dwellers and Those of Homeowners with Respect to Drug Detection Dogs*, 92 N.D. L. REV. 661, 667 (2017).

47. *Katz*, 389 U.S. at 356.

48. *Id.* at 348; Gordon, *supra* note 46, at 667.

49. *Katz*, 389 U.S. at 348.

50. *Id.* at 349.

51. *Id.*

52. *Id.* at 352.

53. *Id.* ("But what [Katz] sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen.")

54. *Id.* at 351; Fifield, *supra* note 19, at 158.

55. Justice, *supra* note 24, at 314.

when a person enters a public telephone booth and shuts the door behind him, that person “is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.”⁵⁶ Here, Katz did exhibit an expectation of privacy when he closed the door to the phone booth.⁵⁷

The government also tried to argue that there had been no physical intrusion into the phone booth that Katz was inside.⁵⁸ The Supreme Court did not agree with the government’s argument, stating that once it is understood that the Fourth Amendment protects people—not places—against unreasonable searches and seizures, then it “becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.”⁵⁹ In summary, it did not matter that there was no physical invasion or intrusion into the phone booth; the government violated Katz’s privacy when it listened to and recorded his oral statements, and a search and seizure under the Fourth Amendment occurred.⁶⁰ Moreover, the Court found that searches conducted without a warrant obtained from a judge or magistrate are per se unreasonable under the Fourth Amendment, barring a few exceptions that were not applicable in this case.⁶¹

D. *Applying the Katz Test: Where Do You Have a Reasonable Expectation of Privacy?*

While the *Katz* opinion is certainly important for expanding the protections that the Fourth Amendment offers, it is also important for establishing a two-pronged test that has been

56. *Katz*, 389 U.S. at 352.

57. See Fifield, *supra* note 19, at 158.

58. *Katz*, 389 U.S. at 352.

59. *Id.* at 353 (“We conclude that the underpinnings of *Olmstead* . . . have been so eroded by our subsequent decisions that the ‘trespass’ doctrine there enunciated can no longer be regarded as controlling.”).

60. *Id.*

61. *Id.* at 357; Justice, *supra* note 24, at 315. Searches incident to arrest, hot pursuit, and consent are a few examples of exceptions to the rule that searches without a warrant are per se unreasonable. See *Katz*, 389 U.S. at 357–58.

applied in other Fourth Amendment cases, which has come to be known as the “reasonable expectation of privacy” test.⁶² The first part of the test is subjective: the person must exhibit the expectation of privacy.⁶³ The second part of the test is objective: the expectation of privacy must be one that society would deem “reasonable.”⁶⁴ The purpose of this test is to figure out whether a search has occurred under the Fourth Amendment by determining whether a person has a reasonable expectation of privacy in certain situations.⁶⁵

The “reasonable expectation of privacy” test has been applied in many cases involving numerous factual scenarios.⁶⁶ Perhaps one of the most important cases involving the application of the *Katz* test is *Kyllo v. United States*. There, federal agents became suspicious that Daniel Kyllo was growing marijuana inside of his house, an act which usually involves the use of high intensity heat lamps.⁶⁷ To determine if Kyllo had these lamps inside of his home, the agents used a thermal imager, a device designed to detect heat, to scan Kyllo’s house.⁶⁸ The agents conducted the scan of Kyllo’s house from a car across the street.⁶⁹ The agents then discovered that certain areas of Kyllo’s home were warmer than other parts of the home and neighboring homes, which led them to believe that Kyllo was, indeed, growing marijuana.⁷⁰ Following the thermal imaging, a federal magistrate issued a warrant that allowed the agents to search Kyllo’s home, where the agents then discovered one

62. Justice, *supra* note 24, at 315.

63. *Id.*

64. *Id.*

65. *Id.*

66. *See id.*; *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (“[W]e have applied the [*Katz*] test on two different occasions in holding that aerial surveillance of private homes and surrounding areas does not constitute a search.”); *see also* Jace C. Gatewood, *It’s Raining Katz and Jones: The Implications of United States v. Jones—A Case of Sound and Fury*, 33 PACE L. REV. 683, 688–89 (2013) (“The *Katz* reasonable expectation of privacy test informed the Supreme Court’s decision in numerous situations, including thermal imaging, aerial observations, curbside trash, dog sniff tests, and traffic stops.” (footnote omitted)).

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

68. *Id.*; Gatewood, *supra* note 66, at 710.

69. *Kyllo*, 533 U.S. at 30.

70. *Id.*

hundred marijuana plants, ultimately leading to Kyllo's arrest.⁷¹

Eventually, the case was appealed to the Supreme Court, which held that when the government "uses a device that is not in general public use to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."⁷² In recognizing this, the Court acknowledged that protecting privacy in the home is very important, noting that *all* details in the home are considered intimate "because the entire area is held safe from prying government eyes."⁷³ Furthermore, the Court stated that "the Fourth Amendment draws 'a firm line at the entrance to the house.' That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant."⁷⁴ Though the Court's holding did mention that the government could not use technology that was not in "general public use" to conduct a search of a home, it has been argued that the Court's opinion should be seen as more than that because "[t]he Court took 'the long view, from the original meaning of the Fourth Amendment forward,' stepping in to eliminate a significant threat to the privacy of the home posed by advancing technology."⁷⁵

E. *The Curtilage Doctrine and the Dunn Factors*

Another concept that the Supreme Court has developed is called "curtilage." This doctrine assists courts in making a determination as to whether citizens have a reasonable expectation of privacy in certain areas on their property that are not necessarily inside of the home, but may be spaces that are

71. *Id.*

72. *Id.* at 40; *see also* Justice, *supra* note 24, at 306 ("The law firmly establishes that a police officer cannot establish probable cause by . . . using implements that are not available to the public to gain insight as to what may be occurring inside a home.").

73. *See Kyllo*, 533 U.S. at 37.

74. *Id.* at 40 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)).

75. Lewis, *supra* note 13, at 299 (quoting *Kyllo*, 533 U.S. at 40).

intimately linked to the home.⁷⁶ Although the reasonable expectation of privacy test is the main test that courts have used after the *Katz* decision, the Court developed the curtilage doctrine to protect areas that may not have satisfied the traditional *Katz* test.⁷⁷ Therefore, it can be said that the reasonable expectation of privacy test goes hand-in-hand with the curtilage doctrine.⁷⁸ Curtilage seems to “embod[y] all of the same principles underlying reasonable expectations of privacy.”⁷⁹ Examples of areas that have generally been deemed curtilage are places like a porch or patio of a stand-alone home.⁸⁰ There are two important cases that have helped develop the curtilage analysis: *Oliver v. United States* and *United States v. Dunn*. They are discussed in turn below.

In *Oliver*, the police went to the defendant’s farm because they believed he was growing marijuana.⁸¹ The police drove by the defendant’s house and up to a locked gate with a “no trespassing” sign, walked around the gate, and found a field of marijuana.⁸² Though the officers did trespass onto the defendant’s land, the Court stated that “an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.”⁸³ The Court therefore “implied that an individual may legitimately demand privacy in the area immediately surrounding the home and that such space is protected by the Fourth Amendment.”⁸⁴

76. See Andrew Guthrie Ferguson, *Personal Curtilage: Fourth Amendment Security in Public*, 55 WM. & MARY L. REV. 1283, 1317 (2014); Fifield, *supra* note 19, at 162; Justice, *supra* note 24, at 327.

77. Justice, *supra* note 24, at 315–16.

78. *Id.*

79. Fifield, *supra* note 19, at 162.

80. Justice, *supra* note 24, at 327.

81. *Oliver v. United States*, 466 U.S. 170, 173 (1984).

82. *Id.*; Fifield, *supra* note 19, at 161.

83. *Oliver*, 466 U.S. at 178; Fifield, *supra* note 19, at 161.

84. Ferguson, *supra* note 76, at 1318 (“*Oliver* is understood to have established that ‘open fields’ fall outside the curtilage and thus outside the protections of the Fourth Amendment. At the same time, implicit in this reasoning is that areas within the curtilage are afforded heightened protection.”); Fifield, *supra* note 19, at 161.

Similarly, in *Dunn*, the question before the Supreme Court was whether a barn on the defendant's ranch was a part of the defendant's curtilage, and therefore protected by the Fourth Amendment.⁸⁵ The police did not have a search warrant when they first stepped onto the defendant's property.⁸⁶ In this landmark case, the Court listed factors to help lower courts conduct the curtilage analysis and therefore determine whether an area could be considered curtilage for Fourth Amendment purposes.⁸⁷ The factors that the Court laid out are

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.⁸⁸

The Court stated that the important question was "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."⁸⁹ When the factors were applied to this case, the Court held that the barn was not a part of the defendant's curtilage.⁹⁰ Though the curtilage doctrine has been criticized as "subjective and amorphous" in some respects, it is clear from this case law that the Supreme Court was concerned about protecting citizens' security while they are in the confines of the home or areas intimately tied to the home.⁹¹

85. *United States v. Dunn*, 480 U.S. 294, 299–300 (1987); Ferguson, *supra* note 76, at 1318.

86. *Dunn*, 480 U.S. at 297.

87. *Id.* at 301.

88. *Id.*; Ferguson, *supra* note 76, at 1318–19.

89. *Dunn*, 480 U.S. at 301.

90. *Id.*

91. See Fifield, *supra* note 19, at 161.

F. *The Particularity Requirement for Warrants: Multiple Family Dwellings*

As previously mentioned, the Supreme Court has taken steps to ensure that people's privacy is protected when they are in the confines of their homes and has made clear that there is protection for curtilage as well.⁹² If someone is deemed to have a reasonable expectation of privacy in a specific area, be it a public phone booth or the inside of his or her home (or an area around the home), it is wise for the police to first seek out a warrant before conducting any sort of "search." This is because the vast majority of searches conducted without warrants are per se unreasonable.⁹³ Seeking out a warrant, however, can become complex when the police are looking to search an apartment building that contains multiple units.

In *Maryland v. Garrison*, the police obtained a warrant to search an apartment on the third floor of an apartment building.⁹⁴ The police were under the impression that there was only one apartment unit on the third floor, but in reality, the third floor had two separate apartment units.⁹⁵ For that reason, the warrant could have been interpreted as allowing the police to search the third floor in its entirety.⁹⁶ One apartment was occupied by the person the police were seeking to search, McWebb; the other was occupied by a different resident of the apartment building, Garrison.⁹⁷ Before the police conducting the search realized they were in the wrong apartment, they found contraband that resulted in Garrison's arrest and conviction.⁹⁸ The case was appealed up to the Supreme Court, and the Court needed to decide whether the seizure of the contraband was illegal under the Fourth Amendment.⁹⁹

92. See *id.* at 161–62; see also *supra* Sections II.D, II.E.

93. See *Katz v. United States*, 389 U.S. 347, 357 (1967).

94. 480 U.S. 79, 80 (1987).

95. *Id.*; David Gray, *A Spectacular Non Sequitur: The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 AM. CRIM. L. REV. 1, 39 (2013).

96. See *Garrison*, 480 U.S. at 88.

97. *Id.* at 80.

98. *Id.*

99. *Id.*

The Fourth Amendment is known for having multiple parts to it. One of those parts has been referred to as the “Warrant Clause.” The Warrant Clause contained within the Fourth Amendment “categorically prohibits the issuance of any warrant except one ‘particularly describing the place to be searched and the persons or things to be seized.’”¹⁰⁰ The *Garrison* Court referenced the history of the Fourth Amendment in its opinion, noting that the reason there is a particularity requirement for warrants is to avoid general warrants and searches.¹⁰¹ The Court stated:

By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.¹⁰²

The Court determined, however, that the warrant, even though it may have allowed a search to take place that was somewhat ambiguous and broad in terms of scope, was still valid.¹⁰³

But that was not the end of the inquiry; the Court also needed to determine whether the search violated Garrison’s right to be secure in the confines of his home.¹⁰⁴ In its analysis, the Court noted that despite the particularity requirement of the Warrant Clause, Supreme Court cases have recognized the need for some leeway for “honest mistakes” that the police make when executing a search warrant.¹⁰⁵ The Court then stated that to determine whether the search was legal based on a warrant that

100. *Id.* at 84; *see also* U.S. CONST. amend. IV.

101. *See Garrison*, 480 U.S. at 84; *see also* Friedman & Kerr, *supra* note 14; *supra* Section II.A.

102. *Garrison*, 480 U.S. at 84.

103. *Id.* at 85–86.

104. *Id.* at 86.

105. *Id.* at 87.

allowed the police to search the whole third floor was dependent on whether the officers' "failure to realize the overbreadth of the warrant was objectively understandable and reasonable."¹⁰⁶

The Court found that the search was objectively understandable and reasonable in this case because the facts that the officers had at the time did not suggest there were two separate apartments on the third floor.¹⁰⁷ The Court also stated that even if the warrant had been interpreted as limiting the search to just McWebb's apartment and not the whole third floor, the officers believed McWebb's apartment was the only apartment on the third floor anyway, so there still would not have been an issue with the execution of the warrant.¹⁰⁸ In summary, the Court held that "[u]nder either interpretation of the warrant, the officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment."¹⁰⁹

G. *A Fourth Amendment Twist: Bringing Back the Property-Based Analysis*

According to contemporary Fourth Amendment jurisprudence, the Court has brought back a property-based/trespass analysis that coexists with the *Katz* reasonable expectation of privacy test.¹¹⁰ Based on current case law, neither an objectively reasonable expectation of privacy nor a property interest is required to find a Fourth Amendment violation; satisfaction of either is sufficient.¹¹¹ In *United States v. Jones*, the police placed a GPS tracking device on the defendant's car while it was parked in a parking lot open to the public and

106. *Id.* at 88.

107. *Id.*; Gray, *supra* note 95, at 39 (stating that the unlawful entry into Garrison's apartment was a "reasonable mistake of fact").

108. *Garrison*, 480 U.S. at 88.

109. *Id.*

110. *United States v. Jones*, 565 U.S. 400, 409 (2012); Fifiield, *supra* note 19, at 159–60.

111. Fifiield, *supra* note 19, at 159–60.

tracked the defendant's movements.¹¹² The Supreme Court held that placing the GPS on the defendant's car and keeping tabs on the defendant's whereabouts constituted a "search" for Fourth Amendment purposes.¹¹³

What was interesting about this case is that the Supreme Court relied on the fact that a "physical intrusion" took place when the police installed the GPS on the defendant's private property in order to gain information.¹¹⁴ The Court determined that the defendant's Fourth Amendment rights did not "rise or fall with the *Katz* formulation," noting that "*Katz* did not erode the principle 'that, when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment.'"¹¹⁵ The Court explained that the *Katz* two-prong test "*added to, not substituted for, the common-law trespassory test.*"¹¹⁶ Through its analysis, the Court expanded the avenues for determining whether a search occurred under the Fourth Amendment.¹¹⁷

In *Florida v. Jardines*, the police walked a drug-sniffing canine up to the front porch of the defendant's home and the dog alerted, indicating there were narcotics inside.¹¹⁸ This led the police to apply for and obtain a warrant, and the search turned up marijuana.¹¹⁹ This case affirmed much of what the Court stated in *Jones*: that *Katz* expanded what could be considered a "search" under the Fourth Amendment, but did not override the fact that a physical intrusion may still be considered a search as well.¹²⁰ The Court stated that the officers entered the defendant's curtilage by going up to his front porch, which is a

112. 565 U.S. at 403; Gatewood, *supra* note 66, at 686.

113. *Jones*, 565 U.S. at 404; Gatewood, *supra* note 66, at 691.

114. *Id.* at 409.

115. *Id.* at 407 (quoting *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring)).

116. *Id.* at 409.

117. *Id.* at 411 (explaining that trespass is not "the *exclusive test*," and that the *Katz* test can still be applied to applicable situations); see also Fifiield, *supra* note 19, at 159–60.

118. 569 U.S. 1, 3–4 (2013).

119. *Id.* at 4.

120. *Id.* at 5; see also Fifiield, *supra* note 19, at 159–60; Justice, *supra* note 24, at 318.

protected area under the Fourth Amendment.¹²¹ They were able to obtain information indicating there might be narcotics in the home because they physically entered the curtilage.¹²² That did not end the analysis, however, as the Court noted that there is an implicit license present that allows visitors—including trick-or-treaters and Girl Scouts, as humorously noted by Justice Scalia—or even the police to go up to the front door of a home, knock, and then leave if no one answers the door.¹²³ Walking a drug-sniffing dog up to the front door to see if there were narcotics present in the home, however, was beyond the “customary invitation standard” that the Court was discussing.¹²⁴ Thus, the Court held that the officers were only able to find out that marijuana was present in the defendant’s home because they physically intruded upon his curtilage in order to conduct the sniff by the canine, and therefore a search occurred.¹²⁵

II. ANALYSIS: THE PROBLEM OF “EXCLUSIVE CONTROL”

As of this writing, the Supreme Court has not ruled on a case where there was a Fourth Amendment search in a locked common area in an apartment building, which has resulted in a circuit split.¹²⁶ This Note specifically focuses on the Second Circuit, the circuit in which New York is situated, and examines how the court has dealt with the issue of reasonable expectations of privacy in the common areas of multi-unit dwellings. Following a discussion of Second Circuit case law, the following sections explore how the Second Circuit has

121. *Jardines*, 569 U.S. at 5–6.

122. *Id.* at 6.

123. *Id.* at 8; Justice, *supra* note 24, at 318.

124. *Jardines*, 569 U.S. at 9 (“To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police.”).

125. *Id.* at 11; *see also* Fifield, *supra* note 19, at 163 (explaining that the Court in *Jardines* relied on a property/trespass analysis when it determined that a search occurred under the Fourth Amendment).

126. *See* Justice, *supra* note 24, at 321.

developed its analysis to determine whether a person enjoys a reasonable expectation of privacy in the common areas of his or her apartment building. This Note argues that the Second Circuit's current analysis regarding emphasis on exclusive control may result in unequal distribution of Fourth Amendment rights based on a person's income and what type of multi-unit dwelling a person can afford to live in, and offers some proposed solutions in order to ensure equal application to all.

A. *An Exploration of Second Circuit Case Law: How Did We End Up Here?*

As previously mentioned, the Second Circuit has relied heavily on "exclusive control" when determining whether a person has a reasonable expectation of privacy in a multi-unit dwelling under the Fourth Amendment. An important Second Circuit case that has set the stage for the expectation of privacy in the common areas of apartment buildings is *United States v. Holland*. There, the defendant lived on the second floor of an apartment building and used a common hallway on the first floor to access his unit.¹²⁷ Police showed up at the apartment building because they had planned a drug bust, and they rang the bell for the defendant's apartment as they were standing on the first floor at the entrance to the common hallway.¹²⁸ The defendant opened the door for the officer, recognizing him as a friend, or at the very least an acquaintance, and was subsequently arrested.¹²⁹ The police did not have a warrant.¹³⁰ The district court determined that some evidence and oral statements by the defendant should be suppressed because although probable cause was present, the arrest was in violation of the Fourth Amendment due to the fact that the defendant was "inside of his home" when he was arrested.¹³¹

127. *United States v. Holland*, 755 F.2d 253, 254 (2d Cir. 1985).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

On appeal, the Second Circuit disagreed, stating that while the Supreme Court had found that apartment units and hotel rooms constitute a “house” under the Fourth Amendment, common hallways are not viewed in the same way.¹³² The *Holland* court found that an expectation of privacy “has reference to a place, and will be violated only if the place is one that the defendant has the right to keep private and subject to his *exclusive control*.”¹³³ The court also stated that there is no requirement that the area be accessible to the general public, nor is there a requirement for a quantified amount of daily traffic in the common area to find that the common area is beyond the zone of privacy.¹³⁴ In applying the “exclusive control” test, the court stated that the defendant, or any other resident of the apartment building, could expect to see a landlord, other tenants in the building, delivery people, or guests and visitors, and the defendant would have been unable to exclude those people from common areas in the building.¹³⁵

Following this rule, the *Holland* court noted that in the Second Circuit, common hallways and lobbies of multi-unit dwellings “are not within an individual tenant’s zone of privacy even though they are guarded by locked doors.”¹³⁶ With this holding, it seems as though the court was trying to find a balance between ensuring the safety of residents in the hallways of their buildings by allowing for police protection and ensuring their privacy inside of their actual apartment units.¹³⁷ The “exclusive control” test also promised a clear rule for the police so that they would know what actions are permissible when it comes to apartment buildings.¹³⁸ The court likely did not realize,

132. *Id.* at 255. *But see* *United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985) (holding that the defendant had an expectation of privacy in his apartment unit and the use of a drug sniffing dog at the door outside the apartment intruded upon that legitimate expectation because the canine is like a “superior, sensory instrument”).

133. *Holland*, 755 F.2d at 255 (emphasis added) (citing *United States v. Agapito*, 620 F.2d 324, 331 (2d Cir.), *cert. denied*, 449 U.S. 834 (1980)).

134. *Id.* at 256.

135. *Id.*

136. *Id.* at 255.

137. *See id.* at 256.

138. *See id.*

however, that this holding and test involving “exclusive control” has the ability to negatively impact the average or below-average income citizen’s Fourth Amendment rights simply because he or she lives in a multi-unit dwelling.

Surprisingly, despite the fact that *Holland* was decided in 1985, the “exclusive control” rule is still alive and well in more recent Second Circuit cases. For example, in *United States v. Gray*, a case from 2008, the court again cited the rule from *Holland*, reminding citizens that there is only an expectation of privacy when the defendant has the ability to keep the area private and the area is within his exclusive control.¹³⁹ After restating the test, the court found that the defendant did not have a privacy interest in the hallway that the police entered because he did not have exclusive control over the area.¹⁴⁰ The defendant shared the hallway with his neighbor, they both kept items in the common area, and the landlord had access to common areas of the building.¹⁴¹ The court subsequently concluded that the defendant did not have a reasonable expectation of privacy in the hallway, and therefore his Fourth Amendment rights were not violated.¹⁴²

Finally, in yet another example from a case decided merely a few years ago, the Second Circuit failed to directly apply the *Katz* test and instead relied on the *Holland* rule: “exclusive control.”¹⁴³ Though this case originated in a district court in Vermont,¹⁴⁴ it still effectively demonstrates how the Second Circuit views the Fourth Amendment when it comes to common areas in apartment buildings in New York, as both states are in the Second Circuit. In *United States v. Simmonds*, the police went to an apartment building and began searching one of the units, and while doing so they came into contact with the defendant.¹⁴⁵ The police began asking the defendant questions,

139. 283 F. App’x 871, 872–73 (2d Cir. 2008) (quoting *Holland*, 755 F.2d at 255).

140. *Id.* at 873.

141. *Id.*

142. *Id.*

143. *United States v. Simmonds*, 641 F. App’x 99, 104 (2d Cir. 2016).

144. *Id.* at 100.

145. *Id.*

the defendant responded with incriminating comments, and the police arrested him.¹⁴⁶ The defendant argued that his Fourth Amendment rights had been violated because the police, who lacked consent, gained access to the building through a street level door and then accessed the hallway and stairs so that they could get into the apartment unit.¹⁴⁷

The *Simmonds* court disagreed and cited *Holland*, which held that there is no reasonable expectation of privacy in the common areas of a multi-unit dwelling.¹⁴⁸ Because some residents in the building would leave the building's street level door unlocked, and guests and delivery people would gain access to the building and use the common spaces, like the hallways, the court found that the defendant did not have a reasonable expectation of privacy in the common areas.¹⁴⁹ This seems to imply or at least hint that the court was still focused on exclusive control in determining whether a reasonable expectation of privacy existed, although this was not explicitly stated in the analysis.¹⁵⁰

B. *The Second Circuit's Support for the Exclusive Control Test*

The question remains: where did this "exclusive control" test come from? The Second Circuit is not the only circuit that has applied this test to determine whether someone has a reasonable expectation of privacy in the common areas of his or her apartment building.¹⁵¹ To support its analysis in *Holland*, the

146. *Id.*

147. *Id.* at 104.

148. *Id.*; see also *United States v. Holland*, 755 F.2d 253, 255–56 (2d Cir. 1985).

149. *Simmonds*, 641 F. App'x at 104 (analogizing and relying on the *Holland* court's "findings that an individual did not have a reasonable expectation of privacy in a hallway because 'on any given day . . . [he] reasonably might expect to meet the landlord or his agents . . . deliverymen, tradesmen, or one or more visitors to [an] apartment'" (alterations in original) (quoting *Holland*, 755 F.2d at 256)).

150. See *id.*; *Holland*, 755 F.2d at 255–56.

151. See *Lewis*, *supra* note 13, at 287. The Eighth Circuit has also focused heavily on the "right to exclude" in order to determine if someone has an expectation of privacy. In *United States v. Eisler*, the reasoning seemed to parallel *Holland* and the other Second Circuit cases already cited—there was no Fourth Amendment violation because the common areas of the apartment building could be accessed by tenants, visitors, and the landlord. 567 F.2d 814, 816 (8th Cir. 1977).

Second Circuit cited *Rakas v. Illinois*, a Supreme Court case involving the search of an automobile.¹⁵² The Court in *Rakas* examined “the passengers’ inability to exclude others as one of many factors that established that the defendants did not have a legitimate expectation of privacy in an automobile in which they had neither a property nor possessory interest.”¹⁵³

The Supreme Court in *Rakas*, however, never explicitly said that an absolute right to exclude, or exclusive control, is required in order to find that someone has a legitimate expectation of privacy.¹⁵⁴ Furthermore, tenants in multi-unit dwellings are different than the defendants in *Rakas* because they have at least some ability to control who is coming into their building. They have the ability to exclude people who were not invited by other residents in the apartment building or the landlord, and tenants also have privacy and security interests in the common areas of their multi-unit dwellings.¹⁵⁵ It is also worth pointing out that the Supreme Court itself recognized in *Rakas* that “cars are not to be treated identically with houses or [a]partments for Fourth Amendment purposes.”¹⁵⁶ Therefore, *Rakas* is not a case that courts should cite when it comes to privacy expectations in common areas of multi-unit dwellings, which are areas located close to a tenant’s apartment unit, especially when this case never explicitly said exclusive control is required in order to find that someone possesses an expectation of privacy.¹⁵⁷

*C. Demonstrating the Problem: How Individuals with Higher
Income Could Have a Greater Expectation of Privacy Under the
Second Circuit’s Current Fourth Amendment Analysis*

Some authors have suggested that Fourth Amendment rights may be applied differently based on who can afford to live in a

152. 439 U.S. 128, 130 (1978).

153. Lewis, *supra* note 13, at 290.

154. *Id.*

155. *Id.* at 290–91.

156. 439 U.S. at 148.

157. See Lewis, *supra* note 13, at 290.

single-family home, and that those who live in multi-family spaces such as apartment buildings are more likely to have their privacy intruded upon by the government.¹⁵⁸ *Maryland v. Garrison* serves as an example, demonstrating that courts may have made decisions which will result in the poor having less privacy rights under the Fourth Amendment.¹⁵⁹ Interestingly, this case involved a multi-unit dwelling.¹⁶⁰ Although not directly on point in terms of the issue this Note explores, as there was a warrant in that case and that case did not deal directly with a “reasonable expectation of privacy,” it nevertheless shows that individuals living in multi-unit dwellings—who often have lower incomes than the residents of single-family homes—may receive less protection under the Fourth Amendment when it comes to searches by the police.¹⁶¹ Some authors believe that the outcome of this case would not have been the same had two single-family homes been at issue, or even more expensive and luxurious apartment units because the “objective facts” the officers would have made it easier to distinguish between the expensive apartments or homes.¹⁶²

As demonstrated by the case law above, it becomes clear that the Second Circuit has not always been willing to find that there is a reasonable expectation of privacy in the common areas of apartment buildings.¹⁶³ It would seem that, with the way the

158. See Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 401 (2003).

159. *Id.* at 403; see *supra* Section II.F.

160. *Maryland v. Garrison*, 480 U.S. 79, 80 (1987).

161. Slobogin, *supra* note 158, at 403.

162. See *id.*

163. At least one Note has taken the position that the Second Circuit has a more liberal view of the Fourth Amendment, and has argued that there is a reasonable expectation of privacy in common areas of apartment buildings. See Justice, *supra* note 24, at 321. However, it is worth noting that the case that has been cited to support that proposition is *United States v. Thomas*, the facts of which are very different from the Second Circuit cases explored in this Note, which do not involve the use of drug sniffing dogs or any technology that would enhance a police officer’s senses. See 757 F.2d 1359, 1366–67 (2d Cir. 1985). Generally speaking, when a canine is not used, the cases in this Note demonstrate that the Second Circuit has not necessarily taken a “liberal view” when it comes to determining whether someone has a reasonable expectation of privacy in the common areas of an apartment building. See Justice, *supra* note 24, at 321.

Second Circuit is currently conducting its Fourth Amendment reasonable expectation of privacy analysis in some of its cases, wealthy individuals could potentially be granted more Fourth Amendment protection than citizens with an average or less than average income because of the buildings they can afford to live in. The Second Circuit has also been criticized for failing to meaningfully apply the *Katz* test; none of the Second Circuit cases explored above even mention the two-pronged test.¹⁶⁴

The Second Circuit focuses a lot on whether the defendant exercised “exclusive control” over the area in order to determine whether the defendant had a reasonable expectation of privacy in the common areas of the multi-unit dwelling.¹⁶⁵ What the court means by “exclusive control” is whether the defendant would be able to exclude certain people from common areas of the building, such as guests or visitors, the landlord, and people making deliveries.¹⁶⁶ In demonstrating that the wealthy would enjoy more of a reasonable expectation of privacy using the Second Circuit’s “exclusive control” analysis, it becomes useful to compare and contrast average apartment buildings with more luxurious ones like 15 Central Park West.

164. See Lewis, *supra* note 13, at 280–84. But see *United States v. Bedell*, 311 F. App’x 461, 461–64 (2d Cir. 2009). In *United States v. Bedell*, the Second Circuit did lay out the two-prong *Katz* test and found that the defendant had no reasonable expectation of privacy in a “multi-tenant rooming facility” hallway because he did not show “circumstances regarding his relationship with other renters, their particular use of the common areas, or any other factor that might conceivably form the basis of a conclusion that the officers’ presence in the common hallway . . . implicated Bedell’s reasonable privacy expectations.” 311 F. App’x at 463. Even though the court mentioned the *Katz* test, however, there was still no meaningful application of it present in the analysis or any mention of how certain facts fit within both prongs of the test. It is also worth noting that the court considered this a very fact-determinative analysis, stating that in this situation there was no reasonable expectation, but the court did not address “whether or to what extent residents in other rooming-house situations may claim a reasonable expectation of privacy in their common hallways.” *Id.* at 464.

165. See, e.g., *United States v. Gray*, 283 F. App’x 871, 872–73 (2d Cir. 2008) (citing the “exclusive control” test from *Holland*); *United States v. Holland*, 755 F.2d 253, 255 (2d Cir. 1985) (“The expectation of privacy against warrantless felony arrests thus has reference to a place, and will be violated only if the place is one that the defendant has the right to keep private and subject to his exclusive control.”).

166. *Gray*, 283 F. App’x at 873; *Holland*, 755 F.2d at 256.

It is common knowledge that most apartment buildings or multi-unit buildings do not come with all the amenities that 15 Central Park West offers.¹⁶⁷ Although the building's policies are not posted anywhere on the internet, news articles have been written that explain what the building offers in terms of privacy and security. According to the *New York Post*, "there are seven concierges, six doormen, eight white-gloved lobby attendants . . . [and] four security guards," and "[s]ix people man Fifteen's lobbies by day, two each for the doors, concierge desks and lobbies."¹⁶⁸ Residents who live in the exclusive, high-end building have electronic key fobs that give them access to the elevators and allow them to travel from floor to floor, and apparently the building's security guards can monitor movement using cameras installed in the building.¹⁶⁹ This shows that the building is extremely private and not open to the general public or random visitors.¹⁷⁰

Further, one of the rules of the apartment building is that "[n]o group tour, open house or exhibition of any residential unit or its contents shall be conducted without the consent of the Condominium Board or the Managing Agent in each instance."¹⁷¹ This again shows how much control there is over who is coming in and out of the building, and how prominent the ability and right to exclude is at 15 Central Park West, as even the apartment owner or renter would not be able to have an open house or tour without first consulting the Condominium Board or Managing Agent.¹⁷²

The average apartment or multi-unit dwelling, however, is quite different. According to New York law, these types of buildings only need to have automatic "self-closing and self-

167. *The Amenities*, *supra* note 6.

168. Michael Gross, *Inside the Walls of Swanky 15 Central Park West*, N.Y. POST (Mar. 9, 2014), <https://nypost.com/2014/03/09/inside-the-walls-of-swanky-15-central-park-west/>.

169. *Id.*

170. *Id.*

171. Julie Strickland, *13 Things Tenants Can't Do at 15 Central Park West*, REAL DEAL (Nov. 18, 2013, 5:31 PM), <https://therealdeal.com/2013/11/18/13-things-tenants-cant-do-at-15-central-park-west/>.

172. *Id.*

locking doors,” and if the building has more than eight units, it needs to have an intercom system for tenants to let visitors in; not much else seems to be required.¹⁷³ New York law also states that “tenants of multiple dwellings with eight or more apartments are entitled to maintain a lobby attendant service for their safety and security at their own expense, whenever any attendant provided by the landlord is not on duty.”¹⁷⁴ According to this law, the landlord is not required to provide a lobby attendant, and it is worth noting that even if the landlord chooses to do so, providing a lobby attendant is not the same as providing security guards.¹⁷⁵ Further, there is no requirement for surveillance cameras.¹⁷⁶

Based on the “exclusive control” test utilized by the Second Circuit, it becomes clear that the wealthy will be afforded a higher expectation of privacy in the common areas of their buildings, and will therefore receive more protection under the Fourth Amendment. Because of all the different policies and safeguards in place that protect the security and privacy of both the residents and the building (fobs, security guards, various surveillance methods, etc.), wealthy residents at 15 Central Park West have much more control over who is coming in and out of the building and utilizing the common areas, and they also have more of an ability to exclude people from those common areas.¹⁷⁷ In average apartment buildings, however, security guards are not required, and it would seem that most residents are not able to prevent visitors or delivery people, for example,

173. OFFICE OF THE N.Y. STATE ATT’Y GEN., TENANTS’ RIGHTS GUIDE 21 (2016), https://ag.ny.gov/sites/default/files/tenants_rights.pdf.

174. *Id.*

175. *Id.*; see also *Job Description for Lobby Attendant*, SETUP MY HOTEL, <https://setupmyhotel.com/job-description-for-hotels/house-keeping/160-lobby-attendant.html> (last visited Dec. 16, 2018) (showing the general job description of a lobby attendant, which involves cleaning and maintaining the lobby, as well as helping guests with requests and answering any questions they may have); *Security Guard*, AMERICA’S JOB EXCHANGE, <http://www.americasjobexchange.com/security-guard-job-description> (last visited Dec. 16, 2018) (stating that a security guard’s job duties include “patrolling the premises of residences or buildings to detect suspicious activity, assist tenants, and ensure the safety of occupants”).

176. TENANTS’ RIGHTS GUIDE, *supra* note 173.

177. Gross, *supra* note 168.

from entering the building and common areas.¹⁷⁸ It is also simply a matter of common knowledge that the average apartment building in New York does not have all the private amenities that 15 Central Park West does. For example, 15 Central Park West has six doormen, but websites where one can look to buy or rent in New York acknowledge that a doorman is usually present in large buildings “that have enough *tenants to pay for [the] employee*,” and that those buildings without doormen are often not as expensive and may not have as many units.¹⁷⁹

Because those with higher incomes can afford buildings that have multiple security guards, fobs that grant elevator access, and the like, it follows that there is more control over who is entering these luxury buildings, as well as more of an ability to exclude. The “exclusive control” test is therefore more likely to be satisfied.¹⁸⁰ Residents of 15 Central Park West would be much less likely to see delivery people or visitors utilizing the common areas of their building than the average person in an apartment building would, because visitors need to be filtered by security and granted elevator access in order to even get to the common areas of the building.¹⁸¹ Furthermore, residents have more of an ability to exclude people from utilizing the common areas because of all the security measures in place to protect residents’ privacy.¹⁸²

178. See *United States v. Holland*, 755 F.2d 253, 256 (2d Cir. 1985); TENANTS’ RIGHTS GUIDE, *supra* note 173.

179. *Doorman Apartments for Rent*, RENTHOP, <https://www.renthop.com/nyc/doorman-apartments-for-rent> (last visited Dec. 16, 2018) (emphasis added). Again, a doorman is not required under New York law.

180. See, e.g., *Gross*, *supra* note 168.

181. See *id.*

182. It is worth mentioning that the Ninth Circuit has ruled on a case in which the building at issue was a high-security high-rise. See *United States v. Nohara*, 3 F.3d 1239 (9th Cir. 1993). Though the building was high-security, the Ninth Circuit reasoned that the defendant had no expectation of privacy in the common areas, and quoted the Eighth Circuit when it suggested that the security measures previously mentioned were in place for exactly that purpose: security, not privacy. *Id.* at 1240–42. Again, because the common areas were able to be used by guests, the landlord, and others legitimately on the premises, there could be no expectation of privacy. *Id.* at 1242; see also *Justice*, *supra* note 24, at 325–26. However, it is not clear that the Second Circuit would choose to follow the Ninth Circuit’s analysis in applying the *Holland* “exclusive control” test, and *Nohara* is not binding. Furthermore, the security measures in place

It is true that the Second Circuit could choose to focus heavily on the fact that while visitors and guests, delivery people, and others might have much more limited access to the common areas, *residents* that occupy units on the same floor will still have access to those areas (along with visitors that pass through all of the security measures in place), potentially diminishing an expectation of privacy even for the wealthy residents of 15 Central Park West.¹⁸³ The argument still stands, however, that wealthy individuals might still have a higher expectation of privacy if they buy apartments that take up an entire floor (or even multiple floors) of the building, for example.¹⁸⁴ In that situation, the exclusive control test will almost certainly be satisfied, as the individual could exclude not only visitors and delivery people, but even other residents that live in the building.¹⁸⁵

D. Possible Solutions? Applying Curtilage to the Common Areas of Multi-Unit Dwellings or Expanding the Second Prong of the Katz Test

Some authors have made suggestions on how to better protect the Fourth Amendment rights of *all* those living in multi-unit dwellings. One author has pointed out that when

at 15 Central Park West do not solely serve the purpose of security—privacy is clearly a concern, which is demonstrated by the fact that privacy is heavily advertised at 15 Central Park West. Therefore, this reasoning is not totally applicable to a building like 15 Central Park West where privacy, the ability to exclude others, and control over who enters the building—not just security—are reasons celebrities and other wealthy individuals choose to live there. *See* Gross, *supra* note 168.

183. *See, e.g., Holland*, 755 F.2d at 256 (stating the defendant might expect to see not only visitors, the landlord, and deliverymen, but also other residents of the building, and the defendant would have not been able to exclude any of those people from common areas of the building).

184. Although there is currently not any information that definitively states that 15 Central Park West has apartments that take up an entire floor, there are other expensive buildings in New York that contain apartments that take up one or more floors. For example, a penthouse in the CitySpire building, with an asking price of \$100 million, occupies three floors. The master suite alone takes up the whole top floor. It includes a private elevator for the three floors the apartment is on. Morgan Brennan, *Meet New York City's \$100 Million Penthouse for Sale*, FORBES (July 30, 2012, 12:46 PM), <https://www.forbes.com/sites/morganbrennan/2012/07/30/a-look-at-new-york-citys-100-million-penthouse/#1ab71daf1fe4>.

185. *See Holland*, 755 F.2d at 256.

applying the *Katz* test, the subjective prong is oftentimes not the problem.¹⁸⁶ It is the objective prong that has created conflict among the courts.¹⁸⁷ For this reason, authors have suggested expanding the second prong of the *Katz* test to account for the norms in society.¹⁸⁸ For this suggestion to work, however, the Second Circuit needs to be consistent, conduct the *Katz* analysis in a more meaningful way, and make clear how the facts fit into both prongs, rather than placing so much emphasis on “exclusive control.”¹⁸⁹ Although there have been some cases where the Second Circuit has applied *Katz* in a more in-depth and meaningful way, there are plenty of cases where the court has not and has instead focused its analysis on “exclusive control,” which will create scenarios where not everyone has the same Fourth Amendment rights.¹⁹⁰

In New York City, there are over 1.5 million apartments currently occupied, and as of 2016, apartments accounted for 45% of the total housing in the city.¹⁹¹ Jeremy J. Justice, an author who has written on this topic, has pointed out that even though citizens’ housing preferences are changing and people are beginning to prefer multi-unit buildings, courts fail to consider this fact when applying the second prong of *Katz*.¹⁹² Aside from the change in housing preferences, some people live in apartment buildings because of their income and what they

186. Justice, *supra* note 24, at 329.

187. *Id.* The objective prong asks whether society would recognize the expectation of privacy as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

188. Justice, *supra* note 24, at 329.

189. See Lewis, *supra* note 13, at 283–84; see also Fifield, *supra* note 19, at 166–67 (citing *United States v. Correa*, 653 F.3d 187, 191 (3d Cir. 2011)). Based on the Third Circuit’s analysis in *Correa*, it would be interesting to know if the Second Circuit believes that under its “exclusive control” standard a defendant could not have an objectively reasonable expectation of privacy according to the *Katz* test. However, the court never explicitly analyzes the second prong in the cases above, and there is therefore no way to know for sure.

190. See *United States v. Fields*, 113 F.3d 313, 320–22 (2d Cir. 1997) (citing the two-prong *Katz* test and finding the defendants did not demonstrate that they had a subjective expectation of privacy); see also *supra* Section III.A. The cases examined in that section demonstrate that the Second Circuit has not been consistent in applying the *Katz* test.

191. *Quick Facts: Resident Demographics*, NMHC, <https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-resident-demographics/#LargeCities> (last visited Dec. 16, 2018).

192. Justice, *supra* note 24, at 330.

can afford.¹⁹³ Justice states that the *Katz* test was not meant to be a standard that was supposed to remain the same forever; the test was meant to change as society changed.¹⁹⁴

Another solution to this problem could be expanding curtilage to include common areas in multi-unit dwellings through the Court's opinion in *Jardines*.¹⁹⁵ If curtilage is expanded to include those areas, then the *Katz* reasonable expectation of privacy test would not be necessary because "privacy expectations are presumed" in those areas.¹⁹⁶ Courts have declined to extend the curtilage doctrine to common areas of apartment buildings and have instead chosen to rely on exclusive control, as demonstrated by the Second Circuit, and reasonable expectations of privacy.¹⁹⁷ The Second Circuit has explicitly "stat[ed] that an apartment tenant's 'dwelling' does not extend beyond his apartment and separate areas subject to his exclusive control."¹⁹⁸ *Jardines*, however, could be used to extend curtilage to common areas in multi-unit dwellings, and in fact it should be, because of the similarities between the front porch that the dog sniff took place on in *Jardines* and locked common areas in apartment buildings.¹⁹⁹ Like the porch of a stand-alone house, residents in apartment buildings may still have a property interest in the common areas of the building.²⁰⁰ Furthermore, common areas, like hallways, are close to the

193. *Id.* at 306.

194. *Id.* at 331.

195. Fifiield, *supra* note 19, at 150, 172.

196. *Id.* at 164; *see also* Florida v. *Jardines*, 569 U.S. 1, 5–6, 11 (2013) ("[W]e need not decide whether the officers' investigation of *Jardines*' home violated his expectation of privacy under *Katz*. One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on *Jardines*' [curtilage] to gather evidence is enough to establish that a search occurred.").

197. Fifiield, *supra* note 19, at 172; *supra* Section III.A.

198. Carol A. Chase, *Cops, Canines, and Curtilage: What Jardines Teaches and What It Leaves Unanswered*, 52 HOUS. L. REV. 1289, 1304 (2015) (citing *United States v. Arboleda*, 633 F.2d 985, 992 (2d Cir. 1980)).

199. Fifiield, *supra* note 19, at 172.

200. *Id.*

apartment unit itself, just like a front porch or a stoop is close to the home.²⁰¹

Moreover, common areas of apartment buildings are similar to the stoop or front porch of a home because people other than the resident may have access to those areas to some extent.²⁰² Although residents, their visitors, the landlord, and delivery people may enter the apartment building, they are still “subject to limits on customary or appropriate behavior. While they may be permitted to pass through the hallways, they would not be permitted to investigate or detain others in the hallways.”²⁰³ Because there are so many similarities that can be drawn between the common areas of multi-unit dwellings and areas like the front porch of a single-family home, curtilage should apply to the common areas of apartment buildings.²⁰⁴

The Second Circuit should adopt this solution, as *Jardines* shows that even those who live in single-family homes might not always be able to prevent other people from entering areas around their home, like the front porch.²⁰⁵ Even still, those areas may be deemed curtilage and receive protection under the Fourth Amendment.²⁰⁶ Therefore, rather than focusing so heavily on whether someone has “exclusive control” over an area, the Second Circuit could shift gears and instead recognize certain areas as curtilage as well, regardless of whether the resident has the ability to prevent others (such as guests, the landlord, or delivery people) from entering the hallways or other common areas.²⁰⁷ When applying the curtilage doctrine and *Jardines*, “once an individual, specifically law enforcement, has exceeded the scope permitted by the ‘license’ to physically

201. *Id.*; see also *United States v. Dunn*, 480 U.S. 294, 301 (1987) (stating that proximity to the home is one of the factors the courts will consider when determining whether an area is curtilage); Lewis, *supra* note 13, at 298.

202. See Fifield, *supra* note 19, at 172.

203. *Id.* at 173.

204. *Id.*

205. *Florida v. Jardines*, 569 U.S. 1, 8–9 (2013); Fifield, *supra* note 19, at 173.

206. *Jardines*, 569 U.S. at 5–6, 11; Fifield, *supra* note 19, at 173.

207. *United States v. Holland*, 755 F.2d 253, 255–56 (2d Cir. 1985); Fifield, *supra* note 19, at 173.

invade the property of another, the trespass is no longer objectively reasonable and entitles the resident to protection under the Fourth Amendment.”²⁰⁸

The shift in Fourth Amendment analysis over time shows that the Supreme Court meant to protect more citizens’ rights, not less. Therefore, these proposed solutions would still be in line with the Supreme Court’s precedent. It is clear that the Supreme Court has valued protecting privacy in the home and in areas that are intimately linked to the home; extending protection to common areas in apartment buildings, therefore, would be consistent with that case law.²⁰⁹ Furthermore, the Supreme Court drifted from the *Olmstead* property-based, physical invasion standard to the *Katz* reasonable expectation of privacy test.²¹⁰ With the creation of the *Katz* test, Fourth Amendment protections were expanded and broadened because a physical intrusion or a trespass was not necessary in order for a search to occur.²¹¹

It is true that the Court has brought back the trespass or property-based Fourth Amendment analysis in some respects. As mentioned above, in *Jones*, the government placed a GPS onto the defendant’s car without a warrant to monitor where the car was going.²¹² The Court determined that when the GPS

208. *Fifield*, *supra* note 19, at 173; *see also* *Justice*, *supra* note 24, at 333 (stating that the police can, for example, use the buzzer outside of an apartment to contact a tenant, but they should not be able to do more than what a private citizen is permitted to do).

209. *See* *Kyllo v. United States*, 533 U.S. 27, 37, 40 (2001); *United States v. Dunn*, 480 U.S. 294, 301 (1987); *Ferguson*, *supra* note 76, at 1318; *Fifield*, *supra* note 19, at 162; *Justice*, *supra* note 24, at 327; *Lewis*, *supra* note 13, at 297–300; *see also* *McDonald v. United States*, 335 U.S. 451, 458 (1948) (*Jackson, J.*, concurring). Though *McDonald v. United States* focused on the “physical intrusion” standard and involved a rooming house, not an apartment building, and though the majority opinion never expressly considered whether the defendant’s expectation of privacy was violated when police entered the locked common area of the rooming house, Justice *Jackson’s* concurring opinion acknowledged that while a tenant “has no right to exclude from the common hallways those who enter lawfully, [the tenant] does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry.” 335 U.S. at 458. Authors have argued that this concurrence should govern the issue of expectations of privacy in common areas of apartment buildings. *Lewis*, *supra* note 13, at 293–95.

210. *United States v. Jones*, 565 U.S. 400, 405–06 (2012); *Justice*, *supra* note 24, at 311–14.

211. *Justice*, *supra* note 24, at 314; *see also* *Katz v. United States*, 389 U.S. 347, 353 (1967).

212. 565 U.S. at 403.

was placed on the vehicle, a search occurred under the Fourth Amendment because a physical intrusion took place.²¹³ Furthermore, in *Jardines*, where the police walked a drug-sniffing dog up to the defendant's porch,²¹⁴ the Court "reaffirmed both *Katz* and *Jones* by clarifying that the *Katz* reasonable expectation of privacy test was not the sole standard in establishing Fourth Amendment rights. Instead, the Court intended the reasonable expectation of privacy test to expand the traditional-property-based-standard."²¹⁵ The Court applied what has been called the "customary invitation standard" when it determined that a search occurred.²¹⁶ All of these cases show that the Court has been expanding ways to protect citizens' Fourth Amendment rights, not limiting them; there are now multiple ways to prove that an area is protected under the Fourth Amendment.²¹⁷ Therefore, the Second Circuit's analysis should be modified to ensure that this intent is actually being carried out.

CONCLUSION

If the police were to search Denzel Washington in the hypothetical posed at the beginning of this Note, that search may fall within the purview of the Fourth Amendment according to Second Circuit precedent because Denzel had a reasonable expectation of privacy, even though he was in a common area of his apartment building (which, in this scenario, was the hallway located outside of his apartment unit). This is because, as explained previously, those living in 15 Central Park West, like Denzel Washington, have much more control over who is coming in and out of their building than the

213. *Id.* at 404–05.

214. 569 U.S. 1, 3–4 (2013).

215. Justice, *supra* note 24, at 318 (emphasis omitted); see also Chase, *supra* note 198, at 1290 (explaining that the Court in *Jardines* used a property-based analysis when it held there was a search under the Fourth Amendment); Fifield, *supra* note 19, at 163.

216. Justice, *supra* note 24, at 318–19.

217. Gordon, *supra* note 46, at 668 ("[T]he *Katz* test of 'reasonable expectation of privacy' did not replace the common law trespass test; rather, it provided an *additional avenue* to determine whether an area is constitutionally protected." (emphasis added)).

average person may, as well as who is utilizing the common areas of the building.²¹⁸ It is undeniable that Denzel would not expect to see delivery people, for example, strolling through the hallways of his apartment building because it is so exclusive and private. Furthermore, visitors might have some access to the common areas, but that access is very limited due to the need for fobs to access the elevators, the security guards that man the lobbies, and the need to be recognized by the staff before gaining access to the building.²¹⁹

The Second Circuit has not yet ruled on a case involving an expensive and luxurious building like 15 Central Park West where celebrities and other wealthy individuals live, so it is impossible to say with certainty that, in this exact scenario, a person in this type of building would be afforded a higher expectation of privacy. It really will depend on how much the court takes into consideration the following: the building's private amenities, the security methods in place to protect the residents and their privacy, the greater ability to exclude in luxury buildings like 15 Central Park West, and the emphasis the court puts on the fact that even some wealthy individuals may share a floor with other residents, which the court may reason diminishes the expectation of privacy.

Even if the court chooses to focus on the fact that other residents have access to the common areas, however, the "exclusive control" test is still flawed because the wealthy could satisfy that test by simply buying a penthouse that takes up an entire floor. That would be a scenario in which a resident would most certainly be able to exclude other residents from the floor, as there would be no reason for any other residents or their guests to be there. For all of these reasons, it is probably fair to say that the exclusive control test is more likely to be satisfied when it comes to the common areas of luxury buildings, as opposed to the common areas of the average apartment building.

218. See Gross, *supra* note 168; Strickland, *supra* note 171.

219. Gross, *supra* note 168.

This potential application of the Second Circuit's exclusive control rule to the facts of different cases is troubling. The Fourth Amendment should not be for sale; privacy should not be something that individuals are granted under the Constitution simply because of where they can afford to live or where they choose to live. If the Second Circuit continues to apply the "exclusive control" rule, there could be an unequal distribution of Fourth Amendment rights based on things like income and the amenities and security that an apartment or multi-unit dwelling has, which really comes down to what a person is able to afford: luxurious, multi-million-dollar housing or the typical housing that the average person lives in.

In order to make sure that the rights of all citizens living in multi-unit dwellings are protected, rather than only the rights of those who can afford luxury buildings, the Second Circuit should apply the *Katz* test in a more meaningful manner in all of its cases, and the second prong of the test should be expanded to account for the changes that have taken place in society when it comes to multi-unit housing.²²⁰ Another solution could be expanding the curtilage doctrine through the Court's opinion in *Jardines* to include the common areas of apartment buildings.²²¹ These solutions would better protect the rights of everyone, regardless of the type of home they can afford to live in and whether they have the ability to exclude certain people from the common areas of their building. This is an especially important concern when considering the number of people that currently live in apartment buildings in New York, whether it is because of socioeconomic status or merely because of personal preference.²²²

Authors who have written about similar topics have recognized that the Fourth Amendment might apply unequally depending on whether one lives in a single-family home as opposed to a multi-family dwelling. These authors argue that the Framers never would have imagined that the Fourth

220. Justice, *supra* note 24, at 329–30; Lewis, *supra* note 13, at 284.

221. Fifield, *supra* note 19, at 172–73.

222. *Quick Facts: Resident Demographics*, *supra* note 191.

Amendment would not apply equally to all, especially when considering the history behind why the Fourth Amendment was included in the Bill of Rights.²²³ Furthermore, the Framers also likely would not have imagined that depending on where someone can afford to live, his or her Fourth Amendment rights may be different. Regardless of who a person is, the amount of money he or she has, or the home that he or she lives in, one should not be able to buy his or her way into the Fourth Amendment.

223. See Chase, *supra* note 198, at 1311; see also David C. Roth, Comment, Florida v. Jardines: *Trespassing on the Reasonable Expectation of Privacy*, 91 DENV. U. L. REV. 551, 572 (2014) (pointing out that physical characteristics of a home are important in a Fourth Amendment analysis, therefore Fourth Amendment protections may be distributed unequally depending on economic class and favor those who can afford to live in single-family dwellings); Lewis, *supra* note 13, at 301–05; William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1266–67 (1999) (noting that privacy can be bought and therefore will not be distributed equally among the wealthy and the poor); *supra* Section II.A.