

# VERDUN V. CITY OF SAN DIEGO

## THE CONSTITUTIONALITY OF TIRE CHALKING

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*Recent Case: Verdun v. City of San Diego, 51 F.4th 1033 (9th Cir. 2022)*

*The Ninth Circuit recently held that parking enforcement officers' use of tire chalk, while possibly a warrantless search, is still constitutional under the special needs doctrine. This ruling explicitly rejected a previous Sixth Circuit decision which said that the practice of tire chalking was a warrantless search not justified under the doctrine. The reasoning behind these cases sheds light on some of the most critical and contentious disputes around Fourth Amendment case law that are happening right now across our federal courts: the original meaning and purpose of the Fourth Amendment, debates over how to understand what constitutes a search, and questions of how far the special needs doctrine really goes. Few things seem more mundane than tire chalking; therefore, if tire chalking is a search, that has important implications for the future of the Fourth Amendment.*

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### INTRODUCTION

The *Chicago Tribune*'s 2015 travel section gushes with praise for the quaint California town of Coronado. The coastal city of only 20,000 people is so idyllic that it needs no law enforcement presence—well, save for one small thing: “[In Coronado t]here is no graffiti, [the] streets are clean, and

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the only police activity we saw in a week was tire-chalking.”<sup>1</sup>

With cars comes parking, and with parking comes parking enforcement. No matter where one goes in America, someone or something will be there, ensuring that their vehicle does not overstay its welcome. One of the oldest tools of these parking enforcers is tire chalking, a practice employed since at least the 1920s.<sup>2</sup> Tire chalking involves an officer placing chalk on the tire of a parked car and returning after a set amount of time. If the chalk remains where the officer left it, the car has evidently not moved, and the driver is issued a fine for violating the city’s parking ordinances.<sup>3</sup> Tire chalking means many things to many people. It can be seen as trivial, boring, inevitable, or just plain annoying. And, maybe, it is also a long-running and egregious violation of the core constitutional rights that we all hold dear as American citizens.

The Ninth Circuit in October 2022 thought otherwise, holding in *Verdun v. City of San Diego* that while tire chalking *might* be a warrantless search under the Fourth Amendment, it nonetheless fell under the special needs doctrine exception and was thus constitutional.<sup>4</sup> In doing so, the Ninth Circuit departed from the Sixth Circuit,<sup>5</sup> creating an inter-circuit split ripe for Supreme Court review.<sup>6</sup> The outcome of *Verdun* raises important questions about the Fourth Amendment and the contours of the Supreme Court’s precedent on unconstitutional searches and the special needs doctrine. On a more conceptual level, the case also presents unique insights on how different judges understand the constitutional interpretive method of originalism, as well as the ultimate purpose behind the Fourth Amendment.

The comment will proceed in three main parts before concluding. Part I provides the reader with the necessary background on what constitutes a

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<sup>1</sup> William Hageman, *Coronado a Laid-Back World Away from San Diego*, CHI. TRIB. (Apr. 27, 2015, 10:48 AM), <https://www.chicagotribune.com/travel/sc-trav-0428-coronado-california-20150422-story.html> [https://perma.cc/KC9Y-7R7L].

<sup>2</sup> Campbell Robertson, *Lose the Chalk, Officer: Court Finds Marking Tires of Parked Cars Unconstitutional*, N.Y. TIMES (Apr. 25, 2019), <https://www.nytimes.com/2019/04/25/us/tire-chalk-parking-unconstitutional.html> [https://perma.cc/R7CG-3LP5].

<sup>3</sup> *Id.*

<sup>4</sup> 51 F.4th 1033, 1037 (9th Cir. 2022) (expressing deep skepticism of “plaintiffs’ effort to have us suddenly declare as violating the United States Constitution a rather innocuous parking management practice” but, nonetheless, putting that “skepticism completely to the side” and assuming that tire chalking would be a search); *id.* at 1046.

<sup>5</sup> *Taylor v. City of Saginaw*, 922 F.3d 328, 336 (6th Cir. 2019) (*Taylor I*) (holding that chalking is a warrantless search and that the exceptions raised on appeal do not apply); *Taylor v. City of Saginaw*, 11 F.4th 483, 489 (6th Cir. 2021) (*Taylor II*) (holding that the administrative need exception does not apply).

<sup>6</sup> Note that technically both circuits only formally disagree on the special needs analysis, but the majority opinion in *Verdun* evinces a clear skepticism that tire chalking is a search under Supreme Court caselaw that the Supreme Court may feel necessary to clear up. See *Verdun*, 51 F.4th at 1037. In fact, a petition for certiorari has been docketed and, after conference, a brief in opposition was submitted. *Id.* at 1033, *appeal docketed*, No. 22-943 (Mar. 28, 2023).

search or seizure under the Fourth Amendment, as well as the special needs doctrine exception to the default requirements of the Fourth Amendment. Part II then analyzes the majority and dissent in the *Verdun* decision. Part III further explores the key topics laid bare by the disagreements in *Verdun*: (1) if tire chalking should be considered a search under current Supreme Court precedent; (2) the breadth of the special needs doctrine; and (3) intra-originalist disagreements on how far an originalist conception of the Fourth Amendment should really go. Finally, the comment concludes and poses a brief question on the Fourth Amendment and innate government skepticism that underlies its text.

## I

### WARRANTLESS SEARCHES AND THE SPECIAL NEEDS DOCTRINE

Under English and early colonial law, warrantless general searches, known as “writs of assistance,” were the norm.<sup>7</sup> Officers would report that they suspected a crime had occurred—no further specificity was needed—and a magistrate would issue a general warrant that allowed officers to search for and seize whatever they wanted within their discretion.<sup>8</sup> This was, unsurprisingly, a great point of contention among the colonists,<sup>9</sup> who reviled at the thought of giving such wide-ranging, despotic power to any enforcing officer who asked for it.<sup>10</sup> Upon attending a rousing speech by the patriot James Otis in 1761 denouncing the British general writs of assistance, a young John Adams wrote: “[t]hen and there the child [of] Independence was born.”<sup>11</sup>

The intuitive instincts of the Framers against general, suspicionless searches led to the adoption of the Fourth Amendment.<sup>12</sup> The key purpose of the Amendment was to take discretion away from the investigating officer(s) and require a warrant issued upon probable cause to “search” or “seize” something from an individual.<sup>13</sup> From this, a general principle arose: warrantless searches and seizures are *per se* unconstitutional, subject to

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<sup>7</sup> See Leonard W. Levy, *Origins of the Fourth Amendment*, 114 POL. SCI. Q. 79, 81 (1999) (“English law was honeycombed with parliamentary enactments that relied on warrantless general searches and on general warrants for their enforcement . . .”).

<sup>8</sup> See *id.* at 82 (discussing these broad general warrants, which “allowed officers to search wherever they wanted and to seize whatever they wanted, with few exceptions”).

<sup>9</sup> *Id.* at 79.

<sup>10</sup> See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 578 (1999) (“[D]elegating of discretionary authority to ordinary, ‘petty,’ or ‘subordinate’ officers was anathema to framing-era lawyers.”); *id.* at 580–82 (attributing this view to the colonists).

<sup>11</sup> *Riley v. California*, 573 U.S. 373, 403 (2014) (quoting 10 WORKS OF JOHN ADAMS 248 (Charles Francis Adams ed., 1856)).

<sup>12</sup> See *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 311–12 (1978) (surveying this history).

<sup>13</sup> See Davies, *supra* note 10, at 724 (noting that the Framers aimed the Fourth Amendment at getting rid of discretionary authority for officers).

exceptions.<sup>14</sup> As a result, a key and oft-litigated distinction in Fourth Amendment case law is what is and what is not a search.

### A. *What Is a Search*

The biggest sea change in understanding what a “search” was began with the famous 1967 case *Katz v. United States*.<sup>15</sup> Before *Katz*, what qualified as a search or seizure under the Fourth Amendment was based in the concept of property rights; a violation of the Amendment was interpreted to require some sort of physical force or trespass.<sup>16</sup> Take, for instance, the case that *Katz* overruled: *Olmstead v. United States*.<sup>17</sup> In this 1920s, prohibition-era decision, the Supreme Court, in an opinion written by Chief Justice William Howard Taft, canvassed the history of the Fourth Amendment to say that a person’s Fourth Amendment rights have not been violated “unless there has been an official search and seizure of his person . . . papers . . . tangible material effects, or an actual physical invasion of his house or curtilage for the purpose of making a seizure.”<sup>18</sup> Thus, the wiretapping<sup>19</sup> of *Olmstead* and his co-conspirators was not a search under the Fourth Amendment.<sup>20</sup> But in *Katz*, the Supreme Court embraced a broader view of the Fourth Amendment and extended its privacy protections to an oral recording of statements, even though the collection of such recordings involved no physical force or trespass to obtain.<sup>21</sup> While Justice Potter Stewart wrote the majority in *Katz*, Justice John Marshall Harlan’s concurrence stole the show. Justice Harlan outlined a two-tiered test for what the Fourth Amendment protected, requiring that a person have both a subjective expectation of privacy and for that expectation of privacy to be one which society objectively views as “reasonable.”<sup>22</sup> Harlan’s concurrence created a radical change in the understanding of modern Fourth Amendment law that accounted for new police technologies that often involved touchless

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<sup>14</sup> *E.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)). These exceptions have, for many, completely vitiated the rule—like Swiss cheese with so many holes it is more air than actual cheese. *See, e.g.*, *Florida v. White*, 526 U.S. 559, 569 (1999) (Stevens, J., dissenting) (arguing that the Supreme Court’s doctrine on exceptions to the warrant requirement has “all but swallowed the general rule”). Nonetheless, these exceptions are still formally “exceptions” to the general rule. *See id.* (“The Court does not expressly disavow the warrant presumption . . .”).

<sup>15</sup> 389 U.S. 347 (1967).

<sup>16</sup> *See, e.g.*, *Olmstead v. United States*, 277 U.S. 438, 463, 465–66 (1928), *overruled by Katz*, 389 U.S. 347 and *Berger v. New York*, 388 U.S. 41 (1967).

<sup>17</sup> *Olmstead*, 277 U.S. 438.

<sup>18</sup> *Id.* at 466 (internal quotation marks omitted).

<sup>19</sup> *Id.* at 456–57.

<sup>20</sup> *Id.* at 466.

<sup>21</sup> *Katz*, 389 U.S. at 352–53.

<sup>22</sup> *Id.* at 361 (Harlan, J., concurring).

surveillance.<sup>23</sup> Naturally, this Harlan test was applied consistently among all federal courts interpreting federal constitutional law—from district courts to the Supreme Court.<sup>24</sup>

But then something changed—or never changed, depending on your perspective. In a series of cases led by Justice Antonin Scalia, the old property right conception of the Fourth Amendment reared its head again. In the 2012 case *United States v. Jones*, the Court was confronted with the warrantless GPS tracking of a car.<sup>25</sup> The government argued, per the *Katz* formulation, that no one had a reasonable expectation of privacy to the movement of their car on public roads visible to all.<sup>26</sup> Justice Scalia’s majority opinion said that the lack of a reasonable expectation of privacy was of no matter because the government, by *physically* placing a GPS tracker on a car to obtain information, committed common law trespass and, thus, engaged in a search or seizure.<sup>27</sup> Furthermore, Justice Scalia announced that *Katz* was not a “new” test for the Fourth Amendment; rather, it was just additional protection that supplemented the old property law protections of the Fourth Amendment.<sup>28</sup> Therefore, after *Jones*, a search is one that violates a reasonable expectation of privacy *or* is one that involves the government physically intruding on a constitutionally-protected area to obtain information.<sup>29</sup> Justice Samuel Alito concurred in *Jones*, but he found the GPS tracking a violation of the Fourth Amendment because it invaded a reasonable expectation of privacy.<sup>30</sup> For Justice Alito, *Katz* did away with the old, archaic, property-based standard.<sup>31</sup>

Then, a year later, in *Florida v. Jardines*, Justice Scalia further solidified this disjunctive, either-or test for what constitutes a Fourth Amendment search. In *Jardines*, the physical trespassing of an officer and their drug-sniffing dog on a homeowner’s property was enough to constitute a search because it involved the government physically invading a protected property interest to gather information.<sup>32</sup> Justice Alito, again, looked to whether the homeowner had a reasonable expectation of privacy and *not* the

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<sup>23</sup> See STEPHEN J. SCHULHOFER, MORE ESSENTIAL THAN EVER 119–20 (2012) (noting the Court’s watershed application of the Fourth Amendment “regardless of the place where the surveillance occurs and regardless of the means used”).

<sup>24</sup> See, e.g., *Kyllo v. United States*, 533 U.S. 27, 32–33 (2001); *United States v. Ramapuram*, 632 F.2d 1149, 1153–54 (4th Cir. 1980); *United States v. Nettles*, 175 F. Supp. 2d 1089, 1092 (N.D. Ill. 2001).

<sup>25</sup> 565 U.S. 400, 402–03 (2012).

<sup>26</sup> *Id.* at 406.

<sup>27</sup> *Id.* at 406–10.

<sup>28</sup> *Id.* at 409.

<sup>29</sup> See *id.* at 407–08 (holding that “*Katz* did not narrow the Fourth Amendment’s scope” based on subsequent precedent preserving the property rights element).

<sup>30</sup> *Id.* at 430–31 (Alito, J., concurring).

<sup>31</sup> *Id.* at 422.

<sup>32</sup> 569 U.S. 1, 5–6 (2013).

property test. Justice Alito argued that law enforcement has routinely used dogs' sense of smell for centuries and society has not recognized a reasonable expectation of privacy in odors emanating from a property.<sup>33</sup>

Ultimately, Justice Scalia's property conception of the Fourth Amendment articulated in *Jones* and *Jardines* is critical to our understanding of the constitutionality of tire chalking. Under the *Katz* test, cars are understood to involve minimal privacy interests.<sup>34</sup> Combine this with the minimal intrusion of the process of tire chalking, and it is an uphill battle to convince a court solely under the *Katz* formulation that tire chalking is a search. But, under *Jones*, tire chalking is a physical trespass upon one's property by a government official to obtain information, i.e., a search.

### B. Special Needs Doctrine

Even under the *Jones* and *Jardines* test, there is a significant hurdle a litigator needs to clear in arguing that the practice of tire chalking is unconstitutional: the special needs doctrine. The first case implicating the special needs doctrine was the relatively recent 1985 case of *New Jersey v. T.L.O.*<sup>35</sup> There, the Supreme Court allowed widescale searches of students' backpacks within a school without probable cause or a warrant.<sup>36</sup> After several subsequent cases, the special needs doctrine was solidified. It held that if the government engages in systematic search or surveillance not primarily related to law enforcement purposes, they do not need to worry about probable cause or warrants.<sup>37</sup> Therefore, even though something is a "search" and lacks a valid warrant issued under probable cause, the government can still constitutionally engage in such a search under the special needs doctrine.<sup>38</sup>

One may be excused for wondering if, through the special needs doctrine, we have gone full circle back to the detested generalized writs of

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<sup>33</sup> *Id.* at 16–17 (Alito, J., dissenting).

<sup>34</sup> *See, e.g.*, *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (surveying case law that indicates lesser Fourth Amendment protections for cars due, in part, to reduced expectations of privacy for cars); *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) ("One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects.").

<sup>35</sup> 469 U.S. 325 (1985); *see* RONALD JAY ALLEN, JOSEPH L. HOFFMANN, DEBRA A. LIVINGSTON, ANDREW D. LEIPOLD & TRACEY L. MEARES, *CRIMINAL PROCEDURE: INVESTIGATION AND RIGHT TO COUNSEL* 677 (4th ed. 2020) (noting *T.L.O.* as the first of a long line of cases under the special needs doctrine).

<sup>36</sup> *T.L.O.*, 469 U.S. at 341–43.

<sup>37</sup> *See* Barry Friedman, *Lawless Surveillance*, 97 N.Y.U. L. REV. 1143, 1181 (2022) (outlining this framework for the special needs doctrine).

<sup>38</sup> *See, e.g.*, *Ferguson v. City of Charleston*, 532 U.S. 67, 74 n.7 (2001) ("[I]n limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when 'special needs' other than the normal need for law enforcement provide sufficient justification." (citing *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987))).

assistance that birthed the American “child of Independence” all those years ago.<sup>39</sup> In fact, many have argued as such.<sup>40</sup> However, a key distinction in special needs cases is that they involve an exercise of government authority that is separate and distinct from mere law enforcement, often justified for reasons like health or efficient bureaucracy.<sup>41</sup> This crucial difference can be illuminated in the special needs cases that deal with government roadblocks and checkpoints. In *Michigan Department of State Police v. Sitz*, the Court applied the special needs doctrine to allow drunk driving checkpoints, reasoning that the public safety interest in preventing drunk driving was high and the interest against being briefly stopped was minimal.<sup>42</sup> However, ten years later, in *City of Indianapolis v. Edmond*, the Court held that warrantless and suspicionless checkpoints designed to locate narcotics were indistinguishable from general crime fighting purposes and, therefore, did not qualify for the special needs exception.<sup>43</sup> However, checkpoints can be implemented, and police can inadvertently stumble upon criminal evidence without a warrant while working them, so long as gathering it is not their “primary” purpose.<sup>44</sup> Further, along with requiring a primary purpose that does not involve general crime fighting, courts will typically conduct some sort of reasonableness balancing test, which weighs the government’s interest in carrying out the program against the privacy interests intruded upon.<sup>45</sup> Therefore, the special needs doctrine is arguably not as expansive as the old generalized writs were.

## II

### THE DECISION IN *VERDUN*

Before engaging with *Verdun*, it is important to consider the prior Sixth

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<sup>39</sup> Cf. *supra* notes 7–11 and accompanying text.

<sup>40</sup> See, e.g., Scott E. Sundby, *Protecting the Citizen “Whilst He Is Quiet”: Suspicionless Searches, “Special Needs” and General Warrants*, 74 MISS. L.J. 501, 511 (2004) (arguing that the special needs doctrine has systematically undermined the warrant requirement of the Fourth Amendment); Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV 473, 509–10 (1991) (noting that in special needs analysis the courts depart from the traditional procedural analysis and reasonableness requirements of the Fourth Amendment).

<sup>41</sup> See WILLIAM E. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSION 2D § 10:13, Westlaw (database updated Mar. 2023) (examining how courts distinguish health and safety concerns from law enforcement); see, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 830–31 (2002) (using government interest in health and safety to justify an application of the special needs doctrine); *O’Connor v. Ortega*, 480 U.S. 709, 720 (1987) (using government interest in “efficient operation of the workplace” to justify an application of the special needs doctrine).

<sup>42</sup> 496 U.S. 444, 451–52 (1990).

<sup>43</sup> 531 U.S. 32, 41–42 (2000).

<sup>44</sup> *Illinois v. Lidster*, 540 U.S. 419, 423 (2004).

<sup>45</sup> See, e.g., *id.* at 426–27 (stating that you first look to non-criminal purpose per *Edmond*, 531 U.S. at 41–42, and then engage in a reasonableness test); *Lynch v. City of New York*, 589 F.3d 94, 100 (2d Cir. 2009) (noting this balancing test).

Circuit jurisprudence on the issues resulting from two different decisions in *Taylor v. City of Saginaw: Taylor I* in 2019 and *Taylor II* in 2021.<sup>46</sup>

In *Taylor I*, the Sixth Circuit addressed the question of whether tire chalking was a search under the Fourth Amendment. The court noted that after *Jones*, there are two ways to see if something is a search: the *Katz* reasonable expectation of privacy test, or the *Jones* property-based approach.<sup>47</sup> Following *Jones*, the court noted that using chalk to mark someone's car was a trespass under the common law.<sup>48</sup> Further, it was a trespass to obtain information on whether the vehicle would later move, satisfying the second part of the *Jones* test, which requires a government intrusion with the goal of obtaining information.<sup>49</sup>

Two years later, in *Taylor II*, Saginaw was back in front of a different panel of Sixth Circuit judges. This time Saginaw admitted that tire chalking was a search, but one that was justified under the special needs doctrine.<sup>50</sup> The city argued that tire chalking was essentially an administrative scheme—like inspecting a home for compliance with a housing code—that allowed warrantless searches under the special needs doctrine.<sup>51</sup> The panel of three Sixth Circuit judges disagreed and took a narrow view of what counted as an exception to the warrant requirement under the special needs doctrine.<sup>52</sup> For one, tire chalking was not *necessary* for parking enforcement—there were other ways to do it.<sup>53</sup> Second, the court found unconvincing the city's arguments that tire chalking was being done for a non-law enforcement purpose like “the public welfare.”<sup>54</sup> For the court, this was a general crime control scheme.<sup>55</sup>

In May 2019, a month after the Sixth Circuit held suspicionless tire chalking a search,<sup>56</sup> a class action lawsuit was filed against San Diego for

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<sup>46</sup> *Taylor I*, 922 F.3d 328 (6th Cir. 2019); *Taylor II*, 11 F.4th 483 (6th Cir. 2021).

<sup>47</sup> *Taylor I*, 922 F.3d at 332.

<sup>48</sup> *Id.* at 332–33.

<sup>49</sup> *Id.* at 333. *Taylor I* also rejected two exceptions to the warrant requirement that were argued by the city: the automobile exception and the community caretaking exception. For the automobile exception, the court said that the reduced expectation of privacy for cars did not mean zero expectation of privacy. *Id.* at 334. The court also rejected the community caretaking exception because tire chalking was not being done to mitigate a public hazard but to raise revenue. *Id.* at 335.

<sup>50</sup> *Taylor II*, 11 F.4th at 486, 488.

<sup>51</sup> *Id.* at 488.

<sup>52</sup> *Id.* at 487–89.

<sup>53</sup> *See id.* at 489 (“[T]ire chalking is not necessary to meet the ordinary needs of law enforcement, let alone the extraordinary.”) (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000)).

<sup>54</sup> *Taylor II*, 11 F.4th at 488.

<sup>55</sup> *See infra* note 115 and accompanying text.

<sup>56</sup> *Taylor I*, 922 F.3d 328, 332 (6th Cir. 2019).



their use of tire chalking in parking enforcement.<sup>57</sup> Prior to the lawsuit, San Diego had been doing tire chalking to enforce time limits for their parking code since the 1970s.<sup>58</sup> In the contentious two-to-one *Verdun* decision, the Ninth Circuit parted ways with the Sixth Circuit and said the practice was constitutional.<sup>59</sup> Judge Daniel Bress wrote the majority decision to which Judge Patrick Bumatay dissented.

### A. *The Majority Opinion*

The first thing to note is that for Judge Bress, there is salient skepticism over whether tire chalking is a search. Judge Bress states that before *Jones*, no one even seriously considered that tire chalking constituted a search.<sup>60</sup> Nonetheless, Judge Bress assumed tire chalking is a search for the purposes of his analysis.<sup>61</sup> This initial skepticism by Judge Bress over whether tire chalking is a search is important to consider as it likely influences his understanding, later, of what is a reasonable or unreasonable intrusion in the context of a government scheme under the special needs doctrine.<sup>62</sup>

Having assumed a search, Judge Bress moved on to the special needs doctrine, which involves a two-part analysis in the Ninth Circuit drawing on precedent regarding *checkpoints*.<sup>63</sup> First, the court must determine if the search is “per se invalid” because its “primary purpose” is “to advance the general interest in crime control.”<sup>64</sup> Second, if the search is not per se invalid, the court must conduct a balancing test to determine if the search is reasonable.<sup>65</sup> Note that Judge Bress’s analysis draws on the Ninth Circuit’s

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<sup>57</sup> See Ashley Mackin-Solomon, *San Diego Police Using New System for Detecting Parking Violations After City Is Sued over Chalking Tires*, LA JOLLA LIGHT (Nov. 20, 2020), <https://www.lajollalight.com/news/story/2020-11-20/san-diego-police-using-new-system-for-detecting-parking-violations-after-city-is-sued-over-chalking-tires> [https://perma.cc/4UG7-BFSV] (noting the class action lawsuit, which was filed in May 2019).

<sup>58</sup> *Verdun v. City of San Diego*, 51 F.4th 1033, 1037 (9th Cir. 2022).

<sup>59</sup> *Id.* at 1048.

<sup>60</sup> *Id.* at 1037.

<sup>61</sup> *Id.*

<sup>62</sup> See *infra* notes 72–73 and accompanying text.

<sup>63</sup> In a nutshell, checkpoints—or roadblocks—involve police setting up a barrier and briefly stopping and inspecting drivers as they come through. See Paul Bergman, *When Can Police Set Up Roadblocks*, NOLO, <https://www.nolo.com/legal-encyclopedia/police-set-up-roadblocks.html> [https://perma.cc/4C4Q-F5CH]. Of course, the police lack probable cause to question or briefly hold many of these drivers, but the Supreme Court has held that checkpoints are valid under the Fourth Amendment so long as they conform to certain procedures. *Id.*; see also Kathryn L. Howard, *Stop in the Name of that Checkpoint: Sacrificing Our Fourth Amendment Right in Order to Prevent Criminal Activity*, 68 MO. L. REV. 485, 491–93 (2003) (providing a brief history of checkpoints under the Fourth Amendment).

<sup>64</sup> *Verdun*, 51 F.4th at 1041 (quoting *Demarest v. City of Vallejo*, 44 F.4th 1209, 1220 (9th Cir. 2022)).

<sup>65</sup> *Id.* at 1041–42. The idea behind this second reasonableness test, Judge Bress notes, is that the special needs doctrine merely exempts the “warrant” requirement of the Fourth Amendment,

precedents for *checkpoints*, which both makes a somewhat awkward fit and also represents a broader understanding of the special needs doctrine as one that allows for another exception even if there is no specific case law on it.<sup>66</sup> This latter point is especially problematic for Judge Bumatay in his dissent.<sup>67</sup>

Using this test, Judge Bress first notes that the primary purpose of tire chalking is not for general crime control. Instead, its primary purpose is to “assist the City in its overall management of vehicular traffic . . . .”<sup>68</sup> Tire chalking is about freeing up parking spots, which enhances public safety, promotes commerce, and makes room for emergency service vehicles.<sup>69</sup> Yes, tire chalking *can* lead to a parking citation, but that is not its primary purpose.<sup>70</sup> Next, tire chalking also satisfies the reasonableness prong.<sup>71</sup> The “search” itself is small and insignificant<sup>72</sup> (this understanding surely being informed by Judge Bress’s skepticism of whether it even is a search), especially since cars already have a reduced expectation of privacy.<sup>73</sup> Finally, the process in which the city engages in tire chalking is sufficiently tailored to its stated goals and is thus straightforwardly reasonable.<sup>74</sup>

Judge Bress then moves on to address his detractors. First, concerning the Sixth Circuit’s opinion, Judge Bress argues that the court erroneously viewed the special needs doctrine too narrowly insofar as they said that tire chalking needed to be necessary to enforce parking. For Judge Bress, something can qualify under the special needs exception even if it is not “necessary.”<sup>75</sup> Next, Judge Bress criticizes Judge Bumatay’s dissent as being too originalist and ignoring precedent in favor of a historical analysis of the Fourth Amendment.<sup>76</sup> Judge Bress argues that rather than faithfully applying

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but the “reasonableness” requirement of that Amendment’s textual command stays. *See id.* at 1040 (“[W]hile administrative searches are an exception to the Fourth Amendment’s warrant requirement, they are not an exception to the Fourth Amendment’s standard of reasonableness.” (quoting *United States v. Bulacan*, 156 F.3d 963, 967 (9th Cir. 1998))).

<sup>66</sup> This would contrast with a doctrine such as *Bivens*, which requires identifying factually similar precedent to justify its application. *See* Joanna C. Schwartz, Alexander Reinert & James E. Pfander, *Going Rogue: The Supreme Court’s Newfound Hostility to Policy-Based Bivens Claims*, 96 NOTRE DAME L. REV. 1835, 1836 (2021) (discussing said *Bivens*’ “sufficiently similar” framework).

<sup>67</sup> *See Verdun*, 51 F.4th at 1056 (Bumatay, J., dissenting) (taking a highly limited and narrow view of special needs case law).

<sup>68</sup> *Id.* at 1042 (majority opinion).

<sup>69</sup> *Id.* at 1035–36.

<sup>70</sup> *Id.* at 1042.

<sup>71</sup> *Id.* at 1043.

<sup>72</sup> *Id.* at 1044–45.

<sup>73</sup> *Id.* at 1045.

<sup>74</sup> *Id.* at 1044.

<sup>75</sup> *See id.* at 1046 (arguing that it is not relevant for special needs cases to see if another alternative scheme that does not involve Fourth Amendment searches can be viable).

<sup>76</sup> *See id.* (“Merely citing the general concerns that animated the Fourth Amendment and some basic legal history, as the dissent does, hardly proves the more specific proposition that tire chalking violates the Constitution.”).

Supreme Court and Ninth Circuit precedent on the special needs doctrine, Judge Bumatay’s reasoning starts with the foundational principle that the special needs doctrine violates the original meaning of the Fourth Amendment and goes from there.<sup>77</sup>

### B. *The Dissent*

To begin, Judge Bumatay lays the groundwork of his dissent as one entirely guided by originalist thought. He starts with a citation to the 2005 Supreme Court case of *District of Columbia v. Heller* to argue that “[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them.”<sup>78</sup> Judge Bumatay’s dissent is highly influenced by originalism: it surveys the historical meaning of the Fourth Amendment,<sup>79</sup> early state and federal constitutional debates,<sup>80</sup> and eighteenth-century congressional practice,<sup>81</sup> and quotes from Founding Fathers like Patrick Henry.<sup>82</sup> Using this historical framework as evidence in tandem with *Jones*, Judge Bumatay stresses that the Fourth Amendment is directly tied to the common law trespass test.<sup>83</sup> In light of *Jones*, Judge Bumatay would not just *assume* that tire chalking is a search; he would hold that it is unequivocally.<sup>84</sup>

Of course, given that Judge Bress operated under the assumption in his majority that there was a search, the real meat of the dissent comes with Judge Bumatay’s argument against the application of the special needs doctrine as an appropriate exception to the warrant requirement for tire chalking. What is especially interesting about the discussion between Judges Bumatay and Bress on the special needs doctrine is that their ultimate conclusions can be read as a product of their reasoning methods. Judge Bress starts with Supreme Court and circuit precedent as his first principle, which he then supplements with originalism;<sup>85</sup> alternatively, Judge Bumatay starts

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<sup>77</sup> *See id.* at 1047.

<sup>78</sup> *Id.* at 1049 (Bumatay, J., dissenting) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008)).

<sup>79</sup> *See id.*

<sup>80</sup> *Id.* at 1053, 1053–54.

<sup>81</sup> *Id.* at 1054–55.

<sup>82</sup> *Id.* at 1054.

<sup>83</sup> *Id.* at 1049.

<sup>84</sup> *Id.* at 1051.

<sup>85</sup> Judge Bress in *Verdun* does not explicitly say he is doing this, but it can be inferred by his opinion against a larger context. In the immediate confines of *Verdun*, Judge Bress engages with originalism, but places less value on it in comparison with Supreme Court precedent. *Cf. id.* at 1046–47 (majority opinion). This is consistent with the responses he gave on his judicial nominee questionnaire, which showed support for originalist analysis so long as it conforms to Supreme Court precedent. *See S. COMM. ON THE JUDICIARY, 116TH CONG., NOMINATION OF DANIEL BRESS TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, QUESTIONS FOR THE RECORD* (2019)

with originalism as his first principle, which he then supplements with Supreme Court and circuit precedent.<sup>86</sup> Judge Bress’s method leads to an expansive special needs doctrine, and Judge Bumatay’s method leads to a narrow one.

So, Judge Bumatay begins his opinion by framing the original meaning of the Fourth Amendment as being hostile to “suspicionless general warrants.”<sup>87</sup> Therefore, the special needs exceptions set out by the Supreme Court in its precedents are incredibly narrow exceptions that must “involv[e] extraordinary and immediate governmental interests.”<sup>88</sup> Interestingly—and this is where Judge Bress explicitly accuses Judge Bumatay of misreading Supreme Court precedent<sup>89</sup>—the dissent says this primary-purpose-of-crime-control framework set out in *Edmond* actually stands for the proposition that general interest in crime control is too minor an interest for the special needs doctrine.<sup>90</sup> So, whereas Judge Bress sees this general crime control aspect of *Edmond* as standing to mean that the special needs doctrine works so long as it is unrelated to criminal evidence-gathering and is reasonable, Judge Bumatay says it stands for the principle that even general crime control is not a high enough interest to satisfy the special needs doctrine. Instead, to satisfy the doctrine, the government needs to propose a purpose that is “grave and urgent,” like preventing a terrorist hijacking.<sup>91</sup>

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<https://www.judiciary.senate.gov/imo/media/doc/Bress%20Responses%20to%20QFRs.pdf> [<https://perma.cc/66QG-27S5>] (“The Supreme Court has considered the original public meaning of constitutional provisions when construing them. . . . But ultimately, lower court judges must follow the precedents of the Supreme Court.”). Judge Bress engages with the originalist arguments of Judge Bumatay but finds it both incomplete and incorrect. Incomplete, because his originalist analysis “merely cit[es] the general concerns that animated the Fourth Amendment and some basic legal history. . . .” *Verdun*, 51 F.4th at 1046. And, relatedly, incorrect, because the dissent’s contention that tire chalking exhibits the same characteristic as general warrants and writs and fails to appreciate that the general writs involved search and seizure of “whatever and whomever they pleased while investigating crimes or affronts to the Crown.” *Id.* While clearly accepting the dissent’s originalist style of argumentation as legitimate, Judge Bress takes issue with it because it “does not even purport to work within the Supreme Court’s established doctrinal framework,” *id.* at 1047, and is, therefore, “not one we are permitted to follow,” *id.* at 1048.

<sup>86</sup> *See Verdun*, 51 F.4th at 1049 (Bumatay, J., dissenting) (setting out his originalist framework as the root of his interpretation).

<sup>87</sup> *Id.* at 1051; *see id.* at 1056 (“Because dragnets operate without a warrant or individualized suspicion . . . they have been justified in ‘only limited’ contexts involving extraordinary and immediate governmental interests . . . [G]iven th[is] historical aversion . . . we must scrupulously guard against the expansion of government concerns that warrant this rare exception.”); *see also supra* Part I.

<sup>88</sup> *Verdun*, 51 F.4th at 1056.

<sup>89</sup> *See id.* at 1047 (“The dissent not only fails to explain why the original meaning of the Fourth Amendment requires its result, it is essentially in opposition to longstanding Supreme Court precedent . . .”).

<sup>90</sup> *See id.* at 1057 (Bumatay, J., dissenting) (setting out this interpretation).

<sup>91</sup> *Id.* (quoting *United States v. Davis*, 482 F.2d 893, 910 (9th Cir. 1973)); *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (“[T]here are circumstances that may justify a law

Having laid all this out, Judgeumatay argues that the city is engaging in warrantless and suspicionless general searches<sup>92</sup> for something too mundane like traffic control to justify granting the tremendous power of tire chalking.<sup>93</sup> Or, as Judgeumatay puts it: “[T]he City’s interests in perpetuating its parking enforcement regime don’t chalk up.”<sup>94</sup>

### III

#### IMPLICATIONS AND CORE DISAGREEMENTS

While ostensibly a case just about tire chalk, *Verdun* has much broader implications. There are three critical concepts illuminated by the opinion that the reader may want to keep an eye on in the future. First, how *Verdun* informs our understanding of what qualifies as a search under Fourth Amendment. Second, if courts should view the special needs doctrine—at least functionally—as a flexible grant of power or as a narrow exception to a general rule. Third, the debate over tire chalking lays bare an intra-originalist fight between the Judgeumatay and Justice Scalia originalists versus the Judge Bress and Justice Alito originalists.

#### A. *Is Tire Chalking a Search?*

The formulation in *Jones* and *Jardines* vastly expanded the potential areas of privacy protections for searches and seizures. With tire chalking, we are confronted with the question of how far this *Jones* framework goes. A key concept picked up by Judgeumatay in his *Verdun* dissent is the idea that *Jones* and *Jardines* merged private and public law.<sup>95</sup> As Professors William Baude and James Stern note, *Katz* concerned abstract notions of what our society views as private and not private.<sup>96</sup> What *Jones* and *Jardines* have now done, though, is bring us closer to a simplified version of what a search is by examining whether “a government actor [has] done something that would be unlawful for a similarly situated nongovernment actor to do . . . .”<sup>97</sup> However, while Justice Scalia’s property conception of the Fourth

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enforcement checkpoint where the primary purpose would . . . relate to ordinary crime control . . . . [T]he Fourth Amendment would almost certainly permit an appropriately tailored roadblock to thwart an imminent terrorist attack . . . .”).

<sup>92</sup> *Verdun*, 51 F.4th at 1055 (Bumatay, J., dissenting).

<sup>93</sup> *See id.* at 1057–58 (drawing a contrast between the concerns motivating chalking and less “routine” challenges such as drunk drivers and hijacking of airplanes).

<sup>94</sup> *Id.* at 1058.

<sup>95</sup> *Cf. id.* at 1049 (framing intrusions on private property as common law trespass).

<sup>96</sup> *See* William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1831 (2016) (describing *Katz* as an “abstract exploration of sensibilities about the privacy of places or information”).

<sup>97</sup> *Id.*; *see also* *Carpenter v. United States*, 138 S. Ct. 2206, 2267–68 (2018) (Gorsuch, J., dissenting) (advocating increased focus on a better, more understandable conception of property law for the Fourth Amendment).

Amendment brought Fourth Amendment law closer to private law, it is highly doubtful that he closed the gap completely. For instance, a property *and* privacy conception of Fourth Amendment law completely shuts off the justifications behind the open fields doctrine,<sup>98</sup> which has its reasoning rooted in the *Katz* formulation that one has no reasonable expectation of privacy in the vast fields of property that they own outside their actual house.<sup>99</sup> The open fields doctrine technically should not work under the *Jones* test. And yet, Justice Scalia in *Jardines* explicitly voices support for the open fields doctrine, stating that privacy protection for open fields is not “enumerated in the [Fourth] Amendment’s text.”<sup>100</sup>

So, a critical debate relevant to tire chalking is how close *Jones* brings private and public law together. Judge Bumatay’s dissent considers it more 1:1, arguing that since a private party cannot chalk your tires, neither can a public official without a warrant. For Judge Bumatay, it is an “easy case.”<sup>101</sup> Judge Bress’s majority opinion is more skeptical of the 1:1 distinction, and while reluctantly considering tire chalking a search, he clearly still has his doubts.<sup>102</sup>

The above is about the reach of *Jones*, but if one considers *Jones* narrowly with respect to tire chalking, the connection is too strong, and it makes it hard to argue that tire chalking is not a search under *Jones*—this is perhaps why Judge Bress did not fight this point and decided the case on the more solid grounds of the special needs doctrine. *Jones*, again, said a physical common law trespass with the intent to gain information is a search.<sup>103</sup> Just like the light touch of a GPS tracker was a search, so too should be tire chalking. The counterargument would be that surely GPS information is different and more expansive, but it is important to remember that Justice Scalia’s opinion in *Jones* said the question of privacy and the GPS data *did not matter*; rather, it all came down to the physical touch to gain information.<sup>104</sup> Some have also suggested that tire chalking may not be a search to gain information when it is done because the information is gleaned once the parking enforcer returns.<sup>105</sup> This is a relatively weak

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<sup>98</sup> See Baude & Stern, *supra* note 96, at 1886 (“At a minimum, the [*Jones* and *Jardine*] model eliminates the modern rationale for the open fields doctrine.”).

<sup>99</sup> See *Oliver v. United States*, 466 U.S. 170, 179 (1984) (“[O]pen fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter . . .”).

<sup>100</sup> *Florida v. Jardines*, 569 U.S. 1, 6 (2013).

<sup>101</sup> *Verdun v. City of San Diego*, 51 F.4th 1033, 1051 (9th Cir. 2022) (Bumatay, J., dissenting) (quoting *Jardines*, 596 U.S. at 11).

<sup>102</sup> *Id.* at 1037 (majority opinion).

<sup>103</sup> See *supra* note 27 and accompanying text.

<sup>104</sup> *Id.*

<sup>105</sup> See Orin S. Kerr, *Chalking Tires and the Fourth Amendment*, VOLOKH CONSPIRACY (Apr. 23, 2019), <https://reason.com/volokh/2019/04/23/chalking-tires-and-the-fourth-amendment> [<https://perma.cc/B8KT-CS6J>] (“Is it really a search of the car at Time A to see at Time B if the chalk moved between Time A and Time B?”).

argument, though, insofar as one could say that very same logic applies to the GPS tracker in *Jones*. The information was not gained at the time of the placement but *after*.

It is the obvious triviality of tire chalking that makes it so significant. If tire chalking is a search, that could mean that other government behavior involving touch that was previously seen as unobjectionable could be considered a search. Consider previously unchecked police activity that does not require warrants, such as canine drug sniffs.<sup>106</sup> What if the dog's nose lightly taps the bag it is smelling? Or, what if an officer places his hand on the trunk of a car and gently pushes down to make sure it is locked when he pulls a driver over?<sup>107</sup> Both of these things, by definition, involve a touch (dog nose on bag and officer's hand on car) to gain information (drugs in the bag or status of the trunk), which is all that is needed for a search under *Jones*.<sup>108</sup>

### B. *Special Needs: Narrow Exception or Broad Tool?*

In *Verdun*, we see two approaches to the special needs doctrine and tire chalking. The Judge Bress majority views the application of special needs broadly and looks to see if the programmatic intent is both unrelated to general crime-fighting efforts and is reasonable.<sup>109</sup> On the other end of the spectrum, the Judge Bumatay dissent sees the special needs doctrine as incredibly narrow and containing only a few notable exceptions for particularly crucial government purposes.<sup>110</sup> For Judge Bress, then, there is a sense that the special needs doctrine can still be used for mundane, necessary purposes, whereas Judge Bumatay suggests mundane purposes can never satisfy.<sup>111</sup>

With respect to Judge Bumatay's dissent, Judge Bress accuses Judge Bumatay of willfully misreading special needs case law.<sup>112</sup> And Judge Bress does make a solid argument to that effect in light of Judge Bumatay's reading of *Edmond*. *Edmond* has stood for the proposition in the Ninth Circuit that the special needs doctrine cannot be used for general crime control.<sup>113</sup> In *Edmond*, the city tried to justify suspicionless checkpoints to locate

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<sup>106</sup> See, e.g., *United States v. Place*, 462 U.S. 696, 707 (1983) (holding that a canine "sniff" is not a search under the Fourth Amendment).

<sup>107</sup> Cf. *Why Do Policemen Touch Your Tail Light When They Pull You Over?*, THE LAW DICTIONARY, <https://thelawdictionary.org/article/why-do-policemen-touch-a-tail-light-when-they-pull-you-over> [https://perma.cc/3FZA-JYKE].

<sup>108</sup> See *supra* note 27 and accompanying text.

<sup>109</sup> See *supra* notes 64–65 and accompanying text.

<sup>110</sup> See *supra* notes 87–90 and accompanying text.

<sup>111</sup> See *supra* notes 91–94 and accompanying text.

<sup>112</sup> See *supra* note 89 and accompanying text.

<sup>113</sup> See, e.g., *Demarest v. City of Vallejo*, 44 F.4th 1209, 1218 (9th Cir. 2022) (making this argument).

narcotics,<sup>114</sup> but the Supreme Court said that the special needs doctrine did not include general crime fighting purposes.<sup>115</sup> In dicta, however, the Supreme Court left open the possibility that the doctrine may encompass certain terrorism-related purposes.<sup>116</sup> Judge Bumatay interpreted this passage to mean that special needs is only for the most pressing needs, like fighting terrorism.<sup>117</sup> This seems like quite a stretch or, at least, an interpretation outside of the way *Edmond* is typically interpreted.<sup>118</sup> Interestingly, Judge Bumatay did not fight Judge Bress on one of the stronger anti-tire chalking points: whether or not the primary purpose of the tire chalking was to issue fines—i.e., general crime control. This was an important finding the Sixth Circuit hung its hat on when invalidating the tire chalking scheme in Saginaw, Michigan.<sup>119</sup>

Another key question and tension brought to the surface in this case law is the idea behind special needs and programmatic intent surrounding *why* a city is doing tire chalking. In decisions surrounding the Fourth Amendment, the Supreme Court has been clear that the Fourth Amendment is concerned with *objective* standards and not with *why* an officer is doing something.<sup>120</sup> In *Whren v. United States*, a unanimous Supreme Court said that “the Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be

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<sup>114</sup> More specifically, the city set up a number of highway checkpoints on roads within Indianapolis to interdict illegal drugs. *City of Indianapolis v. Edmond*, 531 U.S. 32, 34–35 (2000). At each checkpoint, an officer would approach the vehicle, tell the person they were being stopped at a drug checkpoint, and ask for licenses and registration all while looking for signs of impairment and looking through the window in an open-view examination. *Id.* at 35. While this was happening, a “narcotics-detection dog walks around the outside of each stopped vehicle.” *Id.*

<sup>115</sup> *Id.* at 41–42.

<sup>116</sup> *See id.* at 44 (“Of course, there are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, related to ordinary crime control. . . . [T]he Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack . . .”).

<sup>117</sup> *Verdun v. City of San Diego*, 51 F.4th 1033, 1057 (9th Cir. 2022) (Bumatay, J., dissenting).

<sup>118</sup> *See, e.g., Illinois v. Lidster*, 540 U.S. 419, 426–27 (2004) (framing *Edmond* as standing for the idea that the special needs doctrine requires a primary purpose outside of crime control before *then* engaging in a reasonableness balancing test); *United States v. Fraire*, 575 F.3d 929, 932 (9th Cir. 2009) (“If the checkpoint is not per se invalid as a crime control device, then the court must ‘judge [the checkpoint’s] reasonableness . . . .’” (quoting *id.* at 426)); *United States v. Henson*, 351 F. App’x 818, 820 (4th Cir. 2009) (stating that you first look to whether the primary purpose is a valid, non-criminal one per *Edmond* before then conducting a balancing test); *United States v. William*, 603 F.3d 66, 68–69 (1st Cir. 2010) (same).

<sup>119</sup> *See Taylor II*, 11 F.4th 483, 489 (6th Cir. 2021) (“[T]ire chalking is not necessary to meet the ordinary needs of law enforcement, let alone the extraordinary.”) (citing *Edmond*, 531 U.S. at 37).

<sup>120</sup> *See, e.g., Horton v. California*, 496 U.S. 128, 138 (1990) (“[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.”); *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (“The Utah Supreme Court also considered the officers’ subjective motivations relevant. . . . Our cases have repeatedly rejected this approach.”).



taken in certain circumstances, *whatever* the subjective intent.”<sup>121</sup> The Court further added that the protections of the Fourth Amendment cannot “be made to turn upon such trivialities” like the subjective intent of the action.<sup>122</sup> And yet, when it comes to the programmatic intent of a government action like tire chalking, which is arguably a lot harder and more complicated to discern than an individual officer’s intent, the constitutionality of the practice may live or die based on the subjective reasoning of why it is being done. This is not even to mention the genuine possibility that some cities’ primary purposes for tire chalking will be issuing citations and others will be for traffic control.

The issue of tire chalking has implications for the future of the special needs doctrine. It can narrow the doctrine to what is only necessary or extreme (Judge Bumatay dissent); alternatively, it can leave room for its expansion (Judge Bress majority). First step is tire chalking; next step is car GPS trackers for everyone.<sup>123</sup> Or maybe not. It depends on where and if you draw the line somewhere.

### C. *Originalism and Its Limits—or Lack Thereof*

*Jones*, *Jardines*, and *Verdun* are also interesting for the originalist infighting they create: the perhaps softer originalists, Judge Bress and Justice Alito, against the more hardcore originalists, Judge Bumatay and Justice Scalia. In *Jones* and *Jardines*, Justice Scalia’s property conception of the Fourth Amendment is stiff and binary.<sup>124</sup> For Justice Scalia, the Fourth Amendment was fastened firmly to property protections in its original conception.<sup>125</sup> Justice Alito disagrees, viewing the Fourth Amendment as being about broader privacy protections that encompass new technology.<sup>126</sup> For Justice Alito, it is not correct to simply have the property conception coexist with the *Katz* conception because, under the Fourth Amendment, a technical trespass is neither necessary nor sufficient.<sup>127</sup> What is interesting

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<sup>121</sup> 517 U.S. 806, 814 (1996).

<sup>122</sup> *Id.* at 815.

<sup>123</sup> This, of course, would be unlawful per *United States v. Jones*, 565 U.S. 400 (2012), so we know that—at least now—the line is at least somewhere before GPS trackers.

<sup>124</sup> *Cf.* *Florida v. Jardines*, 569 U.S. 1, 11 (2013) (“One virtue of the Fourth Amendment’s property-rights baseline is that it keeps easy cases easy.”).

<sup>125</sup> *See* *United States v. Jones*, 565 U.S. 400, 405 (2012) (“The text of the Fourth Amendment reflects its close connection to property . . . .”); *see also* *Jardines*, 569 U.S. at 5 (describing baseline protections for physical intrusions).

<sup>126</sup> *See* *Jones*, 565 U.S. at 421–22 (Alito, J., concurring) (framing *Katz* as doing away with the old property-rights baseline and onto a broader, more modern conception of privacy); *see also* *Jardines*, 569 U.S. at 17 (Alito, J., dissenting) (framing his argument about reasonable expectation of privacy).

<sup>127</sup> *See* *Jones*, 565 U.S. at 423 (Alito, J., concurring).

about this is that both Justices are self-professed originalists<sup>128</sup> yet come out with very different views on this question.

Arguably, one could square the distinction between an originalism which takes past principles and adopts them to the present (Justice Alito) and an originalism which takes past principles and actively resists adopting them to the present (Justice Scalia). Justice Alito's framework may initially appear to come close to the ostensible counter to originalism: living constitutionalism.<sup>129</sup> An attempt to square Justice Alito's vision of originalism as being separate from living constitutionalism, of course, would require several pages of analysis, but, arguably, it can be squared. Take someone closer to the ideology of living constitutionalism like Justice John Paul Stevens,<sup>130</sup> who sees constitutional interpretation as being based on the premise that the definition of certain concrete terms can be defined by future generations.<sup>131</sup> Justice Alito, meanwhile, holds the definition of liberty at the Founding stagnant, but is more willing to separate it purely from its physical context.<sup>132</sup> As a rough metaphor, one could think of constitutional meaning as a historical rock: Justice Stevens says the rock can be replaced by future generations, Justice Alito says the original rock is to be smoothed by future generations, and Justice Scalia says the rock is to be preserved by future

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<sup>128</sup> See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (Justice Scalia defending his viewpoint on originalism); Neil S. Siegel, *The Distinctive Role of Justice Samuel Alito: From a Politics of Restoration to a Politics of Dissent*, 126 YALE L.J.F. 164, 166 (2016) (noting that Justice Alito is a self-described originalist).

<sup>129</sup> See generally Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1244 (2019) (“Originalists argue that the meaning of the constitutional text is fixed and that it should bind constitutional actors. Living constitutionalists contend that constitutional law can and should evolve in response to changing circumstances.”). Solum goes on to define several different and competing versions of living constitutionalism in the same piece. See *id.* at 1271–76.

<sup>130</sup> See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 877 (2010) (Stevens, J., dissenting) (“The judge who would outsource the interpretation of ‘liberty’ to historical sentiment has turned his back on a task the Constitution assigned to him and drained the document of its intended vitality.”); see also *id.* at 803 (Alito, J., concurring) (“Justice Stevens’ response to this concurrence makes the usual rejoinder of ‘living Constitution’ advocates . . .”).

<sup>131</sup> See John Paul Stevens, *The Third Branch of Liberty*, 41 U. MIA. L. REV. 277, 291 (1986) (“The task of giving concrete meaning to the term ‘liberty’ . . . was [a part] of the work assigned to future generations of *judges*.”) (emphasis added).

<sup>132</sup> Compare *Jones*, 565 U.S. at 420 (Alito, J., concurring) (“The Court argues—and I agree—that ‘we must “assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted . . . .”’ But it is almost impossible to think of late-18th-century situations that are analogous to which took place in this case.” (internal citation omitted)), *with id.* at 406 n.3 (majority opinion) (arguing by analogy that tracking of car movements was originally considered by the Founders because “it posits a situation that is not far afield—a constable’s concealing himself in the target’s coach in order to track its movements”). The back and forth of the “small constable” between the two Justices shows Justice Scalia straining to preserve the Amendment historically and Justice Alito willing to bend when the historical analogizing becomes too ridiculous. See *id.* at 420 n.3 (Alito, J., concurring) (“The Court suggests that something like this might have occurred in 1791, but this would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience.”).

generations. Of course, Justice Alito’s view is much more similar to Justice Stevens’s view than Justice Scalia’s is. Thus, it is no surprise that Justice Alito was able to get Justices Ruth Bader Ginsburg, Steven Breyer, and Elena Kagan—but not Sonia Sotomayor—to sign onto his opinion in *Jones*.<sup>133</sup>

A similar split is happening between Judgesumatay and Bress in *Verdun*. Judge Bress has a clear skepticism of Justice Scalia’s understanding in *Jones*. This is made apparent in Judge Bress’s inadvertent—or intentional—tipping of his hand, where he describes *Jones* as a “reorientation” of the Fourth Amendment.<sup>134</sup> Of course, true believers like Judgeumatay or Justice Scalia would not describe *Jones* as a “reorientation” of the Fourth Amendment since the whole premise of *Jones* is that the property conception of the Fourth Amendment was present since the beginning.<sup>135</sup> Judge Bress posits that surely not *every* touch to gain information is a search.<sup>136</sup> Judgeumatay, however, adopts a much stricter approach and stresses the rigid property conception of what constitutes a search laid out by Justice Scalia in *Jones*.<sup>137</sup> As originalism becomes more popular and cements itself as the default framework of constitutional analysis for some judges, tire chalking and *Jones* present a potential intra-originalist fight.

#### CONCLUSION

The October 2022 *Verdun* decision was about much more than tire chalking. In parting ways with the Sixth Circuit’s decision in *Taylor*, the Ninth Circuit created a problem ripe for Supreme Court review that carries with it incredibly far-reaching consequences. Is the *Jones* conception of what constitutes a search unlimited, or is there a line? How potent is the special needs doctrine and does it reach tire chalking? Is the primary purpose of tire chalking for general criminal investigative purposes, and should we even be considering subjective intent in handling Fourth Amendment questions? How should an originalist approach the question of tire chalking and the special needs doctrine?

There is something quintessentially American about a constitutional standoff concerning the use of tire chalk by parking enforcers. Throughout our history, American society has developed a natural distrust of government.<sup>138</sup> When the British gave general writs of assistance to revenue

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<sup>133</sup> *Id.* at 418.

<sup>134</sup> *Verdun v. City of San Diego*, 51 F.4th 1033, 1036–37 (9th Cir. 2022).

<sup>135</sup> *See Jones*, 565 U.S. at 407–08 (arguing that *Katz* had never repudiated the old property rights baseline of the Fourth Amendment).

<sup>136</sup> *See Verdun*, 51 F.4th at 1037.

<sup>137</sup> *See id.* at 1049–50 (umatay, J., dissenting).

<sup>138</sup> *See* Michael Price, *Remember Why We Have the Fourth Amendment*, BRENNAN CTR. (Nov. 25, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/remember-why-we-have->

collectors, it was this instinctive distrust that enraged James Otis. “[These writs are] the worst instrument of arbitrary power . . . that was ever found in an English law book,” he said, because “the liberty of every man [is] in the hands of every petty officer.”<sup>139</sup> Otis is inextricably linked with the Fourth Amendment; his 1761 words are cited again and again by the Supreme Court.<sup>140</sup> What the Supreme Court leaves out, though, is that Otis was also famously prone to “fits of insanity” and suffered from an unstable psyche.<sup>141</sup> In 1770, John Adams wrote about Otis again, this time noting that Otis had been described by a colleague that afternoon as “raving Mad—raving vs. Father, Wife, Brother, Sister, Friend &c. [sic]”<sup>142</sup> This added context may put Otis’s words in perspective and perhaps be used to frame his complaints as somewhat hyperbolic. On the other hand, it is worth considering how useful a natural skepticism of government power is in protecting the promises that underly the Fourth Amendment. In that way, maybe the duality of Otis is what makes him the perfect representative for that Amendment. What would he think of tire chalking?

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fourth-amendment [<https://perma.cc/J3N8-4U53>] (“[A]s Americans, we are . . . committed to a few basic values that we do not fail to mention time-and-again from atop our shining city on a hill—liberty being chief among them.”).

<sup>139</sup> *Boyd v. United States*, 116 U.S. 616, 625 (1886).

<sup>140</sup> *See, e.g., Stanford v. Texas*, 379 U.S. 476, 481 (1965); *Terry v. Ohio*, 392 U.S. 1, 37 (1968) (Douglas, J., dissenting); *Payton v. New York*, 445 U.S. 573, 583 n.21 (1980); *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018).

<sup>141</sup> *See James Otis: American Politician*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/James-Otis> [<https://perma.cc/T2PG-3MNN>] (describing Otis as “prone to fits of insanity”); James R. Ferguson, *Reason in Madness: The Political Thought of James Otis*, 36 WM. & MARY Q. 194, 194–95 (1979) (“As early as 1765 [James Otis’] mental instability was clearly evident in his confused and erratic behavior . . . .”); Erick Trickey, *Why the Colonies’ Most Galvanizing Patriot Never Became a Founding Father*, SMITHSONIAN MAG. (May 5, 2017), <https://www.smithsonianmag.com/history/transformativ-patriot-who-didnt-become-founding-father-180963166> [<https://perma.cc/N7TT-ZSQ7>] (discussing Otis’s fragile psyche, which was further exasperated after he was wounded in a fight).

<sup>142</sup> John Adams, Diary Entry of Feb. 26, 1770, in *DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, VOLUME I, DIARY, 1755-1770*, 349–50 (L.H. Butterfield ed., 1961).