DRONES AND *JONES*: RETHINKING CURTILAGE FLYOVER IN LIGHT OF THE REVIVED FOURTH AMENDMENT TRESPASS DOCTRINE

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I. INTRODUCTION

"I would predict . . . that the first guy who uses a Second Amendment weapon to bring a drone down that's been hovering over his house is going to be a folk hero in this country."[1] While Charles Krauthammer does not advocate for such action,[2] his remarks represent the public apprehension over the use of unmanned aerial vehicles (UAVs)—commonly known as drones—flying over U.S. skies.[3] According to a recent poll, "64[% of Americans] are 'very concerned' or 'somewhat concerned' about their privacy if U.S. law enforcement uses drones with high-tech cameras."[4] Elected officials across the country, both Republicans and Democrats, have shared a similar concern.[5] Legislatures in all but seven states have proposed or adopted domestic drone legislation.[6] Congress has proposed

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[1] Charles Krauthammer, *Special Report with Bret Baier* (Fox News television broadcast May 14, 2012), *available at* http://www.foxnews.com/on-air/special-report/2012/05/15/debate-over-using-drones-monitor-american-cities.

[2] *Id.*

[3] David Uberti, *Rise of the Machines: Domestic Drones Take Off*, MEDILL NAT'L SECURITY ZONE (Apr. 3, 2012), http://nationalsecurityzone.org/site/rise-of-the-machines-domestic-drones-take-off/.

[4] Jim Gold, *Poll: Americans OK with Some Domestic Drones—But Not to Catch Speeders*, U.S. NEWS ON NBCNEWS.COM (June 13, 2012, 4:15 PM), http://usnews.nbcnews.com/_news/2012/06/12/12205763-poll-americans-ok-with-some-domestic-drones-but-not-to-catch-speeders.

[5] Dustin Hurst, *The Bipartisan Opposition to Domestic Drones*, REASON.COM (Jan. 29, 2013), http://reason.com/archives/2013/01/29/the-bipartisan-opposition-domestic-drone.

[6] *2013 Unmanned Aircraft Systems (UAS) Legislation*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/issues-research/justice/unmanned-aerial-vehicles.aspx (last visited Mar. 5, 2014).

similar legislation on the federal level, which would allow a law enforcement agency to operate a drone only with a warrant.[7] This legislation would have exceptions for border patrol purposes, exigent circumstances, and high-risk terrorist threats.[8] U.S. cities also have taken action; for example, Seattle, Washington, recently terminated its drone program and returned purchased drone equipment to the manufacturer.[9] Concerns over the use of domestic drones stem from new legislation that encourages the acceleration of drone programs in the United States.[10]

A. The FAA Modernization and Reform Act of 2012

On February 14, 2012, President Barack Obama signed the FAA Modernization and Reform Act of 2012 (Act) into law.[11] While many applauded the Act for providing long-term funding to the Federal Aviation Administration[12] (FAA), privacy groups such as the American Civil Liberties Union (ACLU) criticized the Act because of the "privacy risks associated with domestic drones."[13] Others stated that "the full-scale introduction of drones into U.S. skies will inevitably generate a host of legal issues."[14]

The Act requires the Secretary of Transportation to "issue guidance regarding the operation of public unmanned aircraft systems to . . . provide for a collaborative process with public agencies to allow for an incremental

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[7] Greg McNeal, *Sen. Paul Proposes Bill Requiring Warrants for Drone Use*, FORBES (June 13, 2012, 12:27 PM), http://www.forbes.com/sites/gregorymcneal/2012/06/13/sen-paul-proposes-bill-requiring-warrants-for-use-of-drones.

[8] *Id.*

[9] Catherine Crump & Jay Stanley, *Why Americans Are Saying No to Domestic Drones*, SLATE (Feb. 11, 2013, 3:30 PM), http://www.slate.com/articles/technology/future_tense/2013/02/domestic_surveillance_drone_bans_are_sweeping_the_nation.html.

[10] Neal Conan, *Drones Moving from War Zones to the Home Front*, NPR (Apr. 7, 2012, 1:00 PM), http://www.npr.org/2012/04/17/150817060/drones-move-from-war-zones-to-the-home-front.

[11] FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, 126 Stat. 11 (codified in scattered sections of 49 U.S.C.); Dan Namowitz, *Long-Term FAA Bill Signed into Law*, AIRCRAFT OWNERS & PILOTS ASS'N (Feb. 14, 2012), http://www.aopa.org/advocacy/articles/2012/120214long-term-faa-bill-signed-into-law.html.

[12] Namowitz, *supra* note 11.

[13] Chris Kirk, *Domestic Drone Bill Upsets Civil Liberties Advocates*, MEDILL NAT'L SECURITY ZONE (Feb. 10, 2012), http://nationalsecurityzone.org/site/domestic-drone-bill-upsets-civil-liberties-advocates.

[14] ALISSA M. DOLAN & RICKARD M. THOMPSON II, CONG. RESEARCH SERV., R42940, INTEGRATION OF DRONES INTO DOMESTIC AIRSPACE: SELECTED LEGAL ISSUES 1 (2013).

expansion of access to the national airspace system as technology matures and the necessary safety analysis and data become available."[15] The Act also requires the Secretary of Transportation to "enter into agreements with appropriate government agencies to simplify the process for issuing certificates of waiver or authorization with respect to applications seeking authorization to operate public unmanned aircraft systems in the national airspace system."[16] The certificates of waiver or authorization "allow a government public safety agency to operate unmanned aircraft weighing 4.4 pounds or less, if operated . . . less than 400 feet above the ground."[17]

Some feel that "[d]rones are becoming a darling of law enforcement authorities across the country."[18] The Department of Homeland Security has offered grants to local law enforcement agencies to help purchase this new technology.[19] The Federal Bureau of Investigation (FBI) recently admitted to flying drones in U.S. airspace a total ten times over the past seven years.[20] Stephen Kelly, FBI Assistant Director of Congressional Affairs, stated that the FBI will use drones to acquire information without a warrant if individuals do not have a reasonable expectation of privacy.[21] However, the FBI has yet to give clarification on how it defines reasonable expectation of privacy.[22]

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[15] FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 334(a)(2), 126 Stat. 11, 76.

[16] *Id.* § 334(c)(1).

[17] *Id.* § 334(c)(2)(C)(ii), 126 Stat. at 77. However, the FAA currently allows drones to weigh up to twenty-five pounds for United States safety agencies. Alan Levin, *Drones up to 25 Pounds Allowed for U.S. Safety Agencies*, BLOOMBERG (May 14, 2012, 6:48 PM), http://www.bloomberg.com/news/2012-05-14/drones-up-to-25-pounds-allowed-for-u-s-safety-agencies.html.

[18] Somni Sengupta, *Lawmakers Set Limits on Police in Using Drones*, N.Y. TIMES, Feb. 16, 2013, at A1.

[19] *Id.*

[20] Cheryl K. Chumley, *FBI Tells Sen. Rand Paul: We've Used Drones on U.S. Soil 10 Times*, WASH. TIMES (July 26, 2013), http://www.washingtontimes.com/news/2013/jul/26/fbi-tells-sen-rand-paul-weve-used-drones-us-soil-1/.

[21] *See* Letter from Stephen D. Kelly, Assistant Dir. of Cong. Affairs, Fed. Bureau of Investigation, to Rand Paul, Senator, United States Senate (July 19, 2013), *available at* www.paul.senate.gov/files/documents/071913FBIresponse.pdf.

[22] Chumley, *supra* note 20.

B. Protecting Privacy by Protecting Property

The current debate over drones largely focuses on privacy concerns.[23] These concerns are both predictable and well intentioned given the technological capabilities of drones. Most drones, for example, carry high definition cameras, heat sensors, infrared cameras, Global Positioning Systems (GPS), and automated license plate readers.[24] Manufacturers have created some drones to resemble tiny hummingbirds, as well as large blimps.[25] Some commentators have criticized the FAA for not "prioritizing privacy" in its integration of drones over U.S. skies.[26] The FAA, whose "mission is to provide the safest, most efficient aerospace system in the world,"[27] recognizes "that it does not require drone operators to follow any privacy guidelines."[28]

The U.S. House Homeland Security Subcommittee on Oversight, Investigations, and Management recently held a hearing on increased domestic drone use.[29] During opening statements, Representative Henry

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[23] *See* Ben Wolfgang, *Who's in Charge of Drones a Question That's up in the Air: Privacy Issue Comes to Forefront*, WASH. TIMES, Feb. 18, 2013, at A3 (noting that lawmakers and the public are growing more concerned about drones and their implications for personal privacy); *see also* Matthew J. Schwartz, *FAA Promises Privacy Standards for Domestic Drones*, INFORMATIONWEEK (Feb. 15, 2013, 11:55 AM), http://www.informationweek.com/security/privacy/faa-promises-privacy-standards-for-domes/240148698 ("Privacy concerns surrounding the use of drones in American airspace have been intensifying since President Obama signed the FAA Modernization and Reform Act . . . into law in February 2012.").

[24] *Domestic Unmanned Aerial Vehicles (UAVs) and Drones*, ELECTRONIC PRIVACY INFO. CENTER, http://epic.org/privacy/drones/ (last visited Mar. 5, 2014).

[25] Jay Stanley & Catherine Crump, *Protecting Privacy from Aerial Surveillance: Recommendations for Government Use of Drone Aircraft*, AM. CIVIL LIBERTIES UNION 2 (Dec. 2011), http://www.aclu.org/files/assets/protectingprivacyfromaerialsurveillance.pdf; *see also* James Nelson, *Utah City May Use Blimp as Anti-Crime Spy in the Sky*, REUTERS (Jan. 16, 2011, 10:53 AM), http://www.reuters.com/article/2011/01/16/us-crime-blimp-utah-idUSTRE70F1Dj20110116.

[26] Brendan Sasso, *Lawmakers: Lax FAA Rules on Drone Surveillance Will Put Privacy at Risk*, HILL (Nov. 29, 2012, 5:05 PM), http://www.thehill.com/blogs/hillicon-valley/technology/270167-lawmakers-faa-failing-to-protect-americans-privacy-from-drones.

[27] *Mission*, FED. AVIATION ADMIN., http://www.faa.gov/about/mission (last visited Mar. 5, 2014).

[28] Sasso, *supra* note 26.

[29] *Homeland Security Oversight, Investigations, and Management Subcommittee to Hold Hearing on Domestic Use of Unmanned Aerial Systems*, COMMITTEE ON HOMELAND

(*continued*)

Cuellar declared, "[T]he privacy issues have already been determined by the Supreme Court. All we are looking at is using a different type of platform . . . [such as] a UAV . . . ."[30] Representative Cuellar was referring to *California v. Ciraolo*[31] and *Florida v. Riley*[32]—two U.S. Supreme Court cases that held an individual does not have a reasonable expectation of privacy from aerial surveillance above the curtilage of a home.[33]

However, Representative Cuellar's statement that a UAV is just a "different platform"[34] is a mischaracterization of the issue. Manned aircraft are costly to purchase, operate, and maintain, which has put a natural limit on law enforcement's ability to conduct aerial surveillance.[35] The Denver City Council, for example, considered whether to acquire drones to replace its helicopter, which currently has a $377,400 maintenance bill.[36] In contrast, domestic drones save law enforcement agencies a considerable amount of money over manned aircraft[37] and they are easier to maneuver.[38] For instance, the Maine State Police Department

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SECURITY (July 18, 2012), http://homeland.house.gov/press-release/homeland-security-oversight-investigations-and-management-subcommittee-hold-hearing-0.

[30] *Using Unmanned Aerial Systems Within the Homeland: Security Game-Changer?: Hearing Before the Subcomm. on Oversight, Investigations, & Mgmt. of H. Comm. on Homeland Sec.*, 112th Cong. 6 (2012) [hereinafter *Using Unmanned Aerial Systems Within the Homeland*] (statement of Rep. Cuellar).

[31] 476 U.S. 207 (1986).

[32] 488 U.S. 445 (1989).

[33] *See infra* Part III.A–B. The reasonable-expectation-of-privacy test originated in *Katz v. United States*, a decision that changed the scope of the Fourth Amendment from "property" to "privacy." *See* 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[34] *Using Unmanned Aerial Systems Within the Homeland*, *supra* note 30, at 27.

[35] Anna Mulrine, *Drones Are Cheaper and More Powerful. In US, That's a Problem, Lawmakers Told*, CHRISTIAN SCI. MONITOR, May 17, 2013, at 10.

[36] Editorial, *Police Drones and Privacy Concerns*, DENVER POST, June 30, 2013, at 3D. *But see* Jeremy Meyer, *Denver Police Chief White Says No Police Drones in Near Future for Denver Skies*, DENVER POST (July 9, 2013, 4:15 PM), http://blogs.denverpost.com/thespot/2013/07/09/denver-helicopter-drones/98168/ (noting the police chief declined to use drones in Denver).

[37] Joan Lowy, *FAA Drone Request: Administration Moves to Expand Unmanned Aircraft for Domestic, Civilian Use*, HUFFINGTON POST (Feb. 15, 2013, 3:48 AM), http://www.huffingtonpost.com/2013/02/15/faa-drone-request_n_2693982.html.

[38] *See* Susan Greene, *Colorado's Mesa County a National Leader in Domestic Drone Use*, COLO. INDEP. (June 6, 2013, 3:56 PM), http://coloradoindependent.com/127870/colorados-mesa-county-a-national-leader-in-domestic-drone-use.

recently purchased a drone that can be controlled from a cell phone.[39] This particular drone, the Parrot AR.Drone 2.0, is equipped with "'absolute flight' mode," which allows the operator to "steer the drone around in the air by just tilting [the operator's] smartphone."[40]

If law enforcement personnel are expected to stay within the guidelines of *Ciraolo* and *Riley*, as Representative Cuellar suggests, then Americans can continue to expect their privacy to erode around the curtilage of their homes. As *Ciraolo* and *Riley* demonstrated, the reasonable-expectation-of-privacy test failed to protect personal privacy from aerial surveillance of fixed-wing aircraft and helicopters.[41] The attractive advantages for law enforcement personnel flying domestic drones will only result in Americans losing their privacy at a faster rate. With the expectation of 30,000 drones over U.S. soil by the year 2020,[42] it is time to reevaluate the protection afforded to the airspace around an individual's home. Many people, including Representative Cuellar, have failed to recognize the impact of *United States v. Jones*[43] on curtilage flyovers. This Note argues Supreme Court precedent on curtilage flyovers will have to be reconsidered in light of *Jones*. The *Jones* majority's emphasis on the relationship between property rights and the Fourth Amendment's scope raises new issues that were not considered in either *Ciraolo* or *Riley*. Furthermore, the originalist interpretation in *Jones* will force the Court to examine the scope of airspace rights at the time of the Fourth Amendment's inception.

Part II of this Note examines the origins of the Fourth Amendment and its close connection to property rights.[44] Part II.B discusses *Katz v. United States*,[45] a decision that fundamentally changed the scope of the Fourth

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[39] *See* Jason Koebler, *Maine State Police Purchase $300 'Toy' Drone; Using It Would Be Illegal*, U.S. NEWS & WORLD REP. (March 1, 2013), http://www.usnews.com/news/articles/2013/03/01/maine-state-police-purchase-300-toy-drone-using-it-would-be-illegal.

[40] Rafe Needleman, *Parrot AR.Drone Quadcopter Gets Better Specs and Software*, CNET (Jan. 8, 2012, 8:59 AM), http://www.cnet.com/8301-33373_1-57353325/parrot-ar.drone-quadcopter-gets-better-specs-and-software/.

[41] Florida v. Riley, 488 U.S. 445, 450–52 (1989); California v. Ciraolo, 476 U.S. 207, 215 (1986).

[42] Shaun Waterman, *Coming to a Sky Near You: Drones over U.S. Get OK by Congress*, WASH. TIMES, Feb. 8, 2012, at A1.

[43] 132 S. Ct. 945 (2012).

[44] *See infra* Part II.

[45] 389 U.S. 347 (1967); *see infra* Part II.B.

Amendment.[46] Part III analyzes both *Ciraolo* and *Riley* under the *Katz* reasonable-expectation-of-privacy test.[47] Finally, Parts IV and V examine the re-adoption of the property-based interpretation of the Fourth Amendment and its impact on curtilage flyovers.[48] Specifically, this Note argues that the airspace around the curtilage of the home shall be deemed a constitutionally protected area.

II. THE FOURTH AMENDMENT AND ITS ORIGINS

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[49]

The Fourth Amendment's roots can be traced back to eighteenth-century England.[50] During this period, officials commonly authorized general warrants to search among the papers of political suspects.[51] Under King George III, general warrants authorized petty officials to search any home in order to apprehend individuals engaged in seditious libel against the king.[52] At the time, trespass was the only direct means to redress these wrongs,[53] so all actions were brought in trespass against those who issued and executed such warrants.[54]

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[46] *See Jones*, 132 S. Ct. at 950; *see infra* Part II.B.

[47] *Katz*, 389 U.S. at 360 (Harlan, J., concurring); *see infra* Part III.

[48] *See Jones*, 132 S. Ct. at 950–51; *see infra* Parts IV, V.

[49] U.S. CONST. amend. IV.

[50] *See* Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 898 (2002).

[51] *See* Osmond F. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 362 (1921).

[52] *Id.* at 363; *see also* M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave It Birth*, 85 N.Y.U. L. REV. 905, 909 (2010).

[53] Fraenkel, *supra* note 51, at 363–64.

[54] *See* Fabio Arcila, Jr., *A Response to Professor Steinberg's Fourth Amendment Chutzpah*, 10 U. PA. J. CONST. L. 1229, 1251 (2008) ("For nearly a century after the Constitution was adopted there was no constitutional search and seizure jurisprudence. Instead, search and seizure claims were litigated through common law trespass or civil law forfeiture." (quoting Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood*

(*continued*)

The case of *Entick v. Carrington*[55] is an example of how the tort of trespass provided protection against general warrants. In a decision regarded "as one of the landmarks of English liberty,"[56] Lord Camden ruled that there was no authority under statute or common law for the issuance and execution of a general warrant.[57] Lord Camden held that the king's messengers, who executed the warrants, unlawfully searched through the private papers of Entick.[58] Ultimately, Entick recovered in tort.[59]

In *Entick*, Lord Camden largely focused on the significance of individual property rights.[60] He wrote: "[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser . . . ; if he will tread upon his neighbour's ground, he must justify it by law."[61]

The Supreme Court has noted that these principles are "the true and ultimate expression of constitutional law" and were influential to the framers of the Fourth Amendment.[62] The Court has repeatedly cited *Entick*, describing the case as "undoubtedly familiar" to every American statesman during the revolutionary period.[63]

Common-Law History of Suspicion and Probable Cause, 10 U. PA. J. CONST. L. 1, 5–6 (2007))).

[55] (1765) 95 Eng. Rep. 807 (K.B.).

[56] Boyd v. United States, 116 U.S. 616, 626 (1886).

[57] *Entick*, 95 Eng. Rep. at 812.

[58] *Id.* at 817.

[59] *Id.* at 817–18. *See also* George C. Thomas III, *Stumbling Toward History: The Framers' Search and Seizure World*, 43 TEX. TECH L. REV. 199, 210 (2010) (stating that *Entick v. Carrington* is an example of how the "routine application of tort law" provided protection against illegal searches and seizures).

[60] *See* United States v. Jones, 132 S. Ct. 945, 949 (2012); *see also* Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 310 (1998) ("The English case, *Entick v. Carrington*, discussed in detail the importance of property rights as affecting the government's ability to search and seize.").

[61] *Entick*, 95 Eng. Rep at 817.

[62] Boyd v. United States, 116 U.S. 616, 626–27 (1886); *see also* Thomas, *supra* note 59, at 214.

[63] *Boyd*, 116 U.S. at 626; *Jones*, 132 S. Ct. at 949; Brower v. Cnty. of Inyo, 489 U.S. 593, 596 (1989); Berger v. New York, 388 U.S. 41, 49 (1967); United States v. Lefkowitz, 285 U.S. 452, 466 (1932) ("The teachings of [*Entick v. Carrington*] were cherished by our statesmen when the Constitution was adopted.").

A. Show Me the Physical Invasion: Applying a Property-Based Fourth Amendment Standard to New Technology

From the early nineteenth century until the 1960s, property law largely determined the scope of the Fourth Amendment.[64] This strict standard did not allow judges to rely on their own subjective theories of what constituted an unreasonable search and seizure.[65] The Court continued to rely on the property-based origin of the Fourth Amendment, although the use of new technologies challenged the limitations of the Amendment's scope.[66] One such example is set forth in *Olmstead v. United States*.[67]

1. Olmstead v. United States

Olmstead was a leading conspirator of a business that illegally imported, possessed, and sold liquor.[68] Federal prohibition officers inserted small listening devices along public telephone wires in order to intercept the conversations of Olmstead and his associates.[69] Given this, the Court held that officers made these insertions *without* trespass upon the property of the defendants.[70] This use of eavesdropping technology led to a significant amount of information about the conspiracy, including large business transactions for the sale of liquor.[71]

The Court held that the Fourth Amendment did not forbid the actions of the federal prohibition officers.[72] In its reasoning, the Court emphasized that the officers inserted the listening device on a telephone wire that was not part of Olmstead's house.[73] The Court remained faithful to the property-based origins of the Fourth Amendment, holding that no violation

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[64] Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33, 35 (2005).

[65] *See id.* at 37.

[66] Orin Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 807 (2004).

[67] 277 U.S. 438 (1928).

[68] *Id.* at 455–56.

[69] *Id.* at 456–57.

[70] *Id.*; *see also* Cheryl Kettler Corrada, Dow Chemical *and* Ciraolo*: For Government Investigators the Sky's No Limit*, 36 CATH. U. L. REV. 667, 672 (1987) ("[T]he Court found significant the lack of a physical entry by government investigators.").

[71] *Olmstead*, 277 U.S. at 457.

[72] *Id.* at 464.

[73] *Id.* at 465.

can be found "unless there has been . . . an actual *physical invasion* of [the] house."[74]

In his dissenting opinion, Justice Brandeis argued that the majority's limited reading of the Fourth Amendment did not (and will not) adequately address "[t]he progress of science."[75] Justice Brandies further argued that the Fourth Amendment should not only protect physical intrusions upon material objects, but should also protect against "every unjustifiable intrusion by the [g]overnment upon the privacy of the individual, whatever the means employed."[76] The majority discussed similar arguments made by the Court in past decisions, but claimed that no argument can justify the liberal construction beyond the meaning of houses, papers, and effects.[77]

2. Silverman v. United States

Almost forty years later, the Court once again decided a case that involved a listening device.[78] In *Silverman v. United States*, local officials had reason to believe that Silverman was running a gambling operation out of his home.[79] The officials occupied the home next door for three straight days and employed a "spike mike" to listen to the activities inside Silverman's premises.[80] The spike mike made contact with Silverman's heating duct, which transformed the heating duct into a conductor of sound.[81]

Writing for the majority, Justice Stewart noted that "the eavesdropping was accomplished by means of an unauthorized *physical penetration* into the premises occupied by the [defendants]."[82] In contrast to *Olmstead*, where the eavesdropping was accomplished by placing a device on a

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[74] *Id.* at 466 (emphasis added); *see also* Justin F. Kollar, *USA PATRIOT Act, the Fourth Amendment, and the Paranoia: Can They Read This While I'm Typing It?*, 3 J. HIGH TECH L. 67, 76 (2004) ("[The] requirement of actual physical invasion is known as the 'physical trespass' doctrine.").

[75] *Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting).

[76] *Id.* at 478; *see* Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 27 (2010) ("Justice Brandeis's dissent . . . argued that the founders intended to 'protect Americans in their beliefs, their thoughts, their emotions and their sensations.'" (quoting *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting))).

[77] *Olmstead*, 277 U.S. at 464.

[78] Silverman v. United States, 365 U.S. 505, 506 (1961).

[79] *Id.* at 506.

[80] *Id.*

[81] *Id.* at 506–07.

[82] *Id.* at 509 (emphasis added).

public telephone wire,[83] "the officers overheard the [defendants'] conversations only by usurping part of the [defendants'] house . . . ."[84] The majority, however, refused to base the opinion on "the technicality of a trespass."[85] Rather, the Court based the decision "upon the reality of an actual intrusion into a constitutionally protected area."[86]

In his concurrence, Justice Douglas criticized the majority for resting its decision solely on the "unauthorized physical penetration" of the spike mike.[87] Contrary to the majority's holding, Justice Douglas argued that the scope of the Fourth Amendment should not be based on local trespass law, but determined by "whether the privacy of the home was invaded."[88]

3. Lessons Learned from Olmstead *and* Silverman

Olmstead and *Silverman* are both reminders that, in the early twentieth century, the Court largely determined the Fourth Amendment's scope by whether there was a physical intrusion into the Amendment's enumerated areas—persons, houses, papers, and effects.[89] However, some members of the Court continually questioned whether the limited scope of the Fourth Amendment would be able to meet the challenges of technological advancements.[90] As Justice Douglas argued, one way to meet this challenge is to protect the invasion of *privacy* instead of *property*.[91] The Court would soon adopt Justice Douglas's theory.[92]

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[83] Olmstead v. United States, 277 U.S. 438, 456–57 (1928).

[84] *Silverman*, 365 U.S. at 511.

[85] *Id.* at 512.

[86] *Id.*

[87] *Id.* at 513 (Douglas, J., concurring).

[88] *Id.*

[89] *See supra* Part II.A.1–2.

[90] *See Silverman*, 365 U.S. at 513 (Douglas, J., concurring) ("Our concern should not be with the trivialities of the local law of trespass, as the opinion of the Court indicates."); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("The protection guaranteed by the Amendments is much broader in scope. . . . [The Framers] knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things.").

[91] *Silverman*, 365 U.S. at 513 (Douglas, J., concurring).

[92] *See infra* Part II.B.

B. Katz v. United States*: Protecting People, Not Places*

Katz v. United *States*[93] was the landmark case that fundamentally transformed the Fourth Amendment's scope of protection.[94] In *Katz*, FBI officials, without a warrant, placed an electronic recording device on the outside of a public telephone booth where Katz was placing his calls.[95] The trial court allowed the Government to introduce evidence of Katz's telephone conversations.[96] The court of appeals held there was no Fourth Amendment violation because "[t]here was no physical entrance into the area occupied by [Katz]."[97] The Supreme Court overturned that decision.[98]

Writing for the majority, Justice Stewart immediately declined to analyze "[w]hether a public telephone booth is a constitutionally protected area."[99] He wrote:

> Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which [Katz] placed his calls. [Katz] has strenuously argued that the booth was a "constitutionally protected area." The Government has maintained with equal vigor that it was not. But this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. *For the Fourth Amendment protects people, not places*.[100]

The majority admitted that, at one time, the Court limited Fourth Amendment protection to the physical penetration of tangible property.[101] However, the Court reasoned that this narrow view had been discredited.[102] To support this proposition, the Court cited to *Silverman* as an example of

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[93] 389 U.S. 347 (1967).

[94] *See* Kaitlyn A. Kerrane, Note, *Keeping up with Officer Jones: A Comprehensive Look at the Fourth Amendment and GPS Surveillance*, 79 FORDHAM L. REV. 1695, 1707–08 (2011).

[95] *Katz*, 389 U.S. at 348.

[96] *Id.*

[97] Katz v. United States, 369 F.2d 130, 134 (9th Cir. 1966).

[98] *Katz*, 389 U.S. at 359.

[99] *Id.* at 349–50.

[100] *Id.* at 351 (emphasis added).

[101] *Id.* at 352–53; *see supra* Part II.A.

[102] *Katz*, 389 U.S. at 353.

the Fourth Amendment protecting oral statements without any technical trespass.[103] Justice Stewart wrote: "Once this much is acknowledged, . . . it becomes clear that the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a *physical intrusion* into any given enclosure."[104] Therefore, "[t]he Government's activities in electronically listening to and recording [Katz's] words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."[105]

Although the majority pronounced a departure from the origin of the Fourth Amendment, it failed to establish a clear standard that could be followed in subsequent cases. As Justice Harlan explained, "'the Fourth Amendment protects people, not places.' The question, however, is what protection it affords to those people."[106] In answering this question, Justice Harlan set forth a two-pronged analysis: "[F]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[107] In applying this two-pronged analysis to the present facts, Justice Harlan concluded that a man who walks into a telephone booth, shuts the door, and pays the toll is entitled to assume that his conversation will not be intercepted.[108]

III. FLYOVER THROUGH THE LENS OF *KATZ*

California v. Ciraolo[109] and *Florida v. Riley*[110] allowed the Court to set a clear standard for how *Katz* would apply to aerial surveillance cases in subsequent years. Both *Ciraolo* and *Riley*, however, ironically represent how the *Katz* privacy-based standard does little to protect the privacy of individuals around the curtilage of their homes.

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[103] *Id.*

[104] *Id.* (emphasis added). However, the majority in *Silverman* found a Fourth Amendment violation "based upon the reality of an actual intrusion into a constitutionally protected area." Silverman v. United States, 365 U.S. 505, 512 (1961) (Douglas, J., concurring).

[105] *Katz*, 389 U.S. at 353.

[106] *Id.* at 361 (Harlan, J., concurring).

[107] *Id.*

[108] *Id.*

[109] 476 U.S. 207 (1986).

[110] 488 U.S. 445 (1989).

A. California v. Ciraolo

Police officers, acting on a tip that Ciraolo was growing marijuana, secured a private airplane and flew it over the curtilage of Ciraolo's home.[111] From an altitude of 1,000 feet and within public navigable airspace, the officers readily observed marijuana growing on Ciraolo's property.[112] The officers subsequently obtained a search warrant based on these observations.[113] The State argued these observations were permissible under the Fourth Amendment because Ciraolo "knowingly exposed" his backyard to aerial observation.[114] The State argued that such observation is analogous "to a knothole or opening in a fence: if there is an opening, the police may look."[115] The Court agreed.[116]

Applying Justice Harlan's two-pronged test, the Court quickly concluded that Ciraolo had a subjective expectation of privacy.[117] The crux of the Court's analysis turned to the second prong: whether Ciraolo's expectation was reasonable.[118] Ciraolo argued that the police officers' conduct was a search of a constitutionally protected area—his curtilage.[119] Interestingly, the Court phrased the issue as "whether naked-eye observation of the curtilage by police from an aircraft *lawfully operating* at

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[111] *Ciraolo*, 476 U.S. at 209.

[112] *Id.*

[113] *Id.* The officers also took photographs of what they observed. *Id*. However, the Court strictly focused on the officer's observations with the naked eye because "[i]t was the officer's observation, not the photograph, that supported the warrant." *Id.* at 212 n.1. As one of the officers testified, the true color of marijuana can only be captured with the naked eye. *Id*.

[114] *Id.* at 210.

[115] *Id.*

[116] *Id.* at 215 ("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.").

[117] *Id.* at 211. However, the Court did not answer whether Ciraolo's subjective expectation of privacy was absolute. *Id.* at 211–12. Although a ten-foot fence surrounded Ciraolo's backyard, anyone who had a view above ten feet could have looked into his backyard (a police officer on a two-tiered bus could have seen into his backyard). *Id.* at 211. Thus, the Court noted it was unclear whether Ciraolo had a subjective expectation of privacy from *all* observation. *Id.* at 211–12.

[118] *Id.* at 212.

[119] *Id.*

an altitude of 1,000 feet violates an expectation of privacy that is reasonable."[120]

The Court ultimately held that Ciraolo did not enjoy a reasonable expectation of privacy.[121] The Court reasoned: "The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."[122] Although the Court used the *Katz* two-pronged test, it also concluded that the officers performed the aerial observation in a "nonintrusive manner" because they flew in a "public navigable airspace."[123] As the Court noted, "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed."[124] Thus, there is no reasonable expectation of privacy when officers travel on a public thoroughfare—whether through air or ground—and observe activity with the naked eye.[125]

B. Florida v. Riley

1. Justice White's Plurality Opinion

Florida v. Riley[126] also involved the use of aerial surveillance over an individual's property.[127] Acting on an anonymous tip that Riley was growing marijuana on the curtilage of his home,[128] an officer flew a helicopter over his property at a height of 400 feet.[129] Through an opening

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[120] *Id.* at 213 (emphasis added).

[121] *Id.* at 214.

[122] *Id.* at 213.

[123] *Id.*

[124] *Id.* at 213–14. The dissent attacked this reasoning. *Id.* at 223 (Powell, J., dissenting). "[T]he actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent. Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass." *Id.* (Powell, J., dissenting).

[125] *Id.* at 215. This analysis is similar to a police officer driving down a public road and observing illegal activity with the visible eye. *Id.* at 213.

[126] 488 U.S. 445 (1989).

[127] *Id.* at 448.

[128] *Id.* Riley was growing marijuana in a partially covered greenhouse. *Id.* This greenhouse was ten to twenty feet behind Riley's mobile home and the contents inside the greenhouse were not visible from the ground. *Id.* A wire fence surrounded his mobile home and greenhouse, and the property had a "DO NOT ENTER" sign. *Id.*

[129] *Id.* The 400-foot altitude could have served as the inspiration for the maximum altitude guidelines for public unmanned aircraft in the FAA Modernization and Reform Act

(*continued*)

of Riley's greenhouse, the officer saw marijuana growing with the naked eye.[130] The officer subsequently obtained a warrant based on these observations and Riley was charged with possession of marijuana.[131]

Following *Katz* and *Ciraolo*, a plurality of the Court held that the home and curtilage are not protected from this type of surveillance.[132] Writing for the plurality, Justice White stated: "As a general proposition, the police may see what may be seen 'from a public vantage point where [they have] a right to be.'"[133] Similar to the holding of *Ciraolo*, Riley did not have a reasonable expectation of privacy from an aircraft flying in a public navigable airspace.[134]

The Court also dismissed the claim that this case should be analyzed differently than *Ciraolo* because the helicopter flew at an altitude of 400 feet.[135] Although the Court pointed to the fact that helicopters are regulated differently than fixed-wing aircraft, "it is of obvious importance that the helicopter in this case was *not* violating the law."[136] However, the Court left open the possibility that "an inspection of the curtilage of a house from an aircraft will [not] always pass muster under the Fourth Amendment simply because the plane is within the navigable airspace specified by law."[137] Unfortunately, the Court did not give an example of what type of aerial observation would not be protected.[138]

2. Justice O'Connor's Concurrence

Justice O'Connor concurred in the judgment.[139] Although she agreed that Riley did not have a reasonable expectation of privacy, she wrote: "[T]he plurality's approach rests the scope of Fourth Amendment

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of 2012. *See* FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 334(c)(2)(C)(ii), 126 Stat. 11, 77.

[130] *Riley*, 488 U.S. at 448.

[131] *Id.* at 448–49.

[132] *Id.* at 449.

[133] *Id.* (alteration in original) (citation omitted).

[134] *Id.* at 450.

[135] *Id.* at 451. In *Ciraolo*, the officers flew in an airplane at an altitude of 1,000 feet. California v. Ciraolo, 476 U.S. 207, 209 (1986).

[136] *Riley*, 488 U.S. at 451. The minimum altitude for fixed-wing aircraft is 500 feet. 14 C.F.R. § 91.79 (1988). However, a helicopter can fly below this limit "if the operation is conducted without hazard to persons or property on the surface." *Id.*

[137] *Riley*, 488 U.S. at 451.

[138] *See id.*

[139] *Id.* at 452 (O'Connor, J., concurring in the judgment).

protection too heavily on compliance with FAA regulations whose purpose is to promote air safety, not to protect '[t]he right of the people . . . [from] unreasonable searches and seizures.'"[140] Justice O'Connor did not interpret the holding in *Ciraolo* to mean that Riley lacked a reasonable expectation of privacy because the plane operated "where it had a 'right to be,' but because public air travel at 1,000 feet is a sufficiently routine part of modern life that it is unreasonable for persons on the ground to expect that their curtilage will not be observed from the air at that altitude."[141] Justice O'Connor found that the relevant inquiry in determining whether Riley had a reasonable expectation of privacy was whether the helicopter operated "at an altitude at which members of the public travel with sufficient regularity that Riley's expectation of privacy from aerial observation was not 'one that society is prepared to recognize as 'reasonable.'"[142]

Justice O'Connor concluded that Riley's expectation of privacy was not a reasonable one because there is reason to believe the public flies at an altitude of 400 feet with regularity.[143] Justice O'Connor warned, however, that as the altitude of a plane or helicopter drops, the more likely it is that one's expectation of privacy will be violated.[144]

IV. TURNING THE CLOCK BACK: *JONES* AND THE REAPPLICATION OF THE PROPERTY-BASED STANDARD

For more than four decades, the Court adhered to Justice Harlan's two-pronged test in *Katz*.[145] While it is reasonable to believe that a standard rooted in privacy rather than property enhances Fourth Amendment protection in an increasingly technological world, the opinion in *United States v. Jones*[146] proves otherwise.

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[140] *Id.* (first alteration in original).

[141] *Id.* at 453. Although Justice O'Connor believed that FAA regulations should not define the scope of Fourth Amendment protection, she wrote that ground-level observation is somewhat similar to aerial observation because the police officers have a "legal right to occupy the physical space from which their observations are made." *Id.*

[142] *Id.* at 454.

[143] *Id.* at 455.

[144] *Id.*

[145] *See* Afsheen John Radsan, *The Case for Stewart over Harlan on 24/7 Physical Surveillance*, 88 TEX. L. REV. 1475, 1481–82 (2010) (noting the Court's revival of property-based analysis in the 2001 decision of *Kyllo v. United States* despite Justice Harlan's influential concurrence).

[146] 132 S. Ct. 945 (2012).

A. United States v. Jones

1. Facts

Officers became suspicious that Jones was trafficking in narcotics.[147] Prior to the disputed incident, local officials and FBI agents continuously tracked Jones's whereabouts.[148] Based on information gathered, the Government applied for a warrant in the United States District Court for the District of Columbia.[149] The warrant authorized officials to attach a GPS device to a vehicle registered to Jones's wife.[150] Officials subsequently attached the GPS device to the undercarriage of the vehicle while it was parked in a public parking lot.[151] Officials, however, did not comply with the warrant's restrictions.[152] Officers tracked the vehicle for the next four weeks, which produced more than 2,000 pages of information.[153]

Based on this extensive information, the Government indicted Jones on multiple charges.[154] Jones moved to suppress the evidence because officials did not adhere to the restrictions in the warrant.[155] The district court ruled that the officials did not need a warrant to attach the GPS device to the vehicle because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his

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[147] *Id.* at 948.

[148] *Id.* Jones was the owner of a nightclub in Washington, D.C. *Id.* Local officials and FBI agents "employed various investigative techniques, including visual surveillance of the nightclub, installation of a camera focused on the front door of the club, and a pen register and wiretap covering Jones's cellular phone." *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.* The reason for placing the GPS device onto the vehicle while it was in a public parking lot is because, as Justice Harlan noted in his concurrence in *Katz*, "objects . . . that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited." Katz v. United States, 389 U.S.347, 361 (1967) (Harlan, J., concurring).

[152] *Jones*, 132 S. Ct. at 948. The warrant authorized officials to place the GPS device on the vehicle registered to Jones's wife within ten days and within the border of D.C. *Id.* However, officers placed the GPS device on the vehicle eleven days later in Maryland. *Id.*

[153] *Id.* During this time, officials had to replace the battery in the GPS device. *Id.*

[154] *Id.*

[155] *Id.*; United States v. Jones, 451 F. Supp. 2d 71, 87–88 (D.D.C. 2006), *rev'd sub nom.* United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010).

movements from one place to another."[156] The jury subsequently convicted Jones and the court sentenced him to life imprisonment.[157] However, in *United States v. Maynard*, the court of appeal overturned the jury verdict because Jones did have a reasonable expectation of privacy.[158] The Supreme Court granted certiorari.[159]

2. *The Days of* Entick *Are Back Again?*

Writing for the majority, Justice Scalia began by noting that a vehicle is an "effect" for purposes of the Fourth Amendment.[160] Justice Scalia then limited the holding of *Katz* by adhering to the Fourth Amendment's property-based standard.[161] He wrote: "The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a *physical intrusion* would have been considered a 'search' within the meaning of the Fourth Amendment *when it was adopted*."[162] With support from *Entick v. Carrington*,[163] Justice Scalia wrote: "The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to 'the right of the people to be secure against unreasonable searches and seizures'; the phrase 'in their persons, houses, papers, and effects' would have been superfluous."[164]

Justice Scalia immediately made two points. First, Justice Scalia looked to the plain language of the Fourth Amendment. The words "persons, houses, papers, and effects" are important because they put a limit on what is protected. As demonstrated in *Jones*, Justice Scalia first

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[156] *Jones*, 132 S. Ct. at 948; *Jones*, 451 F. Supp. 2d at 88 (quoting United States v. Knotts, 460 U.S. 276, 281 (1983)).

[157] *Jones*, 132 S. Ct. at 949.

[158] *Maynard*, 615 F.3d at 558. "[T]he whole of one's movements over the course of a month is not *actually* exposed to the public because the likelihood anyone will observe all those movements is effectively nil." *Id.*

[159] *Jones*, 132 S. Ct. at 949.

[160] *Id.*

[161] *Id.* at 949–50.

[162] *Id.* at 949 (emphasis added).

[163] Entick v. Carrington, (1765) 95 Eng. Rep. 807 (K.B.); *see also supra* text accompanying notes 57–61.

[164] *Jones*, 132 S. Ct. at 949.

established the "thing" being protected—the vehicle.[165] Since the vehicle is an "effect," it has Fourth Amendment protection.[166]

Second, the question then becomes—What type of protection is given to the property in dispute? In *Jones*, Justice Scalia answered that the vehicle (the effect) is protected from *physical intrusion*.[167] This then begs the question—What is considered a physical intrusion under the Fourth Amendment? The majority adopted an originalist interpretation by answering whether such physical intrusion would have been a search when the Constitution was adopted.[168] Although Justice Scalia provided little guidance on what constituted a physical intrusion when the Fourth Amendment was adopted, he made clear that one such example is when the government physically occupies private property to gather information.[169] Thus, when the Court has a Fourth Amendment issue before it, three questions must be answered: What is (the thing) being protected? Was there a physical intrusion? And was the government's purpose to obtain information?

While the majority re-adopted a property-based approach, it did not overrule the holding in *Katz*.[170] As Justice Scalia explained, "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test."[171] In this case, the Government argued Jones had no reasonable expectation of privacy because he was driving on public roadways.[172] However, this argument alone was insufficient because "Fourth Amendment rights do not rise or fall with the *Katz* formulation."[173] As a result, the Court affirmed the judgment of the court of appeals.[174]

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[165] *Id.*

[166] *See id.*

[167] *Id.*

[168] *See id.*

[169] *Id.* ("The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted.").

[170] *See id.* at 952.

[171] *Id.*

[172] *Id.* at 950.

[173] *Id.*

[174] *Id.* at 954.

B. The "New" Two-Pronged Analysis

As explained above, *Jones* did not overrule the *Katz* reasonable-expectation-of privacy-test.[175] Justice Scalia explained, "[W]e do not make trespass the exclusive test."[176] Additionally, as Justice Sotomayor's concurrence reiterated, "*Katz's* reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it."[177] Therefore, the Court will analyze Fourth Amendment issues under both *Jones* and *Katz*.[178] When the government physically intrudes upon a constitutionally protected area to gather information, it is a prima facie Fourth Amendment violation.[179] The Court will continue to apply *Katz* if the government conducts a search where a trespass is unnecessary.[180]

Opponents have criticized the *Jones* opinion for not being "pro-privacy."[181] Some scholars have attached significant weight to Justice Sotomayor's observation that, "[i]n cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property, the majority opinion's trespassory test may provide little guidance."[182] Justice Sotomayor was correct in saying this, however,

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[175] *Id.* at 952.

[176] *Id.* at 953.

[177] *Id.* at 955 (Sotomayor, J., concurring).

[178] *See id.* at 953 (majority opinion).

[179] Daniel T. Pesciotta, Note, *I'm Not Dead Yet:* Katz*,* Jones*, and the Fourth Amendment in the 21st Century*, 63 CASE W. RES. L. REV. 187, 210 (2012).

[180] *Id.* at 211; *see also* Kyllo v. United States, 533 U.S. 27, 34 (2001) ("We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search—at least where (as here) the technology in question is not in general public use." (citation omitted)).

[181] *See* Tom Goldstein, *Why* Jones *Is Still Less of a Pro-Privacy Decision than Most Thought*, SCOTUSBLOG (Jan. 30, 2012, 10:53 AM), http://www.scotusblog.com/2012/01/why-jones-is-still-less-of-a-pro-privacy-decision-than-most-thought/ ("[I]n some respects *Jones* is still less of a pro-privacy ruling than many people initially thought. Many early reactions seem to have projected onto the decision what the writer wanted it to hold, rather than what the opinion actually concludes.").

[182] *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring); s*ee also* Lauren Millcarek, Comment, *Eighteenth Century Law, Twenty-First Century Problems:* Jones*, GPS Tracking, and the Future of Privacy*, 64 FLA. L. REV. 1101, 1110 (2012) ("'The significance of *Jones* . . . will fade pretty quickly' [because] [t]echnology is constantly getting more

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because the tests for property and privacy are both exclusive.[183] As Justice Scalia stated in *Kyllo v. United States*,[184] "it may be difficult to refine *Katz* when the search of areas such as . . . the curtilage and uncovered portions of residences [are] at issue . . . ."[185] Since *Katz* alone was unable to protect the privacy of the curtilage from aerial surveillance, the use of drones over U.S. skies will now allow the Court to give a more thorough analysis of curtilage flyovers under the revived common law trespassory test.

V. ANALYSIS

The following analysis focuses on the effect of curtilage flyovers after *Jones*. The construct of *Jones* will be used to answer whether a drone, operating above the curtilage of a home to gather information, without a warrant, is a Fourth Amendment violation. To sufficiently answer this question, the two questions set forth in *Jones* will be discussed: First, what is being protected? Second, is there a physical intrusion that constitutes a "search" within the meaning of the Fourth Amendment when it was adopted?

A. What Is the Thing Being Protected?

As Justice Scalia explained, "for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates."[186] The curtilage of a home is not enumerated in the text of the Fourth Amendment, but the Court has historically given it the same protection as the house.[187] Like the Fourth Amendment, the history of curtilage protection can be traced back to eighteenth-century England.[188]

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sophisticated and law enforcement soon will no longer need to physically attach a tracker to property in order to perform round-the-clock surveillance." (citation omitted)).

[183] *See Jones*, 132 S. Ct. at 952 ("[T]he *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.").

[184] 533 U.S. 27 (2001).

[185] *Id.* at 34.

[186] *Jones*, 132 S. Ct. at 950.

[187] Brendan Peters, *Fourth Amendment Yard Work: Curtilage's Mow-Line Rule*, 56 STAN. L. REV. 943, 951 (2004) ("Finding or simply concluding that a structure is a house, however, is not the end of the inquiry to determine the scope of the house's Fourth Amendment privacy protection. The privacy of the house extends beyond the perimeter of its walls because courts have held that 'house' in the Fourth Amendment means 'house plus curtilage.'").

[188] *Id.* at 952.

In his influential writings,[189] William Blackstone wrote, "[a]nd if . . . , though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenants, *if within the curtilage* or homestall."[190]

The Court has consistently protected the home's curtilage.[191] The majority's reasoning in *Olmstead v. United States*, for example, largely focused on whether the Government committed a trespass upon a constitutionally protected area.[192] The Court held there can be no Fourth Amendment violation "unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure."[193] The protection afforded to the curtilage did not change after *Katz*. In *Oliver v. United States*,[194] the majority ruled that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home."[195] Further, the *Ciraolo* Court stated, "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened."[196]

Because the curtilage of the home receives constitutional protection, the next question is whether that protection extends upward. Contrary to both *Ciraolo* and *Riley*, after the Court's decision in *Jones*, FAA

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[189] *See infra* notes 200–11 and accompanying text.

[190] 4 WILLIAM BLACKSTONE, COMMENTARIES *225 (emphasis added).

[191] *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 466 (1928).

[192] *Id.* at 465.

[193] *Id.* at 466.

[194] 466 U.S. 170 (1984).

[195] *Id.* at 178. The court compared curtilage to open fields, which do not receive the same type of protection. *Id*. at 177, 179, 181. The majority wrote: "We conclude, from the text of the Fourth Amendment and from the historical and contemporary understanding of its purposes, that an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers." *Id.* at 181.

[196] California v. Ciraolo, 476 U.S. 207, 212–13 (1986); *see also* United States v. Dunn, 480 U.S. 294, 301 (1987) ("[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 . . . .").

regulations[197] are immaterial.[198] Instead, the overarching issue is whether there is a search within the meaning of the Fourth Amendment when it was adopted.[199] It is essential, therefore, to determine whether the vertical curtilage of the home was given protection during the era of the framers to the Constitution.

1. *Does Protection of the Curtilage Extend Upward?: The Ad Coelum Rule*

The framers of the Constitution did not express an opinion on aerial surveillance because the technology did not exist in 1789.[200] However, in the seventeenth and eighteenth centuries, some legal scholars endorsed the common law principle of *cujus est solum, ejus est usque ad coelum*—"whoever has the land possesses all the space upwards to an indefinite extent."[201] "This doctrine is often referred to as 'one of the oldest rules of property known to the law.'"[202] Like many English common law principles, William Blackstone's famous *Commentaries on the Laws of England* established the *ad coelum* rule in the United States in 1766.[203]

The *Commentaries* served much more than an overview of English common law principles.[204] "Blackstone and his *Commentaries* almost

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[197] Drones can legally operate below 400 feet. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 334(c)(2)(C)(ii), 126 Stat. 11, 77. The decisions in *Ciraolo* and *Riley* largely depended on whether the plane and helicopter were in a "public thoroughfare," as defined by the legal altitudes in the FAA regulations. *See supra* notes 109–44 and accompanying text.

[198] This is contrary to the *Katz* analysis, which the Court used to rely heavily upon, where the relevant inquiry was whether the aircraft was operating in a public thoroughfare. *Ciraolo*, 476 U.S. at 213.

[199] United States v. Jones, 132 S. Ct. 945, 949 (2012).

[200] Tom Bush, *A Privacy-Based Analysis for Warrantless Aerial Surveillance Cases*, 75 CALIF. L. REV. 1767, 1768 (1987).

[201] *See* Colin Cahoon, Comment, *Low Altitude Airspace; A Property Rights No-Man's Land*, 56 J. AIR L. & COM. 157, 161–62 (1990).

[202] Andrea B. Carroll, *Examining a Comparative Law Myth: Two Hundred Years of Riparian Misconception*, 80 TUL. L. REV. 901, 912 (2006) (quoting Hannabalson v. Sessions, 90 N.W. 93, 95 (Iowa 1902)).

[203] John G. Sprankling, *Owning the Center of the Earth*, 55 UCLA L. REV. 979, 982–83 (2008).

[204] *See* Allan D. Boyer, *Law's Architect*, 22 YALE J.L. & HUMAN. 127, 127 (2010) ("Since the first volume of Blackstone's *Commentaries* . . . , this work has thus filled a place unique in the history of law in the English-speaking world. It is the most important and the most influential systematic statement of the principles of the common law."

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singlehandedly shaped the course of American law."[205] Not only have many regarded Blackstone "as the prime influence on the Declaration of Independence,"[206] but many have noted that he also influenced the deliberations of the Constitutional Convention.[207] As one historian noted, "[i]n the history of American institutions, no other book—except the Bible—has played so great a role."[208] Due to the general acceptance of English common law immediately after independence, Blackstone commanded tremendous influence over the drafting of the U.S. Constitution.[209] In sum, the *Commentaries* served as the foundation for the American legal education by teaching the American Revolutionaries their rights.[210]

(quoting DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S *COMMENTARIES* SHOWING HOW BLACKSTONE, EMPLOYING EIGHTEENTH-CENTURY IDEAS OF SCIENCE, RELIGION, HISTORY, AESTHETICS, AND PHILOSOPHY, MADE OF THE LAW AT ONCE A CONSERVATIVE AND A MYSTERIOUS SCIENCE 3 (1941))).

[205] Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 731 (1976).

[206] *Id.* at 731–32.

[207] Richard J. Goldstone, *Foreward to* WILLIAM BLACKSTONE, THE COMMENTARIES OF SIR WILLIAM BLACKSTONE, KNIGHT, ON THE LAWS AND CONSTITUTION OF ENGLAND, at v (2009).

[208] *Id.* (quoting Daniel J. Boorstin, *Preface to the Beacon Press Edition of* THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES SHOWING HOW BLACKSTONE, EMPLOYING EIGHTEENTH-CENTURY IDEAS OF SCIENCE, RELIGION, HISTORY, AESTHETICS, AND PHILOSOPHY, MADE OF THE LAW AT ONCE A CONSERVATIVE AND A MYSTERIOUS SCIENCE (Beacon Press ed. 1958) (1941)); *see also* Wilfrid Prest, *Blackstone as Architect: Constructing the Commentaries*, 15 YALE J.L. & HUMAN. 103, 107 (2003) ("Blackstone's *Commentaries* . . . played a key role in transforming legal education from writ-based apprenticeship to rights-based academic process.").

[209] *See* Ryan Patrick Alford, *The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens*, 2011 UTAH L. REV. 1203, 1221 (2011) ("Blackstone's *Commentaries* . . . had an unparalleled influence on the American lawyers who drafted the Constitution."); *see also* Michael D. Pepson & John N. Sharifi, *Two Wrongs Don't Make a Right: Federal Death Eligibility Determinations and Judicial Trifurcations*, 43 AKRON L. REV. 1, 28–29 (2010) ("Blackstone's *Commentaries* served as a conduit through which English jurisprudential developments influenced the Framers and thus affected the development of the Constitution.").

[210] *See* Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 5 (1996) ("One thousand copies of the English edition of Blackstone were sold in the American Colonies before the first American edition appeared in 1772."); *see also* Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L.

(*continued*)

In his reasoning of the *ad coelum* rule, Blackstone wrote the following:

> *Cujus est solum, ejus est usque ad coelum*, is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another's land: and, downwards, whatever is in a direct line between the surface of any land, and the center of the earth, belongs to the owner of the surface . . . .[211]

The idea that property rights extend upward was not only accepted during the Constitution's commencement, but some state courts accepted the *ad coelum* rule into the early twentieth century.[212] The Iowa Supreme Court, for example, once held: "It is one of the oldest rules of property known to the law that the title of the owner of the soil extends, not only downward . . . , but upward . . . ."[213] Also, in *Smith v. New England Aircraft Co.*,[214] the Supreme Judicial Court of Massachusetts held that takeoffs and landings of low altitude flights constituted "trespass to the land."[215] Furthermore, the Restatement (Second) of Torts continued to recognize a version of the *ad coelum* rule.[216]

REV. 150, 152–53 (2007) ("While plain-meaning originalists might find context inconvenient, the same was not true for the founding generation. Rather than simply seek the plain meaning of the text, the Founders—at least those who took their cues from Blackstone—were deeply concerned with the context that gave rise to specific constitutional provisions."); William D. Graves, *Evolution, The Supreme Court, and the Destruction of Constitutional Jurisprudence*, 13 REGENT U. L. REV. 513, 523 (2000) ("Blackstone's . . . views guided the Founders of the United States, who wrote and ratified the Constitution . . . .").

[211] 2 WILLIAM BLACKSTONE, COMMENTARIES *18.

[212] Carroll, *supra* note 202, at 918; *see also* Sprankling, *supra* note 203, at 980 ("For decades, the American legal system has answered this question with the solemn assurance that a landowner's title extends to everything between the land surface and the center of the planet.").

[213] Hannabalson v. Sessions, 90 N.W. 93, 95 (Iowa 1902).

[214] 170 N.E. 385 (Mass. 1930).

[215] *Id.* at 393.

[216] RESTATEMENT (SECOND) OF TORTS § 159(2) (1965) ("Flight by aircraft in the air space above the land of another is a trespass if, but only if . . . it enters into the immediate reaches of the air space next to the land, and . . . it interferes substantially with the other's use and enjoyment of his land.")

Some commentators say that the *ad coelum* rule is impracticable in an era of commercial air flight.[217] Critics of the *ad coelum* rule point to the Supreme Court's decision in *United States v. Causby*.[218] In that case, Causby, who raised chickens on his land, complained about U.S. government aircraft flying close over his property.[219] As a result of the excessive noise, Causby lost approximately 150 chickens and had to close his business.[220] Causby brought an action alleging a taking because his property value depreciated.[221] In ruling that the *ad coelum* rule did not give Causby a basis for relief, Justice Douglas wrote, "[The] *ad coelum* . . . doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits."[222]

B. Curtilage Flyover Through the Lens of Jones

1. Does Jones *Matter?*

Those who believe it is constitutional for a drone to gather information above the curtilage of a home, without a warrant, will likely rely on decisions such as *Causby*.[223] Although the Court did not cite *Causby* in either *Ciraolo* or *Riley*, the rationale in both decisions declared the air a "public" highway or space.[224] This same reasoning has also led some scholars to believe that *Jones* does not apply at all.[225] One legislative attorney for the Congressional Research Service even stated, "The Court's focus on whether the attachment of a tracking device constitutes a trespass triggering Fourth Amendment protections is not necessarily applicable to

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[217] *See* Sprankling, *supra* note 203, at 1000 (stating that some have argued that landowners own only as much of the airspace as they can use).

[218] *See* 328 U.S. 256, 260–61 (1946).

[219] *Id.* at 259.

[220] *Id.*

[221] *Id.* at 258.

[222] *Id.* at 261.

[223] *Id.* at 260–61.

[224] *See supra* notes 123–25, 133–37 and accompanying text.

[225] Jake Laperruque, Jones*, Drones, and (GPS Tracked) Automobiles*, CENTER FOR DEMOCRACY & TECH. (July 3, 2012), https://www.cdt.org/blogs/jake-laperruque/0307jones-drones-and-gps-tracked-automobiles ("[D]rones pull an end run on *Jones* by giving law enforcement the same means to continuously track individuals without the need to attach a device.").

drone surveillance."[226] Thus, the debate on drone surveillance revolves around the issue of privacy rather than property.[227]

However, are scholars and commentators mistakenly overlooking the effect of *Jones* on aerial surveillance? As mentioned, aerial surveillance over the curtilage of a home will first have to pass the *Jones* trespass test before courts analyze the surveillance under the *Katz* reasonable-expectation-of-privacy test.[228] Under *Jones*, the issue will not be whether a drone is flying in a "public thoroughfare"[229] or at a legal altitude, but will be whether the drone physically intrudes upon a constitutionally protected area—the vertical curtilage of the home.[230]

2. Ciraolo *and* Riley *Reconsidered: FAA Modernization and Reform Act of 2012*

Assume the Court has a case before it, following its decision in *Jones*, with facts similar to *Ciraolo* and *Riley*. The issue will be whether it is constitutional for a drone to operate above a home's curtilage,[231] without a warrant, to collect information. Similar to *Ciraolo* and *Riley*, the Court will first establish that the curtilage of the home receives Fourth

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[226] RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R42701, DRONES IN DOMESTIC SURVEILLANCE OPERATIONS: FOURTH AMENDMENT IMPLICATIONS AND LEGISLATIVE RESPONSES 9 (2013).

[227] *See* Judy Keen, *Citing Privacy, Critics Target Drones Buzzing over USA*, USA TODAY (Jan. 10, 2013, 6:50 PM), http://www.usatoday.com/story/news/nation/2013/01/10/domestic-drones-backlash/1566212/; *see also* Gary Martin & Viveca Novak, *Drones: Despite Problems, A Push to Expand Domestic Use*, OPENSECRETS.ORG (Nov. 27, 2012, 5:46 PM), http://www.opensecrets.org/news/2012/11/drones-despite-problems-a-push-to-e.html (framing the issue as whether drone surveillance is an unconstitutional invasion of privacy).

[228] *See supra* Part IV.B.

[229] United States v. Jones, 132 S. Ct. 945, 948 (2012) (quoting United States v. Knotts, 460 U.S. 276, 281 (1983)).

[230] *See id.* at 949.

[231] *See* FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 334(c)(2)(C)(ii), 126 Stat. 11, 77. The reason why domestic drones must remain lower than 400 feet is so they do not become hazards for other aircraft. *Mercury News Editorial: Silicon Valley Should Help FAA Write Drone Policy*, SAN JOSE MERCURY-NEWS, http://www.mercurynews.com/opinion/ci_22235033/mercurty-news-editorial-silicon-valley-should-held-faa (last updated Dec. 23, 2012, 7:24:52 PM).

Amendment protection.[232] This issue will not be in dispute because the Court has traditionally given curtilage the same protection as the home.[233]

The central issue will be whether the curtilage extends upward and to what extent. The government will presumably argue that the airspace above the home's curtilage is a "public thoroughfare," which is consistent with *Causby*, *Ciraolo*, and *Riley*. Analogizing the drone to a police officer driving on a public road, the government will argue the "plain view" of the curtilage does not enjoy a reasonable expectation of privacy.[234] Yet, contrary to *Ciraolo* and *Riley*, the Court will now give the airspace above the curtilage of the home Fourth Amendment protection.

With support from Blackstone's writings, the Court has no choice but to rule that the drafters of the Fourth Amendment intended to protect vertical curtilage of the home. In *Jones*, Justice Scalia wrote that the attachment of a GPS device to the vehicle "would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."[235] In order to come to such a conclusion in an aerial surveillance case, the Court will first have to establish the level of protection given to the vertical curtilage when the Fourth Amendment was adopted.[236] As mentioned, the vertical curtilage of the home was given indefinite protection at the Fourth Amendment's inception.[237]

The Court will ultimately come to a different conclusion than it did in *Ciraolo* and *Riley* because the analysis will focus on property rather than privacy. Any physical intrusion of vertical curtilage to gather information is a "search" under the Fourth Amendment because that space is protected under *Jones*.[238] This difference in analysis will result in greater protection

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[232] Oliver v. United States, 466 U.S. 170, 180 (1984) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)); Peters, *supra* note 187, at 957.

[233] *Oliver*, 466 U.S. at 180 (quoting *Boyd*, 116 U.S. at 630); Peters, *supra* note 187, at 957.

[234] *See* California v. Ciraolo, 476, U.S. 207, 215 (1986) (citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) ("[A] man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited.")).

[235] United States v. Jones, 132 S. Ct. 945, 949 (2012).

[236] *See id.*

[237] *See supra* notes 211–12 and accompanying text.

[238] *See Jones*, 132 S. Ct. at 949 ("It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining

(*continued*)

to an individual's property and privacy. Thus, once a drone, without a warrant, crosses the boundary of a home's curtilage to collect information, there is a Fourth Amendment violation.

This expansive protection from aerial surveillance is consistent with Justice O'Connor's concurrence in *Riley*.[239] Unlike *Katz*, *Jones* does not allow an individual's Fourth Amendment rights to be determined by FAA minimum-altitude regulations.[240] Justice O'Connor's criticism—the plurality in *Riley* rested "the scope of Fourth Amendment protection too heavily on compliance with FAA regulations" [241]—is resolved under the *Jones* trespass test. As illustrated in both *Ciraolo* and *Riley*, FAA regulations cannot, and should not, be used to protect individuals from Fourth Amendment violations.

Justice O'Connor's concurrence in *Riley* also demonstrates the weak rationale of using an aircraft's altitude to define a person's reasonable expectation of privacy.[242] Justice O'Connor warned that, as an aircraft lowers, the more likely it will violate one's expectation of privacy.[243] Under this rationale, the Court must determine an altitude that is impermissible for aerial surveillance. When officials operate a drone, however, this type of analysis will not be useful. The Act only requires a drone be "*less than* 400 feet above the ground,"[244] meaning that a drone can *legally* operate between 0 and 400 feet. Due to the fact that the *Riley* Court held that an altitude *above* 400 feet is a public thoroughfare,[245] vertical curtilage of the home will essentially be eliminated as applied to drones.[246] The only way to avoid this potential abuse of both property and privacy is by defining the vertical curtilage as a constitutionally protected area.

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information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted.").

[239] *See supra* notes 140–44 and accompanying text; *see also* Florida v. Riley, 488 U.S. 445, 453–55 (1989) (O'Connor, J., concurring in the judgment).

[240] A domestic drone can operate at a maximum height of 400 feet. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 334(c)(2)(C)(ii), 126 Stat. 11, 77.

[241] *Riley*, 488 U.S. at 452 (O'Connor, J. concurring in the judgment).

[242] *Id.* at 452–55.

[243] *Id.* at 455.

[244] FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 334(c)(2)(C)(ii), 126 Stat. 11, 77 (emphasis added).

[245] *Riley*, 488 U.S. at 451.

[246] *See* 14 C.F.R. § 91.79 (1988) (stating the minimum safe altitudes for aircraft).

C. Using Old Methods to Solve New Problems: The Resurrection of the "Constitutionally Protected Area"

In its conclusion that "the Fourth Amendment protects people, not places," the majority in *Katz* refused to frame the issue around whether the telephone booth was a "constitutionally protected area."[247] The Court further held, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[248] This begs the question—"[W]hen are activities exposed to the public?"[249] Thus far in aerial surveillance cases, activities are exposed "when they can be viewed from public airspace."[250] If the Court accepts this reasoning, it is easy to understand why John Yoo, former Deputy Assistant Attorney General in the Office of Legal Counsel of the U.S. Department of Justice,[251] thinks "the Fourth Amendment will not pose much of an obstacle to drones for surveillance purposes."[252] Should the Court continue to refuse to define the airspace above a home's curtilage as a constitutionally protected area? With the expectation of 30,000 drones flying over U.S. soil by 2020,[253] the answer is no.

The best way to protect an individual's privacy from drone surveillance is by establishing vertical curtilage as a constitutionally protected area. In *Silverman*,[254] for example, the Court held a Fourth Amendment violation had been committed "based upon the reality of an

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[247] Katz v. United States, 389 U.S. 347, 351 (1967).

[248] *Id.*

[249] Daniel R. Hansen, Note, *Warrantless Aerial Surveillance and* Florida v. Riley*: The Loss of Liberty*, 1990 UTAH L. REV. 407, 430 (1990).

[250] *Id.*; *see also* John R. Dixon, *Criminal Procedure/Constitutional Law—Warrantless Aerial Surveillance and the Open View Doctrine*, 17 FLA. ST. U. L. REV. 157, 169 (1989) ("Exposure of any part of the curtilage, no matter how small, is considered equivalent to unlimited exposure to all types of aerial observations so long as the aerial observations are made from a legal altitude.").

[251] *John Yoo*, AM. ENTERPRISE INST., http://www.aei.org/scholar/john-yoo/ (last visited Mar. 5, 2014).

[252] John Yoo, *Domestic Drones & the Invasion of Privacy*, RICOCHET (May 17, 2012, 2:04 PM), http://ricochet.com/main-feed/Domestic-Drones-the-Invasion-of-Privacy.

[253] Waterman, *supra* note 42, at A1. It is reasonable to expect drones to be used more frequently than manned aircraft for surveillance purposes. Brian Bennett & Joel Rubin, *Police, Others Expand Use of Drones*, L.A. TIMES, Feb. 16, 2013, at A16. Ben Miller, who runs the drone program in Mesa County, Colorado, stated that flying manned planes and helicopters cost at least $600, compared to drones that cost "less than $25 an hour." *Id.*

[254] 365 U.S. 505 (1961).

actual intrusion into a constitutionally protected area."[255] While this decision focused on the intrusion of an "area," it ultimately protected the privacy of the home.[256]

The Court has always struggled with the property-privacy paradigm of the Fourth Amendment.[257] In his dissenting opinion in *Olmstead*, however, Justice Brandeis argued the property-privacy distinction should not matter.[258] He wrote, "every unjustifiable intrusion by the Government upon the privacy of the individual, *whatever the means employed*, must be deemed a violation of the Fourth Amendment."[259] By only applying the *Katz* reasonable-expectation-of-privacy test, *Ciraolo* and *Riley* were not able to protect the privacy of "an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened."[260] Without defining the constitutionally protected area of the airspace above the curtilage of the home, there is reason to believe privacy expectations will continue to deteriorate as government agencies acquire drone technology.[261]

The *Jones* decision, however, provides hope that Fourth Amendment analysis is returning to the question of whether the government can physically intrude upon a constitutionally protected area to gather information. In aerial surveillance cases, the ultimate decision as to whether vertical curtilage of the home receives such protection depends on if the Supreme Court declares vertical curtilage of the home to be a constitutionally protected area. Relying on both *Jones* and the Fourth

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[255] *Id.* at 512.

[256] *Id.* at 506–07.

[257] Clancy, *supra* note 60, at 367 ("As to a person's house, it is 'the right to shut the door on officials of the state unless their entry is under proper authority of law.' This was the core understanding expressed in the physical trespass theory of *Olmstead*. Of course, *Olmstead* read the right too literally. . . . *Katz* and the privacy theory, however, failed to grasp the essence of the interest protected." (footnotes omitted)).

[258] *See* Olmstead v. United States, 277 U.S. 438, 477–78 (1928) (Brandeis, J., dissenting).

[259] *Id.* at 478 (emphasis added).

[260] California v. Ciraolo, 476 U.S. 207, 213 (1986); *see supra* Part III.

[261] *See* Josh Solomon, *Domestic Drone Use Raises Privacy* Concerns, MEDILL NAT'L SECURITY ZONE (Jan. 23, 2013), http://nationalsecurityzone.org/site/domestic-drone-use-raises-privacy-concerns/ ("Of the 313 drone certificates issued in the U.S. [up to February 2012], all of them are held by government agencies, and many by local, state and national law enforcement.").

Amendment's historical context, this declaration is not only justified, but also required.

VI. CONCLUSION

An ACLU lobbyist recently said that, when he speaks with audiences about privacy issues, drones are what "everybody just perks up over."[262] Politicians across the country are responding to this interest by introducing legislation on how individual privacy can be protected from drone surveillance.[263]

In Oregon, for example, a state senator introduced a bill that would declare "the space above the ground that is not part of airspace governed by federal law" as "Airspace of Oregon."[264] The stated purpose for making the air public property is that it would make it easier for state agencies to regulate drone use.[265] The Montana Senate recently supported a measure that would ban information collected by drones from being used in court.[266] Additionally, in Charlottesville, Virginia, the city council ordered a two-year moratorium on citywide use of unmanned aircraft.[267] The Virginia General Assembly followed Charlottesville's lead by passing similar legislation with bipartisan support.[268]

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[262] *Talk of Drones Patrolling U.S. Skies Spawns Anxiety*, USA TODAY (June 19, 2012, 9:13 AM), http://usatoday30.usatoday.com/news/washington/story/2012-06-19/drone-backlash/55682654/1 ("People are interested in the technology, they are interested in the implications and they worry about being under surveillance from the skies . . . ." (internal quotation marks omitted)).

[263] *Montana, Other States Look at Limiting Use of Drones by Police*, MISSOULIAN (Feb. 5, 2013, 9:45 PM), http://missoulian.com/news/state-and-regional/montana-legislature/montana-other-states-look-at-limiting-use-of-drones-by/article_6974cb42-6fcf-11e2-8fd5-001a4bcf887a.html ("Lawmakers in at least [eleven] states are looking at plans to restrict the use of drones over their skies amid concerns the unmanned aerial vehicles could be exploited to spy on Americans.").

[264] Jason Koebler, *Oregon Drone Bill Would Claim the 'Airspace' Above Your Shoestrings*, U.S. NEWS & WORLD REP. (Jan. 31, 2013), http://www.usnews.com/news/articles/2013/01/31/oregon-drone-bill-would-claim-the-airspace-above-your-shoestrings.

[265] *Id.*

[266] *Montana, Other States Look at Limiting Use of Drones by Police*, *supra* note 263.

[267] W.J. Hennigan, *City Passes Anti-Drone Resolution*, L.A. TIMES, Feb. 6, 2013, at B2.

[268] Kevin Cirilli, *Bob McDonnell Considers Virginia Drone Ban*, POLITICO (Feb. 6, 2013, 4:12 PM), http://www.politico.com/story/2013/02/bob-mcdonnell-considers-virginia-drone-ban-87282.html.

As a result, the legislative responses from states and cities across the country have forced the drone to answer many questions.[269] These questions likely will result in a growing number of lawsuits as drones become a norm over U.S. skies.[270] However, the legal issues will not turn on whether an individual has a reasonable expectation of privacy from drone surveillance, but whether an individual has a property interest in the air above the curtilage of the home.

By making property relevant once more in Fourth Amendment jurisprudence, *Jones* ultimately provides more protection to cases involving aerial surveillance. Instead of allowing FAA officials to determine the scope of Fourth Amendment protection, judges will once again be forced to adhere to the Amendment's plain language.[271] Due to the fact that judges will first have to determine whether there was a common law trespass upon a person's "houses, papers, and effects,"[272] Fourth Amendment cases will generally become more consistent and predictable. In an age where technology is constantly changing and advancing, *Jones* gives individuals a sense of security against Fourth Amendment intrusions. The *Katz* test, standing alone, failed to accomplish this objective.

Cases that adhered to a property-based standard, such as *Olmstead* and *Silverman*,[273] once again will become relevant in Fourth Amendment jurisprudence. Yet, unlike *Olmstead*, when the property-based test fails to protect the privacy interest of an individual,[274] the government will still have to pass the *Katz* reasonable-expectation-of-privacy test.[275] However, relying on *Katz* to protect individuals from curtilage flyovers will no longer be necessary. Based on the holdings in *Ciraolo* and *Riley*, all individuals who value both privacy and property have a reason to be excited about *Jones*.

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[269] Ben Wolfgang, *Drone Discussions Spread Across U.S.: Concerns Rise with Possibilities*, WASH. TIMES, Feb. 12, 2013, at A1.

[270] *See* Somini Sengupta, *Drones May Set off a Flurry of Lawsuits*, N.Y. TIMES (Feb. 20, 2013, 1:28 PM), http://bits.blogs.nytimes/com/2012/02/20/drones-may-set-off-a-flurry-of-lawsuits/.

[271] *See* United States v. Jones, 132 S. Ct. 945, 949 (2012); *see also* Florida v. Riley, 488 U.S. 445, 452 (1989) (O'Connor, J., concurring in the judgment).

[272] U.S. CONST. amend. IV.

[273] *See supra* Part II.A.

[274] Olmstead v. United States, 277 U.S. 438, 439 (1928).

[275] *See supra* notes 169–78 and accompanying text.