



4-1-2015

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Shaw, Justin; Frost, T. Mark; and Stevens, Michael (2015) ""The Conundrum of the Curtilage: A Critical Interpretation of Florida v. Jardines", "*Brigham Young University Prelaw Review*: Vol. 29 , Article 11.

Available at: <https://scholarsarchive.byu.edu/byuplr/vol29/iss1/11>

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THE CONUNDRUM OF THE CURTILAGE: A CRITICAL INTERPRETATION OF *FLORIDA V. JARDINES*

*Justin Shaw*¹, *T. Mark Frost*², and *Michael Stevens*³

In late November of 2006, the Miami police received an unverified tip regarding a man who was surreptitiously producing illegal narcotics in his home.⁴ Two officers from the local drug-unit were dispatched along with a drug detection dog. Upon arrival, they surveyed the house for a few minutes and found closed blinds, an empty driveway, and no observable activity. Recognizing this, one detective took the leashed dog and casually walked to the front door; whereupon, the dog confirmed the presence of narcotics on the property. With this indication, the detectives left the premises and obtained a search warrant. After searching the home, they confirmed the existence of prohibited substances.

When the case went to trial, the accused demanded that the evidence (the drugs) be suppressed on the grounds that it was obtained in an unlawful manner constituting an “unlawful search or seizure.” The defendant argued that the search was “unlawful” because the police officers invaded an area of private property to gain the necessary information for a warrant. The case eventually reached the Supreme Court wherein the justices hotly debated the question as to whether this instance constituted a Fourth Amendment search. The

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4 *Florida v. Jardines*, 569 U.S. 1 (2013).

justices argued that the use of the dog in the acquisition of evidence and the porch and its inclusion in the protections afforded to a home qualified as a Fourth Amendment search. In a five-four decision, the Justices decided that the porch was incorporated into the curtilage; thereby, validating the defendant's claims. The narcotics were suppressed as evidence because the policemen's search was considered unconstitutional in accordance with the Fourth Amendment.

The facts of this case come from the Supreme Court Case, *Florida v. Jardines*. The dilemma examined in the case questions the boundary between government intrusion and government protection. By ruling that the porch is included in the curtilage, the laws regarding the surrounding area of one's home have become even more ambiguous. This ambiguity results from a porch's lack of privacy, generally available to areas inside the home and the enclosures of a curtilage. The decision jeopardizes the rights of citizens by causing uncertainty in knowing property boundaries. The ambiguity is also problematic for law enforcement officers who desire to protect the community, but are unsure where the partition of citizen protection begins and ends.⁵

While the Supreme Court already ruled on the issue, setting a precedent for future cases, this paper offers an alternative solution wherein the porch operates in its own unique legal position. This unique position in the law is more consistent with past legal precedent and reconciles both the majority opinion and dissenting opinion of the Supreme Court.

This article shall examine the definition of curtilage throughout American legal history, including various cases that have extended the definition of the curtilage, as well as cases that have used past precedents in determining whether a specific instance qualifies as a curtilage or not. Part I shall examine the history of the curtilage. Part II will identify the failure of consideration by the majority opinion in distinguishing the porch's "publicness." Part III shall analyze the decision in *Florida v. Jardines* and establish how it is inconsistent

5 *Id.* (The *Jardines* case is a prime example of ambiguity with regard to law officers).

with past precedent. Part IV will seek to clarify and expand on the dissenting opinion to describe a better interpretation of the definition of the curtilage. Based upon these opinions, Part V proposes that the walkway and porch of a home operate in their own sphere, carving out what would then be its own unique position in legal procedure.

I. BACKGROUND

(i) The Progressive Definition of Curtilage

The curtilage has progressed to become an integral part of the law, protecting outlying parts of a person's property that are entitled to the protections given to the home. Laws regarding searches and seizures in the United States developed from clauses in the Fourth Amendment. The Fourth Amendment was principally created to inhibit government searches and seizures of one's dwelling. The amendment was drafted due to continual abuses of the writs of assistance, an unlimited search warrant enacted by the British government which allowed searches without necessary cause to look for evidence of smuggling.⁶ Derived from common law, the term curtilage was defined in 1891 in *Black's Law Dictionary* as,

The enclosed space of ground and buildings immediately surrounding a dwelling-house. In its most comprehensive and proper legal signification, it includes all that space of ground and buildings thereon which is usually enclosed within the general fence immediately surrounding a principal messuage [sic] and outbuildings, and yard closely adjoining to a dwelling-house, but it may be large enough for cattle to be levant [sic] and couchant therein.⁷

This definition since determined what qualifies as curtilage and what does not. It has assisted in granting protections to certain areas of the home that would otherwise be unprotected. Nevertheless, this developing definition still retains a large level of ambiguity. Even in established definitions, certain words can be explained in a variety

6 ERIC FONER, *Give Me Liberty!* A67 (Steve Forman et al. eds., 4th ed. 2014).

7 BLACK'S LAW DICTIONARY 311 (1st ed. 1891).

of ways. The Court has, therefore, been operating on a case-by-case basis.

(ii) *United States v. Dunn*

In the Supreme Court Case, *United States v. Dunn*, Drug Enforcement Administration (DEA) officers learned that a certain carpenter had been buying large quantities of chemicals typically used in the manufacture of controlled substances.⁸ The officers placed tracking “beepers” within some of the equipment containers. These beepers led the officers to the carpenter’s ranch. Through the use of aerial photography, the DEA learned that the suspect’s truck had been parked at a barn behind the ranch house. The entire ranch was enclosed by a fence and contained several smaller barbed wire fences.

Without a warrant, officers traversed the border fence, barbed wire fences, and wooden fence to reach the barn. As they approached, they could smell pungent chemicals plausibly issuing from the barn. Also, while they approached, they could hear the faint workings of a small motor, supposedly coming from inside the barn. While the officers did not enter the barn, they halted at a locked gate, shined a flashlight inside, and observed what appeared to be a drug laboratory. Having gained the evidence they needed, they left. The DEA officers returned twice the following day to vindicate the presence of the laboratory. The officers obtained a warrant, arrested the carpenter, and seized the chemicals.⁹

The suspect argued that the evidence be suppressed on the basis that it was obtained through an unreasonable search and seizure. The Court of Appeals suppressed the evidence stating that the barn was within the resident’s curtilage, and that it carried a reasonable expectation of privacy. When the case went before the Supreme Court, the justices overturned the Court of Appeals decision and held that all the evidence was admissible. This landmark case significantly contributed to the definition of the curtilage because The Court was

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

9 *Id.* at 299.

able to specifically dictate the stipulations of what does and does not qualify as a curtilage. The court stated,

[C]urtilage questions should be resolved with particular reference to four factors: the *proximity* of the area claimed to be curtilage to the home, whether the area is included within an *enclosure* surrounding the home, the *nature* of the uses to which the area is put, and the *steps taken by the resident to protect the area* from observation by people passing by. We do not suggest that combining these factors produces a finely tuned formula that . . . yields a “correct” answer to all extent-of-curtilage questions. Rather, these factors are *useful analytical tools* only to the degree . . . they bear upon the centrally relevant consideration — whether the area in question is so intimately tied to the home itself that it should be placed under the home’s “umbrella” of Fourth Amendment protection. Applying these factors to respondent’s barn and to the area immediately surrounding it, we have little difficulty in concluding that this area lay outside the curtilage of the ranch house.¹⁰

This decision contributed immensely to the definition of the curtilage. The Court identified four independent factors (proximity of the area, if the area is in an enclosure, the nature of its uses, and steps taken to protect the area) that should help in determining whether a specific area qualifies as curtilage. Each factor must be separately considered if a reasonable conclusion is to be made.

(iii) *California v. Ciraolo*

The Supreme Court Case, *California v. Ciraolo*, made another significant addition to the understanding of the curtilage.¹¹ Dante Carlo Ciraolo had been growing marijuana in his backyard; high fences concealed the cannabis’s visibility. Upon receiving an anonymous tip, the Santa Clara Police Department dispatched detectives

10 *Id.* at 302 (Emphasis added).

11 *California v. Ciraolo* 478 U.S. 1014 (1986).

in a private plane to discover if there was any basis to the claim. The policemen flew over the house at an altitude of 1,000 feet and took photos of Ciraolo's backyard for investigation. The officers were able to observe, without any visual enhancements, the existence of the marijuana. The officers obtained a warrant based upon this observation alone.

Similar to the *Florida v. Jardines* case, the defendant requested that the evidence be suppressed based upon the manner that the evidence was obtained. Ciraolo argued that obtaining evidence through an aerial search qualified as an unreasonable search, therefore violating the exclusionary rule.¹² The exclusionary rule states any evidence collected in a way that violates a citizen's rights is prohibited. The question then was if evidence obtained by the naked eye, in an arguably public place constituted an unlawful search. The case also analyzed whether the backyard should be included in the protections of the curtilage.

The Supreme Court allowed the evidence to stand. Chief Justice Warren Burger wrote in the majority opinion, "The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye."¹³ The logic for this conclusion takes into consideration the "publicness" of the space in question. The police officers could not be held to the impractical stricture of ignoring what they see while investigating an air space or public area. This question of "publicness" is an important distinction to understanding an area legally.

In the case, *Florida v. Jardines*, the essential question is whether or not the porch should qualify as being part of the curtilage being a "public" or visible area. The dispute in the case arises from the act of the detectives walking along the pathway to the house and stopping while on the front porch. Detective Douglas Bartelt approached the house with his trained narcotics dog. Bartelt later noted that the dog had responded to the smell of drugs while on the driveway before even reaching the porch of the house. The dog began tracking

12 *Id.* at 212-215.

13 *Id.*

as it is trained to do, then centered on the strongest location of the odor. The dog began to “bracket,” or as detective Bartelt described, the dog began “tracking that airborne odor by...tracking back and forth.”¹⁴ Finally, the dog concluded its search at what happened to be the base of the front door. With the discovery, the dog sat down indicating that it had discovered the scent’s most powerful point. With this information, one detective left, having obtained the information required for a warrant. The other detective stayed put on the driveway. While there, he could hear the air conditioner running and could smell the traces of marijuana.¹⁵ Later, police arrested Joelis Jardines after he attempted to flee from police. Upon examination of the home, the investigators confirmed that cannabis plants were being cultivated there.

When the case went to trial, Jardines requested that the evidence obtained (the cannabis) be suppressed due to the unreasonableness of the drug-sniffing dog’s use in obtaining evidence. The arguments focused largely on the question of “[w]hether the officers’ conduct during the investigation of the grow house, including remaining outside the house awaiting a search warrant is, itself, a Fourth Amendment search.”¹⁶ The exploration of this and other questions was the basis for the opinions of the court.

II. FAILURE OF CONSIDERATION IN “PUBLICNESS”

(i) *Failure of the Majority Opinion*

The court failed to consider the “publicness”¹⁷ of the porch when deliberating over *Florida v. Jardines*. As the arguments were heard

14 Jardines, 569 U.S. at 2.

15 Mark M. Dobson, *Is a Drug Detection Dog’s Sniff at a Private Home’s Front Door a Search Under the Fourth Amendment?*, 40 PREVIEW U.S. SUP. CT. CAS. 59, 59-62 (2012) (discussing the primary details of the case).

16 *Florida v. Jardines*, 73 So.3d 34 (2nd Cir. 2011), *cert. granted*, (U.S. Jan. 6, 2012) (No. SC08-2101).

17 Meaning visible to onlookers.

for both sides, it was decided by a 5-4 majority that the porch is included in the curtilage, and the evidence condemning Joelis Jardines should be tossed out. Justice Scalia wrote the majority opinion for the case. The foundation of Justice Scalia's opinion rests upon the notion that the curtilage is established as a protected area against unreasonable searches and seizures. This point has been thoroughly attested through numerous cases relating to the subject as previously presented. In Justice Scalia's estimation, the curtilage bears similarity to the inside of the house, receiving many of the same rights and protections.

Nevertheless, the curtilage differs acutely from the interior of one's home. This fact is not articulated in the majority's opinion. The porch of one's home is placed under this protective umbrella without the consideration of its unique position as a public area (meaning visible to onlookers). Much of what can be lawfully performed within the confines of a person's home would otherwise be illegal if engaged in on his or her porch. This distinction is vital in establishing what activities are permissible on the porch and other public areas on private property.

(ii) The Relative Expectation of Privacy

Because it is a public area, the porch surrenders many of the rights guaranteed to the interior of the home. For instance, a person is free to mill about nude within the enclosure of his or her home. However, the same activity, when done in the plain sight of the porch, becomes illegal. The differentiation between the two activities lies in the publicity of the event. The terminology for this category of unlawful conduct is "public indecency" or "indecent exposure."¹⁸ This same practice can even be considered lawful when carried out in the backyard. It is legal as long as it is beyond the visibility of others. Why? Because the backyard is allowed a relative expectation

18 KELLY D. JOHNSON, *ILLICIT SEXUAL ACTIVITY IN PUBLIC PLACES* 1 (33rd ed. 2005).

of privacy.¹⁹ The porch is, thus, fundamentally different from other areas of the curtilage.

The façade of one's residence is tremendously public. It is generally understood that anything that a person may wish to remain private should be removed from the front windows (within visible sight) of the home. This "reasonable expectation of privacy" was established in the Supreme Court case, *Katz v. United States*.²⁰ In the concurring opinion, Justice Harlan identified an objective prong for searches dealing with the Fourth Amendment, namely, that the space in question is reasonably recognized (objectively) by society as a place that should receive privacy.

In dealing with questions regarding the curtilage, it is helpful to consider the searches allowed by the Fourth Amendment and what constitutes a "search." The porch is certainly a location that is sufficiently public to surrender any "reasonable expectation of privacy." In the *Jardines* case, the officers did not look through any windows to gain evidence. Rather, they were investigating in plain sight, an area visible to the general public. Jardine's closed blinds protected the depths of his home. Justice Scalia ignores the fact that the porch differs significantly from the interior of the home. These differences manifest the neglect of the majority opinion.

The inconsideration of the "publicness" of the porch creates ambiguity for citizens. Suppose cannabis were being grown on the front porch of a home and law enforcement officers received an anonymous tip detailing this fact. Would the officers need a warrant to approach the front door to confirm the plant's existence? Would the officer need a warrant to survey this *apparently* public area? Having the porch included in the protections of the curtilage, it treats the area similarly to the inside of the home. Such ambiguous questions are raised with the inclusion of the porch in the protections typically granted to a home.

19 Brian J. Serr, *Great Expectations of Privacy: A New Model For Fourth Amendment Protection*, MINN. L. REV. 605, 583-642 (1989).

20 *Katz v. United States*, 389 U.S. 347, 361 (1967).

III. CONSISTENCY WITH PAST PRECEDENT

(i) *Consideration of Dunn Case in Jardines*

A citizen's home is protected under the Fourth Amendment. This law should prevent unauthorized government intrusion. Likewise, property owners have other areas that deserve the safety of the Fourth Amendment. For instance, one's garage is a place that needs to fall under the "umbrella" of the house.

As mentioned, the determination of such locations is typically in a case by case basis. The disputed spot must qualify under some of the stipulations dictated in the case, *United States v. Dunn*. One of the qualifications established is the nature of the area's use. The majority in the *Jardines* case did not properly consider the "nature of [the area's] uses" with the porch.²¹ It is vital to recognize that some areas of the curtilage differ from others. The *Dunn* case decided that a private barn, protected by fences and other safe guards, was determined to be outside of the home's curtilage. It is peculiar that a seemingly private barn, behind a home and barred by fences, gates, and other exterior warnings, is not a part of the curtilage. In contrast, the curtilage encompasses the front porch, a place where solicitors, hawkers, and peddlers of all kinds are able to enter without the consent of the homeowner.

In *United States v. Dunn*, the Supreme Court established four factors vital in determining the curtilage of a home. The second factor questions "whether the thing is within *an enclosure* surrounding the home".²² Unfortunately, an acknowledgment of this delimitation is absent in Justice Scalia's interpretation. Generally speaking, the façade of a citizen's home is not always enclosed. Does this mean that only those who have enclosed their front yard or porch are protected? Such questions become evident after examining the majority opinion. The uncertainty contributes to the ambiguity of the Court's decision.

21 *Dunn*, 480 U.S. at 302.

22 *Curtilage Definition*, LEGAL INFORMATION INSTITUTE, <http://www.law.cornell.edu/wex/curtilage> (last visited Jan. 30, 2015).

The opinion in *Florida v. Jardines* also fails to recognize the precedent established in *California v. Ciraolo* in which a man was growing marijuana in his backyard, shielded from view by large fences. The court determined the warrantless observation of one's backyard was legal inasmuch as the location was "visible to the naked eye."²³ Visibility played a significant role in the decision of the court. How then is the porch, arguably more public than a backyard, an area that is more protected? The narcotics in *Florida v. Jardines* were made public by their scent given to the dog. The detectives reported also that they could smell the marijuana drifting from the house by the home's air conditioner. The evidence was made public. The five senses are not treated differently by the Fourth Amendment. No protections can be granted for information exposed to the public. For instance, the sound of one's voice, the style of one's handwriting, the smell of illegal drugs, all when made public can be used as evidence in the court of law.

IV. THE DISSENT AND ITS CONSIDERATION OF TRESPASS LAWS

(i) *The Fourth Amendment*

An intrusion into the home/curtilage would qualify as a "search" as dictated by the Fourth Amendment. The intrusion would also be grounds for action against trespassing. However, there is another distinction of trespass, which denotes "the act of knowingly entering another person's property without permission. Such action is held to infringe upon a property owner's legal right to enjoy the benefits of ownership."²⁴ Such an act would violate the Fourth Amendment. These rights, similar to the idea of the curtilage, are to protect people's property from invasions of privacy. Nevertheless, law enforcement officials have in past instances, disregarded trespass laws to obtain evidence lawfully.

23 California, 476 U.S. at 212-215

24 *Trespass Definition*, LEGAL INFORMATION INSTITUTE, <http://www.law.cornell.edu/wex/trespass> (last visited Jan. 30, 2015).

(ii) Oliver v. United States

In 1982, Kentucky State Police acquired reports that marijuana was being grown on a farm within their county; the officers were dispatched to investigate. Upon arrival, officers drove to a locked gate labeled with a “No Trespassing” sign. Alongside this locked gate, however, was a small footpath. The agents walked along the footpath, around the gate, and discovered a field of marijuana. Initially, the District Court suppressed the evidence and held that the petitioner had “a reasonable expectation that the field would remain private and that it was not an ‘open’ field that invited casual intrusion.”²⁵ The Court of Appeals reversed the decision; the Supreme Court upheld this reversal in *Oliver v. United States*.

In *Oliver*, the court held, “[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.”²⁶ Certainly, the court did not imply that any “priva[te] activity” may be conducted “in the area immediately surrounding the home.” There are undoubtedly, as mentioned, certain activities that are prohibited in the area surrounding the home.

Justice Alito wrote the dissenting opinion, in which he argued that the decision to suppress the evidence on grounds that the evidence was obtained in an unlawful manner simply does not hold because it does not follow prior Supreme Court jurisprudence. In Justice Alito’s dissent, he states, “trespass law provides no support for the Court’s holding.”²⁷ Justice Alito further concludes that while the curtilage is constitutionally protected, it is categorically different from other areas of the home in that Detective Bartelt and his dog were on the paved sidewalk—the course any visitor would use to approach the house. He was not sulking around in the bushes, nor climbing on the roof.

When detective Bartelt approaches the door of a house, he is well within his rights to do so. This right was established in *Kentucky v.*

25 *Oliver v. United States*, 466 U.S. 170 (1984).

26 *Id.* at 172.

27 *Jardines*, 569 U.S. at 2.

King where it was determined that a policeman may approach the front door of a residence and it is not specifically categorized as a “search”.²⁸ Also, as Justice Alito cites in his dissent, “police officers do not engage in a search when they approach the front door of a residence and seek to engage in what is termed a ‘knock and talk,’ *i.e.*, knocking on the door and seeking to speak to an occupant for the purpose of gathering evidence.”²⁹ A detective is still able to approach a front door because it is the typical entryway to the house. This demonstrates the variance between a front door and the backyard. If a cop were to be sneaking around the perimeter of the backyard, then a resident would be justified in calling the police.

With this establishment, the matter in question becomes the physical use of the dog. In both *United States v. Place*³⁰ and *Illinois v. Caballes*³¹, the Supreme Court established that a sniff by a police dog, specially trained to detect the presence of narcotics is not a “search” under the meaning of the Fourth Amendment. It is considered “*sui generis*,” or a “special category,” which is intended only to reveal the presence of narcotics.³² In *United States v. Place*, the canine was used to approximate the location of drugs concealed in luggage at an airport.³³ Likewise, in *Illinois v. Caballes*, a drug-sniffing dog was used in a routine traffic stop to locate contraband.³⁴ Both of these cases establish that the utilization of a drug-sniffing dog in the locating and confiscation of narcotics is not inherently unlawful.

28 *Kentucky v. King*, 563 U.S. 1, 1-4 (2011).

29 *Jardines*, 569 U.S. at 6.

30 *United States v. Place*, 462 U.S. 696 (1983).

31 *Illinois v. Caballes*, 543 U.S. 405 (2005).

32 Leslie A. Lunney, *Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of Canine Sniff Doctrine to Include Sniffs of the Home*, 88 OR. L. REV. 829, 1189 (2009).

33 *Place*, 462 U.S. 706-707 (1983).

34 543 U.S. at 405.

V. RESOLUTION: PORCH AS A DISTINCT LEGAL LOCATION

The *Jardines* search did not involve an intrusion into intimate or private areas of the home. The dog and the police officer merely walked along the path to the home's porch—a reasonably public area from its traditional use. The dog was not rummaging through the papers of Joelis Jardines in the home's interior. Any other citizen who approached the door with a dog would have been well within their constitutional rights to approach the front door of a home. In *Jardines*, the dog merely conveyed a public fact; it sat down at the front door, indicating that drugs were present in the home. As mentioned, one of the police officers remarked that he could smell the scent of marijuana emanating from the home's air conditioning unit. The dog's indication enabled the police officers to secure a warrant—the necessary documentation to perform a search.

As a result of the deviation from past precedent and the failure to consider the difference of the porch as a public space, the porch needs to occupy a distinct position in legal understanding. The porch deserves rights and privileges that are not afforded to a public space. It needs to protect one's home from invasion and misconduct. Nevertheless, the fact remains, the porch and the walkway leading to the porch *is* a relatively public space. The porch is a paradox because it is accessible to those who wish to engage with the homeowner, but it is private in the sense that there are certain activities that are restricted on the porch because it is another person's property. This paradox does not align with the definition of a curtilage. The porch should not be as protected as a curtilage, because a curtilage implies an inclosure or private space. The resolution between these two conflicting concepts is the porch needs to occupy a special space beyond that of curtilage.

The porch, receiving its own special recognition in the law, would relieve much of the ambiguity surrounding the porch and its incorporation into the curtilage. This new distinction will operate upon the principle of *reasonable intent*. Therefore, one is able to approach another person's home (including the walkway to the porch and the porch itself) with reasonable intent to somehow engage with the homeowner. This difference will give a level of privacy to the

homeowner who does not wish for misconduct on their porch, as well as a level of accessibility to those who wish to approach the home and engage with the homeowner. Under this idea, the evidence in the case of *Florida v. Jardines* would not have been suppressed because the police, acting upon a tip, had a reasonable intent to approach the home.

The new conception of the porch reconciles the two opinions (both Scalia and Alito) of the court, and does not disregard prior precedent regarding the matter. Thus, in future cases dealing with the porch of one's home, the courts would be able to analyze the reasonable intent of the offender. We define porch as the area surrounding the front entrance of one's home. When the front of a home has two or more main entrances, each entrance shall be included under the protections afforded to the porch. Also, in cases regarding a home that sits upon land that is a great distance from a street, a person may approach the home with the reasonable intent of somehow engaging with the homeowner. Obviously this proposal has its shortcomings; nevertheless, it is an appropriate proposition to curtail some of the problems that have occurred on the porch of a home.

