ARTICLE

COPS, CANINES, AND CURTILAGE: WHAT *JARDINES* TEACHES AND WHAT IT LEAVES UNANSWERED

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ABSTRACT

The Supreme Court's ruling in *Florida v. Jardines*, holding that the Fourth Amendment was violated by the warrantless use of a narcotics detection dog on a private residence, may not provide equal protection against such dog sniffs to all residential property dwellers. This is because the holding was narrowly based upon the ground that the use of the dog by police officers constituted a trespass onto the curtilage of the dwelling. This Article analyzes the *Jardines* opinions. It then examines the concept of curtilage and the reluctance by courts that have considered the issue to extend Fourth Amendment curtilage protection to common areas of multi-resident dwellings. Finally, the Article will consider issues that remain to be resolved in the context of dwellings for which traditional notions of curtilage protection do not apply.

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I. INTRODUCTION

On March 26, 2013, a five-justice majority of the U.S. Supreme Court ruled in *Florida v. Jardines* that a police officer's use of a trained drug-sniffing dog at the front door of a home is a search within the meaning of the Fourth Amendment.[1] Interestingly, the majority opinion side-stepped what had become the primary test for what constitutes a search in the wake of the *Katz v. United States*[2] ruling in 1967: whether the use of a drug-sniffing dog outside a residence violated the residents' expectation of privacy.[3] Instead, for the second time in as many years[4] the Court relied upon a property rights theory to determine that a Fourth Amendment search had occurred.[5]

In narrowing the scope of its holding to situations involving a physical intrusion onto a property's curtilage, the *Jardines* opinion leaves open whether the use of a drug-sniffing dog outside a dwelling that does not include a traditional "curtilage"—such as an urban multi-family dwelling—would constitute a search. Can a police officer walk a drug-sniffing dog through an urban housing project, on pathways or in hallways

1. Florida v. Jardines, 133 S. Ct. 1409, 1417–18 (2013).

2. Katz v. United States, 389 U.S. 347 (1967).

3. *Jardines*, 133 S. Ct. at 1417 ("[W]e need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*.").

4. In *United States v. Jones*, 132 S. Ct. 945, 949 (2012), the Court held that a Fourth Amendment search occurred when the government obtained information by physically intruding on persons, houses, papers, and effects. In that case, the physical intrusion was found to have occurred when police officers placed an electronic tracking device on respondent's automobile. *Id.* at 952.

5. *Jardines*, 133 S. Ct. at 1414–15.

traversed by members of the public and other tenants, without running afoul of the Fourth Amendment prohibition against unreasonable searches?

This Article will first explore the *Jardines* opinions. It will then consider the history and current understanding of the concept of curtilage as well as case law discussing whether multi-unit housing dwellers have an expectation of privacy in common areas. Finally, it will consider issues that remain to be resolved in the context of dwellings for which traditional notions of curtilage do not apply.

II. THE *JARDINES* OPINIONS

The facts involved in the *Jardines* appeal are fairly straightforward. After receiving an unverified tip that respondent was growing marijuana in his home, a police detective brought a leashed, trained drug-detection dog to the front door of the Jardines's home.[6] The front door was accessed via a driveway and paved path.[7] It took the detective and his dog "a minute or two" to walk the driveway and path to the front door, allow the dog to track any odor, and walk back to the police car.[8] While at the front door, the dog sniffed the base of the door and then sat, "which is the trained behavior upon discovering the odor's strongest point."[9]

Based upon what he had learned as a result of the dog sniff, the detective applied for and received a search warrant for the residence and the search revealed the presence of marijuana plants in the home.[10] At trial, respondent moved to suppress evidence of the marijuana plants contending that the use of a trained narcotics dog was an unlawful search under the Fourth Amendment, which rendered invalid the warrant issued based upon that search.[11] The trial court granted the motion, and after working its way through the Florida state courts, the case reached the U.S. Supreme Court on the limited question of whether the officer's act of performing the dog sniff constituted a search within the meaning of the Fourth Amendment.[12]

The decision by the Court reflected interesting partnerships, with two of the more conservative justices (Justice Scalia, the

6. *Id.* at 1413.
7. *Id.* at 1421 (Alito, J., dissenting).
8. *Id.*
9. *Id.* at 1413 (majority opinion).
10. *Id.*
11. *Id.*
12. *Id.* at 1413–14.

author of the majority opinion, and Justice Thomas) teaming up with three justices (Justices Ginsburg, Sotomayor, and Kagan) who are generally regarded as three of the four Court "liberals." Justices Ginsburg, Sotomayor, and Kagan also filed a separate concurring opinion authored by Justice Kagan. The four dissenting Justices (Chief Justice Roberts and Justices Alito, Kennedy, and Breyer) also represent a broad spectrum of the philosophical/political views of the members of the Court. Each opinion is examined below.

A. The Majority Opinion

As noted at the outset, in the years following the *Katz* decision in 1967,[13] most of the Supreme Court cases that have considered whether government conduct constituted an unlawful search in violation of the Fourth Amendment did so by applying the *Katz* reasonable expectation of privacy test.[14] Indeed, Justice Scalia noted in his opinion in *Kyllo* that, although well into the twentieth century the Court's Fourth Amendment jurisprudence was tied to common law trespass, "[w]e have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property."[15] Eleven years after recognizing that this decoupling had occurred, Justice Scalia, again writing for the majority, breathed new life into the older test based on trespass to property in *United States v. Jones*.[16] In *Jones* he made it clear that the *Katz* reasonable expectation of privacy test supplemented, rather than replaced, the older common law "trespassory test"[17] for the purpose of determining whether a Fourth Amendment search had taken place.

The *Jones* case concerned the warrantless installation of a GPS tracking device on respondent's vehicle.[18] The majority

13. Katz v. United States, 389 U.S. 347 (1967).

14. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 34–35 (2001) (explicitly applying the *Katz* test in holding that the use of a thermal imaging device violates a homeowner's reasonable expectation of privacy and is therefore a Fourth Amendment search); California v. Greenwood, 486 U.S. 35, 41 (1988) (holding that a police officer's search of respondents' trash did not violate the Fourth Amendment because "society would not accept as reasonable respondents' claim to an expectation of privacy in trash left for collection in an area accessible to the public"); California v. Ciraolo, 476 U.S. 207, 213–15 (1986) (holding surveillance of respondent's yard conducted from an airplane did not violate the Fourth Amendment because respondent's expectation that his yard was protected from such surveillance was unreasonable due to the fact that members of the public flying in the same airspace could see what officers saw).

15. *Kyllo*, 533 U.S. at 31–32.

16. United States v. Jones, 132 S. Ct. 945, 949–51 (2012).

17. *Id.* at 952.

18. *Id.* at 948–49.

concluded that the installation of that device was a trespass onto an "effect" of the respondent and that the installation and use of that device to monitor respondent's movements constituted a search within the meaning of the Fourth Amendment.[19] In so holding, Justice Scalia's majority opinion reviewed the Fourth Amendment's close connection to property and explained that, consistent with that view, the Court's "Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century."[20]

In returning to a property-based trespass test to hold that the installation of the GPS tracking device on respondent's automobile constituted a search in violation of the Fourth Amendment, Justice Scalia's opinion was careful to note that the *Katz* reasonable expectation of privacy test was added to, not substituted for, the common law trespass test.[21] Thus it is not surprising that when the *Jardines* case presented facts which may have stretched the reasonable expectation of privacy test beyond what a majority on the court may have been willing to accept,[22] the five-justice majority could find common ground in relying upon the trespass test to conclude that the conduct involved—bringing a trained drug-detection dog to the front door of the house—constituted a trespass and, therefore, a search within the meaning of the Fourth Amendment.[23]

In reaching this conclusion, the majority opinion first had to deal with the fact that the home itself had not been intruded into, but rather the intrusion of the officer with his dog was into the curtilage of the home. The concept of curtilage will be explored later in this Article,[24] but the majority opinion—after first reiterating the view that the home receives heightened protection under the Fourth Amendment[25]—highlighted the fact that the protection granted to the home under the Fourth Amendment extends to the curtilage as well.[26] It then declared that it was indisputable that the officer and dog had entered respondent's curtilage, given that "[t]he front porch is the classic

19. *Id.* at 949.

20. *Id.*

21. *Id.* at 952.

22. *See infra* notes 31–34 and accompanying text.

23. Florida v. Jardines, 133 S. Ct. 1409, 1417–18 (2013).

24. *See infra* Part III.

25. *Jardines*, 133 S. Ct. at 1414 ("[W]hen it comes to the Fourth Amendment, the home is first among equals."); *see also* Kyllo v. United States, 533 U.S. 27, 31 (2001) (citing Silverman v. United States, 365 U.S. 505, 511 (1961)) (placing one's home at the core of the Fourth Amendment protections).

26. *Jardines*, 133 S. Ct. at 1414–15.

exemplar of an area adjacent to the home and 'to which the activity of home life extends.'"[27]

The majority's analysis of whether the entry violated the Fourth Amendment next turned to whether the intrusion of the police officer and dog was trespassory or was within an implicit license that permits visitors to approach the front door by the front path.[28] On this question the majority held that there is no "customary invitation" to bring a trained police dog to explore the area around the home for possible incriminating evidence.[29] Thus, the majority concluded, the conduct constituted a trespass to Jardines's property and "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment."[30]

In reaching this conclusion, Justice Scalia expressly declined to decide whether the officer's use of the drug-detection dog to investigate the home also violated the respondent's reasonable expectation of privacy under the *Katz* test.[31] What is unclear is whether Justices Scalia and Thomas, who did not join in the concurring opinion which does apply the *Katz* analysis, would disagree with the result reached by the concurring opinion that the conduct violates the respondent's reasonable expectation of privacy,[32] or whether they merely chose not to address an issue unnecessary to the decision because the "virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy."[33]

B. The Concurring Opinion

Justice Kagan's concurrence, in which she was joined by Justices Ginsburg and Sotomayor, agrees with the property-based trespass analysis of the majority, but the opinion expresses the view that the case could easily have been decided under the *Katz* reasonable expectation of privacy analysis.[34] Indeed, the concurrence notes that if the Court had decided the case on privacy grounds, it would have determined that the decision in

27. *Id.* at 1415 (quoting Oliver v. United States, 466 U.S. 170, 182 n.12 (1983)).

28. *Id.*

29. *Id.* at 1416.

30. *Id.* at 1417–18. The majority does not indicate how this is distinguishable from a police officer without a dog approaching the front door of a residence to investigate, which it approved in *Kentucky v. King*, 131 S. Ct. 1849 (2011).

31. *Jardines*, 133 S. Ct. at 1417.

32. *Id.* at 1418–19 (Kagan, J., concurring).

33. *Id.* at 1417 (majority opinion).

34. *Id.* at 1418 (Kagan, J., concurring).

Kyllo v. United States[35] "already resolved it."[36] This conclusion, however, overlooks a line of authority that provides grounds for distinguishing the outcome in *Kyllo* from the outcome of the *Jardines* case.

Kyllo involved the use of a thermal imaging device on a home to detect heat loss from the home, based upon which the officer could infer that heat-producing halide lights were being used to grow marijuana within the residence.[37] It is useful to focus on what was revealed by the use of the thermal imaging device in *Kyllo* and to contrast it with what was revealed by the trained drug dog in *Jardines*. In *Kyllo* the device merely revealed that the heat dissipating from a particular residence exceeded that of neighboring homes. Justice Scalia, writing for the majority in *Kyllo*, relied upon the *Katz* reasonable expectation of privacy analysis and expressed the concern that this type of surveillance can reveal such details as what time the "lady of the house takes her daily sauna and bath" or whether someone left a closet light burning.[38] In other words, the device would reveal information (relative heat) based upon which officers could draw inferences as to myriad activities or details within the home, both lawful and unlawful. Ultimately the Court set forth the following rule:

> Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.[39]

Although the language quoted may appear broad enough on its face to control the *Jardines* decision, the underlying facts of the two cases provide a basis for asserting that the *Kyllo* decision may not control the outcome of *Jardines* under a reasonable expectation of privacy analysis.

In 1983, in *United States v. Place* the Supreme Court considered the lawfulness under the Fourth Amendment of a dog sniff performed on respondent's luggage.[40] The majority noted that the Fourth Amendment protects against unreasonable government intrusions into one's "*legitimate* expectations of

35. Kyllo v. United States, 533 U.S. 27 (2001).
36. *Jardines*, 133 S. Ct. at 1419 (Kagan, J., concurring).
37. *Kyllo*, 533 U.S. at 29–30.
38. *Id.* at 32–35, 38.
39. *Id.* at 40.
40. United States v. Place, 462 U.S. 696, 697–98 (1983).

privacy."[41] The Court stated that because a dog sniff of luggage discloses only the presence or absence of narcotics—a contraband item—the information obtained is limited (it does not reveal other contents of the luggage), and thus the use of a trained drug dog to investigate whether the luggage contained contraband "did not constitute a 'search' within the meaning of the Fourth Amendment."[42]

One year later, in *United States v. Jacobsen*, a different method of determining the presence of contraband—a chemical field test—was before the Court, and the Court was called upon to determine whether the field test constituted either a search or a seizure under the Fourth Amendment.[43] Relying on dicta in *Place*, the *Jacobsen* Court ruled that a chemical field test, which merely discloses whether a particular substance is contraband (in that case, cocaine), does not compromise any legitimate interest in privacy.[44] The Court stated that Congress has declared that the privacy interest in possessing cocaine is illegitimate and noted that the chemical field test, like the canine sniff in *Place*, can reveal only whether the substance is cocaine "and no other arguably 'private' fact" and therefore does not compromise any "legitimate privacy interest."[45] Thus, the Court held that the chemical field test did not constitute a search subject to the Fourth Amendment.[46]

The rules articulated in *Place* and *Jacobsen* have withstood the test of time. *Illinois v. Caballes*, which was decided more than two decades later, and which, like *Place*, concerned a dog sniff, relied upon both *Place* and *Jacobsen* in stating,

> We have held that any interest in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that *only* reveals the possession of contraband "compromises no legitimate privacy interest." This is because the expectation "that certain facts will not come to the attention of the authorities" is not the same as an interest in "privacy that society is prepared to consider reasonable."[47]

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41. *Id.* at 706–07 (emphasis added).

42. *Id.* at 707. Ultimately, however, the Court ruled that the seizure of the luggage was unreasonably prolonged with the result that the Court ruled that the evidence discovered in the subsequent search was inadmissible as the product of an unreasonable seizure. *Id.* at 710.

43. United States v. Jacobsen, 466 U.S. 109, 122 (1984).

44. *Id.* at 123–24.

45. *Id.* at 123.

46. *Id.* at 124. The Court also considered whether the destruction of the powder during the field test was an unlawful seizure and concluded that the seizure had only a *de minimis* impact on the possessory interest and was therefore reasonable. *Id.* at 125–26.

47. Illinois v. Caballes, 543 U.S. 405, 408–09 (2005) (citation omitted).

Caballes involved the use of a trained narcotics-detection dog to detect contraband in the trunk of an automobile during a lawful traffic stop.[48] In validating the lawfulness of that investigation, and holding that it did not implicate legitimate privacy interests, the majority opinion written by Justice Stevens for six members of the Court and joined in by Justice Scalia—the author of the *Kyllo* majority opinion—concluded by distinguishing the facts of *Caballes* from the facts at issue in *Kyllo*.[49] Justice Stevens stated that the *Caballes* majority is "entirely consistent" with the *Kyllo* decision and noted that what was critical to the *Kyllo* decision, and is distinguishable in the *Caballes* case, "was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home."[50] The opinion then concluded that the legitimate expectation that lawful activity can be reasonably expected to be private is distinguishable from an individual's hopes (but not reasonable expectations) that contraband will not be detected.[51] Finally, to drive the point home, the Court stated that use of the dog to sniff a car, which "reveals no information other than the location of a substance that no individual has any right to possess," is not a violation of the Fourth Amendment.[52]

Although the portion of the *Caballes* opinion distinguishing its holding from that of *Kyllo* mentions the fact that *Kyllo* involved the use of a thermal detection device revealing information about a home and *Caballes* involved use of a trained narcotics dog on an automobile, the fact that one search was of a home and the other was of a car was not cited as the "critical" fact distinguishing the two cases. Nor was the fact that one involved a fairly sophisticated electronic gadget and the other involved a dog. Rather, and this is a key point, the "critical" distinction lay in the fact that the device in *Kyllo* was capable of detecting lawful activity, whereas a dog sniff merely reveals the presence (or not) of contraband, a fact in which an individual has no reasonable expectation of privacy.[53]

In light of the reasoning of *Caballes*, it is far from clear, as Justice Kagan's opinion asserts, that a straightforward application of the reasonable expectation of privacy test used by *Kyllo* would have neatly resolved whether the Fourth

48. *Id.* at 409.
49. *Id.* at 409–10.
50. *Id.*
51. *Id.* at 410.
52. *Id.*
53. *Id.* at 409–10.

Amendment would be violated by the use of the trained narcotics dog at the home involved in the *Jardines* case. And given that Justices Scalia and Thomas, two of the five Justices comprising the *Jardines* majority, both joined in the *Caballes* majority opinion which distinguished that case from *Kyllo* based upon the type of activity that can be revealed, it is even less certain that they would have voted with the concurring justices in *Jardines* if that had been the only basis for the opinion. Rather it suggests, although such speculation may be dangerous, that had it not relied upon the trespass rationale the Court may well have reached a different result in *Jardines*.

C. The Dissenting Opinion

Justice Alito authored the dissenting opinion in *Jardines*, which was joined in by Chief Justice Roberts along with Justices Kennedy and Breyer. The dissenting opinion finds fault with both the property-based trespass analysis forming the basis of the majority opinion and the reasonable expectation of privacy analysis advanced as a separate ground to find that the dog sniff is a search under the concurring opinion.[54]

As to the property-based trespass analysis, Justice Alito would find that no trespass occurred. Initially, his opinion notes that there is a well-recognized license granted to members of the public (including police officers) to proceed along a walkway to the front door of a house.[55] The opinion recognizes that this license has spacial and temporal limitations.[56] It is limited to the walkway, in that the license does not permit one to meander around the property.[57] It is limited by time of day, so that it does not permit a visitor to arrive in the middle of the night without express permission.[58] And it is limited in duration, such that a visitor may not linger.[59] Finally, Justice Alito relies on case law establishing that the implied license extends to police officers.[60] Indeed, the dissenting opinion concludes that only the presence of a narcotics dog differentiates the visit at issue in *Jardines* from the "knock and talk" that the Court expressly approved in *Kentucky v. King*,[61] and he concludes that there is no authority in

54. Florida v. Jardines, 133 S. Ct. 1409, 1420–21, 1424–26 (2013) (Alito, J., dissenting).

55. *Id.* at 1420.

56. *Id.* at 1422.

57. *Id.*

58. *Id.*

59. *Id.* at 1422–23.

60. *Id.* at 1423.

61. Kentucky v. King, 131 S. Ct. 1849 (2011).

support of the proposition that bringing a dog to the front door during an otherwise lawful entry into the curtilage of a home constitutes a trespass.[62]

The dissenters next take aim at the concurring opinion's endorsement of a reasonable expectation of privacy analysis as an alternate theory upon which to find the officer's conduct violated the Fourth Amendment. Here, the discussion by the dissenters seems to be a bit untethered from precedent, although the same result can be reached by more closely hewing to the Court's prior opinions. In the dissenters' view, there is no basis for concluding that occupants of a premises have a reasonable expectation of privacy in odors emanating from the dwelling.[63] But if that is the case, it could also be argued that occupants of a dwelling have no reasonable expectation of privacy in heat emanating from a dwelling. Such an argument, however, would undercut the basis for the Court's holding in *Kyllo*, which invalidated the use of a thermal imaging device to measure heat emanating from a dwelling.[64] In other words, it is a shaky proposition, after *Kyllo*, to rest the reasonable expectation of privacy argument on whether an occupant has such an expectation with respect to heat, odors, light, or any other perceptible thing emanating from a dwelling.

The dissenters also distinguish the holding in *Kyllo* by limiting that case to "new technology," and noting that law enforcement has made use of a dog's acute sense of smell for centuries.[65] Yet, *Kyllo*'s holding was sharply focused on the fact that a technology not in general public use had been trained upon a private residence to learn details about the interior of the home.[66] Curiously, the dissenters do not mention at all the strongest argument that can be advanced against a finding that the use of a narcotics-detection dog constituted a search in violation of the Fourth Amendment: that there is no reasonable expectation of privacy in the possession or location of contraband, and as the Court has steadfastly held since 1983, any investigation (such as a dog sniff or a chemical field test) which can only confirm the location or existence of contraband, without revealing other lawful details, is not to be a search within the meaning of the Fourth Amendment.[67]

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62. *Jardines*, 133 S. Ct. at 1423–24 (Alito, J., dissenting).

63. *Id.* at 1424–25.

64. *See* Kyllo v. United States, 533 U.S. 27, 40 (2001); *see also supra* notes 38–39.

65. *Jardines*, 133 S. Ct. at 1425.

66. *Kyllo*, 533 U.S. at 34–35.

67. *See* United States v. Place, 462 U.S. 696, 707 (1983); *see also supra* notes 43–53 and accompanying text (discussing *Jacobsen* and *Caballes*).

III. THE LIMITED NATURE OF CURTILAGE PROTECTION

The five-justice majority in *Jardines* relies upon the ground that the Fourth Amendment was violated when the officers and their drug-detection dog trespassed on respondent's property by entering the home's curtilage to perform a dog sniff. But do all dwellings include a "curtilage"? It is instructive to examine the concept of curtilage, beginning with its historical use, then examine modern Supreme Court cases that define what constitutes curtilage, and finally consider whether the concept of "curtilage" extends to multi-family dwellings.

A. The Origins of "Curtilage"

The concept of "curtilage" has its origins in the eighteenth century development of the English common law of burglary.[68] As a result of the enclosure acts prevalent in England at that time, nearly all private property included a wall or fence.[69] Within the wall or fence would be a dwelling house and possibly outbuildings.[70]

As the theft laws evolved, and in particular as the crime of burglary developed, the English common law became protective of residential property within the fenced enclosure.[71] Thus, the area within the walls or fence was treated as an extension of the home and was the subject of enhanced protection.[72] This area, known as the curtilage, included anything that was not a part of the house, but was within the walled or fenced area of the property on which the house was located.[73] Under the common law, breaking into a house or its curtilage amounted to a more severe offense than breaking into a store, warehouse, barn, or other structure that was not within the curtilage of a dwelling.[74] Thus, as originally understood, curtilage was a mechanism for heightening the degree of theft offenses committed by those who committed thefts by breaking into a dwelling house or its curtilage.

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68. United States v. Dunn, 480 U.S. 294, 300 (1987).

69. *See* W.G. HOSKINS, THE MAKING OF THE ENGLISH LANDSCAPE 138–43 (7th impression 1967).

70. *Id.* at 157–61.

71. C.S. Parnell, Annotation, *Burglary: Outbuildings or the Like as Part of "Dwelling House,"* 43 A.L.R. 2d 831, 833–34 (1955).

72. *Id.*

73. *Id.*

74. *See* Eric Dean Bender, *The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?*, 60 N.Y.U. L. REV. 725, 732 (1985).

B. Curtilage and the Fourth Amendment

In the early twentieth century, the concept of curtilage made its way into Supreme Court Fourth Amendment jurisprudence. It was first mentioned by the Court in that context in *Amos v. United States*, a case challenging the legality of the seizure of property from petitioner's home and another building which the Court characterized as being "within his curtilage."[75] Petitioner sought return of the property, which the Court granted on the ground that it had been unconstitutionally seized.[76] The Court did not, however, elaborate on the definition of curtilage or how that concept would be applied in a country, which, unlike England where the concept originated, did not necessarily depend on fences or enclosures to enclose residential real property.

Three years later, in *Hester v. United States*, the Court began to develop the distinction that has since become commonplace: a distinction between open fields, which receive no special Fourth Amendment protection, and curtilage, which is treated as part of the home.[77] In *Hester* officers made a warrantless entry onto Hester's property.[78] Their testimony concerning their observations there led to Hester's conviction, which he challenged as having been based in part upon an unlawful search.[79] Specifically, the officers, who were on Hester's land, but approximately 50–100 yards from the house, witnessed an exchange of illicitly distilled spirits between Hester and another individual, and Hester moved to exclude the officers' testimony under the Fourth and Fifth Amendments.[80] Justice Holmes, writing for the majority, quickly dismissed the Fifth Amendment ground.[81] As to the Fourth Amendment argument, he stated "that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure."[82] He further stated 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.[83]

75. Amos v. United States, 255 U.S. 313, 314–15 (1921).
76. *Id.* at 316–17.
77. Hester v. United States, 265 U.S. 57 (1924).
78. *Id.* at 58.
79. *Id.* at 57–58.
80. *Id.*
81. *Id.* at 58–59.
82. *Id.* at 58.
83. *Id.* at 59.

Thus began the Court's recognition that a trespass onto private property does not implicate the Fourth Amendment so long as the trespass was onto "open fields." Although the *Hester* decision does not mention curtilage, taken together with *Amos*, it marks the beginning of the distinction between privately owned property that is an "open field" and that which is the "curtilage of a dwelling," a distinction that continues to the present day.[84]

As noted previously, the *Katz* decision shifted the focus of the determination that there has been a Fourth Amendment search from the issue of trespass to the issue of whether one's reasonable expectation of privacy has been violated.[85] The concept of curtilage has nevertheless remained relevant to whether there has been a violation of one's reasonable expectation of privacy. In two post-*Katz* cases, *Oliver v. United States*[86] and *United States v. Dunn*,[87] the Court fleshed out what constitutes curtilage as it is used in the context of the Fourth Amendment. In *Oliver*, the Court determined that an intrusion onto privately owned land marked by a gate and "No Trespassing" signs was outside the protection afforded by the Fourth Amendment because it was an "open field" rather than "curtilage."[88] The *Oliver* Court defined "curtilage" as "the area around the home to which the activity of home life extends."[89] In *Dunn*, the Court elaborated upon this definition by providing a four-factor test for determining the extent to which it can be claimed that property is curtilage, as opposed to an open field.[90] Those four factors are: (1) the "proximity of the area" at issue to the home; (2) "whether the area is included [in] an enclosure surrounding the home"; (3) "the nature of the uses to which the area is put"; and (4) "the steps taken by the resident to protect the area from observation by people passing by."[91]

The Court has recognized some limits to the Fourth Amendment protections granted to curtilage. For example, it has recognized that observations into the curtilage of a home from the vantage point of an aircraft flying in public airspace does not violate the reasonable expectation of privacy an occupant has in curtilage.[92] Further, the Court has been wary of extending

84. *See infra* notes 86–91 and accompanying text.
85. *See supra* notes 14–15 and accompanying text.
86. Oliver v. United States, 466 U.S. 170, 178–80 (1984).
87. United States v. Dunn, 480 U.S. 294, 300–01 (1987).
88. *Oliver*, 466 U.S. at 176–80.
89. *Id.* at 182 n.12.
90. *Dunn*, 480 U.S. at 301.
91. *Id.*
92. California v. Ciraolo, 476 U.S. 207, 213–14 (1986).

privacy protection beyond the curtilage of the home, even refusing to grant privacy protection to trash left for pick-up by a refuse collection company because the trash was left on the curb outside the curtilage of the home.[93]

To this date, however, the Supreme Court has yet to consider a thorny issue: does the Fourth Amendment protection-afforded concept of curtilage exist outside the context of a single-family dwelling? Thus far, that is the only context in which it has been examined by the Court. Even *Jardines* involved a single-family dwelling.[94]

Can residents of multi-family dwellings, such as a duplex or an apartment building, rely upon the privacy or anti-trespass protection afforded by curtilage? Or will their Fourth Amendment property-based protections (possibly literally) go to the dogs?

C. Curtilage and Privacy in the Context of Multi-Family Dwellings

A review of all post-2000 federal appellate court cases and a sampling of pre-2000 federal appellate court cases decided after the *Katz* case has yielded interesting results with respect to whether common areas of multi-family dwellings—such as hallways, shared yards, and parking areas—are protected areas under the Fourth Amendment. The cases generally fall into two categories: cases which are decided based upon "curtilage" and cases which are decided based upon a post-*Katz* reasonable expectation of privacy analysis. A few cases apply both analyses.

1. Cases Applying a Curtilage Analysis. Generally speaking, appellate courts that have considered whether common areas in a multi-family dwelling are part of the curtilage of a dwelling have been reluctant to recognize curtilage protection for those areas. Recently, this was the determination of the Eighth Circuit in *United States v. Brooks*, which held that, in a multi-family dwelling, a staircase leading to the basement, which was a common area for all tenants, could not be characterized as part of the curtilage of a particular residence.[95] The Sixth Circuit has similarly held that a shared basement of a duplex was not within the curtilage of the residence, although the court did conclude that both tenants in a duplex have a reasonable

93. California v. Greenwood, 486 U.S. 35, 40–41 (1988).

94. Florida v. Jardines, 133 S. Ct. 1409, 1413 (2013).

95. United States v. Brooks, 645 F.3d 971, 975–76 (8th Cir. 2011).

expectation of privacy in the basement.[96] Other federal appellate decisions refuse to recognize a violation of curtilage protection when officers entered through the gate of an apartment complex to approach the front door of an apartment,[97] in the shared yard of a multi-story multi-unit dwelling,[98] in common stairways and common porches of a multi-tenanted apartment house,[99] in the common area available for trash storage,[100] in a common area parking lot[101] or underground parking garage,[102] or in the lobby of a multi-tenanted apartment house.[103] While not expressly deciding the issue based on "curtilage," the Second Circuit has held that an officer's peaceable entry into the area just inside the hall door of an apartment building does not constitute a trespass.[104] Since the use of "trespass" is associated with the property-based analysis, this suggests that the Second Circuit did not consider this area to be curtilage.

Fourteen years later, the Second Circuit, in *United States v. Arboleda*, made a more sweeping pronouncement as it dealt with a defendant's attempt to base a Fourth Amendment argument on the "hoary concept of 'curtilage.'"[105] The facts of the *Arboleda* case involved a police officer who was present on a two-foot-wide ledge outside an apartment occupied by an individual who apparently contended that the ledge outside his apartment was curtilage.[106] After stating that the relevant question is whether the defendant has an expectation of privacy in that area, the majority opinion states, "[I]t is doubtful that the curtilage concept has much applicability to multifamily dwellings such as the one involved here."[107] The court cited, with approval, language from a Massachusetts case indicating that in a modern, urban multi-family apartment house the curtilage is much more limited than in a dwelling subject to one owner's control, and stating that an apartment tenant's "dwelling" does not extend beyond his apartment and separate areas subject to his exclusive control.[108]

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96. United States v. King, 227 F.3d 732, 749–50, 753 (6th Cir. 2000).

97. United States v. Thomas, 120 F.3d 564, 571–72 (5th Cir. 1997).

98. Reeves v. Churchich, 484 F.3d 1244, 1254–55 (10th Cir. 2007); United States v. Acosta, 965 F.2d 1248, 1257 (3d Cir. 1992).

99. United States v. Freeman, 426 F.2d 1351, 1353–54 (9th Cir. 1970).

100. United States v. Jackson, 728 F.3d 367, 373–75 (4th Cir. 2013).

101. United States v. Stanley, 597 F.2d 866, 870 (4th Cir. 1979).

102. United States v. Cruz Pagan, 537 F.2d 554, 558 (1st Cir. 1976).

103. United States v. Miguel, 340 F.2d 812, 814 (2d Cir. 1965).

104. United States v. Conti, 361 F.2d 153, 157 (2d Cir. 1966).

105. United States v. Arboleda, 633 F.2d 985, 992 (2d Cir. 1980).

106. *Id.* at 987–88, 992.

107. *Id.* at 991–92.

108. *Id.* (citing Commonwealth v. Thomas, 267 N.E.2d 489, 491 (Mass. 1971)).

The only federal appellate case that arguably found curtilage protection in the context of multi-family dwellings is the 1974 Fifth Circuit opinion in *Fixel v. Wainwright*.[109] The question before the court was whether a four-unit apartment building's fenced backyard, that was "completely removed from the street," is protected as within the curtilage of one of the apartment units.[110] Although rejecting the government's argument that the backyard should not receive "the protection usually afforded the curtilage of a purely private residence," the court merely held that the backyard was protected under the Fourth Amendment.[111] In doing so, the court's reasoning does not follow the analysis used to distinguish open fields from curtilage.[112] Rather, its approach is very similar to that relied upon post-*Katz*: whether the occupant has a reasonable expectation of privacy in the area. Indeed, instead of concluding that the backyard is a part of the curtilage of the apartment, the court merely concludes that the backyard area "is sufficiently removed and private in character that he could reasonably expect privacy."[113]

In summary, the overwhelming weight of authority rejects the proposition that a resident of a multi-dwelling residential building can claim curtilage protection in common areas—or even anywhere outside an individual unit. Indeed, the only case to the contrary appears to have decided the issue based on reasonable expectation of privacy grounds.

2. Cases Applying a Reasonable Expectation of Privacy Analysis. Although courts have been reluctant to apply the concept of curtilage to multi-unit residential dwellings, at least in the Sixth Circuit there has been some willingness to find that a multi-unit dwelling resident has a reasonable expectation of privacy in some common areas of the residence. Nonetheless, it is far more common for courts to conclude that there is no reasonable expectation of privacy in common areas of multi-unit residential buildings than it is for courts to conclude that such an expectation of privacy exists. The results of a review of all post-2000 federal appellate court cases and a sampling of

109. Fixel v. Wainwright, 492 F.2d 480, 483–84 (5th Cir. 1974). *But see* United States v. Thomas, 120 F.3d 564, 571 (5th Cir. 1997) (holding that officers did not trespass on curtilage when entering an open gate of a privacy fence surrounding the apartment).

110. *Fixel*, 492 F.2d at 483–84.

111. *Id.* at 484.

112. *See supra* notes 74–79 and accompanying text.

113. *Fixel*, 492 F.2d at 484 (citing Katz v. United States, 389 U.S. 347, 353 (1967)). The majority opinion also explicitly distinguished the backyard from common passageways and corridors used by tenants and others for gaining access to the individual apartments. *Id.*

pre-2000 federal appellate court cases decided after the *Katz* case are summarized below.

a. Federal Appellate Court Cases Finding a Reasonable Expectation of Privacy in Common Areas of Multi-Unit Residential Buildings. The Sixth Circuit is one of only two circuits that has found that a reasonable expectation of privacy exists in common areas of multi-unit dwellings, but in both cases so holding, those common areas were not accessible by the general public. *United States v. King* involved a duplex in which both units were occupied by members of the same family.[114] At issue was whether the shared basement of the duplex receives Fourth Amendment protection either as curtilage or under the reasonable expectation of privacy test.[115] Although the court concluded that the basement is not a part of the curtilage of the residence, it held that the occupants of the duplex have a reasonable expectation of privacy in the shared basement.[116] In so concluding, the court noted that the basement is accessible only to the tenants of the building, and distinguished it from common hallways in multi-unit dwellings through which visitors must pass to reach particular units.[117]

The other Sixth Circuit case, *United States v. Carriger*, also dealt with a common area of an apartment building not accessible by the general public.[118] The apartment building in that case had both a back and a front entrance, and the doors at each entrance were locked and could only be opened by someone with a key or by someone within the building who activated a buzzer.[119] The *Carriger* court determined that the tenant had a reasonable expectation of privacy in the common areas that are not open to the general public.[120] Another, more recent case of the Sixth Circuit, *United States v. Dillard*, held that a tenant in a duplex did *not* have an expectation of privacy in the common hallway and stairway of a duplex where the door was unlocked and left ajar by the defendant because, by not locking the outer doors, he did nothing to maintain his privacy or indicate that officers were not welcome in the common areas.[121]

The only other circuit court case that has recognized a tenant's reasonable expectation of privacy in a common area is

114. United States v. King, 227 F.3d 732, 736, 748 (6th Cir. 2000).
115. *Id.* at 743–44, 752–53.
116. *Id.* at 750, 753.
117. *Id.* at 749–50.
118. United States v. Carriger, 541 F.2d 545, 548 (6th Cir. 1976).
119. *Id.*
120. *Id.* at 551.
121. United States v. Dillard, 438 F.3d 675, 682 (6th Cir. 2006).

the 1976 Ninth Circuit decision in *United States v. Fluker*.[122] That case concerned an entryway leading to two basement units in which the only other unit was the landlord's upper floor unit.[123] The *Fluker* court itself limited its holding to the facts of that case,[124] and subsequent Ninth Circuit cases have not only refused to extend *Fluker* but have held that multi-unit dwelling residents do not have a reasonable expectation of privacy in common areas.[125]

Mention should be made of a case involving what might be considered a hybrid between a multi-unit dwelling and a single-family dwelling. *United States v. Werra* considered whether a tenant in a single-family dwelling inhabited by several co-tenants has a reasonable expectation of privacy in the foyer of the home.[126] Although Werra had his own room with a lock on the door,[127] the court concluded that each of the tenants in fact occupied the entire home and could exclude anyone whom he or his housemates wished to exclude.[128] Based upon the finding that Werra considered the entire house—as opposed to his particular room—to be his home, the court held that he had a reasonable expectation of privacy in the foyer of the house.[129]

b. Federal Appellate Court Cases Finding No Reasonable Expectation of Privacy in Common Areas of Multi-Unit Residential Buildings. In contrast to the limited number of courts that have found a reasonable expectation of privacy in certain common areas of multi-unit dwellings, federal appellate courts from nine circuits (including the Sixth and Ninth Circuits) have concluded in various circumstances that an occupant of a multi-unit dwelling does not have a reasonable expectation of privacy in the common areas of the multi-unit dwelling.

The common hallway leading to individual dwelling units is the most commonly discussed context in which courts have considered whether residents of multi-unit dwellings have a reasonable expectation of privacy outside their individual unit.

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122. United States v. Fluker, 543 F.2d 709, 716–17 (9th Cir. 1976).

123. *Id.* at 716.

124. *Id.* at 716–17 (finding a reasonable expectation of privacy "under the narrow set of facts in this case" and expressly noting that "we are *not* intimating that a similar result would obtain in circumstances other than the one before us").

125. *See* United States v. Nohara, 3 F.3d 1239, 1242 (9th Cir. 1993); *cf.* United States v. Roberts, 747 F.2d 537, 542 (9th Cir. 1984).

126. United States v. Werra, 638 F.3d 326, 331–32 (1st Cir. 2011).

127. *Id.* at 334.

128. *Id.* at 336.

129. *Id.* at 333–36.

The Second,[130] Third,[131] Sixth,[132] Seventh,[133] Eighth,[134] and Ninth[135] Circuits have each held that a tenant in a multi-unit dwelling has no reasonable expectation of privacy in a common hallway. Other courts have considered this question in the context of undifferentiated common areas, and there are decisions by the Third,[136] Seventh,[137] Eighth,[138] and Eleventh[139] Circuits holding that residents of multi-unit dwellings do not have a reasonable expectation of privacy in common areas. Courts from the various circuits have also considered, and rejected, the contention that a resident in a multi-unit dwelling has an expectation of privacy in a common basement area,[140] a

130. United States v. Barrios-Moriera, 872 F.2d 12, 14 (2d Cir. 1989) (finding no reasonable expectation of privacy in hallway enclosed by locked door); United States v. Holland, 755 F.2d 253, 255–56 (2d Cir. 1985) (holding there was no reasonable expectation of privacy in the hallway or vestibule leading to outer door of two-story multi-resident dwelling).

131. United States v. Acosta, 965 F.2d 1248, 1253 (3d Cir. 1992) (ruling there is no reasonable expectation of privacy in inner hallway accessible via unlocked door).

132. United States v. Dillard, 438 F.3d 675, 682 (6th Cir. 2006) (finding no reasonable expectation of privacy in duplex's common hallway where doors leading thereto were unlocked and ajar).

133. United States v. Villegas, 495 F.3d 761, 766–68 (7th Cir. 2007) (holding tenant has no reasonable expectation of privacy in common hallway of duplex).

134. United States v. Eisler, 567 F.2d 814, 816 (8th Cir. 1977) (deciding there is no reasonable expectation of privacy in apartment hallway even though the building was locked and entry was gained by sneaking in after another tenant opened the door with a key).

135. United States v. Nohara, 3 F.3d 1239, 1241–42 (9th Cir. 1993) (finding no reasonable expectation of privacy in hallway of a twenty-seven-story security apartment building with seven apartments per floor); *see also* United States v. Calhoun, 542 F.2d 1094, 1100 (9th Cir. 1976) ("The hallway of an apartment building, as with the threshold of one's dwelling, is a 'public' place for purposes of interpreting the Fourth Amendment."). The *Jardines* holding seems to undercut this language. *See supra* notes 25–27 (discussing the *Jardines* decision, in which the Court held that the officer's use of a trained drug dog to search the exterior of the front door constitutes an unreasonable search of a curtilage).

136. United States v. Correa, 653 F.3d 187, 191–92 (3d Cir. 2011) (stating even locked exterior doors do not give rise to a reasonable expectation of privacy in a building's common areas).

137. United States v. Espinoza, 256 F.3d 718, 723 (7th Cir. 2001) (ruling no reasonable expectation of privacy in common areas of multi-family housing buildings); United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991) (finding no reasonable expectation of privacy in common areas of an apartment building).

138. United States v. Mendoza, 281 F.3d 712, 715 (8th Cir. 2002) ("[W]e have repeatedly held that tenants of multifamily dwellings have no legitimate expectation of privacy in common or shared areas."); United States v. McCaster, 193 F.3d 930, 932–33 (8th Cir. 1999) (holding no expectation of privacy in closet in common area).

139. United States v. Miravalles, 280 F.3d 1328, 1333 (11th Cir. 2002) (finding no reasonable expectation of privacy in common areas of high-rise apartment building where the lock on the building's door was not operational on the day in question).

140. United States v. Hawkins, 139 F.3d 29, 32–33 (1st Cir. 1998) (ruling no reasonable expectation of privacy in basement common area); United States v. McGrane, 746 F.2d 632, 634 (8th Cir. 1984) (holding no reasonable expectation of privacy in basement area that was accessible to all tenants and the landlord).

landing,[141] a lobby,[142] the parking area,[143] a ledge,[144] a common garbage area,[145] an unfenced yard,[146] or a common walkway.[147]

When all of these cases are taken together, the ten circuits[148] that have considered whether residents in multi-unit dwellings have an expectation of privacy in common areas have, for the most part, rejected arguments in favor, although there is limited authority in two circuits, the Sixth and Ninth Circuits,[149] to the contrary. It is safe to say, therefore, that the great weight of authority is contrary to an assertion by a resident of a multi-unit dwelling that he has an expectation of privacy in a common area of that dwelling.

The next step, then, is to consider the impact, if any, of the *Jardines* decision on the future use of drug-detection dogs in or around residential dwellings.

IV. PRACTICAL IMPLICATIONS OF *JARDINES* GOING FORWARD

The *Jardines* opinion has implications for the future use of drug-detection dogs for residents of all types of dwellings. These implications are explored below.

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141. United States v. Rheault, 561 F.3d 55, 61 (1st Cir. 2009) (finding no expectation of privacy on third floor landing that was accessible to all tenants).

142. United States v. Brown, 169 F.3d 89, 92 (1st Cir. 1999) (finding there is no reasonable expectation of privacy in the lobby of an apartment building).

143. United States v. Cruz Pagan, 537 F.2d 554, 557–58 (1st Cir. 1976) (holding there is no expectation of privacy in well-traveled common areas used for underground parking and that parking areas are not curtilage).

144. United States v. Arboleda, 633 F.2d 985, 991–92 (2d Cir. 1980) (deciding there is no reasonable expectation of privacy on ledge outside defendant's second story apartment).

145. United States v. Maestas, 639 F.3d 1032, 1040 (10th Cir. 2011) (ruling there is no expectation of privacy in common garbage storage area of triplex).

146. Reeves v. Churchich, 484 F.3d 1244, 1254 (10th Cir. 2007) (finding no expectation of privacy in shared, unfenced front yard of duplex).

147. United States v. Clark, 67 F.3d 1154, 1162 (5th Cir. 1995) (holding that petitioner Coffman had no reasonable expectation of privacy in the walkway outside her apartment), *vacated sub nom.* Coffman v. United States, 519 U.S. 802 (1996).

148. The First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have considered the reasonable expectation of privacy issue with respect to multi-unit common areas. The Fourth Circuit has not considered this question with respect to multi-unit common areas but has considered whether the common areas receive curtilage protection. *See* United States v. Jackson, 728 F.3d 367, 373–75 (4th Cir. 2013) (holding that the common area of an apartment building available for trash storage is outside the curtilage of individual apartments and that the petitioner did not have a subjective expectation of privacy in his trash when it was searched); *see also supra* Part III.C.2.

149. *See supra* notes 114–29 and accompanying text.

A. Residents of Single-Family Dwellings

Since *Jardines* has made it plain that the warrantless use of a drug-detection dog in a home's curtilage, even briefly, constitutes a trespass onto protected property in violation of the Fourth Amendment,[150] the likely result is that drug-detection dogs will not be used on such dwellings at all in the future. This is because the Fourth Amendment explicitly provides that "no Warrants shall issue, but upon probable cause."[151] In other words, in order to secure a warrant to use a drug-detection dog, the law enforcement officers seeking the warrant would need to establish that there is probable cause to believe that contraband drugs are located inside the home. If the officers can make that showing, they are entitled to a warrant to search the home. It would be irrational in that circumstance for the officers to seek a warrant to bring a drug-detection dog onto the property when the evidence presented in the officers' affidavit would be sufficient to provide the basis for a search warrant without including the result of a dog sniff.

Thus, for all practical purposes, drug-detection dogs will be absent from investigations into whether contraband drugs are located inside a single-family dwelling surrounded by a curtilage. The dogs cannot be used to establish probable cause justifying the issuance of a search warrant because their use itself requires a warrant. And if probable cause exists without relying on an alert by a drug-detection dog, a search warrant will issue, and the home will be subject to a search.

B. Residents of Multi-Unit Dwellings

The protection against the warrantless use of a drug-detection dog conferred by *Jardines* extends only to those dwellings that are surrounded by a "curtilage" because the majority rests the opinion on the fact that the entry of the police officer using a drug-detection dog was only held to violate the Fourth Amendment because it constituted a trespass in violation of the Fourth Amendment.[152] As noted above, the overwhelming majority of appellate courts that have considered the issue have refused to recognize "curtilage" in the context of multi-unit dwellings.[153] Neither have the courts been receptive to the idea that those residing in multi-unit dwellings have any reasonable

150. Florida v. Jardines, 133 S. Ct. 1409, 1413–17 (2013).

151. U.S. CONST. amend. IV.

152. *Jardines*, 133 S. Ct. at 1417–18.

153. *See supra* Part III.C.1.

expectation of privacy in the common areas (including hallways) outside the dwelling units.[154]

Thus, by virtue of the only rationale adopted by a majority of the Supreme Court, the Fourth Amendment may now be deemed to provide greater protection against the use of drug-detection dogs to dwellers of single-family dwellings than it does for those living in multi-unit dwellings. Although it may be said that the very nature of living in close proximity to others provides less privacy in general than residing in a more isolated setting, it is hard to imagine that those drafting the Fourth Amendment would have countenanced this type of unequal application of the protections which they found sufficiently important to guarantee by constitutional amendment. Nor is this something that should be acceptable in a country founded upon the principle that "all men are created equal."[155] It becomes particularly disturbing once it is recognized that in many settings those who reside in multi-unit dwellings are financially less well-off than their neighbors in single-family residences.[156]

This inequality in treatment under the Fourth Amendment is something that the Court will need to resolve. One way to do so would be to revisit the *Place* rule[157] with an eye toward whether that rule—which was developed in the context of a dog sniff of luggage in an airport[158]—should be more restrictively applied in the context of all private dwellings.

The opinions of the Supreme Court suggest a possible basis for limiting the use of drug-detection dogs to investigate the possible presence of drugs in private dwellings. The Court has repeatedly proclaimed that residential dwellings receive heightened protection under the Fourth Amendment. Thus, in *Kyllo*, Justice Scalia, writing for the majority, noted that "[a]t the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[159] And the Court has repeatedly indicated that the Fourth Amendment draws "a firm line at the

154. *See supra* Part III.C.2.b.

155. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

156. Of course, luxury apartments and condominiums are frequently inhabited by those who are financially well-off and could afford to live in single-family dwellings. But those luxury multi-unit dwellings often come with doormen or security devices which make it difficult for officers and others to enter.

157. *See supra* notes 40–42 and accompanying text (discussing the use of dogs to detect contraband in luggage in *United States v. Place*).

158. United States v. Place, 462 U.S. 696, 698 (1983).

159. Kyllo v. United States, 533 U.S. 27, 31 (2001) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)) (internal quotation marks omitted).

entrance to the house."[160] Thus it can be argued that a doctrine that was born in an airport[161] and, most recently, was affirmed in the context of a traffic stop[162] should not be applied wholesale in the context of a private residence. While the stated rule is that there is no legitimate expectation of privacy in illegal activity, and so "governmental conduct that *only* reveals the possession of contraband compromises no legitimate privacy interest,"[163] there is merit to considering whether this principle should be limited when the government intrusion is an intrusion into a residence.

A majority of the Court found unacceptable the warrantless use of a drug-detection dog to sniff out whether Mr. Jardines was growing marijuana inside his home. Perhaps the only thing more distasteful than the specter of police officers freely bringing dogs to sniff our homes in the hope of detecting contraband within is the reality that, under the current state of the law, they may be able to do so in some of our dwellings—multi-unit residences—but not in others. The Fourth Amendment confers "[t]he right of the people to be secure in their persons, houses, papers, and effects"[164] without distinguishing among the types of dwellings that may comprise "houses." There is no room in that language for the Court to do otherwise.

V. CONCLUSION

It remains to be seen how law enforcement authorities will react to the *Jardines* ruling. It is possible that police practices will be modified so that the warrantless use of drug-detection dogs on all types of residential properties ceases. If, however, drug-detection dogs continue to be used on residential properties other than single-family dwellings surrounded by curtilage, then inevitably the Court will be called upon to consider the issue side-stepped by the five-justice majority in *Jardines*: whether the use of drug-detection dogs on residential property violates the residential occupant's reasonable expectation of privacy.

160. *Id.* at 40 (quoting Payton v. New York, 445 U.S. 573, 590 (1980)); *see also Payton*, 445 U.S. at 576 ("[T]he Fourth Amendment . . . prohibits the police from making a warrantless and nonconsensual entry into a suspect's home . . . .").

161. *Place*, 462 U.S. at 698.

162. Illinois v. Caballes, 543 U.S. 405, 406 (2005).

163. *Id.* at 408 (quoting United States v. Jacobsen, 466 U.S. 109, 123 (1984)) (internal quotation marks omitted).

164. U.S. CONST. amend. IV.