COLLINS AND THE INVENTION OF "CURTILAGE"

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ABSTRACT

In its 2018 decision, Collins v. Virginia, *the Court seemingly took for granted the idea that the curtilage was part of a person's "home" under the Fourth Amendment. The result was a quick resolution of the case for the majority: if the curtilage—the area immediately surrounding the home—was the same as the home, and the driveway was part of the curtilage (and therefore was the home for constitutional purposes), then a search of a motorcycle in the driveway was in fact a search under the Fourth Amendment and required a warrant. As entering the four walls of a home without a warrant would violate the sanctity of the home, so too would entering the driveway without a warrant violate (in Justice Sotomayor's arresting phrase) "the sanctity of the curtilage." Most commentary on the case has followed Justice Sotomayor in believing that this, indeed, was a rather easy case—almost to the point of wondering why the Court would bother to take it all.*

But the Court's unreflective use of the curtilage, and its obeisance to the supposed sacredness of the curtilage ignores the reality that the concept of "curtilage" is one without genuine support in either text or history. The Court has, in fact, repeatedly and consistently misread Blackstone on the curtilage. The problem, in a nutshell, is that the Court has taken Blackstone as meaning something that he clearly did not—that somehow the land near the home itself is part of the home. But Blackstone defined the "home" as including not the curtilage—the land outside the home—but only the buildings contained in the curtilage.

Nor does the curtilage get much support from the Katz *"reasonable expectations of privacy" test, a point somewhat better established. If the test is reasonable expectations of privacy, then labels—"curtilage" or "open fields"—cannot replace actually looking at what those expectations are, and if they apply to the land in question. In other words, we can only call a piece of land "curtilage" after we have decided we have a reasonable expectation of privacy in that land; we cannot begin with the idea that some land is already curtilage. As a result, while the Court has long believed that curtilage finds support both in the text of the Fourth Amendment (because it is part of the "house") and in the* Katz *test (because the curtilage is associated with heightened expectations of privacy), it actually has support on neither ground. The stunning failure of curtilage doctrine raises deeper questions about the Court's Fourth Amendment's jurisprudence more generally.*

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INTRODUCTION

Although *Carpenter* got much attention as *the* Fourth Amendment case of the 2017–2018 Supreme Court Term, a lesser-noticed case, *Collins v. Virginia*, may prove to be the more enduring, at least as a doctrinal matter.[1] Not only was *Collins* a more decisive win for privacy, 8–1 rather than 5–4, it seemed firmly to establish "curtilage" as a fundamental concept in the Court's Fourth Amendment jurisprudence.[2] Whereas the use of "curtilage" in Justice Scalia's opinion in *Florida v. Jardines* seemed somewhat controversial,[3] in *Collins* it was taken for granted by all nine members of the Court that

1 *See generally* Carpenter v. United States, 138 S. Ct. 2206 (2018) (finding a "search" when cell site location information was collected for more than seven days); Collins v. Virginia, 138 S. Ct. 1663 (2018) (holding that the automobile warrant requirement exception does not justify a police officer's invasion of the curtilage of a home, which includes a partially enclosed top portion of the driveway of a home).

2 *See Collins*, 138 S. Ct. at 1663 (explaining the breakdown of votes among the nine Justices in *Collins*).

3 *See* Florida v. Jardines, 569 U.S. 1, 18–22 (2013) (Alito, J., dissenting) (questioning the boundaries of the license to enter the curtilage). More precisely, the controversy seemed to be not about the status of "curtilage" but about how to define the scope of the *license* to come onto the curtilage. The very idea of curtilage in that decision mostly got a free pass. At the same time, *Jardines* marked the first time where "curtilage" was used positively—in the sense that there was found to be a trespass onto land that was curtilage. In prior cases, the Court had found that the land in question was *not* curtilage. *See* discussion *infra* Part I.

"curtilage" was a Fourth Amendment fixture.[4] Curtilage was to be treated as, indeed *was*, part of the "house" itself—and thus had a grounding in the text of the Fourth Amendment, which extends its protections only to "persons, papers, houses, and effects."[5] Justice Thomas in his concurring opinion, while questioning whether the exclusionary rule had any support in the original Fourth Amendment, did not hesitate to endorse the curtilage's "originalist" bona fides: the idea that the curtilage along with the house got heightened protection went back, Thomas said, to Blackstone, who "considered [the curtilage to be] part of the 'hous[e]' itself."[6] Even Justice Alito, in dissent, agreed that a person's "house," under the Fourth Amendment, encompassed the curtilage.[7] But the clearest indication of curtilage's special status was the striking phrase used by Justice Sotomayor for the majority, when she spoke of the "sanctity of the curtilage,"[8] a sacredness previously reserved only for the home.[9]

The problem is that much, if not all, of this is wrong, and we can start with Justice Thomas's misreading of Blackstone (and the misreading the Court had given it several times before him, and which countless lower courts have repeated).[10] Blackstone emphasized the curtilage in his discussion of burglary because it was the *buildings* that resided within the curtilage that

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4 *See Collins*, 138 S. Ct. at 1667; *Collins*, 138 S. Ct. at 1676 (Thomas, J., concurring); *Collins*, 138 S. Ct. at 1681 (Alito, J., dissenting).

5 *See Collins*, 138 S. Ct. at 1669–70 (majority opinion) (explaining the relationship between curtilage and the house with respect to the Fourth Amendment).

6 *See id.* at 1676 (Thomas, J., concurring) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *225) (discussing the meaning of curtilage at the founding). The Court has praised Blackstone as the "preeminent authority on English law for the founding generation." Alden v. Maine, 527 U.S. 706, 715 (1999). This was certainly the case for Justice Scalia. *See* District of Columbia v. Heller, 554 U.S. 570, 593–94 (2008) (citing *Alden*'s discussion of Blackstone with approval).

7 *See Collins*, 138 S. Ct. at 1681 (Alito, J., dissenting). Justice Alito, while not disagreeing with the concept of curtilage, would have adopted a more flexible balancing test in *Collins* to determine whether a Fourth Amendment violation had occurred. *See* discussion *infra* Part III.

8 This phrase was only used by courts prior to *Collins* twice, and in a less definitive way. *See* United States v. Sullivan, No. 3:09-CR-28, 2010 WL 1257720 (W.D. Ky. Mar. 26, 2010) ("Defendant argues that consensual encounters occur in public places, not 'the sanctity of the curtilage of a private residence.'"); United States v. Quintana, 594 F. Supp. 2d 1291, 1302 (M.D. Fla. 2009) ("However, the sanctity of the curtilage is not absolute.").

9 *See, e.g.*, California v. Ciraolo, 476 U.S. 207, 212 (1986) (quoting Oliver v. United States, 466 U.S. 170, 178 (1984)) (describing the "sanctity of a man's home"); Payton v. New York, 445 U.S. 573, 601 (1980) (same); Boyd v. United States, 116 U.S. 616, 630 (1886) (same).

10 *See Collins*, 138 S. Ct. at 1676 (Thomas, J., concurring) ("At the founding, curtilage was considered part of the 'hous[e]' itself."); *see, e.g.*, *Ciraolo*, 476 U.S. at 212–13 (1986) (citing Blackstone on curtilage as an "area" associated with a person's home).

mattered, and not the curtilage itself.[11] Those buildings inside of the curtilage, Blackstone said, were part of the home, not the property outside of the curtilage.[12] So curtilage was to be used to designate the buildings that were part of the home; the curtilage—the land itself—was not to be taken *as* the home. If this is the correct reading of Blackstone, as this Article argues it is, then the idea that the curtilage is part of (even obviously part) of the Fourth Amendment's protection of the "house" becomes considerably weakened, if not entirely fictional. In turning the curtilage from a *space* that designates buildings that deserve protection into its own protected *place*, the Court has falsely elevated the curtilage, giving it a meaning that extends past what the text of the Fourth Amendment can reasonably bear.[13] In fact, the contemporary meaning of curtilage given by the Court was basically invented by it in the 1980s, in the *Oliver* and *Dunn* decisions.[14] Those decisions are poorly reasoned—as well as in tension with one another[15]—and the defense of curtilage given in *Collins* only serves to obscure the questionable foundations of the Court's curtilage doctrine.[16]

But the collapse of the curtilage doctrine reveals deeper fissures in the Court's Fourth Amendment jurisprudence. For if protecting "curtilage" does not fall under the Fourth Amendment's text, neither does it find much shelter in the Court's "reasonable expectation of privacy" test.[17] Under that test, a place gets protection from the Fourth Amendment if a person *expects* it to be protected, and society is prepared to find that expectation as "reasonable."[18] The problem, however, with saying that curtilage is protected under this "reasonable expectation of privacy," or *Katz*, test is that

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11 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *225 (discussing curtilage in the context of burglary).

12 *See id.* (classifying buildings as part of the home).

13 *See infra* Part I.

14 *See* United States v. Dunn, 480 U.S. 294, 296 (1987) (holding that the area near a barn lay outside the curtilage of the house); *see also* Oliver v. United States, 466 U.S. 170, 182 n.12 (1984) (describing curtilage as "the area around the home to which the activity of home life extends.").

15 *See* Vanessa Rownaghi, *Driving into Unreasonableness: The Driveway, the Curtilage, and Reasonable Expectations of Privacy*, 11 J. GENDER SOC. POL'Y & L. 1165, 1172–73 (2003) (citing *Dunn*, 480 U.S. at 307–08 (Brennan, J., dissenting)) ("Brennan also criticized the inconsistency between the Court's decisions in *Oliver* and *Dunn*, noting that while *Oliver* refused to entertain a case-by-case analysis in ascertaining the existence of a legitimate expectation of privacy in an open field, *Dunn* adopted an ad hoc approach by insisting that the expectation of privacy in an area be evaluated pursuant to the unique factual circumstances of each case.").

16 *See* Collins v. Virginia, 138 S. Ct. 1663, 1670 (2018).

17 *See* Katz v. United States, 389 U.S. 347, 350–51 (1967) (addressing "reasonable expectation of privacy").

18 *See id.* at 361 (Harlan, J., concurring) (explaining the *Katz* test).

saying something is "curtilage" either begs the question (why do you reasonably expect privacy in *this* place, whatever you call it?) or is just a stand in for an argument that has already been made (we call this place curtilage because you can reasonably expect privacy there). In short, under the reasonable expectation of privacy test, an invocation of curtilage is either empty or redundant.[19] Curtilage can do no independent work unless we already *know* that the place is protected, but we will not know if it is protected until we can say one has a reasonable expectation of privacy in it—and of course if we know that, we do not have to use the concept of "curtilage" at all. While *Collins* and *Jardines* (and before them, *Oliver* and *Dunn*) seemed to suggest that curtilage had a *double* justification in both the Constitution's text and the new *Katz* test, in fact, it may have *no* justification at all—neither as a matter of the text nor as a matter of theory.[20]

The facts of *Collins* show well the looming problems.[21] The motorcycle at issue in *Collins* was in the driveway outside of the home—parked in what Justice Sotomayor analogized to a "carport" or "parking patio."[22] But what makes the driveway inherently part of the "curtilage"?[23] The answer is "nothing, really" but Sotomayor elides this point by referring, as Justice Scalia had before in *Jardines*, to a footnote in *Oliver*—our ordinary everyday intuitions should be enough to tell us that the driveway is part of the curtilage.[24] Many lower courts, in fact, have disagreed about driveways.[25]

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19 *See infra* Part II (discussing curtilage in terms of the reasonable expectation of privacy test).

20 *See Collins*, 138 S. Ct. at 1670 (noting that curtilage protection has long been "black letter law" and is afforded because privacy expectations are heightened); Florida v. Jardines, 569 U.S. 1, 5 (2013) (describing the Fourth Amendment and *Katz* as foundations for supporting property rights); United States v. Dunn, 480 U.S. 294, 301 (1987) (concluding that a barn area lay outside the curtilage of a house); Oliver v. United States, 466 U.S. 170, 173–74 (1984) (applying *Katz* and the Fourth Amendment); *Katz*, 389 U.S. at 359 (applying reasonable expectation of privacy to the Fourth Amendment).

21 *See Collins*, 138 S. Ct. at 1668–69 (describing the uncovering of a motorcycle).

22 *Id.* at 1675; *see also infra* Appendix, Figure 1 (showing picture of motorcycle in "curtilage" of the home in *Collins*).

23 *See* discussion *infra* Part II.

24 *See infra* Part I; *see also* Orin S. Kerr, Collins v. Virginia *and the "Conception Defining the Curtilage*," VOLOKH CONSPIRACY (May. 29, 2018, 3:44 PM), https://reason.com/2018/05/29/collins-v-virginia-and-a-thought-on-curt/ ("Recent cases suggest the concept [of curtilage] is easy and intuitive, but I wonder if that is true.").

25 *See, e.g.*, United States v. Beene, 818 F.3d 157, 162 (5th Cir. 2016) (internal citations omitted) ("Here, as the district court noted, only the driveway's proximity to the residence weighs in favor of a finding that it was part of the curtilage of the home. The driveway was open and could be observed from Greer Street. Although fences encircled part of the driveway, nothing blocked its access or obstructed its view from the street. Finally, neither Beene nor Heard took steps to protect their privacy, such as posting "no trespassing" signs. In an unpublished opinion, we held that a similar driveway was not part of the curtilage of a defendant's home; we agree with that analysis.

However, once we have made this move—defined the driveway by fiat as part of the curtilage—and take as our premise that the curtilage is "part of the home itself for Fourth Amendment purposes,"[26] the conclusion naturally follows—the invasion of a person's driveway to search the automobile is tantamount to an invasion of the home to do the same search. Indeed, Justice Sotomayor makes the point explicitly, as she has us "imagine" that the motorcycle was not parked outside the home, in the driveway, but parked *inside* the house.[27] When we do that, Sotomayor concludes, we have an easy case.[28] The officer could no more walk down the driveway to search the car than he could break down (or even open) the door of a house to do the same thing.[29] But if we get rid of the assumption that the curtilage is the house—which we should—*Collins* becomes a much harder case. That is, when we read "house" plainly as just meaning *house and its associated buildings*, it is no longer obvious that going down a person's driveway is the same as breaking into their house—a distinction Blackstone surely would have noticed.[30] Nor is it obvious that the *Katz* test offers us much help, either. It certainly does not make the case "easy," as it would require a careful accounting of why Collins had a reasonable expectation of privacy for the motorcycle parked in his driveway.[31] *Collins* turns out to be a hard case, even if the Court may have ultimately reached the correct result.

This Article has three Parts. The first Part traces the roots of the mistaken idea that curtilage is something like a *place* that deserves protection in its own

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Likewise, we hold that the driveway here was not part of the curtilage of Beene's home."). As one federal court put it:

> It is by no means certain that the entry upon the driveway [by the defendant] was contrary to the Fourth Amendment, even though there were no warrant or exceptional circumstances excusing failure to obtain one. The driveway may not have been such a place as to support a reasonable expectation of privacy on the part of the defendants.

United States v. Bustamante-Gamez, 488 F.2d 4, 7–8 (9th Cir. 1973). For an excellent, although somewhat dated, survey, see Rownaghi, *supra* note 15, at 1166 ("The collective result is a trend toward sanctioning seizures that occur as a result of warrantless police intrusion in one's driveway. Consequently, driveways are increasingly subject to police search."). The more general point is that the fact that a driveway is close to the home can only be *one* factor in favor of calling it part of the curtilage. As we shall see, Justice Sotomayor took the closeness of the driveway to the home as *decisive*. This was a mistake.

26 *Collins*, 138 S. Ct. at 1670.

27 *Id*. at 1671; *see also infra* Appendix, Figure 2 (showing a picture of a car in a living room).

28 *See Collins*, 138 S. Ct. at 1671 (confirming that an application of the relevant legal principles to a different factual scenario would be an easy case).

29 *Id.*

30 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *225. Of course, as discussed *infra* note 68, "breaking" seems to refer to "breaking into" a structure, as opposed to trespassing onto land.

31 *See infra* Part III (discussing, in this context, Justice Alito's dissent).

right rather than a *space* that designates the structures that are worthy of constitutional consideration.[32] This mistake goes back to a misreading of Blackstone, so it spends some time analyzing where Blackstone talks about curtilage in his commentaries, mostly in his chapter on burglary.[33] Part I ends with a discussion of Justice Holmes' opinion in *Hester v. United States*, which started the path back to Blackstone as a way of understanding what property was—and was not—protected under the Fourth Amendment.[34] *Hester*, however, is such a crimped and crabbed opinion, it is hard to see anything like a curtilage doctrine coming out of it (which has not stopped many courts from seeing precisely that).[35]

The second Part digs deep into the invention of curtilage as not just a space which designated what buildings were part of the home, but a separate place worthy of its own protection, a move which started in earnest with the two cases *Oliver* and *Dunn*.[36] *Oliver* was mainly an "open fields" case, which established that open fields did not have protection under the Fourth Amendment, neither as a matter of the text nor as a matter of society's "reasonable expectations of privacy."[37] *Oliver* also mentioned the curtilage by means of distinguishing "curtilage" from "open fields"—distinguishing constitutionally protected from constitutionally unprotected—but almost wholly in a negative way.[38] Curtilage was precisely the place that was not open fields—beyond that, there was no precise definition of the scope of curtilage, besides a sort of "you'll know it when you see it" commonsense appeal.[39] The Court would quickly reverse itself in *Dunn* and hold that we can isolate several factors to decide when something is curtilage.[40] But the

32 *See infra* Part I.

33 *See infra* Part I.

34 *See* Hester v. United States, 265 U.S. 57, 59 (1924) (declining to extend Fourth Amendment protection to "open fields"). Part I, *infra*, argues that this opinion has been subsequently misread, or *over*read, as articulating a conception of curtilage.

35 *See, e.g.*, United States v. Dunn, 480 U.S. 294, 300 (1987) (citing *Hester* to state curtilage "plays a part . . . in interpreting the reach of the Fourth Amendment").

36 *See id.* at 301 (holding that curtilage is *sometimes* protected under the Fourth Amendment, depending on four factors); Oliver v. United States, 466 U.S. 170, 180–81 (1984) (distinguishing curtilage, which can have Fourth Amendment protections, from open fields, which cannot).

37 *Oliver*, 466 U.S. at 177, 180.

38 *Id.* at 180 ("The distinction implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home.").

39 *See id.* (internal quotation marks omitted) ("At common law, the curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life . . . .").

40 *See* Thomas E. Curran III, Comment, *The Curtilage of* Oliver v. United States *and* United States v. Dunn*: How Far is Too Far?*, 18 GOLDEN GATE U. L. REV. 397, 404 (1988) (viewing *Dunn* as a necessary corrective to *Oliver*).

Court struggles in *Dunn* to separate curtilage from the factors that define it, and so may not advance the ball much further than what the Court said in *Oliver*—that we do not have to define curtilage because it is "easily understood."[41] It is this dodge that Justice Scalia would use in *Jardines* and Justice Sotomayor again in *Collins*.[42]

It is upon the shaky foundations of *Oliver*, *Dunn*, and *Jardines* that Justice Sotomayor rests her argument that *Collins* is an easy case, and it is her opinion and Justice Alito's dissent that are taken up by this Article's third Part.[43] Justice Sotomayor's opinion, commanding seven other votes, shows a striking victory for the concept of curtilage, and more importantly, the equivalence in privacy and "sanctity" of the curtilage with the home.[44] But the justification for granting this status to curtilage is sketchy, and so too is the means of defining curtilage—which Justice Sotomayor chalks up to "common sense."[45] Indeed, Justice Sotomayor's patchwork defense of the home inadvertently shows the Court's shifting and uncertain foundation for that category.[46] Justice Alito in his dissent is right to raise questions about the Court's decision in *Collins*, and his flexible "balancing" approach is intriguing.[47] But the options facing the Court if it rejects the simple equivalence of "the home" and "curtilage"—something Justice Alito seems unwilling to do—are stark. Either the Court has to restrict the protections of the Fourth Amendment to *only* persons, papers, houses and effects, which would mean protecting neither open fields nor curtilage, or it would have to extend the Fourth Amendment's protections beyond the home and even past the curtilage into open fields. Neither option is particularly desirable, suggesting the mess that the Court's Fourth Amendment jurisprudence is in—something that we might discern in fractured *Carpenter* opinions, but

41 *See id.* (setting out the factors that a court must consider when answering "extent-of-curtilage questions" in any given case); Oliver v. United States, 466 U.S. 170, 182 n.12 (1984).

42 *See* Collins v. Virginia, 138 S. Ct. 1663, 1671 (2018) (quoting *Oliver*, 466 U.S. at 182 n.12); Florida v. Jardines, 569 U.S. 1, 7 (2013) (same).

43 *See Collins*, 138 S. Ct. at 1671 (citing *Jardines* and *Oliver* in holding that a driveway "is properly considered curtilage.").

44 *Id.* at 1667, 1672 ("[S]earching a vehicle parked in the curtilage involves not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of the sanctity of the curtilage.").

45 *See id.* at 1671 (quotation marks omitted) (quoting *Jardines*, 569 U.S. at 7) (describing curtilage as "familiar enough that it is easily understood from our daily experience") .

46 *See generally id.* at 1668–75.

47 *See id.* at 1681, 1683 (Alito, J., dissenting) (questioning the Court's conclusion that the officer needed a warrant to search a vehicle on private property and instead advocating that "a case-specific inquiry regarding *the degree of intrusion on privacy* is entirely appropriate when the motor vehicle . . . is located on private property").

something that is also lurking not far below the surface in *Collins*.[48] The Conclusion tries to tease out the possible ways out from the Court's flawed "curtilage" doctrine.

I. THE ORIGINAL MEANING OF CURTILAGE

The urtext for the invention of curtilage as a place that deserves protection in its own right—protection to the same degree as the home because it is in fact part of the home—is from Blackstone's discussion of the curtilage in his chapter on "Burglary" in the *Commentaries*. The quote (which is given more fully in Section A) says that the home protects not only the literal four walls of the home, but also "all it's [sic] branches and appurtenants, if within the curtilage or homestall."[49] It is this quotation that is referenced in *Oliver*, which started the conception of curtilage as a place that might deserve Fourth Amendment protection.[50] It is repeated again by Justice Scalia in *Jardines* and most recently by Justice Thomas in his concurring opinion in *Collins*.[51] The recent use by Justice Thomas is especially important, given the context in which the quotation appears. Justice Thomas's concurring opinion is an originalist brief *par excellence* because it is about how the original meaning of the Fourth Amendment does not support the modern use of the exclusionary rule.[52] At the same time, however, Justice Thomas does not dispute the accepted wisdom that the original meaning of "home" also included the curtilage—and he has the passage in Blackstone's *Commentaries* to back him up.[53] "At the founding," Justice Thomas writes, "the curtilage was part of the house itself."[54] In other words, while the Founders would not accept the remedy to the constitutional violation adopted by the Court in *Collins* (i.e., exclusion of evidence that was the product of an unconstitutional search), they would accept that there was

48 *See generally* Carpenter v. United States, 138 S. Ct. 2206 (2018) (producing a majority opinion and four separate dissents); Collins v. Virginia, 138 S. Ct. 1663 (2018).

49 4 WILLIAM BLACKSTONE, COMMENTARIES *225.

50 Oliver v. United States, 466 U.S. 170, 180 (1984) (citing Blackstone) ("[T]he common law distinguished 'open fields' from the 'curtilage,' the land immediately surrounding and associated with the home."). *Hester* also cited Blackstone, but as explained *infra* Part II, Holmes did not need to rely on "curtilage" to decide that case, and in fact, did not even use the word.

51 Florida v. Jardines, 569 U.S. 1, 6–7 (2013) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *225); Collins v. Virginia, 138 S. Ct. 1663, 1676 (2018) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *225).

52 *See, e.g.*, *Collins*, 138 S. Ct. at 1676 (Thomas, J., concurring) ("The Founders would not have understood the logic of the exclusionary rule either.").

53 *See id.*

54 *Id.* (internal quotation marks and alteration omitted) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *225).

a constitutional violation, because the motorcycle was in the curtilage, and the curtilage is protected by the Fourth Amendment as part of the "house." But is this understanding of curtilage correct? In fact, it is not, and so the idea of curtilage as a separate and protected "space" under the Fourth Amendment is a bit of a myth, started in the 1980s, but imagined back into a fictional Blackstonian past.

A. Blackstone and the "Curtilage"

We should start with the passage in question that has been quoted repeatedly by the Court. It arises in Blackstone's *Commentaries* in an extended discussion of burglary, an "offense against the habitation." Here is the relevant quotation, which winds up to a conclusion regarding the home and the "curtilage":

> And, therefore, we may safely conclude, that the requisite of it's [sic] being *domus mansionalis* is only in the burglary of a private house; which is the most frequent, and in which it is indispensably necessary to form it's [sic] guilt, that it must be in a mansion or dwelling house. For no distant barn, warehouse, or the like, are under the same privileges, nor looked upon as a man's castle of defence: nor is a breaking open of houses wherein no man resides, and which therefore for the time being are not mansion-houses, attended with the same circumstances of midnight terror. A house however, wherein a man sometimes resides, and which the owner hath only left for a short season, *animo revertendi* [intending to return], is the object of burglary; though no one be in it, at the time of the fact committed. *And if the barn, stable, or warehouse be parcel of the mansionhouse, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all it's [sic] branches and appurtenants, if within the curtilage or homestall*.[55]

There are a few points we should note right away about the quotation, and then we need to back up for context. The first thing to notice is that Blackstone is clearly talking about *buildings* in the run up to his invocation of "curtilage" and "homestall."[56] He is talking about barns, stables, and warehouses. His question is whether these can be considered part of the "mansionhouse" if they are not in fact under the same roof as the mansionhouse or connected to it.[57] The second thing we should point out is the relationship of these buildings to the curtilage. What the curtilage does, according to the passage, is to designate certain areas of a person's property

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55 4 WILLIAM BLACKSTONE, COMMENTARIES *225 (emphasis added).

56 *Id.*

57 *See id.* (questioning whether barns, stables, and stables are part of the mansionhouse); *see also* MATTHEW HALE, 1 HISTORIA PLACITORUM CORONÆ: THE HISTORY OF THE PLEAS OF THE CROWN 558 (1736) ("[O]ut-houses, that are parcel thereof, as barn, stable, cow-houses, dairy-houses, if they are parcel of the messuage, . . . [can be subject to] burglary . . . .").

within which buildings will not be considered separate from the house, but as in fact part of the house.

As this Article will term it, this is a conception of the curtilage as a *space* rather than a *place* in its own right. In the context of Blackstone's interests in the passage, the curtilage is important because it is by means of the curtilage that we can pick out the buildings that are rightly considered as branches of the mansionhouse, and not as separate from it.[58] This is made clear from an earlier remark of Blackstone's, when he says that "[f]or no distant barn, warehouse, or the like, are under the same privileges, nor looked upon as a man's castle of defence."[59] The buildings within the curtilage are important in comparison to those buildings that are *not* in the curtilage—those buildings that are "distant." Distant barns and warehouses are not part of the home, even though they are buildings. It is only the buildings *within* the curtilage that get to be counted as part of the house. That is the importance—and the function—of the curtilage. It tells us which buildings are part of the house, but it does not tell us what *land* is part of the home. It tells us which *buildings* are part of the home. [60]

It follows quite naturally from this that *the curtilage*—i.e., the land surrounding the house—*is not itself part of the house*. This seems clear from the passage.[61] It becomes even clearer in the context of the chapter, which deals with crimes against habitation. In defining those crimes (burglary, arson, and the like) it is important to answer the prior question of what counts as a

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58 As one state court has put this understanding: "Although the subject of burglary at common law extended to buildings within the curtilage of the dwelling home, the curtilage itself was not protected apart from its relationship to a building. Only buildings in the curtilage of the dwelling home fell within the scope of the burglary offense." State v. Pace, 602 N.W.2d 764, 769 (Iowa 1999) (internal citations omitted).

59 4 WILLIAM BLACKSTONE, COMMENTARIES *225.

60 The idea that the house may be separated in this way comes from a time when one's kitchen or bathroom in fact might be in a different building—rather than a different room—than one's living or sleeping areas. *See* Catherine Hancock, *Justice Powell's Garden: The* Ciraolo *Dissent and Fourth Amendment Protection for Curtilage-Home Privacy*, 44 SAN DIEGO L. REV. 551, 566–67 (2007) ("Those activities continued in a different form, after the passing of the era when 'the kitchen, the laundry, the springhouse, the woodshed, and most particularly the "outhouse"' were not to be found 'within the four walls' of houses."). Brendan Peters, *Fourth Amendment Yard Work: Curtilage's Mow-Line Rule*, 56 STAN. L. REV. 943, 952 (2004) ("At common law, the curtilage concept was a boundary within which structures were granted the same protection under the law of burglary as afforded to the house itself."); *id.* at 952 n.56 (collecting cases making the same point).

61 Note also how "branches and appurtenants" *refer back* to the "buildings" in the curtilage and not to the curtilage (and in this context, is something *attached* to the building). Further, the logic of the passage shows how "branches and appurtenants" could not be part of the *curtilage*, for they are specified in the passage as *within* the curtilage rather than the curtilage itself. For more on appurtenants, and a somewhat contrary view on the matter, see *supra* note 58.

person's house. We need this in order to tell when we have something like a burglary, as opposed to a trespass or a stealing. Or we may need it to tell when the crime implicates not just the home but also other places, as when Blackstone says that arson could be the burning of a home, but also the burning of a barn full of corn, even if it is not part of the home, or when burglary could also be breaking into a church even though a church need not be someone's home.[62] So it is no surprise when Blackstone again defines "house" when he discusses burglary, and repeats that barns and stables and dairy houses that adjoin a house can be looked upon as "branches" thereof but not when these same buildings are "distant" from the home.[63] The point could not be clearer—if the *buildings* are close to the home, they are part of the home. It is the feature of *being a building close to the home* that extends the boundary of the home, not merely being close to the home. The idea that the land surrounding the home is also the home does not find any support—*none*—in these passages.[64] It is an invention borne of a misreading of Blackstone on burglary.[65]

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62 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *221 ("Not only the bare dwelling house, but all outhouses that are parcel thereof, though not contiguous thereto, nor under the same roof, as barns and stables, may be the subject of arson."). Context here suggests that even if the barn was *not* within the curtilage, this would still be arson. The point is that arson extends to buildings that are not the house, and are not even within the curtilage of the house.

63 *Id.* at *225.

64 Nor, for that matter, does it find support in any other older sources that build on Blackstone:

> Many cases may and do arise, in which it can be affirmed, as matter of law, that a given house or structure is or is not within the curtilage. Curtilage usually includes "the yard, or garden, or field, which is near to, and used in connection with, the dwelling." And Bish., quoting from ancient authors, says: "The privy, barn, stable, cow-houses, dairy-houses, if they are parcel of the messuage, though they are not under the same roof, or joining or contiguous to it," are included within the curtilage.

Cook v. State, 3 So. 849, 850 (Ala. 1888) (internal citations omitted).

65 *Cf.* Laura L. Krakovec, *Fourth Amendment—The Constitutionality of Warrantless Aerial Surveillance*, 77 J. CRIM. L. & CRIMINOLOGY 602, 607 (1986) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *225) ("The common law views the curtilage as part of the house."). To the extent that Blackstone is here summarizing the common law, it is fair to say as well that this interpretation also involves a misreading of the common law. A court opinion from the 1980s also put this point well, in rehearsing the common law history:

> The curtilage of a dwelling house is a space necessary and convenient, habitually used for family purposes and the carrying on of domestic employment; the yard, garden or field which is near to and used in connection with the dwelling. . . . [I]n England the curtilage seems to have included only the buildings within the inner fence or yard, because there, in early times, for defense, the custom was to enclose such place with a substantial wall. . . . [I]n this country, however, such walls or fences, in many cases, do not exist, so that with us the curtilage includes the cluster of buildings constituting the habitation or dwelling place, whether enclosed with an inner fence or not.

Wellford v. Commonwealth, 315 S.E.2d 235, 238 (Va. 1984) (citations omitted) (quoting Bare v. Commonwealth, 94 S.E. 168, 172 (Va. 1917)).

Nor is there any help to be found for the idea of curtilage as a special *place* in the law of trespass. In Blackstone's *Commentaries*, trespass onto land is just that—trespass onto land.[66] It does not matter if the land is close to or far from the person's house. The action against the trespasser is the same.[67] As we might put it (in a way that Blackstone could, but does not put it), a trespass against open fields amounts to the same as if it were a trespass against a person's curtilage. Of course, a trespass into a building of a person's house could be much more, depending on the facts. It could also be a burglary.[68] But a trespass onto a man's curtilage *only* cannot be a burglary, even if it is for the purpose of committing felony at nighttime because the curtilage is not the house, and it is not even part of the house. For Blackstone, the only things that can be part of the house are buildings, or more precisely, buildings within the curtilage.[69] Curtilage, again, has only a derivative importance for Blackstone, as the relevant space for buildings that can be considered part of the house.[70]

All of this makes it odd for Blackstone to be relied on for the proposition that the curtilage is part of the house. The statement used to support that claim plainly does not say that. The focus at the common law was not on *land* but on the *buildings* on the land.[71] Of course, it might be possible to

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66 *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *209 ("Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close . . . ."); *see also id.* ("[Trespass] signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property.").

67 Nor, it seems, did the right to self-defense mean no duty to retreat from the curtilage, as opposed to the buildings in the curtilage (i.e., those buildings that Blackstone would call part of the "house"). *See* People v. Riddle, 649 N.W.2d 30, 43 (Mich. 2002) (internal citations omitted) ("It is unknown whether the English common law applied the castle doctrine—which, as we have noted, was relevant only to the voluntary participant in a nondeadly encounter—to areas beyond the dwelling. As noted by Professors Perkins and Boyce, 'the scope of [the] special privilege granted to one so far at fault might have been limited to the actual building [but this] is mere speculation.' Because the only indication we have of the castle doctrine as it applied in Michigan at the time of the codification of our murder statute is that it applied '*in the dwelling*,' we lack the authority to now extend this rule to areas beyond 'the dwelling' itself.").

68 Some indirect support that the founding generation saw "house" as being applicable only to buildings can be found in the idea that the evil the Fourth Amendment guarded against was not merely trespass but a "breaking" into the home. *See generally* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 642–50 (1999) (describing how the Fourth Amendment was meant to guard against break-ins rather than merely trespasses).

69 4 WILLIAM BLACKSTONE, COMMENTARIES *225.

70 *Id.*

71 As in the following state court case from Kentucky:

> There is a diversity of decision as to what does, and what does not, in law, constitute a part of a dwelling-house. Some cases include all within the curtilage, and this, according to Blackstone, appears to have been the common-law rule; while others are made to turn upon the use. It has been said that burglary may be committed by breaking into a dairy

update Blackstone, and still get him right, as one federal court did when it considered the possibility that an "adjoining garage" or a "gazebo where the kids keep their pool toys" might be protected as part of the "dwelling house."[72] These, of course, are structures that might be within the curtilage of the house, and so—under Blackstone—be rightly grouped as part of the "house."

It follows that if the Court is using Blackstone as a common-law means of expanding "house" in the Fourth Amendment then there is a considerable obstacle—Blackstone does not say what the Court has taken him to be saying, and the Court has not really offered any other evidence in opinions to defend its conception of curtilage as house *besides* Blackstone. But this may not be fatal to those who would find protection for the "curtilage" in the Fourth Amendment, and so we should canvass that possibility briefly now, *viz.*, that the Fourth Amendment also protects a person's *effects*, and the curtilage could be one of a person's effects.[73] This line of argument does not appear that promising, however.

A recent article by Maureen Brady has suggested that the best reading of the original meaning of "effects" confines it to personal property, and not to real property.[74] The Court has also rejected a "real property" interpretation of "effects" interpretation in *Oliver*, limiting effects to only one's personal effects.[75] And one can see, perhaps, why the Court did so, especially in an opinion that was at pains to distinguish the protected curtilage from other property that is not protected. If "effects" is to be interpreted broadly as to include the *real* property one owns, i.e., your land, then we can no longer make a distinction between property that one owns that is close to one's

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> or laundry, standing near enough to the dwelling-house to be used as appurtenant to it, or into such outbuildings as are necessary to it as a dwelling. Also by breaking into a smoke-house opening into the yard of the dwelling-house, and used for its ordinary purposes. And cases are to be found holding that if an outhouse be so near the dwelling proper that it is used with it as appurtenant to it, although not within the same inclosure, even, yet burglary may be committed in it.

Mitchell v. Commonwealth, 11 S.W. 209, 210 (Ky. 1889) (internal citations omitted).

72 United States v. Johnson, 256 F.3d 895, 911 (9th Cir. 2001). It is not clear, however, that the inclusion of a "yard within the white picket fence" is something Blackstone would have gone along with. *See id.*

73 *See* William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1886 (2016) (questioning whether a limited reading of "effects" is "interpretively sound").

74 *See* Maureen E. Brady, *The Lost 'Effects' of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 985 & n.174 (2016) (citing early sources which equated "effects" with personal property).

75 Oliver v. United States, 466 U.S. 170, 176–77 (1984). This point is reconsidered in the Conclusion of this Article.

house (the curtilage) and property that is far away (open fields). In other words, if the "home"—now with the correct reading of home as meaning only the home and buildings nearby—can seem to narrow, opening up "effects" to mean all owned real property may seem too broad, too expansive of the Fourth Amendment's protections. It would mean that any trespass onto land to seek information could potentially be a "search." This may be an appealing option, but it is not one the Court (including its self-identified originalists) has seemed eager to embrace. The Court has instead chosen to rest its defense of the idea of curtilage, and the idea that the curtilage *is* the house or should be protected in the same way as the house, on its misreading of Blackstone.[76]

B. Fictional "Curtilage": Holmes and Hester

It is of course possible that the "curtilage" can find a foundation outside of the text of the Fourth Amendment and its itemized list, and in the next Part we will turn to this possibility. Before that, however, we should note the opinion by Justice Holmes in *Hester*, which involves the first invocation of the now-famous Blackstone passage, although Holmes does not mention the word "curtilage"—nor even imply it.[77] But Holmes does not use Blackstone the way the modern Supreme Court—and the Supreme Court of the 1980s—used it.[78] In fact, he used it in a way consistent with what this Article takes to be the *correct* reading of Blackstone. At issue in *Hester* was whether revenue officers committed an unlawful, warrantless search when they seized evidence (a bottle and a jug) of moonshine whisky manufacturing outside of Hester's house.[79] Holmes seems to offer several overlapping justifications for why this was not an unlawful search, "even if there had been a trespass" onto

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76 It is the rare court case that tries to correct this misreading of Blackstone, although there are some, as here: "Thus, although the common law unquestionably recognized the concept of 'curtilage,' it did so to enlarge the definition of a dwelling to encompass nearby structures used in conjunction with the dwelling, so that the invasion of any of them could constitute burglary." State v. Dixson, 766 P.2d 1015, 1023 (Or. 1988) (internal citations omitted). *Dixson* also criticizes Holmes on the curtilage, *id.* at 1022, but here the court may go too far: Holmes does not use the idea of curtilage, and, as argued *infra*, he had no need to do so.

77 Hester v. United States, 265 U.S. 57 (1924); *see also* Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1, 7 (1986) (discussing the breadth of the Fourth Amendment argument made in *Hester*). In general, I agree with Stephen Saltzburg when he writes "an examination of *Hester* reveals an opinion that is confined to specific facts and that hardly addresses the extent to which the fourth amendment covers real property." *Id.*

78 *See Hester*, 265 U.S. at 57 (holding that the Fourth Amendment does not extend to open fields).

79 *Id.* at 58.

private property (in this case, the home of Hester's father, where Hester also lived).[80] He first claims that the bottle and the jug were abandoned, so there could be no unlawful seizure of what was abandoned.[81] Holmes then goes on to say, seemingly apropos of nothing, that the revenue officers found no relevant incriminating evidence when they did briefly enter the house, so "it is immaterial to discuss that."[82] We at last get to Holmes' use of Blackstone, to rebut what Holmes says is the "only shadow of a ground for bringing up the case" that this was an unlawful search, viz., that the "examination of the vessels took place upon Hester's father's land."[83] But Holmes in response says "it is enough" to observe that the Fourth Amendment only protects people in their persons, houses, papers and effects, and this protection does not extend to open fields.[84] The distinction between the home and open fields, Holmes says, "is as old as the common law."[85] In support of this, he cites to Blackstone's *Commentaries*, including the page cited repeatedly by the modern Court (and which was quoted above).

It is important to emphasize what Holmes does not say here; he does *not* say that there is a distinction between land that is part of the curtilage and land that is part of open fields.[86] He does not even use the word "curtilage" in his opinion. Moreover, what is striking to note is that the actions of the revenue officers in seizing and searching the bottle and jug was done near the house, *and quite possibly within what Blackstone would call the home's curtilage*.[87] In terms that the Court would use in *Jardines*, the officers may have

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80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.* at 59.

84 *Id.*

85 *Id.*

86 *See id.* (addressing specific language that Justice Holmes leaves out of his opinion).

87 *See id.* at 58. To read *Hester* as creating the doctrine of curtilage requires a lot of machinations, as in this passage:

> While the Court's discussion of curtilage in *Hester* is implicit, it is significant. The Court states that the only "shadow" of a claim Hester has is that the search may have taken place on his father's land, suggesting that such land (or curtilage) would receive some level of Fourth Amendment protection. The Court then states that no Fourth Amendment protection is given to open fields, dismissing the idea that the jugs were within the curtilage of Hester's father's land, and recounts the "old" difference between "open fields" and "the home." While at first the Court uses the phrase "father's land" to describe this suggested protected space, it switches to the word "home" in the conclusion of its opinion. This substitution of "father's land" for "home" suggests the Court viewed the two as interchangeable and equal.

Amelia L. Diedrich, Comment, *Secure in Their Yards? Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment*, 39 HASTINGS CONST. L.Q. 297, 302 (2011).

committed a "trespass onto the curtilage."[88] But Holmes takes no notice of this—or does not seem to care whether the officers went into an area immediately adjoining the home.[89] Holmes does not, to put it lightly, seem interested in expounding on the distinction between curtilage and open fields, nor how to measure when open fields turn into curtilage.[90] Holmes in *Hester* only explicitly cites two things at play in the case—the home, which the officers did not enter into, and open fields, which are not protected by the Fourth Amendment.[91] Holmes says nothing about the "curtilage," and indeed it does no work in his opinion.[92] From the text of the opinion itself, the best we can infer is that either Holmes thinks only the home matters and there is no protection for the curtilage of the home, or Holmes believed that whatever happened in *Hester* happened in open fields, and so we do not need to say anything about the curtilage because it's simply not in play given the facts.[93] Although Holmes cites to a place where Blackstone mentions it, this is incidental to his larger point, viz., that *open fields* are not protected, whether or not curtilage even exists.[94] Indeed, what is most salient to Holmes in *Hester*

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88 The use of curtilage and trespass in *Jardines* is discussed *infra* Part III.B.

89 *See* Hester v. United States, 265 U.S. 57, 58–59 (1924) (omitting curtilage from the discussion).

90 As Charles Rogers notes, there seem to be many foundations for Holmes's decision in *Hester*, only one of which relies on the idea of curtilage. Holmes may have based his decision on, *inter alia*, the fact that the land was not owned by Hester but by his father; that the property was abandoned; and the land was not fenced in. *See* Charles H. Rogers, *The Fourth Amendment and Evidence Obtained by a Government Agent's Trespass*, 42 NEB. L. REV. 166, 170–71 (1962).

91 *See Hester*, 265 U.S. at 58 (concluding that open fields are not protected).

92 *See id.*

93 Courts seem to have exaggerated (or simply imagined) the role curtilage plays in *Hester*. *See, e.g.*, DeMontmorency v. State, 401 So. 2d 858, 860 (Fla. Dist. Ct. App. 1981) ("These cases and the authorities upon which they rely seem without question to extend the legitimate expectation of privacy to the home and the surrounding area coming within the definition of 'curtilage.' *Hester v. United States*, *supra*, clearly distinguishes 'open fields' from the home and its 'curtilage' . . . ."), *approved*, 464 So. 2d 1201 (Fla. 1985); *see also* Hearn v. Sec'y, Dep't of Corr., No. 307-CV-320-J-33MCR, 2010 WL 1462365, at *7 (M.D. Fla. Apr. 13, 2010) (internal citations omitted) ("The concept of curtilage plays a part in determining the reach of the Fourth Amendment's protections. The Supreme Court used the concept of curtilage in *Hester v. United States* to distinguish between the area outside a person's house which the Fourth Amendment protects, and the open fields, which are afforded no Fourth Amendment protection. In general, the curtilage is defined as the area around the home which 'harbors those intimate activities associated with domestic life and the privacies of the home.'"), *aff'd sub nom.* Hearn v. Fla., 410 F. App'x 268 (11th Cir. 2011). Again, *Hester* does not even use the word "curtilage," much less define it.

94 *See Hester*, 265 U.S. at 58–59 (discussing the lack of protection for open fields). Saltzburg again has it about right when he writes the following: "[I]t is possible that all the Court intended to say was that abandoned property found in an open field may be seized. In short, it is difficult to determine what the Supreme Court actually intended to say in *Hester* about open fields and the fourth amendment." *See* Saltzburg, *supra* note 77, at 8–9.

is the actual physical home (the "house"), which plays no real role.[95] Beyond the four walls of the home, it is unclear whether *any other* land gets protected for Holmes.

The point is this: Holmes at best says nothing about whether curtilage is protected as part of the home, or whether the space of the curtilage is to be treated as "open fields."[96] Holmes only distinguishes between the home and open fields. In other words, *Holmes does not use—and does not need to use—anything like "curtilage" in deciding the case*. Holmes did not invent the modern idea of curtilage, and in fact, he did not even come close. The development of the concept of curtilage would have to wait nearly sixty years—and it would rely in great part on a misreading not only of Blackstone, but now also of Holmes, who would be falsely given the credit for employing the concept of "curtilage."[97]

II. THE INVENTION OF CURTILAGE

What is striking about the revival of the use of the common-law categories of "curtilage" and "open fields" by the 1980s Supreme Court is that, between *Hester* and *Oliver*, the Supreme Court moved to the more expansive *Katz* test for defining privacy in the Fourth Amendment context. *Katz* was far from a textualist, original-meaning decision.[98] *Katz* had the feeling of moving outside of the constraints of the text, and beyond rigid categories of where and what was protected toward a more flexible standard.[99] *Katz* meant that

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95 *See* Fernand N. Dutile, *Some Observations on the Supreme Court's Use of Property Concepts in Resolving Fourth Amendment Problems*, 21 CATH. U. L. REV. 1, 4–5 (1971) (criticizing Holmes on this score and suggesting that trespass onto land should have done more work in the opinion); *see id.* at 5 ("There is no adequate discussion [in *Hester*] of *why* a trespass on land by federal officers might not constitute the same kind of violation of one's security under the amendment as would a trespass which involves a wall of some sort.").

96 *See id.* Of course, Blackstone *also* says nothing about "open fields."

97 Ironically, in a case decided in 1921, the Court did correctly use the concept of curtilage, when it found a constitutional violation of a "defendant's house and store *within his curtilage*." Amos v. United States, 255 U.S. 313, 314 (1921). Curtilage here means clearly a space where buildings are, and not a place in its own right. Moreover, the store being within the curtilage, it would count as part of the home (as the Court implicitly concluded it was). *Id.* at 314–15.

98 As Justice Thomas said in *Carpenter*, "[t]he *Katz* test has no basis in the text or history of the Fourth Amendment." Carpenter v. United States, 138 S. Ct. 2206, 2236 (2018) (Thomas, J., dissenting); *see also id.* at 2338. ("The most glaring problem with this test is that it has 'no plausible foundation in the text of the Fourth Amendment.'"); *see also* Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (dismissing the *Katz* test as "self-indulgent," "unhelpful," and with "no plausible foundation in the text of the Fourth Amendment").

99 *See* Katz v. United States, 389 U.S. 347, 353 (1967) ("[T]he Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach

the Fourth Amendment would "travel"—and especially travel outside of the home.[100] We did not need to look to the text to define privacy, and be limited to what the text said was protected—we could look, more widely, to personal and societal expectations of privacy. Privacy could be found in a phone booth, or in a bathroom.[101] It seemed to follow, then, that we did not need to resort to common law concepts like the curtilage, or for that matter, open fields. We would have to *look and see* what society thought about these places. If society reasonably expected privacy in the curtilage, it would be protected—it did not need the imprimatur of Blackstone to get that protection (at best, Blackstone would be redundant, as just confirming the expectations we already knew we had).[102] Even under the *Katz* test, however, the home remained special, but now for different, less formal, and maybe more compelling reasons. The home was special because it was where we could most expect privacy and where society was most willing to recognize it, and not (or not only) because it was in the text or that Blackstone thought the home was important.

A. The Making of the Modern Myth of Curtilage: Oliver

Given the non-textualist and non-originalist emphasis of *Katz*, it is somewhat strange to see the Court in *Oliver* relying heavily on what it takes the common law meaning of "open fields" and "curtilage" to be and focusing on what the text protects, rather than what our expectations of privacy are.[103] One can make some sense of it as trying to reconcile the two approaches and see how they overlap and reinforce one another. The way it does so, however, is also strange, as it has to go to great lengths to read protection for

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of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.").

100 As the majority opinion famously put it, "the Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351.

101 *See* David Alan Sklansky, *"One Train May Hide Another":* Katz, *Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U.C. DAVIS L. REV. 875 (2008) (discussing the origins of the *Katz* test as potentially being in a series of cases involving police spying into bathrooms).

102 As appeared to have been the consensus view prior to *Oliver*:

> The view of most courts appears to have been that *Katz* rendered the open fields doctrine obsolete, perhaps through redundancy: if the ultimate criterion of fourth amendment analysis is the existence of a reasonable expectation of privacy, finding that a search or seizure had been carried out in the "open field" could be considered equivalent to the conclusion that the area was so far removed from a residence (in either distance or purpose) that no legitimate expectation of privacy could attach.

Curran, *supra* note 40, at 402.

103 *See* Oliver v. United States, 466 U.S. 170, 176, 180–81, 183–84 (1984) (discussing common law interpretations of open fields).

the curtilage into *Hester* and into Blackstone. And what is most interesting for our purposes, is that *Oliver* brings "curtilage" into the lexicon of the Fourth Amendment without needing to.[104] In *Oliver*, the Court holds that the property involved in the two consolidated cases (*Oliver* and *Thornton*) was in fact "open fields," and so the defendants had no protection at all—both because open fields are not textually protected places under the Fourth Amendment and because society is not prepared to recognize a reasonable expectation of privacy in open fields.[105] Just as in *Hester*, curtilage need not be involved at all—the Court needed only to decide that the police activity did not take place in the home but instead in "open fields."[106] The opinion in *Oliver* takes the opportunity nonetheless to invent the modern idea of curtilage as its own constitutionally protected *place* and to give it a basis in the Fourth Amendment.[107]

The invention took two moves to complete. The first move was to show how the textualist approach and the reasonable expectation of privacy approach are not really at odds with one another when it comes to open fields. Open fields are not in the text, so they are not protected, nor can it be said that we have a reasonable expectation of privacy in open fields under the more generous *Katz* test. In other words, the failure of the text to protect open fields is not a problem from the standpoint of our expectations of privacy—we do not need the protection to be in the text, because it is not something we would expect to have private. But it is in the process of making this point that the Court began to subtly sneak in the idea of curtilage. Citing *Hester*, the Court reaffirmed the idea that we "may not legitimately demand privacy for activities conducted out of doors in fields, *except in the area immediately surrounding the home*."[108] *Hester*, of course, said no such thing about the area surrounding the home being protected, as we have seen.[109] *Hester* at most stood for the proposition that the home is different from open fields—that the home is protected and open fields are not.[110]

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104 *See id.*

105 *See id.*

106 As the Court admits in a footnote, "Neither petitioner Oliver nor respondent Thornton has contended that the property searched was within the curtilage." *Id.* at 180 n.11.

107 *See* Brendan Peters, *Fourth Amendment Yard Work: Curtilage's Mow-Line Rule*, 56 STAN. L. REV. 943, 953–54 (2004) ("[N]ot until dictum in *Oliver v. United States* was there any suggestion that the curtilage yard was included within the Fourth Amendment's purview.").

108 *Oliver*, 466 U.S. at 178 (emphasis added); Hester v. United States, 265 U.S. 57, 59 (1924) (holding that Fourth Amendment protections do not extend to open fields).

109 *See Hester*, 265 U.S. at 59.

110 *See id.*

This brings us to the Court's second move, which again relied on a misreading of *Hester*. Justice Holmes in *Hester*, the Court said, observed that the common law distinguished open fields from curtilage, or the land "immediately surrounding and associated with the home."[111] This again reads way too much into what Holmes did, and what he needed to do to decide *Hester*. Holmes did of course cite Blackstone, and Blackstone made the distinction between open fields and curtilage, but Holmes did not bring attention to it in his opinion—and as we have seen, he did not even have to use the idea of curtilage at all in reaching his decision.[112] But this is not all the Court misconstrued. Blackstone's distinction between the home and the curtilage, the Court wrote, "implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home."[113] But Blackstone did not say this. What the curtilage implies—in fact, what it *does*—is tell us what buildings are part of the house. A better reading of what Blackstone "implies" is that the buildings in the curtilage are part of the home, and so the Fourth Amendment protections attach to *them* as well as the "mansionhouse."[114] Still, these combined misreadings—of Holmes and Blackstone—are what formally introduced "curtilage" into the Fourth Amendment. What is worse, the Court suggested that curtilage has a double pedigree—it is supported by the text (because the home includes the curtilage) and by our reasonable expectations (because we use the curtilage for intimate activities associated with the home).

In fact, on closer inspection, both justifications fall flat, as the dissent ably sets out. For one, "curtilage" just like "open fields" is not mentioned in the Fourth Amendment—and it is neither a person's house nor one of his effects.[115] As a result, as the dissent pointedly remarks, "the Court's reading of the plain language of the Fourth Amendment is incapable of explaining even its own holding in this case."[116] The best basis for the curtilage would be if it was in fact part of the house, but the Court relies on *Hester* for the idea

111 *See Oliver*, 466 U.S. at 180 (citing *Hester*, 265 U.S. at 59).

112 *See Hester*, 265 U.S. at 59 (explaining that "it is enough to say that . . . the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields").

113 *Oliver*, 466 U.S. at 180.

114 4 WILLIAM BLACKSTONE, COMMENTARIES *225.

115 *See Oliver*, 466 U.S. at 185–86 (Marshall, J., dissenting) (addressing the majority's contention that real property outside of the curtilage is not protected under the Fourth Amendment). The Conclusion reconsiders the "effects" point, *infra*.

116 *Id.* at 186.

of "curtilage"—which, as we have seen, is not in *Hester* at all.[117] The other option is to make the curtilage part of the "effects" protected by the Fourth Amendment, but the majority also rejects this option.[118] That leaves the best defense of curtilage to be in the expectations of privacy we bring to it. Even granting that this may be the case with curtilage, it does not explain why open fields should never come with any reasonable expectations of privacy, the dissent says.[119] The problem is, as the dissent argues, "curtilage" and "open fields" under the *Katz* test are just labels—because they are not in the text, they do not get automatic protection, so if they want that protection, they have to *earn* it.[120] We have to say, in other words, why curtilage always gets protected under the Fourth Amendment, but *open fields* never do. It cannot be—under the *Katz* test—that "open fields" deserve no privacy protection, because that just begs the question: why are you calling these fields "open" rather than "curtilage"?[121] The same thing goes with curtilage—you cannot say this land deserves protection because it is curtilage. We have to ask the question, why are we calling this land curtilage in the first place?

The Court in *Oliver* by and large dodges the question of how curtilage is defined, saying that it is a "familiar one easily understood from our daily experience."[122] This is a dodge the Court would use repeatedly in the years to come. But it is a dodge the Court cannot use if it is defining curtilage in terms of expectations of privacy, because again, we cannot say that "this land is protected because it is curtilage" because that is the *conclusion* of the argument, not its starting point.[123] The *Katz* reasonable expectation of

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117 *See id.* at 176–77 (majority opinion) (explaining that "the term 'effects' is less inclusive than 'property' and cannot be said to encompass open fields").

118 *See id.*

119 *See id.* at 186 (Marshall, J., dissenting) (critiquing the majority's incomplete analysis of Fourth Amendment protection).

120 *See id.* at 187–88 (noting that something is not covered by the Fourth Amendment merely because it is a house or effect, but a claimant must show a reasonable expectation of privacy that has been violated).

121 *See* Saltzburg, *supra* note 77, at 12 ("[T]he language of *Katz* certainly does not suggest that all fields (or all areas of any sort) are completely outside the reach of the fourth amendment. Instead, the language of *Katz* seems to suggest that the focus is on whether an individual seeks to keep private and unexposed the things that are his or hers.").

122 *Oliver*, 466 U.S. at 182 n.12 (majority opinion).

123 *See* United States v. Arboleda, 633 F.2d 985, 992 (2d Cir. 1980) ("Arboleda likewise is not helped by invocation of the hoary concept of 'curtilage[.'] Terming a particular area curtilage expresses a conclusion; it does not advance Fourth Amendment analysis. The relevant question is the one surveyed above, whether the defendant has a legitimate expectation of privacy in the area."). In other words, under *Katz*, saying a piece of land is protected because it is curtilage is tantamount to saying, "we have a reasonable expectation of privacy in this land because we have a reasonable expectation of privacy in it."

privacy test protects places that people have a reasonable expectation of privacy in, and saying that a curtilage is protected because people have a reasonable expectation of privacy in it replaces argument with a label. Getting protection under the *Katz* test means actually going through that test and saying *why* this piece of land deserves protection *qua* curtilage, rather than saying that this is curtilage—because we know it when we see it—and therefore deserves protection. On the *Katz* test, the label "curtilage" should have no independent force. Nor can we get around that by saying that we "easily understand" what curtilage is. We have to say why our expectations of privacy in that place which we "easily understand" to be curtilage are *reasonable*.

B. Doubling Down: Dunn *and Beyond*

The emptiness of the label "curtilage" is a point that the Court slowly came to recognize in *Dunn*, and which it worked to remedy by holding that "curtilage questions should be resolved with particular reference" to certain factors which—it believed—showed that it was reasonable to expect privacy there, in the "curtilage" of a home.[124] Relying on the mistaken reading of *Hester* given in *Oliver*, *Dunn* said that the Court had recognized that "the Fourth Amendment protects the curtilage of a house" but *Dunn* went on to say that "the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home."[125] There is no awareness here that curtilage is not an "area" that deserves protection in its own right, but only *picks out those* buildings—including barns—that can be included as part of the home.[126]

But it is in setting out a multi-factor test for what "land" gets Fourth Amendment protection as part of the "home" that the emptiness of curtilage is laid bare. If curtilage is determined by factors related to the reasonable expectation of privacy in the area then we do not need the label; we do not need to see if this thing is curtilage or not, because what matters is whether we have a reasonable expectation of privacy in the area.[127] And if we do

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124 United States v. Dunn, 480 U.S. 294, 301 (1987).

125 *See id.* at 300 (citing *Oliver*, 466 U.S. at 180).

126 *See id.* at 296 (holding that the building in question laid "outside the curtilage of the house"). Ironically, *Dunn* dealt with a barn, which is a building that may or may not be in someone's curtilage.

127 *See id.* at 300 ("[T]he central component of this inquiry [i]s whether the area harbors the 'intimate activity associated with the sanctity of a man's home and the privacies of life.'"). One might think

have an expectation of privacy *in that place*, we should be able to explain the reasons why that expectation *in this place* is reasonable.[128] Insofar as we give "curtilage" any independent meaning, we are making a mistake—the *Katz* test cannot "attach Fourth Amendment significance to curtilage *per se*, only to the reasonable expectation of privacy that might occur with reference to it."[129] Under the *Katz* test, rightly understood, labels like curtilage and open fields should have no intrinsic meaning. It follows that "curtilage" can have no categorical across-the-board meaning, because whether something is curtilage—that is to say, whether we have a reasonable expectation of privacy around it—will depend on a case-by-case analysis, which is precisely what *Oliver* said it was rejecting.[130] To the extent curtilage makes sense, it makes sense only on the reasonable expectation of privacy test, but that is because *any place* could be protected under that test—a phone booth, a bathroom, and even the area "immediately adjoining the house," i.e., the curtilage. But this is because of the nature of the test, and not because of anything intrinsic to the curtilage.[131]

The upshot of *Dunn*, then, should have been the use of the concept of "curtilage" in only this superficial way—as a way of drawing attention to the fact that some area had been found to be a place where society was prepared to view a person's expectation of privacy as "reasonable." It is perhaps for this reason that when curtilage again pops up as doing real work in *Jardines*, it is the textualist meaning that is used—the idea that curtilage is protected *because it is protected explicitly in the text of the Fourth Amendment*, because curtilage

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that the "proximity" part of the *Dunn* analysis is objective, or at least objective enough. But proximity is (first of all) not the whole story—some land that is proximate is not curtilage—and of course, we still have to answer, how close is close enough ("proximate" enough) for it to be "curtilage"?

128 *See also* Curran, *supra* note 40, at 414 (highlighting the inevitability of case-by-case analysis of curtilage in determining whether a place is used for intimate activities).

129 United States v. Titemore, 437 F.3d 251, 258 (2d Cir. 2006).

130 *See* Saltzburg, *supra* note 77, at 14 ("Part III of the opinion in *Oliver* ends with the Court's rejection of a case-by-case approach to fields as unworkable. Nowhere does the Court recognize that officers will have to decide case-by-case whether they are invading the curtilage and that reviewing courts will have to decide whether the officers' decisions are reasonable."). The following quote highlights an additional concern of the Court:

> *Oliver* rightfully noted that an ad hoc approach to determining whether a particular area was entitled to constitutional protection would not only make it difficult for police to discern the scope of their authority, but would also perpetuate a danger that constitutional rights would be arbitrarily and inequitably enforced. Yet, this case-by-case approach is exactly what has been promulgated by the *Dunn* decision.

Rownaghi, *supra* note 15, at 1179–80.

131 After all, the idea of a bathroom is *also* one familiar and easily understood from our everyday experience!

is part of the "home."[132] By now the moves should be familiar, and they all stem from the misreading of Blackstone. Bootstrapping off what *Hester* does say about the distinction from the common law between the "home" and "open fields," Justice Scalia writes that the "identity" of the home and the curtilage is also as old as the common law, and cites Blackstone.[133] But (again) this is mistaken. Blackstone did *not* identify the curtilage and the home. What is as old as the common law (in fact, what *is* the common law) is the identity of the mansionhouse and the *buildings*—the barn, the outhouse, and other buildings and appurtenances—that are *contained* in the curtilage.[134] For good measure, Justice Scalia adds that in the area close to the home, privacy expectations are most heightened—but this is to mix *Katz*-type reasoning into the textualist account he clearly wants to give of the curtilage.[135] Justice Scalia closes by saying that the scope of the curtilage is, as *Oliver* has said, "easily understood from daily experience."[136] Finally, and in the process almost giving the game up, Justice Scalia appeals to *Entick v. Carrington*, which did not talk in terms of curtilage at all, but rather trespass onto any part of a person's "close," or property—a point which would apply to trespass onto any real property, not just the curtilage.[137] It is not clear that

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132 *See* Florida v. Jardines, 569 U.S. 1, 6 (2013) ("We therefore regard the area 'immediately surrounding and associated with the home'—what our cases call the curtilage—as 'part of the home itself for Fourth Amendment purposes.'").

133 *See id.* at 6–7 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *223, *225).

134 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *225 (explaining that areas "within the curtilage" are protected components of the home). Justice Scalia only achieves the equivalence of the curtilage and the home by slicing and dicing the relevant passage from Blackstone.

135 *See Jardines*, 569 U.S. at 6–7 (highlighting the principle of higher privacy expectations in the immediate area surrounding the home as having "ancient and durable roots"). Justice Scalia's bow to *Katz* is interesting, given his general mistrust of *Katz* even before *United States v. Jones*, 565 U.S. 400 (2012). For more discussion, see Chad Flanders & Ashlyn Dowd, *The Fourth Amendment of "Things": Comment on* Toksen, 59 WASHBURN L.J. 87 (2020).

136 *Jardines*, 569 U.S. at 7 (quoting Oliver v. United States, 466 U.S. 170, 182 n.12 (1984)).

137 *See* Entick v. Carrington (1765) 95 Eng. Rep. 807, 817–18 (KB) (proclaiming that agents of the government may not enter private property unless authorized by law). As one treatise summarizes the point:

> The broad principle here is that which derives from *Entick v. Carrington*, namely that *every invasion of private property*, however slight, is a trespass and that no person has the right to enter and search except by consent or in accordance with some lawful authorisation [sic]. It follows that every search of private property by a police officer is unlawful unless it is capable of justification by reference to some recognised and accepted legal ground [i.e., warrant, statute, or exigency].

POLYVIOS G. POLYVIOU, SEARCH & SEIZURE: CONSTITUTIONAL AND COMMON LAW 260 (1982) (emphasis added). The exact quote from *Entick* is:

> [O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law. . . .

Justice Scalia really advances any genuinely new arguments in favor of the curtilage, rather than relying on past opinions and our intuitions about what ought to be protected.[138]

What may make *Jardines* less egregious as a practical matter is that it involved a trespass onto the porch of a house, which is more a part of the house than simply the area surrounding the house.[139] It might be "appurtenant" to the home, to use Blackstone's term.[140] Still, the weakness

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> [T]here is no law in this country to justify the defendants [messengers of the King] in what they have done; if there was, it would destroy all the comforts of society. . . .

Entick, 95 Eng. Rep. at 817.

138 There is a further argument that Justice Scalia makes in passing, which deserves mention, as Justice Sotomayor will refer back to it—again in passing—in her majority opinion in *Collins*. *See* Collins v. Virginia, 138 S. Ct. 1663, 1671 (2018) (concluding that the driveway enclosure in this case "is properly considered curtilage"). And it may be novel, at least in the mouth of Justice Scalia. Justice Scalia says that the protection that the home gives "would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window." *Jardines*, 569 U.S. at 6. It is unclear exactly what the argument here is, even if we grant the premise (which seems debatable) that the practical value of the protection of the home would be vastly diminished if the curtilage were not protected. Is Justice Scalia inferring that the Founders must have meant the curtilage to be protected *as* the home because otherwise the value of the home would be diminished? Or is he offering the prophylactic value of the curtilage as a separate argument for protecting the curtilage as a Fourth Amendment matter?

Given Justice Scalia's other commitments, it may be best to see this point as simply indicating that the Founder's understanding of the curtilage as including the home (an interpretation this Article has disputed) was wise. In this regard, it is worth pointing out that Justice Scalia was a skeptic of such "prophylactic" arguments for expanding rights-protections in other criminal procedure contexts. *See, e.g.*, Minnick v. Mississippi, 498 U.S. 146, 166 (1990) (Scalia, J., dissenting) ("Today's extension of the *Edwards* prohibition is the latest stage of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restriction upon law enforcement."). The prophylactic argument is addressed in more detail in the context of Justice Sotomayor's presentation of the argument in *Collins*. *See infra* note 161 and accompanying text.

139 *See Jardines*, 569 U.S. at 3–4 ("We consider whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' . . . .").

140 4 WILLIAM BLACKSTONE, COMMENTARIES *225. A few lower courts have dealt with the problem of trying to figure out what is "appurtenant" to a home. In *State v. Pace*, the court found that a step or stoop would be an appurtenance to the home, although it also—citing an earlier case—added that a driveway was "appurtenant" to a home. The *Pace* court seemed open in its admission that including the driveway as appurtenant to the home was a rather "broad" understanding of what could count as appurtenant. *See* State v. Pace, 602 N.W.2d 764, 770 (Iowa 1999) ("More recently, in *Baker,* we concluded a driveway fell within the definition of 'appurtenance to a building or structure.' We found a driveway was an 'appurtenance' because it was closely associated with and connected to buildings and structures, and was built to enhance the use and enjoyment of the building or structure."). For a better understanding of appurtenant, see, e.g., Searle v. Town of Bucksport, 3 A.3d 390, 399–400 (Me. 2010) (Jabar, J., dissenting) (emphasis in original) ("As the definition from Black's Law Dictionary establishes, an object may be appurtenant to a building *either* because it 'belongs to' it *or* because it is 'attached to' it.").

of the textualist argument seems plain. As the dissent observed in *Oliver*, curtilage is not mentioned in the text of the Fourth Amendment.[141] Nor, as we saw, can it be fairly read into Blackstone that the curtilage was considered part of the home, rather than simply a place where *other parts of the home* (i.e., buildings) could be located.[142] And if we move away from the textualist foundation for curtilage, the use of the label curtilage becomes dispensable—it becomes a way of stating a conclusion (that here people have a reasonable expectation of privacy) that has been reached on other grounds. It takes some work to excavate these flaws, to get to the bottom of them. But once we see them, it becomes obvious that "curtilage" is a place that has been invented by the Court. It has been invented by the textualist as somehow contained in the Fourth Amendment, even though curtilage is never mentioned there, and the common-law history does not support the "identity" of home and curtilage. Curtilage has also been "invented"—perhaps less questionably—by those who favor the reasonable expectation of privacy test as a shorthand for the factors that go into making something a place where we can reasonably expect privacy. In either case, the idea that curtilage gets special Fourth Amendment protection *qua* curtilage is a fiction, an invention.[143]

III. THE APOTHEOSIS OF CURTILAGE: *COLLINS*

All of this background is largely beneath the surface in *Collins*, the Court's most recent engagement with the concept of curtilage.[144] The facts of the case are simple. Officers had reason to believe that a motorcycle that had repeatedly been speeding was parked in the driveway of a house.[145] Upon seeing the motorcycle, Officer David Rhodes did not get a warrant, but instead walked "up to the top of the driveway" and, "investigat[ing] further," pulled a tarp that had been placed over the vehicle.[146] Looking up the vehicle identification number of the motorcycle, Rhodes determined that the

141 *See Oliver*, 466 U.S. at 188 (Marshall, J., dissenting) (arguing that the Court's holding is incorrect because curtilage is not covered by the Fourth Amendment).

142 *See* discussion *supra* Part I.

143 *See* Andrew Guthrie Ferguson, *Personal Curtilage: Fourth Amendment Security in Public*, 55 WM. & MARY L. REV. 1283, 1287 (2014) ("Curtilage has long been understood as a legal fiction that expands the protection of the home beyond the formal structures of the house.").

144 *See* Collins v. Virginia, 138 S. Ct. 1663, 1671 (2018) (holding that the partially enclosed top driveway of a home was curtilage for Fourth Amendment purposes).

145 *Id.* at 1668.

146 *Id.*

motorcycle was stolen.[147] Shortly after, Rhodes arrested Collins, who was a resident of the house (his girlfriend's), and who admitted that he stole the vehicle.[148] Collins lost a motion to suppress the search of the vehicle.[149] The state's court of appeals affirmed the denial of the motion to suppress, and so did the Virginia Supreme Court.[150] The United States Supreme Court granted certiorari to answer the question whether—as the Virginia Supreme Court had held—the automobile exception made the warrantless search of the vehicle permissible. The Supreme Court, 8–1, in a decision by Justice Sotomayor, said it did not.[151]

What seems remarkable about this case is about how little (if you buy the premises of the majority) it has to do with the automobile exception, except perhaps to confirm that the exception "only extends" as far as the vehicle itself.[152] If one grants that the motorcycle was on the curtilage, and the curtilage is the same as the house, both of which the majority presumes without much in the way of argument, the conclusion that this is a search, and an unlawful search, because it trespasses into the "home," follows almost immediately. Indeed, the case becomes an *extremely* easy one, as Justice Sotomayor emphasizes when she asks the reader to consider a "slightly different factual scenario," where the search occurs not in the driveway of the house, but inside the *home*, where a vehicle happens to be parked.[153] "Can the officer, acting without a warrant, enter the house to search the motorcycle and confirm whether it is the right one?"[154] "Surely not," she answers.[155] For Justice Sotomayor, the *Collins* case is like the motorcycle-in-the-living-room case in every relevant respect. Where one might invade the sanctity of the home, the other just as surely invades what Justice Sotomayor calls the "sanctity of the curtilage."[156] One can see in that final phrase just how far the curtilage doctrine has come. The curtilage does not merely gain

147 *Id.*

148 *Id.* at 1668–69.

149 *Id.* at 1669.

150 *Id.*

151 *Id.* at 1675.

152 Kerr anticipated this before the decision was handed down. *See* Orin S. Kerr, *A Few Thoughts on* Collins v. Virginia, VOLOKH CONSPIRACY, Jan. 3, 2018, 6:00 AM, https://reason.com/2018/01/03/a-few-thoughts-on-collins-v-virginia/printer ("The Court should reject the application of the automobile exception as a justification to approach the car.").

153 *See Collins*, 138 S. Ct. at 1671 ("Applying the relevant legal principles to a slightly different factual scenario confirms this is an easy case. Imagine a motorcycle parked inside the living room of a house, visible through window to a passerby on the street.").

154 *Id.*

155 *Id.*

156 *Id.* at 1672.

its importance by being sheltered under the home's "umbrella."[157] It has its own intrinsic specialness, its own "sanctity."

We have to retrace Justice Sotomayor's steps to see how she gets to her conclusion, because we can question her opinion at each step. Most significantly, we can question whether her articulation of the nature of the curtilage—both the justification for protecting it and in defining its scope—can support the strong conclusion she ends up making. For the very first step she makes is to assert that the curtilage is part of the home, relying in part on Justice Scalia's articulation of the curtilage in *Jardines*.[158] This borrowing from Justice Scalia seems most noticeable in Justice Sotomayor's emphasis on giving full effect to the Fourth Amendment protection of the home by protecting the curtilage.[159] Justice Sotomayor says that protecting curtilage is necessary, and has been held as part of the home, in part to give "full practical effect" to the Fourth Amendment's protection of the home.[160] This is perhaps best understood as a kind of prophylactic defense of the curtilage, as a protection necessary to fully guard the home's right to privacy.[161] So for "Fourth Amendment purposes," Justice Sotomayor says, guardedly, the curtilage is part of the home.[162]

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157 The language here is borrowed from *Dunn*:

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

United States v. Dunn, 480 U.S. 294, 301 (1987).

158 *See Collins*, 138 S. Ct. 1663, 1670 (quoting Florida v. Jardines, 569 U.S. 1, 6 (2013)).

159 *See id.* (explaining that deeming curtilage to be part of the home for the purposes of the Fourth Amendment is necessary "[t]o give full practical effect to that right"); *see also Jardines*, 569 U.S. at 6 ("This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.").

160 *See Collins*, 138 S. Ct. at 1670 ("To give full practical effect to that right, the Court considers curtilage—'the area "immediately surrounding and associated with the home"'—to be 'part of the home itself for Fourth Amendment purposes.'").

161 *See* Kerr, *supra* note 24 (defending curtilage as creating "a sort of buffer around the home to make sure the home is fully protected fro[m] observation"). Whatever the merits of the argument as a general matter, it is hard to see it as applying to the facts in *Collins*. The officers were not "trawling" on the driveway in order to look into the house; they were trawling on the driveway to look at something (a motorcycle) *in the driveway*.

162 *Collins*, 138 S. Ct. at 1670.

Here curtilage does appear as sort of a pale copy of the home, a kind of "penumbra" of the home,[163] not quite deserving of protection in its own right but getting a kind of borrowed luster from being close to the home. It does not seem to do justice to Justice Sotomayor's later characterization of the curtilage as having its own kind of "sacredness."[164] It is left, then, to Justice Thomas to cite Blackstone for the idea that the curtilage deserves protection because it actually *is* the home. That citation, as we have repeatedly seen, is misleading, if not plainly mistaken. And here we can see the dilemma set out in the prior part. Either curtilage needs to be found in the home, as simply and definitionally included in the home (something we cannot do), or curtilage does not really exist as an independent concept. If the curtilage is important because, as Justice Sotomayor says, we also do "home-like" things there and can expect privacy there, it is because of these things that it gets protection (under *Katz*), not because we call it "curtilage."

There is a further problem with the way Justice Sotomayor sets out the curtilage, as sort of an extra level of protection we give to the home, because home-like "intimate activities" can spill out onto the curtilage.[165] This fact—for Justice Sotomayor—simply means that we can and should expect privacy in our curtilage. The argument here is *Katz*-ian, and so we should ask whether it is right that the driveway is a place where we have a reasonable expectation of privacy, in a way similar to the expectation of privacy we have in our homes. Initially, we should wonder whether a *driveway* always has this character.[166] It may be obvious that a front porch is close enough—adjacent enough—to the home to get a kind of spillover from the home itself. But a driveway? Justice Sotomayor says, quoting *Jardines*, that the driveway here was adjacent to the home, and was an area "to which the activity of home

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163 René Reyes, in the course of providing helpful feedback, deserves the credit for coming up with this term in this context.

164 Nor does it seem to offer any additional, substantive reason to protect the curtilage. It is really a *Katz* argument, but an indirect one. We have a greater expectation of privacy right outside the home, because that is a place where it is more likely that people will be able to see (or hear or smell) things going on in the home, where we have the *greatest* expectation of privacy.

165 The idea that the curtilage is associated with "intimate activities" is taken from *Boyd*—via *Oliver*—which as one commentator has noted, is an opinion that does not mention curtilage:

> The Court's second move used language from *Boyd*, a case that never mentions curtilage, to define the curtilage as "the area to which extends the intimate activities associated with the 'sanctity of a man's home and the privacies of life' and therefore has been considered part of the home itself for Fourth Amendment purposes." This modern curtilage was then defined as an "area immediately adjacent to the home."

Brendan Peters, *Fourth Amendment Yard Work: Curtilage's Mow-Line Rule*, 56 STAN. L. REV. 943, 956–57 (2004).

166 *See id*. at 958 & n.94 (explaining that courts have disagreed with Justice Sotomayor's contention that activity of home life extends to the driveway for Fourth Amendment purposes).

life extends."[167] This is not obvious. Is *driving* part of the activity of the home? If the car was parked on the curb, we would not say that the home's activity extended in that instance to the street—such observations are what drives Justice Alito's dissent.[168] It is not even clear that we can say, *in general*, driveways are used for home-like activities, absent a better idea of what is meant by the "activity of home life." Here we get back to the *Dunn* problem. If curtilage is not this obvious thing that we can mark out easily in every case, and which is not protected just by virtue of the Constitution's text itself, then we seem stuck with a sort of case-by-case assessment of *what the curtilage* is being used for (along with where it is, which is what Justices Sotomayor and Scalia mostly rely on) to justify the fact that our expectations of privacy in that area are reasonable. Justice Sotomayor's reasoning seems to be that *because* it is close to the house, the driveway is an area of "home activity" or a place of "families and personal privacy." This does not follow.[169]

One recalls here Justice Scalia's invocation of the firm and bright line *at the entrance to the home* that he drew in *Kyllo*,[170] and which he seemingly departs from in *Jardines*.[171] The driveway in this case shows no such bright line. Indeed, in order to get to the home, a person would have to walk up the

167 *Collins*, 138 S. Ct. at 1671 (quoting *Jardines*, 569 U.S. at 7).

168 *See id.* at 1682 (Alito, J., dissenting) (maintaining that privacy interests when a vehicle is parked in a driveway of home are no greater than when the vehicle is parked in the street just a few feet away).

169 We might also here mention the Court's point in *Greenwood*, which was that we *know* that people are going to go through our trash if we leave it out on the sidewalk. *See* California v. Greenwood, 486 U.S. 35, 40–41 (1988) (holding that the search and seizure of garbage for collection outside the curtilage of the home does not require a warrant). By the same token, do we not *know* that all sorts of uninvited people will come trundling onto our curtilage—including our driveway? And of course, one might put one's trash on one's driveway for the garbage man to pick up. *See* Commonwealth v. A Juvenile (No. 2), 580 N.E.2d 1014, 1016–17 (Mass. 1991) (citations omitted) (quoting Commonwealth v. Simmons, 466 N.E.2d 85, 87–88 (Mass. 1984); State v. Corbett, 516 P.2d 487, 490 (Or. Ct. App. 1973)) ("In *Simmons,* as in the case at bar, the automobile was parked in a private driveway; the driveway and the automobile on it were clearly visible from a public way; the driveway was the normal route by which to approach the front door of the residence; no intrusion into the automobile was required; there was a garage at the end of the driveway, but the defendant did not use it; and the owner of the automobile had taken no other steps to conceal the parked automobile from public view. 'A driveway is only a semi-private area.' 'In the course of urban life, we have come to expect various members of the public to enter upon such a driveway . . . . If one has a reasonable expectation that various members of society may enter the property in their personal or business pursuits, he should find it equally likely that the police will do so.'").

170 *See* Kyllo v. United States, 533 U.S. 27, 40 (2001) ("That line, we think, must be not only firm but also bright . . . ."). This is also in conflict with Justice Scalia's defense of the curtilage as a buffer that gives added protection to the home. There is a clear line we can draw at the boundary of the home, even without protecting the area immediately around the home; moreover, that clear line is *one that the Constitution itself draws*. The same cannot be said of the curtilage.

171 *See Jardines*, 569 U.S. at 6–7 (invoking curtilage and describing a front porch as a "constitutionally protected area").

driveway—so at least part of the driveway in *Collins* was *not* something that was the same as going *inside* of someone's house.[172] The home, precisely because it is something bounded, does seem like something we can easily mark out in every case.[173] Curtilage seems, by contrast, to require by its nature a case-by-case measuring, which makes it seem more amenable to a kind of multi-factor analysis, as *Dunn* eventually came around to; it is not something that in every case we can define simply by reference to everyday experience. All of which brings us back, in a way, to Blackstone—Blackstone *did* see the lines of the home as in fact firm and bright, because they in every case were boundaries marked by the walls of buildings, either the mansionhouse itself or the buildings that could be found in the curtilage.[174]

There is a disconnect, then, between Justice Sotomayor's strong conclusion about *Collins*—that this is an easy case, that this is just as if the vehicle had been in the home—and the justifications offered for it. Those justifications, including the idea that the curtilage is part of the home and is capable of an easy definition, are weak—a point which should not surprise us. The justifications for the concept of curtilage as its own *place* were always weak. The curtilage is a space, not a place. It is not part of the home, but at best a space outside the home that can tell us what other buildings might be part of the home. Nor does invocation of the concept of curtilage have any talismanic power so that we can simply decide that something is curtilage and—in the same breath—decide that any place designated as curtilage automatically has a reasonable expectation of privacy built into it. Justice Sotomayor, by her hedging references to the "practical" nature of the curtilage, is more honest about this weakness than perhaps Justice Scalia was. As her opinion goes on, this diffidence fades, and the curtilage become firmly established as a constitutionally protected area. This, again, is a fiction.

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172 Kerr raises similar skeptical questions about driveways:

> For example, imagine the more routine case of a car parked in a driveway in front of a house. Maybe the car is parked in front of an attached garage, or perhaps it is in front of a detached garage some yards from the house. Should that be an easy curtilage issue under *Collins*, or should it get a complex 4-factor analysis under *Dunn*? Is *Collins* just about the special case of a space enclosed by walls right up to the house that happens to be a driveway, or is it a general ruling that applies to driveways?

Kerr, *supra* note 24.

173 *See* Brendan Peters, *Fourth Amendment Yard Work: Curtilage's Mow-Line Rule*, 56 STAN. L. REV. 943, 944 (2004) ("One can imagine that the house, as mentioned in the Constitution, might have a clear boundary—ending at the threshold between inside and outside.").

174 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *225 ("[T]he capital house protects and privileges all it's [sic] branches and appurtenants, if within the curtilage or homestall.").

Justice Alito, in his dissent, objects to the majority's invocation of curtilage, but he agrees with the majority more than he disagrees.[175] He agrees that the curtilage is part of the home, because the home is not "limited to the structure in which a person lives."[176] Where Justice Alito departs from the majority is that, although he believes a search occurred, he thinks the search was reasonable.[177] But this means conceding one of the more controversial points in the majority opinion—that the home does include the curtilage and that the driveway was part of the curtilage. Justice Alito is surely right in this regard: it does seem a stretch to say that the search here is *exactly* like a search in the home. At the same time, if Justice Alito agrees that the curtilage is the house under the Fourth Amendment, then it gets hard for him to say how the intrusion in this case is any less worrisome than any intrusion into the actual home itself. Once we make the move that home and curtilage are identical, then we are really just saying that an intrusion into the driveway is the same as an intrusion into the garage which is the same as an intrusion into the actual home itself. They are all intrusions into the "house" as understood by the Fourth Amendment. Justice Alito's opinion seems to sputter on this point near the end. At oral argument, the Commonwealth of Virginia did not do much better, although it was arguably more consistent than Justice Alito was, contemplating that perhaps the automobile exception might license going into someone's home in order to search an automobile parked inside![178]

There is a different, and more textually based way, to get to the conclusion of the majority, and it is interestingly one anticipated by Blackstone himself. Blackstone, as this Article has repeatedly argued, would not have seen the space outside of the house as equivalent or identical to the home itself. He may have thought the curtilage deserved some protection, but that was not because the curtilage was the home—only buildings within the curtilage could be considered part of the home. So, when Officer Rhodes

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175 *See generally* Collins v. Virginia, 138 S. Ct. 1663, 1680–83 (2018) (Alito, J., dissenting).

176 *Id.* at 1681.

177 *See id.* at 1680 ("The Fourth Amendment prohibits 'unreasonable' searches. What the police did in this case was entirely reasonable.").

178 *See* Transcript of Oral Argument at 61, *Collins*, 138 S. Ct. 1663 (No. 16-1027):

> JUSTICE KAGAN: Well, does—does that mean you, without a warrant, that you always have access to a place if there's a reason that you can seize something that you might find within the place?
>
> MR. COX: I'm hesitant to speak beyond the automobile exception, but I think the automobile exception would give you that, that ability, unless there was some other rule that prevented you from doing it, such as a rule that the automobile exception does not apply in the house.

walked up the driveway, he was not invading the home.[179] Nor did he break into any building—certainly not the home of Collins himself. But what the Officer *did* do was to remove the tarp on the motorcycle. This was not a search of the automobile; Justice Sotomayor was right in this. The automobile exception applies only as far as the vehicle itself, and not to the removal of things on *top* of the vehicle. So we have a search that is not covered by that exception, and for which Officer Rhodes did not have a warrant.[180] Moreover, it is a search of a constitutionally protected area—the vehicle is an *effect*, in the uncontroversial sense of being a person's private property.[181] Now, there may be a problem with Collins' standing to make a motion, given that he stole the vehicle.[182] If the vehicle was his, however, he would have that standing, and he should win a motion to suppress—not because of the trespass on to his real property—into his home or his curtilage—but because of the trespass onto his personal property (the lifting of the tarp) for the purpose of obtaining information.[183]

CONCLUSION

Removing the two proffered justifications for the "curtilage" doctrine in the Supreme Court's jurisprudence leaves us with two options, neither of them entirely appealing. Recall that the curtilage doctrine seemingly found its foundation in not one, but two distinct sources. First, the doctrine was thought to be grounded in the text because—it was claimed—curtilage was part of the home, and had been considered as such since the common law.[184] Second, the curtilage was believed to be a place where it was especially reasonable to think that we could expect privacy—it was perhaps second only

179 *Contra Collins*, 138 S. Ct. at 1670 ("When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred.").

180 *See* Kerr, *supra* note 152 ("I don't think that pulling off the tarp can be justified by the automobile exception").

181 As the Court recognized in *United States v. Jones*, 565 U.S. 400, 404 (2012) (internal citation omitted) ("It is beyond dispute that a vehicle is an 'effect' as that term is used in the [Fourth] Amendment.").

182 *See* Byrd v. United States, 138 S. Ct. 1518, 1529 (2018) ("No matter the degree of possession and control, the car thief would not have a reasonable expectation of privacy in a stolen car.").

183 Although this would not count as a *burglary*, as Blackstone makes clear:

> Neither can burglary be committed in a tent or booth erected in a market or fair; *though the owner may lodge therein*: for the law regards thus highly nothing but permanent edifices; a house, or church, the wall, or gate of a town; and it is the folly of the owner to lodge in so fragile a tenement: but his lodging there no more makes it burglary to break it open, than it would be to *uncover a tilted waggon* [sic] in the same circumstances.

4 WILLIAM BLACKSTONE, COMMENTARIES *226 (emphasis added).

184 *See supra* Part II.

to the home in this.[185] The textual hook for curtilage much of this Article has attempted to discredit, still, it seems has several fans in the Justices of the Supreme Court. Justice Scalia is no longer on the Court, but Justice Thomas's quotation from Blackstone in *Collins*, and Justice Sotomayor's reliance on *Jardines*, shows that his take on the original meaning of curtilage shows no signs of going away. The reasonable expectation of privacy defense of curtilage also seems to be well-entrenched. Even Justice Scalia relied on it, if only in passing, and it seems to make up a large part of Justice Sotomayor's somewhat ambiguous articulation of the curtilage doctrine. In short, the fiction of Fourth Amendment curtilage seems to be alive and well on the Court—but what happens when we dispel that fiction?

For the textualist, the solution seems to be simple—acknowledge that the curtilage is not part of the house and confine the protections to just what the text says. If the curtilage is not the home, then the protections of the home really do stop at (as Justice Scalia said in *Kyllo*) the firm boundary of the entrance of the home.[186] To be sure, it also protects buildings in the curtilage, and also things "appurtenant" (or "attached") to those buildings. Blackstone would at least go this far. But these concessions do not get us to the idea that the curtilage—the land surrounding the home—is itself protected as being part of the home. The home really is just the home, according to the text. Homes have walls; so too houses in the Fourth Amendment. The result here is that we get a stingier Fourth Amendment, at least if we read "effects" as limited to personal property and not extending to *all* owned property.

At this point, we might think that we are better off going with the more flexible *Katz* test for what property does not get protected. We might think that it is more honest, with its open admission that we are going outside and beyond the text, and looking to contemporary values. And *Katz* can certainly accept the idea that property near the home has a greater expectation of privacy, which it gets not by virtue of being curtilage, but by virtue of being a place where we can reasonably expect privacy. Curtilage really has no place in the *Katz* world, because there are—or at least should be—no fixed categories in that world; it really depends on which expectations are reasonable, and that will depend on what place we are talking about. To the extent that we use the labels of "curtilage" and "open fields," they will be placeholders until an argument is made or as conclusions to arguments that

185 *See supra* Part III.

186 *See* Kyllo v. United States, 533 U.S. 27, 40 (2001) ("That line, we think, must be not only firm but also bright . . . .").

have already been made. The *Katz* test can get us to protections of the places we want to get protected, because *any place* could be a place that potentially gets us protection. Its open-endedness and its lack of reliance on fixed categories—persons, papers, houses, and effects—is its virtue.[187]

The open-endedness of *Katz* is also its vice. If the real meaning of privacy is the expectations, then why not go all the way in rejecting *all* fixed categories? This would mean abandoning curtilage, which has no place in the text anyway, and is an invented category under the Fourth Amendment, *but also abandoning house and person and every other category*. The *Katz* approach has never had a satisfactory explanation for why the category of "house" does not dissolve under its analysis. Is it the case that all houses are ones that we have a reasonable expectation of privacy in? Maybe, *but maybe not*. The universal acid of the *Katz* test may require us to go even further, in distinguishing rooms (living rooms versus kitchens versus bathrooms versus bedrooms) in the house that may not deserve protection; we may have to fully disaggregate the home and its presumption of all of it being protected under the Fourth Amendment.[188] Pushed to its limit, "requiring a consideration of *Katz* privacy factors to determine what constitutes the curtilage would logically compel the use of those privacy factors to determine what constitutes a house."[189] In any event, when we float away from the text—as *Katz* would have us do—the automatic inclusion of *any* place or *any* thing under the Fourth Amendment is precluded. At the very least, it has to wait until we hear the argument about why that place or that thing is something we can have a reasonable expectation of privacy in.[190] The *Katz* test is only capacious in principle. In practice, we do not know what gets protected—or if anything gets protected. These criticisms are familiar, perhaps, but with the collapse of curtilage we can see them in a new light. The invented category of curtilage should be doing no work in the Fourth Amendment analysis, whether you are an originalist or a *Katz*ian. For the

187 *See* Curran, *supra* note 40, at 412–13 (arguing that *Katz* should support "reasonable privacy expectations beyond the domestic intimacy of the curtilage").

188 *See* Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 909 (2010) ("Even subjective expectations of privacy suggest a relative view of home privacy and call into question the privileging of all things residential. Citizens ascribe much greater intrusiveness to searches of bedrooms, for example, than searches of home garages, curbside residential garbage, or surveillance of backyards.").

189 Eric Dean Bender, Note, *The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?*, 60 N.Y.U. L. REV. 725, 742 (1985).

190 Thus, it seems that it is right, under the *Katz* test, to criticize a defendant for his "faulty premise that the Fourth Amendment protects places *per se*, as opposed to legitimate expectations of privacy." United States v. Thomas, No. 3:02CR00072, 2003 WL 21003462, at *5 (D. Conn. Apr. 28, 2003).

originalist, it is because "curtilage" is not in the Fourth Amendment; it is not in "house" and it is not in "effects." For the *Katz*ian, it is because there is nothing but our "reasonable expectations" in the Fourth Amendment.

What is the defender of privacy to do? The best bet may be to take sides with the textualist, all the while pushing for an expansive reading of "effects." Of course, there is the risk that the original meaning of effects cannot bear a reading that includes real property in it. But suppose such a reading is plausible. The text may in fact be able to bear that meaning, as many wills that bequeath effects have been read as bequeathing *real property*.[191] If it is, then the Fourth Amendment opens up again, in much the same way that the Fourth Amendment was thought to "open up" with the *Katz* test (before the Burger Court closed nearly all of the doors it opened). The Fourth Amendment now moves out of the home, and even out of the crabbed confines of the curtilage, and into the *world*, so that any property that you own—land, cars, etc.—gets to count as a constitutional space, trespass against which for the sake of obtaining information counts as a "search" for the Fourth Amendment. Even the open fields we own get protection on this account. Of course, one should be wary of motivated readings of the Fourth Amendment (or of any text) where we seek the interpretation of the text that we *want* it to have rather than the one it does have. It seems, though, that the existing alternatives are bad enough to excuse at least the effort.

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191 *See, e.g.*, *In re* Tyler, 207 Misc. 569, 570–71 (N.Y. Sur. Ct. 1954) (internal citations omitted) ("The word 'effects' may sometimes be broad enough to encompass all of a testator's property, both real and personal. 'Personal effects' is a term that may have a somewhat more limited meaning, often embracing only tangible personal property having an intimate relation to the person. Either term, however, may be enlarged or restricted by its context and may vary in meaning from an all-embracing term to one very restricted in scope.").

Many other cases could be cited in this connection. *See*, *e.g.*, *In re* Spriggs' Estate, 225 P. 617, 619–20 (Mont. 1924) (holding that a testator's use of "effects" included real property); Coffman's Adm'r v. Coffman, 109 S.E. 454, 459 (Va. 1921) (holding that the testator intended to include both real and personal property when using the word "effects"); *In re* Stixrud's Estate, 109 P. 343, 349 (Wash. 1910) ("[O]ur decision necessarily has the effect of applying the treaty provision [applying the statute to "goods and effects"] to real as well as to personal property . . . ."); Andrews v. Applegate, 79 N.E. 176, 177 (Ill. 1906) ("[I]n its broadest sense of property or worldly substance [effects] may include land, and should be so construed when it appears from other parts of the will that such was the testator's intention."); Trustees of the Univ. v. Miller, 14 N.C. (3 Dev.) 188, 195 (N.C. 1831) ("Effects descending by inheritance must include land.").

APPENDIX

Figure 1: Photograph of Motorcycle Within "Curtilage" of the Home from *Collins*[192]

Figure 2: Photograph Showing that Parking a Vehicle Inside the Home is Not Unprecedented[193]

192 *See* Kerr, *supra* note 24.

193 Inside Edition, YOUTUBE (Oct. 11, 2016), https://www.youtube.com/watch?v=OL2jBPycsVE.