Fourth Amendment and Agriculture: Warrantless Access to Agricultural and Private Rural Lands

Robert Frommer and Joshua Windham

Introduction – Institute for Justice (10 minutes)

- We're a national non-profit public-interest law firm that litigates to defend constitutional rights, including property rights, free speech, and economic liberty. We do what's called strategic litigation, meaning we bring cases designed to move the law in a more pro-freedom direction over time. The goal (and our clients share this goal) is not just to help one person, but to set legal precedent that will help millions of people.

- Even before we started doing more Fourth Amendment work, we've had a long history of helping farmers push back on government abuse

    - In *DeVillier v. Texas*, 601 U.S. 285 (2024), IJ represented a Texas cattle rancher named Richie DeVillier **[Slide]** after the State of Texas built a highway barrier that flooded his land. The Fifth Amendment allows the government to take property for public use—as Texas did when it flooded Richie's land—but only if the government pays "just compensation." Texas hadn't paid Richie—it just flooded his land, land his family had worked for generations, and left him to deal with the consequences. The question in the case was whether Richie could sue Texas to seek that compensation, or whether he needed the Texas legislature's permission to do so. A couple months ago, the U.S. Supreme Court held that Richie had a right to sue Texas under Texas law—even without a statute—and allowed Richie's lawsuit to move forward. **[Opinion attached]**

    - In *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228 (11th Cir. 2017), IJ represented Ocheessee Creamery, a small dairy farm in Florida owned by Mary Lou Wesselhoeft **[Slide]** after the Florida Department of Agriculture banned them from advertising their all-natural skim milk as . . . "skim milk" because she wanted to sell it as pure milk without additives. I'm not joking: Florida banned Mary Lou from calling her skim milk "skim milk" because she refused to add artificial ingredients back into it after skimming the fat off. In 2017, the Eleventh Circuit held that Florida's ban violated the First Amendment—farmers are allowed to truthfully describe their own products. That's free speech. **[Opinion attached]**

- These are just a couple examples, but today we want to focus a bit more on the Fourth Amendment and how abusive searches and seizures affect rural landowners.

Fourth Amendment – Private Land (30 minutes)

- And we thought it would be useful to start with a quick primer on the Fourth Amendment, just to set the stage. The Fourth Amendment protects your right to be secure from unreasonable searches and seizures. Generally speaking, that means the government has to get a warrant based on probable cause before it searches or seize your property. If you go back and look at the historical events that inspired the Fourth Amendment, it was a response to what were called "general warrants." You can think of a general warrant like a blank check for a government official to search and seize property. They didn't require probable cause, they didn't require a specific description of the property to be searched or seized, and they didn't limit the scope of the search. They gave officials unfettered discretion to decide all of that for themselves. The Fourth Amendment was adopted, in large part, secure our property from these kinds of discretionary searches.
- The problem is, courts have invented all kinds of exceptions and loopholes that expose Americans to abusive searches and seizures. So, a few years ago, we started our Fourth Amendment Project **[Slide]** to start closing some of those loopholes. And we'd like to cover a few of those here—some we're already working on, and some that we're hoping to work more on.
    - Open fields doctrine
        - [Josh will tell the story of how he learned about the open fields doctrine using the *Rainwaters* case] **[Slide]**
        - What is the open fields doctrine? Simply put, it holds that all private land beyond the curtilage (the tiny ring of land around your home) receives zero Fourth Amendment protection. As a result, government officials can invade your land at will, roam around as they please, and spy on you—all without a warrant, probable cause, or any other limits. The open fields doctrine is essentially a general warrant for private land.
        - The U.S. Supreme Court announced the open fields doctrine exactly 100 years ago in *Hester v. United States* **[Opinion attached]**. We think that doctrine is wrong—and if you're interested in learning why, Josh wrote a law review article about it that's forthcoming in the GMU Law

Review **[Article attached]**. But the doctrine is pretty entrenched as a matter of federal Fourth Amendment law. So we've taken a long-range approach. We're using state constitutions to push back on the doctrine at the state level, with the hopes of creating a domino effect that will one day convince SCOTUS to revisit the issue.

- [Discuss *Rainwaters*, *Highlander*, *Punxsutawney Hunting Club*, *Manuel* cases, including the recent *Rainwaters*] **[Slides for each] [Opinion attached]**

- Drone surveillance
  - Another issue related to the open fields is aerial surveillance. Unlike open fields, which is about physical entry onto private land, the aerial surveillance problem is rooted in the Supreme Court's distorted conception of the term "search" in the Fourth Amendment.
  - The Fourth Amendment forbids "unreasonable searches." But the reasonableness requirement—what most people think of as the warrant requirement—only kicks in if the government has conducted a "search" in the first place. The Supreme Court has given two definitions: (1) a physical information-gathering intrusion, and (2) a violation of a reasonable expectation of privacy. Applying that logic, the Court has upheld warrantless aerial surveillance as falling outside the definition of "search." *See California v. Ciraolo*, 476 U.S. 207 (1986). **[Opinion attached]** In our view, the Court is reading the term "search" far too narrowly.
  - [Explain our proposed ordinary meaning test—a search is a purposeful investigative act directed at you or your property] **[Tuggle amicus brief attached]**
  - [Rob will discuss *Maxon* case, and how the Michigan Court of Appeals dealt with these issues, before the Michigan Supreme Court vacated the decision and ultimately dodged the issue entirely]

- Closely regulated industries
  - A final issue we've worked on is something called the "closely regulated industries" exception to the warrant requirement. The idea here, according to the Supreme Court, is that some businesses are so "closely" or

"pervasively" regulated that the owners of these businesses can't reasonably expect privacy. The exception allows warrantless inspections of businesses if (1) the business is closely regulated, and (2) three criteria are met: (a) the inspections are part of a regulatory scheme that furthers an important governmental interest, (b) warrantless inspections are necessary to further that interest, and (c) the regulatory scheme provides a fair substitute for a warrant by placing limits on the timing, frequency, duration, and scope of searches.

- [Josh will discuss *Patel* case and how lower courts are ignoring the limits the Supreme Court has placed on the exception by reading "closely regulated" and the various factors too loosely **[Opinion attached]**
- [Josh will discuss the *Bennett* case and how our client defeated warrantless taxidermy shop inspections there]

- There are also issues we haven't directly litigated, but that we're interested in learning more about.
    - One issue related to the open fields issue is the warrantless seizure of personal property on private land. This has come up in *Highlander* case—indeed, the warrantless seizure of game cameras is a common problem—but we have reason to think it's more widespread. It often comes up in the context of livestock seizures, for example. [Josh will briefly discuss the cattle seizure struck down in *Hopkins v. Nichols* 37 F.4th 1110 (6th Cir. 2022)] **[Opinion attached]**
    - Another issue that lies at the intersection of open fields and closely regulated industries is warrantless farm and crop inspections. We're very interested in filing a case about this. The problem is this: Most states have statutes authorizing Department of Agriculture officials to enter farms without a warrant to inspect plants and crops, and to conduct soil or water samples. We think these schemes violate the Fourth Amendment: They give state officials unfettered discretion to enter farms, roam around crops, and even take samples without any limits on their power.

Future Efforts to Secure Private Land (5 minutes)

- Our goal at IJ is to close these loopholes. In our view, private land isn't a constitutional stepchild—it's some of the oldest, most essential property we own. It's baked into our history as Americans, provides a

way of life and a source of income for millions of people, and gives us a place to carve out a degree of privacy and autonomy for ourselves in this world. At IJ, we want to protect it. And that means, more than anything, fixing some of the major distortions in Fourth Amendment law we've talked about:

    - Restoring the ordinary meaning of the term "search" so that aerial surveillance isn't exempt from the Fourth Amendment
    - Overruling the open fields doctrine so that private land isn't subject to unfettered physical intrusions and seizures of personal property
    - Establishing that people don't give up their privacy rights when they open a business on their land—whether a taxidermy shop, a farm, or any other kind of economic use

- But to do all this, we need your help. One reason we were so excited to come to this conference was that we wanted to meet more people in the agricultural community. We need to know the regulatory problems you're facing so that we can focus our cases on problems that affect real people.
- *So, if you or somebody you know has dealt with the kinds of abuses we've talked about today, or anything similar, please come talk to us! We'd love to see if there's something we can do to help.*

Question and Answer Session (15 minutes)

Links to materials - Dropbox folder with Cases and Articles

The Open Fields Doctrine Is Wrong

Joshua Windham[*]

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 Fourth Amendment protection, a contextual reading of the text and a proper application of the privacy test show that "closed" land—land we use and mark as private—deserves protection from arbitrary searches. The open fields doctrine should be overruled.

[*] Attorney and Elfie Gallun Fellow in Freedom and the Constitution, Institute for Justice. This Article reflects my personal views and not necessarily those of the Institute for Justice. Thanks to the Institute for Justice for the opportunity, to our donors for the resources, to our clients for the inspiration, and to my colleague Robert Frommer for the brainstorming.

Introduction

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

That is wrong. The Supreme Court has given two main justifications for the open fields doctrine. In 1924, the Court gave a textual one: The Fourth Amendment protects "persons, houses, papers, and effects," but not land.[1] In 1984, the Court gave a privacy justification: Under *Katz*, the Amendment protects "reasonable expectations of privacy," and it's never reasonable to expect privacy on land beyond the curtilage (the tiny ring of land around the home).[2] While there may be reasons to question the Court's narrow reading of "houses" and effects,"[3] and the validity of the *Katz* test,[4] this Article doesn't fight those premises. Rather, I argue that the Court's textual and privacy analyses were wrong on their own terms.[5]

First, I tackle the textual argument. The Court's core error was that it failed to read the Fourth Amendment's "persons, houses, papers, and

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

[2] Oliver v. United States, 466 U.S. 170 (1984).

[3] Specifically, I'm skeptical that "houses" means only four walls, a roof, and curtilage, and that "effects" means only personal property. *See Oliver*, 466 U.S. at 176–77, 180 & n.7. As for houses, at the founding, nine in 10 Americans lived off the land and ran "household factor[ies]" that integrated domestic and farm life in a way that "mobilized the entire family." BRUCE LAURIE, ARTISANS INTO WORKERS: LABOR IN NINETEENTH-CENTURY AMERICA 16–17 (1997). And there are, of course, myriad "houses" (warehouses, storehouses, public houses) that are not dwellings. So it seems plausible that "houses" is broader than the Euclidian concept that strikes our modern eyes. As for "effects," while some founding-era sources defined it to mean personal property, courts sometimes used it more broadly. *See, e.g.*, Hogan v. Jackson (1775) 98 Eng. Rep. 1096, 1099 (KB) (reading "effects" in a will to mean "worldly substance" or "all a man's property"); Ferguson v. Zepp, 8 F. Cas. 1154, 1155 (C.C.E.D. Pa. 1827) (No. 4,742) (same). This Article takes no position on the true meaning of these terms. The point is simply that these terms may warrant more reflection than the Court has given them.

[4] *See* William Baude & James Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1825 & n.7 (2016) (noting common critiques that "[t]he reasonable expectation of privacy concept has . . . serious defects, including its ambiguous meaning, it subjective analysis, its unpredictable application, its unsuitability for judicial administration, and its potential circularity").

[5] I'm not the first to critique 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. 1, 21–22 (1986) ("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, 130–31 (2002) ("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 1392 (2016) ("illogical considering existing case law"); Graeme Minchin, *The Incredible Shrinking Fourth Amendment*, 12 BEIJING L. REV. 813, 825–27 (2021) ("at odds with both constitutional rights and property law" and arose "out of thin air").

effects" language in context. It cherry-picked five of the Amendment's 54 words-ignoring the common law, historical, and textual context in which those words arise-and assumed they exhaust its meaning. But they don't. Just as the First Amendment's text banning "Congress" from abridging "freedom of speech" doesn't exhaust its protections against censorship, the Fourth Amendment's "persons, houses, papers" language doesn't exhaust its protections from arbitrary searches. Taking the full context into account, "closed" land-land people use and mark as private -deserves Fourth Amendment protection.

Second, 1 tackle the privacy argument and reach the same conclusion from a different angle. 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 state law to exclude intruders can reasonably expect privacy from intruders. Nor is there any good reason why curtilage sometimes deserves privacy but the land beyond it never does. The open fields doctrine should be overruled.

1. Summary of the Open Fields Doctrine

Before we can assess the open fields doctrine, we need to know how it works and how the Supreme Court has justified it. 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 does not appear on the Fourth Amendment's list of "persons, houses, papers, and effects," and it's never reasonable to expect privacy on land. After laying this groundwork, l'll show that neither justification holds up.

A. *The Open Fields Doctrine*

The Fourth Amendment's opening words protect "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches." This typically means officials must get a warrant before searching private property.[6] Requiring a warrant-approval from a neutral magistrate that both certifies the official has probable cause and limits the scope of the search-ensures that private property is not "secure only in the discretion of [government] officers."[7]

The open fields doctrine holds that private land beyond the curtilage receives none of these protections. No warrant, no probable cause, and no other limits on the timing, frequency, or duration of searches. ln the

[6] Kentucky v. King, 563 U.S. 452, 459 (20n).
[7] Johnson v. United States, 333 U.S. ro, 14 (1948).

Supreme Court's words, land has "no Fourth Amendment significance," so officials can invade it whenever and however they please.[8] Applying that logic, courts have upheld not only warrantless entries but even the warrantless installation of cameras on private land.[9]

Worse, the open fields doctrine covers the overwhelming majority of private land in the country. 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."[10] In other words, it's a categorical rule. As the Sixth Circuit recently put it, "th[e] doctrine does not turn on the nuances of a particular case; the rather typical presence of fences, closed or locked gates, and 'No Trespassing' signs on an otherwise open field therefore has no constitutional import."n

Of course, 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 that would qualify as "open fields" under current doctrine. Even assuming the curtilage extends out roo feet from every structure in the country-a generous assumption-only about 4% of all private land could even possibly qualify as curtilage.[12] The remaining 96%- about r.2 billion acres-are unprotected open fields.

B. *The Textual Justiflcation*

The Supreme Court announced the open fields doctrine in *Hester v. United States.*[13] There, federal officers got a tip that Hester was keeping moonshine at his father's farm.[14] 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.[15] Without a warrant, the officers entered the grove, "concealed themselves," jumped the fence, saw Hester hand over a jug, and arrested

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[8] United States v. Jones, 565 U.S. 400, 4n (2012).

[9] *See, e.g.,* United States v. Vankesteren, 553 F.3d 286, 291 (4th Cir. 2009) (upholding warrantless placement of trail camera on private land); Spann v. Carter, 648 F. App'x 586, 587-88 (6th Cir. 2016) (unpublished) (same); State v. Brannon, 2015-Ohio-1488,, 32 (unpublished) (same).

[w] Oliver, 466 U.S. at 180 n.II, 182; *see also* 1 WAYNER. LAFAVE, SEARCH AND SEIZURE§ 2.4(a) (6th ed. Mar. 2024 update) ("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.").

"Hopkins v. Nichols, 37 F.4th mo, m8 (6th Cir. 2022) (internal quotation marks and brackets omitted).

"Joshua Windham & David Warren, Good *Fences?* Good *Luck,* REGULATION, Spring 2024, at ro-14, https://www.cato.org/regulation/spring-2024/good-fences-good-luck.

[13] 265 U.S. 57 (1924).

[14] *Hester,* 265 U.S. at 57-58.

[15] Tro.f Record, *Hester,* 265 U.S. 57 (No. 243), at 15-16, 19; *see also* Saltzburg, *supra* note 5, 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").

him.[16] Hester moved to suppress the officers' testimony as the fruits of an unreasonable search.[17]

But the Supreme Court upheld the search. In all of two sentences, Justice Holmes declared that private land beyond the curtilage receives zero Fourth Amendment 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. 4 BL Comm. 223, 225, 226."[18] 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. Just four years later, the Court held that tapping Roy Olmstead's phone lines to catch him selling liquor did not implicate the Fourth Amendment.[19] The Court cited *Hester* for the rule that the Amendment protects only what it lists, and reasoned that "[t]he language of the amendment cannot be extended and expanded to include telephone wires."[20] *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 has always been applied to provisions of the Constitution safeguarding personal rights."[21] Justice Brandeis rejected the majority's "unduly literal construction" of the text.[22] And Justice Holmes-the man who wrote Hester-panned the majority for "sticking too closely to the words of [the] law where those words impart a policy that goes beyond them."[23]

The *Olmstead* dissenters' more liberal approach prevailed in *Katz v. United States.*[24] There, the Supreme Court held that police conducted a "search" when they attached a recording device to the outside of a public phone booth to spy on Katz's private phone call.[25] The Court rejected the

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[16] *Hester,* 265 U.S. at 58; Tr. of Record, *Hester,* 265 U.S. 57 (No. 243), at 16.

[17] *Hester,* 265 U.S. at 58.

[18] *Id.* at 59.

[19] Olmstead v. United States, 277 U.S. 438, 455-57, 466 (1928), *overruled by* Katz v. United States, 389 U.S. 347, 352-53 (1967).

[20] *Olmstead,* 277 U.S. at 464-65 (citing, in part, *Hester,* 265 U.S. 57).

[21] *Id.* at 487-88 (Butler,)., dissenting); *id.* at 488 (Stone,)., dissenting) ("I agree also with ... Mr. Justice Butler so far as it deals with the merits.").

[22] *Id.* at476 (Brandeis, J., dissenting).

[23] *Id.* at 469 (Holmes,)., dissenting).

[24] 389 U.S. 347 (1967).

[25] *Katz,* 389 U.S. at 352.

"narrow view" that the Fourth Amendment is merely a list of "protected area[s]," reasoning that it "protects people" "from unreasonable searches" "[w]herever [they] may be."[26]

Katz brought about a sea change in Fourth Amendment law. Unlike *Hester* and *Olmstead*, which asked whether officials had invaded a listed 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."[27] Or, as Justice Harlan's later-adopted concurrence explained, the Fourth Amendment protects "reasonable expectation[s] of privacy."[28]

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 was "wrong"—the Court did not resolve it.[29] 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.[30] These arguments were so successful that, by the early 1980s, six federal circuits and most state supreme 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*).[31]

But the Supreme Court ended all that in *United States v. Oliver*.[32] Similar to *Hester*, police got an anonymous tip that Oliver was growing marijuana on his farm.[33] 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

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[26] *Id.* at 350–53, 359.

[27] *Id.* at 351–52.

[28] *Id.* at 360 (Harlan, J., concurring); Smith v. Maryland, 442 U.S. 735, 740 (1979) (adopting Justice Harlan's "reasonable expectation of privacy" test).

[29] Tr. of Argument, *Katz*, 389 U.S. 347, at 9:00–9:10 (Katz's lawyer arguing "*Hester* is wrong."), 13:44–54 (Katz's lawyer distinguishing *Hester*), 21:56–22:06 (Katz's lawyer arguing "the *Hester* case has got to go"), 30:29–43 (government's lawyer relying on *Hester*), 37:40–47 (same).

[30] *See, e.g.*, Saltzburg, *supra* note 5, 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").

[31] At least according to one report. *See* United States v. Oliver, 686 F.2d 356, 361, 367–69 (6th Cir. 1982) (en banc) (Keith, J., dissenting) (collecting cases), *aff'd*, 466 U.S. 170 (1984).

[32] 466 U.S. 170 (1984).

[33] *Oliver*, 466 U.S. at 173–74. *Oliver* was consolidated with a similar case, *Maine v. Thornton* (No. 82-1273), which was on appeal from the Maine Supreme Court's decision that Thornton had established a reasonable expectation of privacy on his land by making efforts to exclude intruders. *Oliver*, 466 U.S. at 174–75 (citing State v. Thornton, 453 A.2d 489 (Me. 1982)); *see also* Bound by Oath, *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).

on walking until they reached a fenced marijuana field over a mile from Oliver's house.[34]

The Court upheld the warrantless search.[35] It began by reaffirming that "the rule announced in *Hester v. United States* was founded upon the explicit language of the Fourth Amendment," noting that open fields are neither "houses" nor "effects" because "[t]he Framers would have understood the term 'effects' to be limited to personal, rather than real, property."[36] 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.'"[37] The Court gave three reasons: First, "[t]here is no societal interest" in limiting "government interference or surveillance" on land. Second, fences and signs, unlike the walls of a home, don't prevent people from seeing land from the ground or air. Third, the common law treated curtilage as part of the home, which "implies ... no expectation of privacy legitimately attaches to open fields."i[8]

Since *Oliver,* the Court has returned to a "property rights baseline" that treats physical intrusions as Fourth Amendment searches.[39] In doing so, though, the Court has stressed that *Hester* remains good law. 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 [text]."[40] And in 2013, the Court wrote that open fields are not protected because they are "not enumerated in the ... text."[4,] Because *Hester* and every major open fields case since has started with the text, that is where my critique will start.

IL 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."[42] The problem with this argument is that it fails to read the text in context. It isolates 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 arise. But context is crucial to meaning. Taking the full

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[34] *Oliver,* 466 U.S. at 173-74.

[35] *Id.* at 181, 184. In the Court's view, the entry was a "'search,' but not one 'in the constitutional sense.'" United States v. Jones, 565 U.S. 400, 4n n.8 (2012) (quoting *Oliver,* 466 U.S. at 170).

[36] *Oliver,* 466 U.S. at 176-77 & n.7 (citing Doe v. Dring (1814) ros Eng. Rep. 447, 449 (KB), and 2 WILLIAM BLACKSTONE, COMMENTARIES "16, "384, "385).

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

[38] *Id.* at 179-80 (citing United States v. Van Dyke, 643 F.2d 992, 993-94 (4th Cir. 1981); United States v. Williams, 581 F.2d 451,453 (5th Cir. 1978); Care v. United States, 231 F.2d 22, 25 (roth Cir.), *cert. denied,* 351 U.S. 932 (1956)).

[39] Florida v. Jardines, 569 U.S. 1, 5 (2013) (citing *Jones,* 565 U.S. at 406 n.3).

[40] *Jones,* 565 U.S. at 4n (citing *Hester,* 265 U.S. at 59 (1924), and *Oliver,* 466 U.S. at 176-77).

[4,] Jardines, 569 U.S. at 6 (citing *Hester,* 265 U.S. 57).

[4,] *Id.*

common law, historical, and textual context into account, the most reasonable inference to draw from the text is that "closed" land-land we use and mark as private-deserves protection from arbitrary searches.

A. *Meaning Requires Context*

Textual meaning requires context. Consider: My wife teaches fourth grade. At the beginning of every year, she gathers her students and asks them to come up with a list of classroom rules that will help promote a productive learning environment. Then she 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? lf 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. lf Sam kicked Tom, he would be punished. And rightly so! We know that because context reveals a more sensible way to read the rule. The point of adopting the classroom rules, all agreed at the outset, 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. lt provides 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. 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."[43] Sometimes, context can clarify semantic meaning (think of business norms clarifying contractual terms). Other times, semantic meaning is clear but context can clarify the inferences we ought to draw from the words (think of implied statutory preemption).

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

[43] Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett,]., concurring) (citation omitted); *see also* Pulsifer v. United States, 144 S. Ct. 718, 730-31 (2024) (similar point about importance of reading text in context).

to stand the test of time. By their very nature-a nature statutes do not share-constitutional provisions sweep broadly.

As Chief Justice Marshall wrote in *McCulloch v. Maryland* (1819), a constitution that tried to spell out its whole practical meaning

> 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.[44]

The Constitution does not and cannot say everything it means. But we can often *infer* meaning in particular cases from what it *does* say.

On this much, 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."[45] And Justice Thurgood Marshall, a living constitutionalist, believed that the Bill of Rights "was designed, not to prescribe with 'precision' ... but to identify ... fundamental human libert[ies]," and thus we should "strive, when interpreting these seminal constitutional provisions, to effectuate their purposes."[46]

Both Scalia and Marshall, notably, pointed to First Amendment law as an example of how this context-sensitive approach works in action.[47] Back to 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 foll 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 for the whole. That is not strict construction, but it is reasonable construction.[48]

Marshall made the same point: The phrase "freedom of speech" literally refers only to verbal utterances. "Yet, to give effect to the purpose of the [First Amendment], we have applied it to conduct designed to convey a message."[49]

Just think of all the non-verbal acts the Court has protected under the umbrella "freedom of speech." Marching in Nazi clothes? Protected. Nude dancing? Protected. Flag burning? Protected. Funding or refusing to fund

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44 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

41 ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37 (1997) (citing *McCulloch,* 17 U.S. (4 Wheat.) at 407).

46 *Oliver,* 466 U.S. at 186-87 (Marshall,]., dissenting).

47 Scalia, *supra* note 45, at 37-38; *Oliver,* 466 U.S. at 187 n.5 (Marshall,]., dissenting).

48 Scalia, *supra* note 45, at 37-38.

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

political advocacy? Protected. Listening to obscenity? Protected. Saying nothing at am Protected.[50]

Why are all these things protected? Because dictionaries don't tell us everything we need to know about the First Amendment.51 Like all Bill of Rights provisions, it embodies "broad principles."[52] So the Court doesn't just seize on the narrowest possible definition of "speech"-as *Hester* did with "houses" and *Oliver* did with "effects"-and stop there. Rather, the Court strives for "the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."[53] And that means securing "rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights."[54]

Look at a famous example: *West Virginia State Board* of *Education v.* Barnette.[55] The plaintiffs there challenged a law that required students to recite the pledge and salute the flag, arguing that the First Amendment secured "a right of self-determination in matters that touch individual opinion."[56] Of course, the text does not mention any of that. But speech is about "communicating ideas," and without "freedom of the mind," free speech would mean nothing.[57] 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."[58] With that deeper liberty in mind, the Court held that forcing a student to "declare a belief' "not in his mind" violates the First Amendment.[59]

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

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[50] Nat'! Socialist Party of Am. v. Viii. of Skokie, 432 U.S. 43, 44 (1977) (per curiam) (marching in Nazi clothes); City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion) (dancing without clothes); Texas v. Johnson, 491 U.S. 397,406 (1989) (burning the flag); Citizens United v. Fed. Election Comm'n, 558 U.S. 3ro, 339 (20ro) (ti.mdingpolitical speech); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 585 U.S. 878, 893-94 (2018) (refusing to fund political speech); Stanley v. Georgia, 394 U.S. 557, 565 (1969) (listening to obscene speech); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) (saying nothing).

[5,] Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty., 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.").

[5,] *Globe Newspaper* Co., 457 U.S. at 604.

[53] Bridges v. California, 314 U.S. 252, 263 (1941).

[54] *Globe Newspaper,* 457 U.S. at 604.

[55] 319 U.S. 624 (1943).

[56] *Barnette,* 319 U.S. at 627-28, 631.

[57] *Id.* at 632, 637.

[58] *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." *Stanley,* 394 U.S. at 565.

[59] *Barnette,* 319 U.S. at 631, 634, 642.

should be liberally construed" because "[a] close and literal construction deprives them of half their efficacy."[60] The *Olmstead* dissenters cited this rule too. As Justice Butler wrote, "[t]his 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_"6,

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 they are. But to see why, we need to weigh the Amendment's full context. 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? We'll turn to these questions now, 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: "the distinction between the [open fields] and the house is as old as the common law. 4 BL Comm. 223, 225, 226."[62] In later cases, the Court cites the same part of Blackstone's *Commentaries* for the idea that only "the area immediately surrounding a dwelling house"-"not the neighboring open fields"-would have received "the same" common law protection as "the house."[63]

Just one problem: The Court's analysis relies solely on a part of the *Commentaries* about "BURGLARY, or nocturnal housebreaking," in a chapter on "Offences Against the Habitations oflndividuals."[64] This is not a fair use of the common law.[65] Obviously, a discussion of burglary will focus on the home. But if we want to understand how the Fourth

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[60] Boyd v. United States, n6 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) (noting *Boyd* "announced that [the Supreme Court] 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").

[6'] *Olmstead,* 277 U.S. at 487-88 (Butler,)., dissenting); *id.* at 476-79 (Brandeis,)., dissenting) (applying *Boyd* principle).

[fo] *Hester,* 265 U.S. at 59 (1924) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES "'223, "'225, "'226).

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

[64] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES "'220, "'223.

[65] *See* Saltzburg, *supra* note 5, at 16 ("[T]he *[Hester]* Court neglected to mention that Blackstone described the curtilage for purposes of defining the crime ofburglary."); State v. Dixson, 766 P.2d ro15, ro22-23 (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 ..... ").

Amendment's context informs the open fields issue, we need to know whether the common law protected land.

It did. At common law, it was illegal to trespass on private land.[66] As Blackstone himself explained in a chapter "On Trespass":

> 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 material fence, as one field is divided from another or 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.[67]

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."[68]

Common law trespass liability even extended to officials who acted without lawful authority.[69] The English cases widely understood to have inspired the founding generation's disdain for arbitrary searches were trespass cases that awarded damages against the officers.[70] While those cases all challenged home entries, one of them—*Entick v. Carrington*, which the Supreme Court has called a "monument of English freedom"[71] —reiterated Blackstone's point that the common law forbade trespassing on private land:

> By the laws of England, every invasion of 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.[72]

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[66] *See, e.g.*, MATTHEW HALE, ANALYSIS OF THE LAW, *109 (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).

[67] 3 WILLIAM BLACKSTONE, COMMENTARIES *209–10.

[68] *Id.* at *209.

[69] 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.'").

[70] *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)).

[71] *Jones*, 565 U.S. at 405 (quoting *Boyd*, 116 U.S. 626).

[72] Entick v. Carrington, 19 How. St. Tr. 1029, 1066 (CP 1765).

Professor Brian Sawers has defended the open fields doctrine on the ground that "Blackstone's doctrine was not accepted in the American colonies."[73] According to Sawers, "trespass law in 1791 did not grant the landowner the power to exclude unwanted visitors from open land."[74] 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*, but that it allows invasions of land the owner has *closed to the public*.

The history Sawers points to draws this very distinction. He observes that "[t]he 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."[75] This shift hardly shows that early Americans rejected the core of English trespass law: "entry on another man's ground without a lawful authority."[76] Instead, it shows that early Americans *preserved* and *adapted* trespass law to suit their novel circumstances.[77] They wanted to settle, but in a way that retained the "absolute rights of Englishmen."[78]

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 "hath mixed" the "*Labour* of his Body . . . and the *Work* of his Hands" with "the State that Nature hath provided."[79] Blackstone agreed that "the idea of a more permanent property in the soil" arose from the need to cultivate wild land—for who

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

[74] *Id.* at 490.

[75] 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.").

[76] 3 WILLIAM BLACKSTONE, COMMENTARIES *209.

[77] *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); 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 *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." (emphasis added)); 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 . . . charged with inspecting fences to ensure they remained in good order" (cleaned up)).

[78] *See* SAMUEL ADAMS, THE RIGHTS OF THE COLONISTS (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 (1763) (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"); *see also* 1 WILLIAM BLACKSTONE, *COMMENTARIES* *129 (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").

[79] JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 27 (1690).

would toil "if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labour?"[80]

Locke and Blackstone were part of a broader intellectual movement that saw the right to exclude as key, but "[p]ossession—occupancy, use or labor" as the "fountainhead of property."[81] The founding generation embraced this view.[82] Which makes sense. In 1791, life happened on the land.[83] As John Dickinson wrote before the revolution: "This continent is a country of planters, farmers, and fisherman . . . ."[84] And as Justice Story recalled after: "The country was a wilderness, and the universal policy was, to procure its cultivation and improvement."[85]

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*,"[86] 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. At the time the Fourth Amendment was adopted, a person who invaded fenced land—whether Washington's Mount Vernon or a frontier farm—was a trespasser. Yet it's precisely those *closed lands* that the open fields doctrine exposes to arbitrary searches.[87]

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,

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[80] 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").

[81] Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 379–403 (2003); *see also id.* at 405 ("Possession—understood as occupancy, use or labor—thus took its central place in the common-law rules concerning property."). On the topic of "possession," it's notable that several state constitutions before and after the fourth amendment's ratification protected a right to be secure in "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*, CHAP. L. REV. (forthcoming 2024) (manuscript at 1, 11–20 & n.1) (study showing that when Americans used the term "possessions" from 1760–1776, they were likely or clearly referring to land 86% of the time), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4668264; *see also* Neil C. McCabe, *State Constitutions and the "Open Fields" Doctrine: A Historical-Definitional Analysis of the Scope of Protections Against Warrantless Searches of "Possessions,"* 13 VT. L. REV. 179, 190–210 (1988) (similar argument).

[82] Mossoff, *supra* note 81, at 404.

[83] LAURIE, *supra* note 3, at 16.

[84] JOHN DICKINSON, LETTERS OF A PENNSYLVANIA FARMER (1767), Letter II, at 21.

[85] Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 145 (1829); *see* Sprankling, *supra* note 75, at 521–56 (giving examples of how "early American property law opinions justify the modification of traditional rules as necessary to adapt English law to American wilderness conditions" (footnote omitted)).

[86] Sawers, *Original Misunderstandings*, *supra* note 73, at 490 (emphasis added).

[87] While I've used Sawers as somewhat of a foil for my perspective, it's possible we'd agree on how all the major open fields cases should have been resolved. *Hester*, *Oliver*, and *Dunn* upheld entries of fenced farms. Given Sawers's focus on unfenced and unimproved land, I don't read him as defending the categorical open fields doctrine embodied in these decisions, but rather a narrower version that applies only to *open* lands.

the Court often notes that censorship of individual expression and ideas is anathema to a free society. The founding generation did not want to live in a society where the government holds that kind of power. Can we identify a similar category of power the Fourth Amendment was adopted to limit?

History helps here. While it can't answer every interpretive question, the Fourth Amendment's "formative history" can still shed light on its "enduring purpose."[88] And, happily, for all the debate over its meaning, there's a remarkably "common consensus" that the Fourth Amendment was adopted to address "the evil of arbitrary government rummaging in people's lives."[89] It reflects a deep "[h]ostility to conferring discretionary search authority on common officers."[90]

The classic discretionary searches were carried out under English general warrants and colonial writs of assistance in famous controversies like *Paxton's Case* (1761), *Wilkes v. Wood* (1763), and *Entick v. Carrington* (1765).[91] 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.[92] General warrants violated these norms by granting discretionary power "to search unspecified places or to seize unspecified persons."[93]

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 "complained that the general writ was 'a power that places the liberty of every man in the hands of every petty officer,' that it allowed officers 'to enter our houses when they please,' that it was an instrument of 'arbitrary power,' that it transformed officers into 'tyrant[s],' that it '[delegated] vast powers,' and that it failed even to impose the usual safeguard of requiring the officer to file a 'return' with the issuing court."[94]

While Otis lost *Paxton's Case*, the principle that officials should not wield discretionary power prevailed in *Wilkes* and *Entick*. Both cases arose after Lord Halifax issued general warrants for officers to search for

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[88] M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave It Birth*, 85 N.Y.U. L. REV. 905, 906–07 (2010).

[89] Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable": The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 316–17 & 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).

[90] Davies, *supra* note 69, at 576–83.

[91] Friedman & Stein, *supra* note 89, at 315–16; Donohue, *supra* note 70, at 1196–1207, 1243–52.

[92] Donohue, *supra* note 70, at 1220, 1235.

[93] Michael, *supra* note 88, at 909; *see also* Davies, *supra* note 69, at 578–80 & nn.74–78 (explaining how leading common law authorities including Coke, Hale, Hawkins, and Blackstone rejected the idea that ordinary officers could wield discretionary search power).

[94] Davies, *supra* note 69, at 580–81 & n.81 (citing 2 LEGAL PAPERS OF JOHN ADAMS 140–43 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965); *see also* Donohue, *supra* note 70, at 1244–52 (explaining facts of *Paxton's Case*).

the authors of papers critical of the Crown.[95] In *Wilkes,* the officers used that vast 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 warrant."[96] In *Entick,* the officers used "force and arms" to break into Entick's house, rooms, chests, and drawers, and to pore over his private papers.[97]

Wilkes and Entick sued the officers for trespass and won damages.[98] Chief Justice Pratt, echoing Otis, rejected the 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."[99] Pratt struck a similar note in *Entick,* rejecting 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."[100]

Part of what made the searches in *Paxton's Case, Wilkes,* and *Entick* so odious was that, unlike modern police, founding-era officers lacked inherent search power. "Proactive criminal law enforcement had not yet developed by the framing of the Bill of Rights."[101] Criminal investigation was instead a reactive process. A complainant would swear out an oath to a justice of the peace, who would decide "whether to activate the criminal justice apparatus for making arrests and searches" by issuing a warrant for an officer to track down the suspect.[102] The warrant was crucial, both to provide "binding instructions" and "to indemnify the constable against trespass claims."[103]

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 discretionary searches before they spread. In the same way the First Amendment lists "freedom of speech," even though it protects a broader range of expression. In the same way "Keep your hands to yourself' calls out the paradigm case of classroom punching, even though it also forbids kicking. The reason to

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[95] Michael, *supra* note 88, at 909-ro.
[96] *Id.* at 9ro.
[97] *Id.* at 9ro-rr.
[98] *Id.*
[99] Wilkes v. Wood, 19 How St Tr n53, n67 (CP 1763).
[wo] Entick v. Carrington, 19 How. St. Tr. ro29, ro66 (CP 1765).
[w,] Davies, *supra* note 69, at 620-24.
[w,] *Id.* at 623-24.
[w3] *Id.* at 624.

list some property was not to *exhaust,* but to *evince,* the arbitrary search power that officials should never be allowed wield.[104]

D. *The Complete Text*

Last, a contextual reading of the Fourth Amendment requires taking its whole text into account. *Hester* failed to do that. lt cherry-picked five of the Amendment's 54 words, 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 all Bill of Rights provisions: 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."[105] Rather, it protects *"the right of the people to be secure* in their persons, houses, papers, and effects."[106] That's a real difference. While it's clear the right "to be secure" covers the right to exclude, there's more to it.[107] Security has a broader meaning akin to freedom from threats, danger, or fear-a kind of assurance against intrusions.[108] To the founding generation, the looming threat of arbitrary searches was as much a problem as actual intrusions.[109]

Imagine a small family farm. There's a house at the center, farming throughout, and a perimeter fence. *Hester* says we only care about the house. The Fourth Amendment, though, says we should also care about the farmer's broader right "to be secure in [his] ... house[]." 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 so they could 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 we shouldn't have to tremble in our homes or live in fear that the government will invade our persons, papers, or effects. Private land contains everything the Fourth Amendment protects. And for millions of Americans, fences and signs are how we keep strangers away from those things. Just as moats secure castles from invasion, private land secures our "persons, houses, papers,

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[104] One last analogy may help drive the point home. Suppose your kitchen floor floods. You see that your sink is leaking and hire a plumber to fix it. The plumber fixes the sink, but while doing so, spots a leaky pipe in the kitchen. Presumably, ifhe left without fixing the pipe, you"d be upset. Why? Because it doesn't matter where the water is coming from-you just don't want it on your floor. I'm making the same point about the fourth amendment. "Persons, houses, papers, effects" : arbitrary searches:: "Come fix my sink" : water on your kitchen floor.

[105] Hester v. United States, 265 U.S. 57, 59 (1924).

[106] U.S. CONST. amend. IV (emphasis added).

[107] Luke M. Milligan, *The Forgotten Right to Be Secure,* 65 HASTINGS L.J. 713, 734-50 (2014).

[108] *Id.* at 738-41.

[109] *Id.;* David H. Gans, *"We Do Not* Want *to Be Hunted": The Right to Be Secure* and Our *Constitutional Story* of Race and *Policing,* rr COLUM. J. RACE & L. 239, 250-59 (2021).

and effects" from arbitrary searches. By skipping past the term "secure," *Hester* discounted all that.

Or look at the Fourth Amendment's second clause. After the phrase *Hester* cites, the Amendment adds: "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."no Again, founding-era officers lacked inherent search power and could typically only invade property with a warrant. By setting the bar for valid *warrants,* the founding generation was effectively dictating the requirements for valid *searches.m*

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." At the founding, "place" was a broad term that meant "a particular portion of space."m 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 the other legal documents often indicate how they should be read. And so does the Bill of Rights. The Ninth Amendment declares that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."n[3] Of course, there are lively debates about what that means.n[4] My point isn't to stake out a position in that debate.

Rather, my point is that *Hester's* approach-a hyper-literal reading of the text-requires reading the Ninth Amendment literally too. And if we do, then 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 the historical right to exclude

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no U.S. CONST. amend. IV.

m *See* Davies, *supra* note 69, at 554 ("At common law, controlling the warrant did control the ofi1cer for all practical purposes."); Gans, *supra* note ro9, 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).

m *See,* e.g., SAMUEL JOHNSON, 2 A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773) ("Particular portion of space"); JOHN ASH, 2 THE NEW AND COMPLETE ENGLISH DICTIONARY (1775) ("a particular portion of space");)AMES BARCLAY, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (1792) ("that part of space which any body possesses"); JOHNWALKER, A CRITICAL PRONOUNCING DICTIONARY (2d ed. 1797) ("Particular portion of space"); NOAH WEBSTER, 2 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("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 81, at 214-15 (agreeing "place" includes land).

ni U.S. CONST. amend. IX.

n4 *See* ANTHONY B. SANDERS, BABY NINTH AMENDMENTS: HOW AMERICANS EMBRACED UNENUMERATED RIGHTS AND WHY IT MATTERS 98-ro5 (2023) (summarizing debate).

intruders.n[5] *Hester* can't it have both ways. Either we should read the text literally, in which case the Ninth Amendment says not to treat the Fourth Amendment as exhaustive, or we should read the text in context, in which case closed land deserves protection from arbitrary searches.

E. *Summary*

Hester was wrong to treat the phrase "persons, houses, papers, and effects" as an exhaustive list of what 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 the "enumeration" of rights as exhaustive, all undermine *Hester's* literalism. Taking all these context clues together, the most reasonable inference to draw from the text is that closed land deserves protection from arbitrary searches.n[6]

111. 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 intrude on something a person seeks to keep private and society would deem that expectation reasonable.n[7] I take no issue with the idea that, when a person makes no effort to exclude intruders, his land fails the *Katz* test.n[8] But *Oliver* went further. It held that any "expectation of privacy in open fields"-even if those fields are closed to the public-"is not an expectation that 'society

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[5] *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 some of these rights were explicitly enumerated or because others were narrowly worded"-separately justifies the result in *Heller).*

[6] 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,* 277 U.S. at 487-88 (Butler,]., dissenting).

[7] *Katz,* 389 U.S. at 360 (Harlan,]., concurring) (articulating "reasonable expectation of privacy" test); *Smith,* 442 U.S. at 740 (adopting Justice Harlan's test).

[8] *See Oliver,* 466 U.S. at 193-94 (Marshall,]., 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.").

recognizes as reasonable."'n[9] 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 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."[120] Every word of this is incorrect.

First, because people use different property in different ways, privacy necessarily shields distinct activities in distinct places. The mere fact that people use their land for distinct purposes than they use their home -even assuming those uses share little in common-does not make it illegitimate to expect privacy on land. The home may be where privacy expectations are highest, but it's not where they end.

Second, people engage in all sorts of intimate activities on their land. Several of my clients are landowners. I've heard them testify about how they've used their land to raise their children, to take quiet walks with their spouse, to find solitude in nature, to hunt or fish, to camp or have sex, etc. These are common activities that occur on private land across the country every day.m If privacy doesn't cover them, I don't know what privacy is for.

Third, the Court treats it as obvious that "the cultivation of crops" deserves no privacy. But that's far from obvious. At the founding, nine in ro Americans lived off the land.[122] They farmed and operated "household factories" that integrated domestic life and outdoor labor in a way that "mobilized the entire family."[123] That is, farming has long been a family enterprise. And it's one that requires autonomy and long-range focus-which requires privacy. Under *Katz,* we can reasonably expect privacy in office buildings and in cars on public roads. Why not when farming on our land?[124]

"9 *Id.* at 179.

no *Id.*

m *See id.* at 192 (Marshall,]., 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 refoge for wildlife, where flora and fauna are protected from human intervention of any kind." (footnotes omitted)).

m LAURIE, *supra* note 3, at 16.

ni *Id.*

"4 *Oliver,* 466 U.S. at 192 n.14 (Marshall,]., dissenting) ("We accord constitutional protection to businesses conducted in office buildings ... ; it is not apparent why businesses conducted in fields

Fourth, even if "there is no social interest" in securing privacy on land-a big if-the Court has never weighed privacy by its social utility. Nor should it. The point of the right to exclude is that the landowner (like any other property owner) gets to choose who enters and when. lf a landowner forbids entry with a fence or signs, we can assume he regards his activities as private. Every state has a trespass statute-the modern descendants of founding-era fence statutes-that empowers landowners to exclude intruders.[125] lt defies logic to say that "society" has no interest in respecting landowners' privacy when they take every step required by state law to preserve their privacy.

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. lt is not generally true that fences or 'No Trespassing' signs effectively bar the public from viewing open fields in rural areas."[126] The Court is knocking down strawmen here.

The Court may be correct that land is often publicly accessible-but that's only because there is a lot of public and undeveloped private land in this country. The fact that my neighbors keep their doors open and allow public access to their homes does not mean 1 deserve no privacy in mine. Likewise, the fact that other people leave their land open to the public does not make it unreasonable for me to expect privacy on mine -especially when 1 take all the steps required under state law to exclude intruders.

Indeed, more recently, the Court has held that state "property law" reflects the expectations "recognized and permitted by society."[127] And existing data bear this out when it comes to closed land. ln a 20n study, 66.5% of respondents said that posting "no trespassing" signs on land creates a reasonable expectation of privacy.[128] ln a 1993 study, similarly, respondents said that searching fenced and posted cornfields was more

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that are not open to the public are less deserving of the benefit of the Fourth Amendment." (citation omitted)).

"5 *Compare,* e.g., 18 Pa. C.S. *§* 3503(b)(1) (empowering landowners to exclude intruders verbally or with fences or visible signs), *with* Br. for Plaintiffs-Appellants, *Punxsutawney Hunting Club v. Pennsylvania* Game *Commission* (23 WAP 2023) (case pending in the Pennsylvania Supreme Court), https://ij.org/wp-content/uploads/2021/12/Briet for-Appellants_lnternal-Correction.pdf; at 65 (App. 6) (collecting fencing statutes adopted in Pennsylvania from 1700-1905).

"6 *Oliver,* 466 U.S. at 179.

"7 Byrd v. United States, 584 U.S. 395,405 (2018).

"8 Henry F. Fradella et al., *Quantifying* Katz: *Empirically Measuring "Reasonable Expectations* of *Privacy" in the Fourth Amendment Context,* 38 AM. J. CRIM. L. 289, 354 (2orr).

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.[129]

Moreover, 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 only see by entering. Indeed, that was true in every major open fields case-including *Oliver-where* officers had to enter closed land and prowl around until they found something. As for the Court's point about viewing, the open fields doctrine has never been about mere visual observation-it's about physical intrusions.

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."[130] This is a non sequitur. Whether the common law treated curtilage as part of the home does not tell us anything about whether it's reasonable, under *Katz,* for a person to expect privacy on his land. Indeed, *Katz* did not mention the common law at all. The question is whether a privacy expectation is reasonable-and 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 section on which *Oliver* relies.[131] At common law, it was entirely reasonable to expect that people would not trespass on your land. And if people violated that expectation, you could sue them. All of that remains true today.[132]

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

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[129] 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).

[130] *Oliver,* 466 U.S. at 180 (citing United States v. Van Dyke, 643 F.2d 992, 993-94 (4th Cir. 1981); United States v. Williams, 581 F.2d 451, 453 (5th Cir. 1978); Care v. United States, 231 F.2d 22, 25 (roth Cir.), *cert. denied,* 351 U.S. 932 (1956)).

[131] *See* 4 WILLIAM BIACKST0NE, COMMENTARIES "'226 (distinguishing "burglary" from "clausum fregit [breaking the close] ... by leaping over ideal invisible boundaries, may constitute a civil trespass").

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

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."[133] 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.[134] 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.[135]

D. *Summary*

Oliver's arguments for why we can never reasonably expect privacy on land lack merit. Now, as at the founding, people engage in countless deeply private activities on their land, and it's 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 officials to invade our land whenever and however they please. And *Oliver* was wrong that it's never reasonable to expect privacy on our land. Under either analysis, closed land-land we use and mark as private-deserves protection. The Fourth Amendment was adopted to make us "secure" from arbitrary searches. The open fields doctrine reflects "an impoverished vision of that fundamental right."[136] One hundred years is enough.

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[133] *Oliver,* 466 U.S. at 181.

[134] *Dunn,* 480 U.S. at 3or; *see also id.* at 3ro (Brennan,]., 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.").

[135] *Oliver,* 466 U.S. at 194-95 (Marshall,]., dissenting).

[136] ***Id.*** at 197.