GEORGE MASON LAW REVIEW FORUM

VOL. 32 DECEMBER 2024 1–26

ARTICLE

The Open Fields Doctrine Is Wrong

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Abstract. This year marks the centennial of the Fourth Amendment "open fields" doctrine. That doctrine holds that the vast majority of private land in the United States receives zero Fourth Amendment protection—and thus government officials can enter any land they please and conduct unfettered surveillance. The Supreme Court has given two main justifications for the doctrine: the Fourth Amendment's text does not mention land, and nobody can reasonably expect privacy on their land. This Article will argue that neither justification holds up. Even if "open" land deserves no protection, a contextual reading of the Fourth Amendment's text and a proper application of the privacy test show that "closed" land—land people use and mark as private—does deserve protection. The open fields doctrine should be overruled.

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Introduction

Exactly a century ago, the Supreme Court held that "open fields"—a term that covers the vast majority of private land in the country—receive no Fourth Amendment protection.[1] That's true even if the land is "closed" to the public by private use and markings that, under state trespass law, would be sufficient to exclude intruders.[2] As a result, officials at every level can invade our land without a warrant or probable cause, roam around as they please, and place cameras on our land to continue spying after they leave—and the Fourth Amendment has nothing to say.[3]

That is wrong. The Supreme Court's two main reasons for the open fields doctrine focus on text and privacy. On text, the Court tells us that land is not protected because the Fourth Amendment lists only "persons, houses, papers, and effects."[4] On privacy, the Court says that even though the Amendment protects "reasonable expectations of privacy" beyond the text,[5] it's never reasonable to expect privacy on land outside the curtilage (the ring of land around the home).[6] Even on their own terms—terms one might well question[7]—neither argument holds up.

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

2 Oliver v. United States, 466 U.S. 170, 179, 183–84 (1984).

3 *See, e.g.*, United States v. Vankesteren, 553 F.3d 286, 291–92 (4th Cir. 2009) (upholding warrantless placement of trail camera on private land); Spann v. Carter, 648 F. App'x 586, 587–89 (6th Cir. 2016) (same); State v. Brannon, 2015-Ohio-1488, at ¶ 32 (same).

4 *Hester*, 265 U.S. at 59.

5 *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring) (articulating a "reasonable expectation of privacy" text for what constitutes a Fourth Amendment "search"); *see also* Smith v. Maryland, 442 U.S. 735, 740–41 (1979) (formally adopting Justice Harlan's test).

6 *Oliver*, 466 U.S. at 179–80.

7 This Article assumes that the Supreme Court's narrow reading of "houses" and "effects," and the *Katz* privacy test, are valid. But call it a skeptical assumption. First, it's far from obvious that "houses" means only four walls, a roof, and curtilage. *See Oliver*, 466 U.S. at 179–80. At the Founding, 9 in 10 people lived off the land and ran "household factor[ies]" that integrated domestic and farm life in a way that mobilized the entire family. *See* BRUCE LAURIE, ARTISANS INTO WORKERS: LABOR IN NINETEENTH-CENTURY AMERICA 16–17 (Eric Foner ed., Noonday Press ed., 2d prtg. 1991). And then, as now, there were myriad "houses" (warehouses, storehouses, public houses) that were not dwellings. So "houses" may mean something more than the *Euclid*-ian concept that strikes our modern eyes. Second, while some early sources defined "effects" to mean personal property, *see Oliver*, 466 U.S. at 176–77 & n.7, courts sometimes used the term more broadly, *see, e.g.*, Hogan v. Jackson (1775) 98 Eng. Rep. 1096, 1099; 1 COWP 298, 304 (reading "effects" in a will to mean "worldly substance" or "all a man's property"); Ferguson v. Zepp, 8 F. Cas. 1154, 1155–56 (C.C.E.D. Pa. 1827) (No. 4,742) (same). Third, the defects in the *Katz* privacy test are well-chronicled. *See, e.g.*, William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1825 & n.7 (2016) (noting critiques that "[t]he reasonable expectation of privacy concept has . . . serious defects, including its ambiguous meaning, its subjective analysis, its unpredictable application, its unsuitability for judicial administration, and its potential circularity"). This Article takes no position on these issues—other than to note that they likely warrant more attention than the Court has given them.

The Court's core textual error is that it fails to read the phrase "persons, houses, papers, and effects" in context. It cherry-picks five of the Fourth Amendment's 54 words—dropping the broader common law, historical, and textual context—and assumes those five words exhaust the Amendment's meaning. But they don't. Just as the First Amendment's text banning Congress from "abridging the freedom of speech" doesn't exhaust its protections from official censorship, the Fourth Amendment's "persons, houses, papers, and effects" language doesn't exhaust its protections from official searches. Taking the full context into account, "closed" land—land people use and mark as private—deserves protection.

The Court's privacy analysis fares no better. Even if people who never use or mark their land lack a reasonable expectation of privacy, the open fields doctrine goes far beyond that. It holds that people never deserve privacy on land outside the curtilage—regardless of how they use or mark it. That's a mistake. People who use their land and take the steps required by law to exclude intruders can reasonably expect privacy from intruders. Nor is there any good reason why people sometimes deserve privacy on their curtilage but never on the land beyond it. The open fields doctrine should be overruled.[8]

I. Summary of the Open Fields Doctrine

Laying some groundwork on how the open fields doctrine works and how the Supreme Court has justified it will set the stage for the critique that follows. To preview, the open fields doctrine allows officials to invade the vast majority of private land in this country, and the Supreme Court has given two main reasons why: land is not on the Fourth Amendment's list of "persons, houses, papers, and effects,"[9] and it's never reasonable to expect privacy on land.[10] After laying this groundwork, the rest of the Article shows that neither justification holds up.

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[8] Others have, of course, offered sharp critiques of the open fields doctrine. *See, e.g.*, Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 20, 21–22 (1986) (describing the open fields doctrine as "a severe threat to liberty" and "indefensible as a matter of precedent, history and common sense"); Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 129–31 (2002) (noting the doctrine "permits police to engage in what is criminal misconduct"); Elizabeth Kingston, *Keeping Up With* Jones*: The Need to Abandon the Open Fields Doctrine*, 52 CRIM. L. BULLETIN Art. 5 (2016) (critiquing the doctrine as "illogical considering existing case law"); Graeme Edward Minchin, *The Incredible Shrinking Fourth Amendment—The Ongoing Erosion of the Fourth Amendment of the Constitution of the United States of America*, 12 BEIJING L. REV. 813, 825–27 (2021) (arguing the doctrine is "at odds with both constitutional rights and property law" and arose "out of thin air"). This Article is better for them.

[9] *Hester*, 265 U.S. at 59.

[10] *Oliver*, 466 U.S. at 179.

A. *The Open Fields Doctrine*

Most Fourth Amendment cases start with the first clause: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches . . . ."[11] This typically means officials must get a warrant—approval from a neutral judge that certifies the official has probable cause while limiting the scope of the search—before searching private property.[12] Requiring a warrant ensures that private property is not "secure only in the discretion of [government] officers."[13]

The open fields doctrine holds that private land beyond the curtilage receives none of these protections.[14] In the Supreme Court's words, land has "no Fourth Amendment significance"[15]—which means officials can invade it whenever and however they please. Applying that logic, courts have upheld not only warrantless entries but even the warrantless use of cameras on private land.[16]

Worse, the open fields doctrine covers the overwhelming majority of private land in the country.[17] The Supreme Court has held that it applies to land that is "neither 'open' nor a 'field'" and despite any "steps taken to protect privacy."[18] In other words, it's a categorical rule. As the Court of Appeals for the Sixth Circuit recently explained, the open fields "doctrine does not turn on the nuances of a particular case; '[t]he rather typical presence of fences, closed or locked gates, and "No Trespassing" signs on an otherwise open field therefore has no constitutional import.'"[19]

Yes, the curtilage remains protected. But that's an extremely marginal issue. The Institute for Justice recently published a study that used public datasets and mapping software to measure the amount of private land

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[11] The Fourth Amendment's full text reads:

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

U.S. CONST. amend. IV.

[12] Kentucky v. King, 563 U.S. 452, 459 (2011).

[13] Johnson v. United States, 333 U.S. 10, 14 (1948).

[14] *Oliver*, 466 U.S. at 179–81.

[15] United States v. Jones, 565 U.S. 400, 411 (2012).

[16] *See supra* note 3.

[17] *Oliver*, 466 U.S. at 180 n.11, 182 n.12; *see also* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.4(a) (6th ed.), Westlaw (database updated Mar. 2024) ("In applying the *Hester* doctrine over the years, lower courts have applied the open fields characterization to virtually any lands not falling within the curtilage.").

[18] *Oliver*, 466 U.S. at 180 n.11, 182.

[19] Hopkins v. Nichols, 37 F.4th 1110, 1118 (6th Cir. 2022) (alteration in original) (quoting United States v. Rapanos, 115 F.3d 367, 372 (6th Cir. 1997)).

that would count as "open fields" under current doctrine.[20] Even assuming the curtilage extends 100 feet from every structure in the country (a generous assumption), only about 4% of all private land could qualify as curtilage.[21] The remaining 96%—nearly 1.2 billion acres—is unprotected open fields.[22]

B. *The Textual Justification*

The Supreme Court announced the open fields doctrine in *Hester v. United States*.[23] There, federal officers got a tip that Hester was keeping moonshine at his father's farm.[24] The Supreme Court wrote shockingly little about the property, but the record shows that there was a house, a fence about 50–75 yards from the house, and a grove and a barn beyond the fence.[25] Without a warrant, the officers entered the grove, "concealed themselves," jumped the fence, saw Hester hand over a jug, and arrested him.[26] Hester moved to suppress the officers' testimony as the fruits of an unreasonable search.[27]

But the Supreme Court upheld the search. In two sentences, Justice Holmes declared that land beyond the curtilage receives zero protection: "[I]t 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. The distinction between the latter and the house is as old as the common law."[28] In other words, *Hester* looked at just five of the Fourth Amendment's 54 words and reasoned: Land is not listed, so land is not protected.

Hester's narrow textualist approach was in step with the times. Four years later, in *Olmstead v. United States*,[29] the Court held that tapping Roy Olmstead's phone lines to catch him selling liquor did not implicate the

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20 *See* Joshua Windham & David Warren, *Good Fences? Good Luck: The Open-Fields Doctrine Gives Government Vast Powers to Invade Nearly 96 Percent of All US Private Land*, REGULATION, Spring 2024, at 10–14, https://perma.cc/9ZDN-Q95Y.

21 *Id.* at 11–12.

22 *Id.*

23 265 U.S. 57 (1924).

24 *Id.* at 57–58.

25 Transcript of Record at 15–16, 19, Hester v. United States, 265 U.S. 57 (1924) (No. 243); *see also* Saltzburg, *supra* note 8, at 8 n.32 (discussing "facts not found in the opinion" based on a review of "the entire record that was before the Supreme Court").

26 *Hester*, 265 U.S. at 58; Transcript of Record at 16, Hester v. United States, 265 U.S. 57 (1924) (No. 243).

27 *Hester*, 265 U.S. at 57–58.

28 *Id.* at 59 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *223, *225, *226).

29 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

Fourth Amendment.[30] The Court cited *Hester* for the principle that the text protects only what it lists, and reasoned that "[t]he language of the Amendment can not be extended and expanded to include telephone wires."[31] *Olmstead* was later overruled—yet *Hester* is alive and well.

C. *The Privacy Justification*

Four Justices dissented in *Olmstead*, sowing the seeds of its demise. Justice Butler, joined by Justice Stone, thought the majority had erred by cabining the Fourth Amendment to the "literal meaning of the words" rather than using "the rule of liberal construction that always has been applied to provisions of the Constitution safeguarding personal rights."[32] Justice Brandeis rejected the majority's "unduly literal construction" of the text.[33] And Justice Holmes—the man who wrote *Hester*—panned the majority for "sticking too closely to the words of [the] law where those words import a policy that goes beyond them."[34]

The *Olmstead* dissenters' more liberal approach prevailed in *Katz v. United States*.[35] There, the Supreme Court held that police conducted a "search" when they attached a recording device to a public phone booth to spy on Katz's private phone call.[36] The Court rejected the "narrow view" that the Fourth Amendment is merely a list of "protected area[s]" and held that it "protects people" "[w]herever [they] may be."[37]

Katz brought a sea change in Fourth Amendment law. Unlike *Hester* and *Olmstead*, which asked whether officials had invaded an enumerated item ("persons, houses, papers, [or] effects"), *Katz* asked whether officials had "violated the privacy upon which [a person] justifiably relied"—an inquiry that turned, at least in part, on the difference between "[w]hat a person knowingly exposes to the public" and "what he seeks to preserve as private."[38] Or, as Justice Harlan's later-adopted concurrence explained, the Fourth Amendment protects "reasonable expectation[s] of privacy."[39]

After *Katz*, there was an open question about *Hester*'s validity. While the issue loomed in *Katz*—the government cited *Hester* and Katz argued it

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30 *Id.* at 455–57, 466.

31 *Id.* at 464–65.

32 *Id.* at 487–88 (Butler, J., dissenting); *id.* at 488 (Stone, J., dissenting) ("I agree also with . . . Justice Butler so far as it deals with the merits.").

33 *Id.* at 476 (Brandeis, J., dissenting).

34 *Id.* at 469 (Holmes, J., dissenting).

35 389 U.S. 347 (1967).

36 *Id.* at 352, 359.

37 *Id.* at 350–53, 359.

38 *Id.* at 351, 353.

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

was "wrong"—the Court did not resolve it.[40] So lawyers and scholars, armed with a new test, started arguing that landowners could establish a reasonable expectation of privacy by taking lawful steps—fences, signs, etc.—to exclude intruders.[41] These arguments were so successful that, by the early 1980s, six federal circuits and many state courts had "rejected [*Hester*'s] per se rule" (land is *never* protected) in favor of *Katz*'s more fact-specific inquiry (land is *sometimes* protected).[42]

But the Supreme Court ended that debate in *Oliver v. United States*.[43] Similar to *Hester*, police got an anonymous tip that Oliver was growing marijuana on his farm.[44] Without a warrant, they entered the farm, drove past a house to a locked gate posted with a "no trespassing" sign, walked past that gate, heard somebody shout "no hunting is allowed," and kept on walking until they reached a fenced marijuana field over a mile from Oliver's house.[45]

The Court upheld the warrantless search.[46] It first reaffirmed that "[t]he rule announced in *Hester v. United States* was founded upon the explicit language of the Fourth Amendment": Lands are not "houses," and they are not "effects" either since "[t]he Framers would have understood the term 'effects' to be limited to personal, rather than real, property."[47] After reaffirming *Hester*, the Court turned to *Katz*.

The Court held that Oliver's "asserted expectation of privacy in open fields is not an expectation that 'society recognizes as reasonable.'"[48] The

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40 *See* Transcript of Oral Argument at 5, Katz v. United States, 389 U.S. 347 (1967) (No. 35) (Katz's lawyer arguing "*Hester* is wrong"); *id.* at 7 (Katz's lawyer distinguishing *Hester*); *id.* at 11 (Katz's lawyer arguing "the *Hester* case . . . has to go" and "cannot stand"); *id.* at 15, 17 (government's lawyer relying on *Hester*).

41 *See, e.g.*, Saltzburg, *supra* note 8, at 18, 22 (arguing that since "*Katz* generally permits a person to control property and to deny public access in order to keep it private," the Fourth Amendment should apply when "[p]rivate land [is] marked in a fashion to render entry thereon clearly against the wishes of the owner or person in control").

42 *See* United States v. Oliver, 686 F.2d 356, 361, 367–69 (6th Cir. 1982) (en banc) (Keith, J., dissenting) (collecting examples), *aff'd*, 466 U.S. 170 (1984).

43 466 U.S. 170 (1984).

44 *Id.* at 173–74. *Oliver* was consolidated with a similar case, State v. Thornton (No. 82-1273), which was on appeal from the Maine Supreme Judicial Court's decision that Thornton had established a reasonable expectation of privacy on his land by making efforts to exclude intruders. *Id.* at 174–75 (citing State v. Thornton, 453 A.2d 489 (Me. 1982)); *see also* Bound by Oath Podcast, *Mr. Thornton's Woods*, INSTITUTE FOR JUSTICE (Dec. 8, 2023), https://ij.org/podcasts/bound-by-oath/mr-thorntons-woods-season-3-ep-1/ (exploring Mr. Thornton's story and interviewing him on his land) (transcript available at https://perma.cc/8ZB5-HYC3).

45 *Oliver*, 466 U.S. at 173–74.

46 *Id.* at 181, 184. In the Court's view, the entry was a "search, but not one "in the constitutional sense." *Id.* at 183.

47 *Id.* at 176–77 & 177 n.7 (citing Doe v. Dring (1814) 105 Eng. Rep. 447, 449; 2 M. & S. 488, 454; 2 WILLIAM BLACKSTONE, COMMENTARIES *16, *384–85).

48 *Oliver*, 466 U.S. at 179.

Court gave three reasons. First, "[t]here is no societal interest" in limiting "government interference or surveillance" on land.[49] Second, fences and signs, unlike the walls of a home, don't prevent people from seeing land from the ground or air.[50] Third, the common law treated curtilage as part of the home, which "implies . . . that no expectation of privacy legitimately attaches to open fields."[51]

Most recently, the Court has returned to a "property-rights baseline"[52] that treats physical intrusions as Fourth Amendment searches.[53] Even so, the Court has stressed that *Hester* remains good law.[54] In 2012, the Court wrote that "an open field, unlike the curtilage of a home, is not one of those protected areas enumerated in the Fourth Amendment."[55] And in 2013, the Court wrote that open fields are not protected because they are "not enumerated in the . . . text."[56] Because *Hester* and every major open fields case since has started with the text, this Article does the same.

II. Response to the Textual Argument

The textual argument says that private land is not protected because it is "not enumerated in the [Fourth] Amendment's text."[57] The problem with this argument is that it fails to read the text in context. It isolates just five of the Fourth Amendment's 54 words ("persons, houses, papers, and effects") and reads them as narrowly as possible, dropping the context in which those words arose. But context is crucial to meaning. Taking the full common law, historical, and textual context into account, the most reasonable inference to draw from the text is that "closed" land—land people use and mark as private—deserves protection from arbitrary searches.

A. *Meaning Requires Context*

Textual meaning requires context. Consider: My wife teaches fourth grade. Every year, she gathers her students and has them create a list of classroom rules to promote a productive learning environment. Then she

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49 *Id.*

50 *Id.*

51 *Id.* at 180.

52 Florida v. Jardines, 569 U.S. 1, 11 (2013).

53 *Id.* at 5 (citing United States v. Jones, 565 U.S. 400, 406–07, 407 n.3).

54 *Jardines*, 569 U.S. at 6 (citing Hester v. United States, 265 U.S. 57, 57 (1924); *Oliver*, 466 U.S. at 170, 176).

55 *Jones*, 565 U.S. at 411 (citation omitted).

56 *Jardines*, 569 U.S. at 6 (citing *Hester*, 265 U.S. at 57).

57 *Id.*

posts—or promulgates—the rules on the wall for everybody to see. One rule that shows up every year is "Keep your hands to yourself."

How should students read this rule? If everything they need to know can be found in the dictionary definitions of those five words, then the correct reading is: Don't touch anybody with your hands. But that would produce some pretty odd results. Sam couldn't high-five or shake hands with Tom. Odder still, Sam could kick or throw things at Tom because, after all, the rule's text refers only to hands.

That's plainly wrong. If Sam kicked Tom, he would be punished. And rightly so, because context reveals a more sensible way to read the rule. The point of adopting the classroom rules was to promote a productive learning environment. Given that context, reading "Keep your hands to yourself" to mean high-fives are banned and kicking is okay would defeat the point.

The better reading is: Don't physically disrupt your classmates. The phrase "Keep your hands to yourself" evinces—but does not exhaust—the conduct that won't be allowed in the classroom. It gives a clear example of what not to do and leaves students to generalize, analogize, and infer from there. Kicking isn't mentioned, but it's forbidden.

Context plays the same role in legal interpretation.[58] As Justice Barrett recently wrote, "the meaning of a word depends on the circumstances in which it is used. To strip a word from its context is to strip that word of its meaning."[59] Sometimes, context can clarify semantic meaning (think of business norms clarifying contractual terms).[60] Other times, semantic meaning is clear, but context can reveal the right inferences to draw from the words (think of implied statutory preemption).[61]

And context is equally important when reading constitutional text. Unlike statutes—easily revised solutions to the concrete policy problems of the day—constitutional provisions set the terms of the social contract, enshrine individual rights, and place limits on government power meant to stand the test of time. By their very nature—a nature statutes do not share—constitutional provisions sweep broadly.

As Chief Justice Marshall explained in *McCulloch v. Maryland*,[62] a constitution that tried to spell out its whole practical meaning

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58 *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167 (2012) ("Context is a primary determinant of meaning.").

59 Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) (citation omitted); *see also* Pulsifer v. United States, 601 U.S. 124, 140–41 (2024) (emphasizing the importance of reading "text in its legal context").

60 SCALIA & GARNER, *supra* note 58, at 73 ("Sometimes context indicates that a technical meaning applies. Every field of serious endeavor develops its own nomenclature—sometimes referred to as *terms of art*.").

61 *Id.* at 290–94 (discussing how context influences statutory interpretation questions involving federal preemption of state laws).

62 17 U.S. (4 Wheat.) 316 (1819).

> would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. . . . Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.[63]

The Constitution does not and cannot spell out everything it means. But it's often possible to infer meaning in particular cases from what it does say.

On this point, even jurists with opposing philosophies agree. Justice Antonin Scalia, an originalist, believed that "[i]n textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear."[64] Similarly, Justice Thurgood Marshall, a living constitutionalist, said the Bill of Rights "was designed, not to prescribe with 'precision' . . . but to identify a fundamental human liberty," and courts should thus "strive, when interpreting these seminal constitutional provisions, to effectuate their purposes."[65]

Both Justices pointed to First Amendment law as an example of how this context-sensitive approach works in action.[66] Back to Justice Scalia:

> Take, for example, the provision of the First Amendment that forbids abridgement of "the freedom of speech, or of the press." That phrase does not list the full range of communicative expression. Handwritten letters, for example, are neither speech nor press. Yet surely there is no doubt they cannot be censored. In this constitutional context, speech and press, the two most common forms of communication, stand as a sort of synecdoche [or representation] for the whole. That is not strict construction, but it is reasonable construction.[67]

Justice Marshall made the same point: The phrase "freedom of speech" literally refers only to spoken words.[68] "Yet, to give effect to the purpose of the [First] Amendment, we have applied it to . . . conduct designed to convey a message . . . ."[69]

Just think of all the non-verbal acts the Court has protected under the umbrella of "freedom of speech." Marching in Nazi clothes? Protected.[70] Dancing without clothes? Protected.[71] Burning flags? Protected.[72] Funding

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63 *Id.* at 407.

64 ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37 (1997).

65 Oliver v. United States, 466 U.S. 170, 186–87 (Marshall, J., dissenting).

66 *Id.* at 187 n.5; Scalia, *supra* note 64, at 37–38.

67 SCALIA, *supra* note 64, at 37–38.

68 *Oliver*, 466 U.S. at 187 n.5 (Marshall, J., dissenting) (citing Edwards v. South Carolina, 372 U.S. 229 (1963)).

69 *Id.*

70 Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43, 43–44 (1977) (per curiam).

71 City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion).

72 Texas v. Johnson, 491 U.S. 397, 406 (1989).

or refusing to fund political advocacy? Protected.[73] Listening to obscenity? Protected.[74] Saying nothing at all? Protected.[75]

Why are all these things protected? Because dictionaries don't say all there is to know about the First Amendment.[76] Like every Bill of Rights provision, it embodies "broad principles."[77] So the Court doesn't merely seize on the narrowest possible definition of "speech"—as *Hester* did with "houses" and *Oliver* did with "effects"—and stop there. Instead, the Court strives for "the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."[78] And that means securing "rights that, while not unambiguously enumerated in the very terms of the [First] Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights."[79]

Look at a famous example: *West Virginia State Board of Education v. Barnette*.[80] The plaintiffs challenged a law that required students to recite the pledge of allegiance and salute the flag, arguing that the First Amendment secured "a right of self-determination in matters that touch individual opinion."[81] Of course, the text does not mention any of that.[82] But speech is about "communicating ideas," and without "freedom of the mind," free speech would mean nothing.[83] So there must be a broader "sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control."[84] With that deeper

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73 Citizens United v. FEC, 558 U.S. 310, 339 (2010) (funding political speech); Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., 585 U.S. 878, 893–94 (2018) (refusing to fund political speech).

74 Stanley v. Georgia, 394 U.S. 557, 565 (1969).

75 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

76 Globe Newspaper Co. v. Superior Ct. for the Cnty. of Norfolk, 457 U.S. 596, 604 (1982) ("[W]e have long eschewed any 'narrow, literal conception' of the Amendment's terms . . . ." (quoting NAACP v. Button, 371 U.S. 415, 430 (1963))). The principle of broad construction applies to First Amendment text beyond the phrase "freedom of speech." *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) ("A broadly defined freedom of the press assures the maintenance of our political system and an open society.").

77 *Globe Newspaper*, 457 U.S. at 604.

78 Bridges v. California, 314 U.S. 252, 263 (1941).

79 *Globe Newspaper*, 457 U.S. at 604.

80 319 U.S. 624 (1943).

81 *Id.* at 627–28, 631.

82 *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

83 *Barnette*, 319 U.S. at 632, 637.

84 *Id.* at 642. As the Court later put it:

> If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

liberty in mind, the Court held that forcing a student to "declare a belief" "not in his mind" violates the First Amendment.[85]

The Fourth Amendment is entitled to the same broad construction. Indeed, one of the first major Fourth Amendment cases applied "the rule that constitutional provisions for the security of person and property should be liberally construed" because a "close and literal construction deprives them of half their efficacy."[86] The *Olmstead* dissenters cited this rule too. As Justice Butler wrote, "This Court has always construed the Constitution in light of the principles upon which it was founded," so the Fourth Amendment must be read to "safeguard[] against all evils that are like and equivalent to those embraced within the ordinary meaning of its words."[87]

Which raises the question: Are arbitrary searches of land "evils that are like and equivalent" to those listed in the Fourth Amendment's plain text? Yes. And the Amendment's full context shows why. What property was secure, and insecure, at the Founding? What kind of power was the Amendment adopted to constrain? What does the text around "persons, houses, papers, and effects" say about the Amendment's purpose? It's to these questions this Article now turns, starting with a point *Hester* raised: the common law.

B. *Common Law Trespass*

Reading *Hester*, one gets the sense that the common law protected only the home from invasions, but not the land beyond the home. As the court, citing Blackstone's *Commentaries*, put it: "The distinction between the [open fields] and the house is as old as the common law."[88] In later cases, the Court cites the same part of Blackstone's *Commentaries* for the idea that only the area "immediately surrounding" a house—"not the neighboring open fields"[89]—would have received "the same" common law protection as "the house."[90]

Stanley v. Georgia, 394 U.S. 557, 565 (1696).

85 *Barnette*, 319 U.S. at 631, 634, 642.

86 Boyd v. United States, 116 U.S. 616, 635 (1886); *see also* Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 574–77 (1996) ("The [*Boyd*] Court announced that it would interpret constitutional provisions protecting individual liberty expansively in order to enforce the values embodied in them; it would not be bound by restrictive canons of statutory construction.").

87 Olmstead v. United States, 277 U.S. 438, 487–88 (Butler, J., dissenting); *see also id.* at 476–79 (Brandeis, J., dissenting) (applying the *Boyd* principle).

88 Hester v. United States, 265 U.S. 57, 59 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *223, *225, *226).

89 Oliver v. United States, 466 U.S. 170, 180 (1984).

90 United States v. Dunn, 480 U.S. 294, 300 & n.3 (1987); *see also Oliver*, 466 U.S. at 180.

Just one problem: The Court's analysis relies entirely on a section of the *Commentaries* about "burglary, or nocturnal housebreaking," in the chapter "Offences Against the Habitations of Individuals."[91] This is not a fair use of the common law.[92] Obviously, a survey of burglary will focus on the home. But a contextual reading of the Fourth Amendment requires asking whether the common law protected land.

It did. At common law, it was illegal to trespass on private land.[93] As Blackstone explained:

> Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close; the words of the writ of trespass commanding the defendant to show cause, *quare clausum querentis fregit* [why he broke the close]. For every man's land is in the eye of the law enclosed and set apart from his neighbor's: and that either by a visible and material fence, as one field is divided from another by a hedge; or, by an ideal invisible boundary, existing only in the contemplation of the law, as when one man's land adjoins to another's in the same field.[94]

Blackstone says this again and again: "[a 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"; "the owner may retain to himself the sole use and occupation of his soil: every entry, therefore, thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression"; "the law of England . . . has treated every entry upon another's lands, (unless by the owner's leave, or in some very particular cases) as an injury or wrong."[95]

Common law trespass liability even extended to officials who acted without lawful authority.[96] The English cases widely understood to have inspired the founding generation's disdain for arbitrary searches were

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91 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *220, *223.

92 *See* Saltzburg, *supra* note 8, at 16 ("[T]he [*Hester*] Court neglected to mention that Blackstone described the curtilage for purposes of defining the crime of burglary."); State v. Dixson, 766 P.2d 1015, 1022 (Or. 1988) ("We question Justice Holmes' reading of this section of Blackstone's treatise. In the chapter of Blackstone's Commentaries cited by the Supreme Court, Blackstone discussed . . . burglary . . . .").

93 *See, e.g.*, MATTHEW HALE, ANALYSIS OF THE LAW 109 (Stafford, John Nutt 1713) (describing common law action for "[t]respass by breaking any man's ground, hedges, [etc.], by the party (trespasser) himself, or by his command, or by his cattle, [etc.]") (cleaned up). That the common law forbade trespassing on private land may explain why other major common law nations reject the open fields doctrine. *See generally* Robert Frommer, The Open Fields Doctrine: America's "Uncommon" Mistake (Mar. 26, 2024) (unpublished manuscript) (available at https://perma.cc/YG6N-DL4X) (showing that Australia, Canada, New Zealand, and the United Kingdom reject the open fields doctrine).

94 3 WILLIAM BLACKSTONE, COMMENTARIES *208–10 (spellings altered to align with modern usage).

95 *Id.* at *209 (spellings altered to align with modern usage).

96 Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 624–26, 661–62 (1999) ("At common law, a search or arrest was presumed an unlawful trespass unless 'justified.'").

trespass cases that awarded damages against the officers.[97] While those cases all challenged home entries, one of them—*Entick v. Carrington*,[98] which the Supreme Court has called a "monument of English freedom"[99] —reiterated Blackstone's point that the common law forbade trespassing on private land:

> [B]y the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action though the damage be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil.[100]

Professor Brian Sawers has defended the open fields doctrine on the ground that "Blackstone's doctrine was not accepted in the American colonies."[101] According to Sawers, "trespass law in 1791 did not grant the landowner the power to exclude unwanted visitors from open land."[102] But the problem with the open fields doctrine—despite its name—is not that it allows invasions of land the owner has left open to the public. The problem is that it allows invasions of land that is *closed* to the public.

The history Sawers points to draws this very distinction. He observes: "The common law of England gave the landowner an unqualified right to exclude people and required fencing livestock in. By statute, the colonials reversed the English rule, invariably within a few years of settlement."[103] This shift to a "fence out" system does not show that early Americans rejected the core of English trespass law: "entry on another man's ground without a lawful authority."[104] Rather, it shows that early Americans preserved and adapted trespass law to suit their novel circumstances.[105]

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97 *See* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1196 (2016) (discussing "[t]hree influential cases [that] laid the groundwork for the Founders' rejection of general warrants: *Entick v Carrington* in 1765, *Wilkes v Wood* in 1763, and *Leach v Money* in 1765" (footnotes omitted)).

98 (1765) 95 Eng. Rep. 807; 19 Howell's State Trials 1029.

99 United States v. Jones, 565 U.S. 400, 405 (2012) (quoting Brower v. Cnty. of Inyo, 489 U.S. 593, 596 (1989)).

100 Boyd v. United States, 116 U.S. 616, 627 (quoting *Entick*, (1765) 95 Eng. Rep. 807).

101 Brian Sawers, *Original Misunderstandings: The Implications of Misreading History in* Jones, 31 GA. ST. U. L. REV. 471, 492 (2015).

102 *Id.* at 490.

103 Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665, 675 (2011); *see also* John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 550 (1996) ("A wave of early nineteenth-century state statutes . . . appeared to reject the English 'fence-in' rule in favor of a new 'free-range' standard, which allowed stock to roam freely over private land without creating trespass liability.").

104 3 WILLIAM BLACKSTONE, COMMENTARIES *209.

105 *See* Buford v. Houtz, 133 U.S. 320, 328 (1890) (observing that "[n]early all the States in early days had what was called the fence law," which specified how to exclude intruders); *see also* McKee v. Gratz, 260 U.S. 127, 136 (1922) ("The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of

They wanted to settle, but in a way that retained the "absolute rights of Englishmen."[106]

The early American shift to a fence-out system, moreover, reflected a worldview that tied property rights to cultivation. John Locke famously wrote that property rights arise when a person has mixed the "labour of his body and the work of his hands" with "the state that nature has provided."[107] Blackstone agreed that "the idea of a more permanent property in the soil" arose from the need to cultivate wild land—for who would toil "if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labour?"[108]

Locke and Blackstone were part of a broader intellectual movement that valued the right to exclude, but viewed "[p]ossession—understood as occupancy, use or labor"—as the true "fountainhead of property."[109] The founding generation embraced this view,[110] which makes sense. In 1791, life happened out on the land.[111] As John Dickinson observed before the American Revolution: "This continent is a country of planters, farmers,

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unenclosed and uncultivated land in many parts at least of this country. Over these it is customary to wander, shoot and fish at will until the owner sees fit to prohibit it."); Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 YALE L.J. 872, 904 (2019) (describing how colonial New Haven, Connecticut, enacted "a rigorous set of regulations govern[ing] the erection and maintenance of fences" to ensure property boundaries were marked, and even employed "one of the oldest government officials on the American continent[,] . . . the 'fence-viewer'" who was "charged with inspecting fences to ensure they remained in good order").

106 *See* SAMUEL ADAMS, THE RIGHTS OF THE COLONISTS 420 (1772) ("The absolute rights of Englishmen, and all freemen in or out of civil society, are principally personal security, personal liberty, and private property."); JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED (Boston, Edes & Gill 1764) (declaring "[t]he end of government . . . is above all things to provide for the security, the quiet, and happy enjoyment of life, liberty, and property" (emphasis omitted)); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *125 (listing among "the rights of the people of England" "the right of personal security, the right of personal liberty, and the right of private property").

107 JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION, ¶ 27, at 11 (J.W. Gough ed., Basil Blackwell Oxford 1948) (1690).

108 2 WILLIAM BLACKSTONE, COMMENTARIES *7; *see also id.* at *9 (explaining that property is "originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use," where it will remain until he "abandon[s] it").

109 Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 379–405 (2003) ("Possession—understood as occupancy, use or labor—thus took its central place in the common-law rules concerning property."). On the topic of "possession," state constitutions before and after the Fourth Amendment's ratification often protected "possessions"—a term that, at the time, was widely understood to refer to land. *See* James C. Phillips, *A Corpus Linguistics Analysis of "*Possessions*" in American English, 1760–1776*, 27 CHAP. L. REV. 143, 144, 163–64 (2024) (showing that when Americans used the term "possessions" from 1760–1776, they were "likely or clearly" referring to land 86% of the time); *see also* Neil C. McCabe, *State Constitutions and the "Open Fields" Doctrine: A Historical-Definitional Analysis of the Scope of Protection Against Warrantless Searches of "Possessions,"* 13 VT. L. REV. 179, 190–210 (1988) (making a similar argument).

110 Mossoff, *supra* note 109, at 404–05.

111 LAURIE, *supra* note 7, at 16.

and fisherman . . . ."[112] And as Justice Story later recalled: "The country was a wilderness, and the universal policy was to procure its cultivation and improvement."[113]

The bottom line is that even if "trespass law in 1791 did not grant the landowner the power to exclude unwanted visitors from open land,"[114] that's beside the point. Early Americans cherished both cultivation and the right to exclude, and their fence-out system was an expression of those values. When the Fourth Amendment was adopted, a person who invaded fenced land—whether George Washington's Mount Vernon or a frontier farm—was a trespasser. Yet it's precisely those closed lands the open fields doctrine exposes to arbitrary searches.[115]

C. *No Arbitrary Searches*

A contextual reading of the Fourth Amendment also requires asking what sort of power it was meant to constrain. In First Amendment cases, the Court often notes that censorship of individual expression and ideas is anathema to a free society.[116] The founding generation did not want to live in a society where the government holds that kind of power.[117] So, what kind of power was the Fourth Amendment adopted to constrain?

History helps. While it can't answer every interpretive question, the Fourth Amendment's "formative history" can still shed light on its "enduring purpose."[118] And, happily, for all the debate over its meaning, there's a remarkably "common consensus" that the Fourth Amendment

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112 JOHN DICKINSON, LETTERS FROM A FARMER IN PENNSYLVANIA (1767), *reprinted in* EMPIRE AND NATION 13 (Forrest McDonald ed., 2d ed. 1999).

113 Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 145 (1829); *see also* Sprankling, *supra* note 103, at 521–56 (providing examples of how "many early American property law opinions justify the modification of traditional rules as necessary to adapt English law to American wilderness conditions" (footnote omitted)).

114 Sawers, *supra* note 101, at 490.

115 While Sawers is cited as somewhat of a foil for this Article's perspective, it's possible he would agree on how all the major open fields cases should have been resolved. *Hester*, *Oliver*, and *Dunn* upheld entries of fenced farms. Given Sawers' focus on unfenced and unimproved land, one may read him as defending, not the categorical open fields doctrine embodied in these decisions, but rather a narrower version that applies only to truly open lands.

116 *See, e.g.*, Oliver v. United States, 466 U.S. 170, 187 n.5 (Marshall, J., dissenting); Globe Newspaper Co. v. Superior Ct. for the Cnty. of Norfolk, 457 U.S. 596, 604 (1982); Time, lnc. v. Hill, 385 U.S. 374, 389 (1967); *see also* SCALIA, *supra* note 64, at 37–38.

117 *See generally supra* note 116.

118 The Honorable M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave It Birth*, 85 N.Y.U. L. REV. 905, 907 (2010); *see also* United States v. Rahimi, 144 S. Ct. 1889, 1914 (Kavanaugh, J., concurring) ("The pre-ratification history of America's many objections to British laws and the system of oppressive British rule over the Colonies—identified most prominently in the Declaration of Independence—can likewise inform interpretation of some of the crucial provisions of the original Constitution and Bill of Rights.").

was adopted to address "the evil of arbitrary government rummaging in people's lives."[119] It reflects a deep "[h]ostility to conferring discretionary search authority on common officers."[120]

The classic discretionary searches were carried out under English general warrants and colonial writs of assistance in famous controversies like *Paxton's Case*,[121] *Wilkes v. Wood*,[122] and *Entick*.[123] The common law, with few exceptions, required officials to have a specific warrant—one issued by a judge, based on probable cause, and that limited the scope of the search—before invading private property.[124] General warrants violated these norms by granting discretionary power "to search unspecified places or to seize unspecified persons."[125]

Thus, when Massachusetts lawyer James Otis challenged the use of broad writs of assistance to search homes and warehouses for smuggled goods in *Paxton's Case*, he maligned the writ as "a power that places the liberty of every man in the hands of every petty officer" and "transformed officers into 'tyrant[s]'" because "it allowed officers 'to enter our houses when they please.'"[126]

While Otis lost *Paxton's Case*, the principle that officials should not hold discretionary power prevailed in *Wilkes* and *Entick*.[127] Both cases arose after Lord Halifax issued general warrants for officers to track down the authors of papers critical of the Crown.[128] In *Wilkes*, officers used that power to "ransack[] houses and printing shops in their searches, arrest[] forty-nine persons (including the pamphlet's author, Parliament member John Wilkes), and seize[] incriminating papers—all under a single general

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119 Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable": The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 316–17, 316 n.189 (2016) (collecting cases and articles); *see also* Emily Berman, *Individualized Suspicion in the Age of Big Data*, 105 IOWA L. REV. 463, 479 n.69 (2020) (same).

120 Davies, *supra* note 96, at 580–81.

121 1 Quincy 51 (Mass. 1761).

122 (1763) 98 Eng. Rep. 489; 19 Howell's State Trials 1153.

123 Friedman & Stein, *supra* note 119, at 315–16; Donohue, *supra* note 97, at 1196–1207, 1243–52 (discussing *Paxton's Case*, *Wilkes v. Wood*, and *Entick v. Carrington*).

124 Donohue, *supra* note 97, at 1236–37.

125 Michael, *supra* note 118, at 909; *see also* Davies, *supra* note 96, at 578 & n.74, 579 nn.75–76, 580 n.78 (explaining how leading common law authorities including Coke, Hale, Hawkins, and Blackstone rejected the idea that ordinary officers could wield discretionary search power).

126 Davies, *supra* note 96, at 580–81 (alteration in original) (citing 2 LEGAL PAPERS OF JOHN ADAMS 140–43 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)); *see also* Donohue, *supra* note 97, at 1244–52 (explaining the facts of *Paxton's Case*).

127 *See generally* Donahue, *supra* note 97 (discussing all three cases in the context of the Fourth Amendment).

128 Michael, *supra* note 118, at 909–10.

warrant."[129] In *Entick*, officers used "force and arms" to break into Entick's house, rooms, chests, and drawers, and to pore over his private papers.[130]

Wilkes and Entick sued the officers for trespass and won damages.[131] Chief Justice Pratt, like Otis, rejected the use of general warrants because they gave the officers far too much discretion. In *Wilkes*, Pratt explained that a "discretionary power given to messengers to search wherever their suspicions may chance to fall . . . . may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."[132] In *Entick*, likewise, Pratt rejected the idea that officers may search wherever they please "whenever the secretary of state shall think fit to charge, or even to suspect, a person" of a crime.[133]

Part of what made the searches in *Paxton's Case*, *Wilkes*, and *Entick* so odious was that, unlike modern police, founding-era officers lacked freestanding search power.[134] "Proactive criminal law enforcement had not yet developed by the framing of the Bill of Rights . . . ."[135] Criminal investigation was instead a reactive process.[136] A complainant would swear out an oath to a justice of the peace, who would then decide "whether to activate the criminal justice apparatus for making arrests and searches" by issuing a warrant to track down the suspect.[137] The warrant was crucial, both to provide "binding instructions" and "to indemnify the constable against trespass claims."[138]

None of this context suggests that the Fourth Amendment tolerates discretionary searches of private land. Rather, the founding generation's disdain for arbitrary searches makes it far more likely that the point of listing "persons, houses, papers, and effects"—the property at risk in *Paxton's Case*, *Wilkes*, and *Entick*—was to stop the discretionary search problem before it spread. In the same way the First Amendment lists "freedom of speech," even though it protects non-verbal expression. In the same way "Keep your hands to yourself" flags the paradigm case of classroom punching, even though it also forbids kicking. The reason to list

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129 *Id.* at 910.

130 Donohue, *supra* note 97, at 1197 (quoting Entick v. Carrington, (1765) 95 Eng. Rep. 807, 807 19 Howell's State Trials 1029, 1030); Michael, *supra* note 118, at 910–11.

131 Michael, *supra* note 118, at 910–11.

132 Marcus v. Search Warrant, 367 U.S. 717, 728–29 (1961) (quoting Wilkes v. Wood, (1763) 98 Eng. Rep. 489, 498; 19 Howell's State Trials 1153, 1167).

133 Michael, *supra* note 118, at 911 (quoting *Entick*, 19 How. St. Tr. at 1063).

134 *See* Donohue, *supra* note 97, at 1196–1207, 1243–52 (discussing *Paxton's Case*, *Wilkes*, and *Entick*).

135 Davies, *supra* note 96, at 620–24.

136 *See id.*

137 *Id.* at 623–24.

138 *Id.* at 624.

some property was not to exhaust, but to evince, the arbitrary search power that officials should never be allowed to wield.[139]

D. *The Complete Text*

Last, a contextual reading of the Fourth Amendment requires taking its whole text into account.[140] *Hester* failed to do that.[141] It cherry-picked five of the Amendment's 54 words,[142] ignoring prefatory text about the right "to be secure," text in the warrant clause about "the place to be searched," and the rule of construction that applies to the entire Bill of Rights: the Ninth Amendment. All three points undercut *Hester*.

Start with the Fourth Amendment's first clause. Contrary to *Hester*, it does not protect *only* "persons, houses, papers and effects."[143] Rather, it protects "the right of the people to be secure in" those things.[144] That's a substantive difference. While it's clear the right "to be secure" covers the right to exclude from property, there's more to it.[145] Security has a broader meaning akin to freedom from threats, danger, or fear—an assurance against intrusions.[146] To the founding generation, the looming threat of arbitrary searches was as much a problem as actual intrusions.[147]

Imagine a small family farm. There's a house at the center, farming throughout, and a perimeter fence. *Hester* says we should care about only the house. The text, though, says we should also care about the farmer's broader right "to be secure in [his] . . . house[]."[148] Surely if officers raided the farm without a warrant, posted up around the house, watched it for hours, and then placed cameras around the farm to continue spying after they left, that would threaten the farmer's security in his home.

The point of the right "to be secure" is that people shouldn't have to tremble in their homes or live in fear that the government will invade their

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139 There is nothing new about the idea that the Fourth Amendment is not an exhaustive list. Indeed, the *Katz* decision, in recognizing protection for a private conversation, rests on that premise. *See Katz*, 389 U.S. at 351–54; *see also* Matthew Tokson, *Blank Slates*, 59 B.C. L. Rev. 591, 631 (2018) (observing the Fourth Amendment's first "clause is generally interpreted to be illustrative, providing examples of things that are protected by the Fourth Amendment rather than strictly limiting its coverage").

140 SCALIA & GARNER, *supra* note 58, at 167 ("The text must be construed as a whole.").

141 *See* Hester v. United States, 265 U.S. 57, 59 (1923).

142 *See id.* (quoting only "persons, houses, papers, and effects").

143 *See* U.S. CONST. amend. IV.

144 *Id.*

145 Luke M. Milligan, *The Forgotten Right to Be Secure*, 65 HASTINGS L.J. 713, 734–50 (2014).

146 *Id.* at 738–41.

147 *See id.*; *see also* David H. Gans, *"We Do Not Want to Be Hunted": The Right to Be Secure and Our Constitutional Story of Race and Policing*, 11 COLUM. J. RACE & L. 239, 250–59 (2021).

148 *See* U.S. CONST. amend. IV.

persons, houses, papers, or effects. Private land can house everything the Fourth Amendment protects. And for millions of Americans, fences and signs keep strangers away from those things. Just as moats secure castles from invasion, closed land secures our persons, houses, papers, and effects from arbitrary searches. If the government can search closed land at will, however—if it can access the persons, houses, papers, and effects behind our fences whenever it pleases—those items are less secure as a result. By skipping past the term "secure," *Hester* discounted all that.

Or look at the warrant clause. After the text *Hester* cites, the Fourth Amendment continues: "and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[149] Again, founding-era officers lacked inherent search power and could typically invade property only with a warrant. By setting the standard for valid warrants, the Fourth Amendment was effectively setting the standard for valid searches.[150]

And here's the kicker: The warrant clause, which begins with "and"—implying more protection—requires a specific description of "the place to be searched."[151] At the Founding, "place" was a broad term that meant "a particular portion of space."[152] What is fenced land if not a "place"? The use of a term that plainly includes land at the heart of a clause designed to do much of the Fourth Amendment's lifting provides yet another clue that land deserves protection. Yet here, too, *Hester* is silent.

Last, *Hester*'s literalism suggests that a rule of construction—if one exists—should inform how we read the Fourth Amendment. Statutes, contracts, and other legal documents often indicate how they should be read. And so does the Bill of Rights. The Ninth Amendment declares, "The enumeration in the Constitution, of certain rights, shall not be construed

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149 U.S. CONST. amend. IV.

150 *See* Davies, *supra* note 96, at 554 ("At common law, controlling the warrant did control the officer for all practical purposes." (emphasis omitted)); Gans, *supra* note 147, at 261–62 (collecting writings from Madison, St. George Tucker, and William Rawle to the effect that the Fourth Amendment required specific warrants for searches).

151 *See* U.S. CONST. amend. IV.

152 *See, e.g.*, SAMUEL JOHNSON, 2 A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773) (defining "place" as "Particular portion of space"); JOHN ASH, 2 THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775) (defining "place" as "a particular portion of space"); JAMES BARCLAY, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (1792) (defining "place" as "that part of space which any body possesses"); JOHN WALKER, A CRITICAL PRONOUNCING DICTIONARY AND EXPOSITOR OF THE ENGLISH LANGUAGE (1791) (defining "place" as "Particular portion of space"); NOAH WEBSTER, 2 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining "place" as "[a] particular portion of space . . . occupied or intended to be occupied by any person or thing, and considered as the space where a person or thing does or may rest or has rested, as distinct from space in general"); *see also* McCabe, *supra* note 109, at 214–15 (agreeing "place" is reasonably interpreted to have included land in its definition).

to deny or disparage others retained by the people."[153] Of course, there are lively debates about what that means,[154] but this Article does not stake out a position in that debate.

The point is merely that *Hester*'s approach—a hyper-literal reading of the text—requires reading the Ninth Amendment literally too. And under that approach, it's clear the Fourth Amendment's list of "persons, houses, papers, and effects" must "not be construed to deny or disparage other rights retained by the people"—including Americans' historical right to exclude intruders.[155]

E. *Summary*

Hester was wrong to treat the phrase "persons, houses, papers, and effects" as an exhaustive list of everything the Fourth Amendment protects. Three context clues show why. First, at common law, private land was secure from trespass, and early Americans preserved that rule with a fence-out system. Second, at the Founding, officials needed a specific warrant to search property. Discretionary searches, where they arose, were odious. Third, the whole text—the first clause's right "to be secure," the second clause's requirement that warrants describe "the place to be searched," and the Ninth Amendment's command not to the treat "enumeration" of rights as exhaustive—undercuts *Hester*'s literalism. Taking these context clues together, the most reasonable inference to draw from the text is that closed land deserves protection from arbitrary searches.[156]

III. Response to the Privacy Argument

The open fields doctrine is separately wrong under current doctrine if private land—at least in some cases—can satisfy the *Katz* privacy test. Under *Katz*, officials conduct a "search" when they invade a reasonable

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153 U.S. CONST. amend. IX.

154 *See* ANTHONY B. SANDERS, BABY NINTH AMENDMENTS: HOW AMERICANS EMBRACED UNENUMERATED RIGHTS AND WHY IT MATTERS 98–105 (2023) (summarizing the debate).

155 *Cf.* Akhil Reed Amar, Heller*,* HLR*, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 174–75 (2008) (arguing that even if the plain text of the Second Amendment does not include a personal right to keep arms for self-defense, reading that text together with the Ninth Amendment—which "was designed to reassure the American public that the fundamental rights that they believed they already had would not be lost merely because only some of these rights were explicitly enumerated or because others were narrowly worded"—separately justifies the result in *Heller*).

156 To borrow a phrase, arbitrary searches of fenced land are "like and equivalent to those [evils] embraced within the ordinary meaning of [the Fourth Amendment's] words." Olmstead v. United States, 277 U.S. 438, 487–88 (Butler, J., dissenting).

expectation of privacy.[157] A landowner who makes no effort to exclude intruders can't succeed under the *Katz* test.[158] But *Oliver* went further. It held that any "asserted expectation of privacy in open fields"—even if those fields are closed to the public—"is not an expectation that 'society recognizes as reasonable.'"[159] That was mistaken, and marching through *Oliver*'s privacy analysis shows why.

A. *Intimate Activities*

Oliver's first point is that, unlike a home, "open fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields."[160] Every word of this is incorrect.

First, because people use property in different ways, privacy necessarily shields distinct activities in distinct places. But the mere fact that land-based activities are different than home-based activities does mean they deserve no privacy. Indeed, distinct activities often seek quite similar ends: where a homeowner sleeps, a landowner camps; where a homeowner trains dogs, a landowner trains horses; where a homeowner walks her treadmill, a landowner hikes her forest; where a homeowner grows herbs, a landowner farms crops; where a homeowner plays board games, a landowner hunts game. There's no plausible reason why all the homeowner activities deserve privacy while the corresponding landowner activities deserve none. The home may be where privacy expectations are highest, but it's not where they end.

Second, to the extent *Oliver*'s claim is that landowner activities are less "intimate" than homeowner activities, that's both confusing and false. It's confusing because the *Katz* test is about privacy, not "intimacy."[161] And it's false because people engage in countless intimate activities on their land. Several of my clients are landowners. I've heard them testify about how they use their land to raise children, to take quiet walks with their

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157 Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (articulating the "reasonable expectation of privacy" test); *see also* Smith v. Maryland, 442 U.S. 735, 740 (1979) (adopting Justice Harlan's test).

158 *See* Oliver v. United States, 466 U.S. 170, 193–94 (Marshall, J., dissenting) ("If a person has not marked the boundaries of his fields or woods in a way that informs passersby that they are not welcome, he cannot object if members of the public enter onto the property. There is no reason why he should have any greater rights as against government officials.").

159 *Id.* at 179.

160 *Id.*

161 *Katz* does not mention "intimacy." And the case on which *Oliver* relies, *Boyd*, refers not to intimacy but to "privacies of life," a phrase plenty broad enough to include landowners' lives. *Oliver*, 466 U.S. at 179–80 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

spouse, to find solitude in nature, to hunt or fish, to discuss religion or family matters in private, to camp or make love, and on and on. These are intimate activities that occur on land across the country every day.[162] If privacy doesn't cover them, it's hard to see what privacy is for.

Third, the Court treats it as obvious that "the cultivation of crops" deserves no privacy.[163] But that's far from obvious. At the Founding, nine in ten Americans lived off the land.[164] They ran "household factories" that integrated domestic life and farm labor in a way that "mobilized the entire family."[165] Thus, even assuming domestic life is the standard for privacy, farming is one of the most deeply rooted family activities Americans have. Moreover, it's one that requires autonomy and long-range focus—which requires privacy. Under *Katz*, people can reasonably expect privacy in their office buildings and in their cars on public roads. Why not when farming on their own land?[166]

Fourth, the Court's claim that "there is no social interest" in securing privacy on land is somewhat baffling. The Court often notes that statutes "embody[] the will of the people,"[167] and has even pointed to "concepts of real . . . property law" as a source of "understandings that are recognized and permitted by society."[168] And every state has a trespass statute—the descendants of founding-era fence statutes—that empowers landowners to exclude intruders.[169] It defies logic to say that society has no interest in respecting a landowner's privacy when he takes every step required by state law to preserve his privacy.

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162 *See Oliver*, 466 U.S. at 192 (Marshall, J., dissenting) ("Many landowners like to take solitary walks on their property, confident that they will not be confronted in their rambles by strangers or policemen. Others conduct agricultural businesses on their property. Some landowners use their secluded spaces to meet lovers, others to gather together with fellow worshippers, still others to engage in sustained creative endeavor. Private land is sometimes used as a refuge for wildlife, where flora and fauna are protected from human intervention of any kind." (footnote omitted)).

163 *See id.* at 179 (majority opinion).

164 LAURIE, *supra* note 7, at 16.

165 *Id.* at 17.

166 *Oliver*, 466 U.S. at 192 n.14 (Marshall, J., dissenting) ("We accord constitutional protection to businesses conducted in office buildings . . . ; it is not apparent why businesses conducted in fields that are not open to the public are less deserving of the benefit of the Fourth Amendment." (citation omitted)).

167 *See, e.g.*, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 451 (2008).

168 Minnesota v. Carter, 525 U.S. 83, 88 (1998) (quoting Rakas v. Illinois, 439 U.S. 128, 143–44, 143 n.12 (1978)); *accord* Byrd v. United States, 138 S. Ct. 1518, 1527 (2018).

169 *Compare, e.g.*, 18 PA. STAT. AND CONS. STAT. ANN. § 3503(b)(1) (West 2024) (empowering landowners to exclude intruders verbally or with fences or visible signs), *with* Brief for Appellants at 65–66, Punxsutawney Hunting Club, Inc. v. Pa. Game Comm'n, 23 WAP 2023 (case pending in the Pennsylvania Supreme Court), https://perma.cc/F7KM-Y4DA (collecting fencing statutes adopted in Pennsylvania from 1700–1905).

B. *No Public Access*

Oliver's next point is that "as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or 'No Trespassing' signs effectively bar the public from viewing open fields in rural areas."[170] The Court is knocking down strawmen here.

The Court may be correct that land is often publicly accessible, but only because there is ample public and undeveloped private land in this country. The fact that your neighbors keep their doors open and allow public access to their homes does not mean you deserve no privacy in yours. Likewise, the fact that other people leave their land open to the public does not make it unreasonable for you to expect privacy on yours.

That's not only how state trespass laws across the country work—it's what people subject to those laws actually believe. In a 2011 study, 66.5% of respondents said that posting "no trespassing" signs on land creates a reasonable expectation of privacy.[171] In a 2009 study, respondents said that searching fenced and posted cornfields was more intrusive than tailing a pedestrian in a car, searching a house with one spouse's consent over the other's objection, and using a needle to take a blood sample at work.[172] And in a 1993 study, respondents said that searching fenced and posted cornfields was more intrusive than a search of a newspaper office, a pat-down, an inspection of plumbing and wiring in a home, and the use of a beeper to track a car.[173]

Moreover, expectations aside, the Court's claim that fences and "no trespassing" signs don't prevent the public from "viewing open fields" is false and misses the point. If fences and signs do their jobs, people will not see the areas they could otherwise see only by entering. That was true in *Hester*, where police saw Hester hand off a jug of whiskey only after they jumped a fence,[174] as well as in *Oliver*, where police had to enter fenced land and prowl around until they found something.[175] Nor does it make sense to fixate on "viewing." The open fields doctrine isn't about viewing land from a lawful spot—it's about *physically invading* land to view it from an *otherwise-unlawful* spot.

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170 *Oliver*, 466 U.S. at 179.

171 Henry F. Fradella, Weston J. Morrow, Ryan G. Fischer & Connie Ireland, *Quantifying* Katz*: Empirically Measuring "Reasonable Expectations of Privacy" in the Fourth Amendment Context*, 38 AM. J. CRIM. L. 289, 356–57 (2011).

172 Jeremy A. Blumenthal, Meera Adya & Jacqueline Mogle, *The Multiple Dimensions of Privacy: Testing Lay "Expectations of Privacy,"* 11 U. PA. J. CONST. L. 331, 355–57 (2009).

173 Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 737–38 (1993).

174 *See* discussion *supra* Section I.B (summarizing *Hester* facts).

175 *Oliver*, 466 U.S. at 173.

C. *The Curtilage Mistake*

Oliver's last point is that the common law treated curtilage as part of the home, which "implies . . . that no expectation of privacy legitimately attaches to open fields."[176] This is a non sequitur. The question under *Katz* is not whether lands are precisely like houses—under English common law or otherwise—but whether people can reasonably expect privacy on land.[177] And that's where the distinction between curtilage and open fields breaks down. Surely a person who prays, or has sex, or holds an intimate conversation expects and deserves privacy whether she does these things in her fenced yard (curtilage) or in her fenced woods (open fields).

To the extent the common law matters under *Katz*, it would seem to matter only for the purpose of deciding whether society has historically deemed a privacy expectation reasonable. But if that's how it works, then *Oliver*'s fixation on curtilage falls short. Just as the common law forbade burglary of the home and its curtilage, the common law forbade trespass onto land—a point Blackstone makes in the very chapter on which *Oliver* relies.[178] At common law, it was entirely reasonable to expect that people would not invade your land. And if people breached that expectation, you could sue them. All of that remains true today.[179]

Oliver's only other reason for drawing the line at curtilage is that a "case-by-case approach" would require "police officers . . . to guess before every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy."[180] But just three years later, the Court adopted a four-factor curtilage test that requires officers to guess whether land is sufficiently secluded or used in ways that deserve privacy.[181] If officers are capable of applying these esoteric factors, it's hard to grasp why they would struggle to recognize "such unequivocal and universally understood manifestations of a landowner's desire for privacy" as fences and signs.[182]

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176 *Id.* at 180.

177 *Id.* at 189–96 (Marshall, J., dissenting) (applying the *Katz* test and concluding two landowners were entitled to privacy).

178 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *226 (distinguishing "burglary" from "*clausum fregit* [breaking the close] . . . by leaping over invisible ideal boundaries, which may constitute a civil trespass").

179 *See* Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978) ("[O]ne who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [the] right to exclude.").

180 *Oliver*, 466 U.S. at 181.

181 United States v. Dunn, 480 U.S. 294, 301 (1987); *see also id.* at 310 (Brennan, J., dissenting) ("The [*Oliver*] Court expressly refused to do a case-by-case analysis to ascertain whether, on occasion, an individual's expectation of privacy in a certain activity in an open field should be protected.").

182 *Oliver*, 466 U.S. at 194–95 (Marshall, J., dissenting).

D. *Summary*

Oliver's holding that it's never reasonable to expect privacy on land rings hollow. Now, as at the Founding, people engage in countless deeply private activities on their land, and it's entirely reasonable for people to expect that those activities will remain private when they take the steps required by state law to exclude intruders. Nor is there any principled reason why, if land around the home sometimes deserves privacy, land beyond that point never deserves it. The courts that held—after *Katz* but before *Oliver*—that private land can sometimes meet the *Katz* test got it right. The Supreme Court was wrong to hold otherwise.

Conclusion

Neither the textual nor the privacy justification for the open fields doctrine holds up. Taking the Fourth Amendment's full common law, historical, and textual context into account, *Hester* was wrong to read the text as a blank check for government officials to invade private land whenever and however they please. And *Oliver* was wrong that it's never reasonable to expect privacy on land. Under either analysis, closed land—land that people use and mark as private—deserves protection. In the end, the Fourth Amendment was adopted to make us "secure" from arbitrary searches. The open fields doctrine reflects "an impoverished vision of that fundamental right."[183] One hundred years is enough.

[183] *Id.* at 197; *see also* Rainwaters v. Tenn. Wildlife Res. Agency, No. W2022-00514-COA-R3-CV, 2024 WL 2078231, at *18 (Tenn. Ct. App. May 9, 2024) (holding that warrantless searches of posted, fenced farms under the banner of the open fields doctrine "bear a marked resemblance to the arbitrary discretionary entries of customs officials more than two centuries ago in colonial Boston" and violated Article I, Section 7 of the Tennessee Constitution).