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The Right Ones for the Job: Divining the Correct Standard of Review for Curtilage Determinations in the Aftermath of Ornelas v. United States

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COMMENTS

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INTRODUCTION

The Fourth Amendment to the Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures," and requires that "no Warrants shall issue, but upon probable cause." The "land immediately surrounding and associated with the home," known as the curtilage, is considered part of the home for Fourth Amendment purposes.[1]

The Fourth Amendment requires, with some limited exceptions, that police officers have probable cause to suspect criminal activity and obtain a warrant from a federal magistrate judge before they are permitted to search a person's home.[2] To enforce this process, evidence gathered in violation of the Fourth Amendment is suppressed and may not be used at trial.[3]

In a typical scenario, the police search a criminal suspect's property and find incriminating evidence that leads to the arrest and conviction of the individual. If this search of the home or curtilage is conducted without a warrant, it is presumed to violate the Fourth Amendment.[4] The suspect's remedy for the violation is the suppression of that

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1 *Oliver v United States*, 466 US 170, 180 (1984):

> At common law, the curtilage is the area to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life," and therefore has been considered part of [the] home itself for Fourth Amendment purposes. Thus, courts have extended Fourth Amendment protection to the curtilage.

(citation omitted).

2 See *United States v Ventresca*, 380 US 102, 106–07 (1965).

3 See *Weeks v United States*, 232 US 383, 393 (1914). The Court later extended the suppression remedy to state courts. See *Mapp v Ohio*, 367 US 643, 654–55 (1961). Additionally, when the police unconstitutionally search the home or curtilage of an innocent party, that party can sue for damages under 42 USC § 1983 (2000). See *Rogers v Pendleton*, 249 F3d 279, 294 (4th Cir 2001).

4 Unreasonable searches violate the Fourth Amendment and warrantless searches of the home and curtilage are presumptively unreasonable. See *Payton v New York*, 445 US 573, 586

evidence so that it cannot be presented at trial. Indeed, appellate courts will overturn convictions that depend on such evidence.[5]

To obtain a warrant, police must present an affidavit to a magistrate detailing both their reason for searching the person's home and what they think they will find. If that affidavit demonstrates sufficient probable cause of illegal activity, the magistrate may issue the warrant,[6] and evidence seized pursuant to a lawful warrant generally cannot be suppressed.[7] This process of requiring police to obtain judicial approval before searching is generally considered sufficient to secure the home against unreasonable searches and seizures.

The relative timing between obtaining the warrant and conducting the search is also important. Police cannot skirt the warrant requirement by entering the property without a warrant, collecting information, and then bringing the information found on the property before a magistrate as probable cause for a warrant. Anything found in the ensuing search can be suppressed.[8]

Evidence gathered from the defendant's property but outside of his curtilage, however, falls beyond the scope of the Fourth Amendment and generally cannot be suppressed. Police can legally search this area—called the "open field"—without violating the Fourth Amendment, even if they are trespassing.[9]

Because the suppression remedy is generally only available for police action taken inside the home and curtilage, criminal trials often turn on where the curtilage line is drawn. Parties frequently appeal adverse curtilage decisions. In fact, defendants often plead guilty when trial courts deny motions to suppress but then appeal the denial.[10]

The circuits are divided over the correct standard for reviewing the trial court's initial determination of the curtilage's scope. Historically, all the circuits treated curtilage determinations as factual, reviewing them for clear error and granting broad deference to the trial judge's findings. But now the First, Fourth, Ninth, and Tenth Circuits ("the de novo circuits") review curtilage determinations de novo, while the Second, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits ("the clear error circuits") maintain clear error review. This division is important both because the standard of review frequently

(1980). The circumstances in which that presumption may be overcome are beyond the scope of this Comment.

5 See *Weeks*, 232 US at 398.

6 *Illinois v Gates*, 462 US 213, 239 (1983).

7 See note 81 and accompanying text.

8 See, for example, *United States v Hauk*, 412 F3d 1179, 1185 (10th Cir 2005).

9 *Oliver*, 466 US at 183–84.

10 See, for example, *United States v Hatch*, 931 F2d 1478, 1480 (11th Cir 1991).

controls the outcome[11] and because it raises significant questions about the allocation of power within the judiciary.[12]

This Comment attempts to resolve the standard of review disagreement by analyzing two distinct lines of Supreme Court precedent. First, Part I explains the background of the circuit split. Then, Part II analyzes the first line of cases, under *Ornelas v United States*.[13] Believing *Ornelas* required it, the de novo circuits changed their standard for reviewing curtilage determinations. Part II argues that those circuits read *Ornelas* incorrectly. Part III analyzes the common law and the second line of precedent, under *United States v Dunn*,[14] to make a positive argument in favor of clear error review of curtilage determinations, and shows that deferential, decentralized review of curtilage determinations is consistent with the common law and areas of constitutional inquiry.

I. *ORNELAS* AND THE STANDARD OF REVIEW

This Part provides background on clear error and de novo review, specifically describing when and why courts employ each standard. It then discusses the history of clear error review for curtilage determinations, introduces *Ornelas*, and describes the split that developed in the wake of *Ornelas*.

A. Distinguishing the Clear Error and De Novo Standards

Whether an appellate court treats a particular trial court decision with deference often turns "on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."[15] Appellate courts gen-

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11 Compare Paul R. Michel, *Advocacy in the Federal Circuit*, in *Trial of a Patent Case* 5, 8 (ALI-ABA 1994) ("One of my main messages to you [as a circuit judge] is that standards of review influence dispositions in the Federal Circuit far more than many advocates realize."), cited in Eugene Volokh and Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 Yale L J 2431, 2441 n 63 (1998).

12 See Timothy P. O'Neill, *Standards of Review in Illinois Criminal Cases*, 17 SIU L J 51, 53–54 (1992).

13 517 US 690 (1995).

14 480 US 294 (1987).

15 *Miller v Fenton*, 474 US 104, 114 (1985). The Court in *Illinois v Gates* explained that "the duty of a reviewing court is simply to ensure that the magistrate [when issuing a warrant] had a 'substantial basis for . . . conclud[ing]' that probable cause existed." 462 US 213, 238–39 (1983), quoting *Jones v United States*, 362 US 257, 271 (1960). The "substantial basis" standard is generally considered equivalent to clear error review. See Wayne LaFave, 6 *Search & Seizure: A Treatise on the Fourth Amendment* § 11.7(c) at 451–54 (West 4th ed 2004). While the doctrine of equating "substantial basis" review with clear error review seems descriptively accurate, it is not without detractors. See, for example, Drey Cooley, *Clearly Erroneous Review is Clearly Errone-*

erally review factfinding at the trial level for clear error.[16] Under clear error review, a lower court's findings should only be overturned when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[17] Appellate courts do not retry factual issues settled at trial because doing so would be unlikely to minimize judicial error.[18] Additionally, appellate courts generally believe that trial courts are better at evaluating and weighing evidence.[19] This is partially because trial courts develop expertise in making factual determinations and also because they directly examine evidence, question witnesses, and become intimately acquainted with each case's factual elements. In contrast, to make fact-intensive findings, an appellate court must not only duplicate the efforts of the trial court but has the added disadvantage of distance, as it is working solely from the trial record.[20] For these reasons, the Supreme Court disapproves of the review of factual determinations de novo.[21]

On the other hand, appellate courts do not typically defer to trial court's decisions of law.[22] When reviewing an issue de novo, the appellate court looks at the trial record and makes an independent decision, paying no heed to the district court's decision.[23] There are at least four reasons why it is preferable for appellate courts to freshly decide legal questions: (1) the record has already been constructed so appellate judges can devote all of their attention to legal issues; (2) because the factual record is settled, the parties will focus their arguments on the legal questions; (3) at least three members of an appellate panel ren-

ous: Reinterpreting Illinois v. Gates *and Advocating De Novo Review for a Magistrate's Determination of Probable Cause in Applications for Search Warrants*, 55 Drake L Rev 85, 106–12 (2006).

16 See *Ornelas*, 517 US at 699.

17 *United States v United States Gypsum Co*, 333 US 364, 395 (1948).

18 *Anderson v City of Bessemer City*, 470 US 564, 574–75 (1985) ("Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources."). See also *Pierce v Underwood*, 487 US 552, 560 (1988):

> Moreover, even where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense, requiring the court to undertake the unaccustomed task of reviewing the entire record, not just to determine whether there existed the usual minimum support for the merits determination made by the factfinder below, but to determine whether urging of the opposite merits determination was substantially justified.

19 See, for example, *Zenith Radio Corp v Hazeltine Research, Inc*, 395 US 100, 123 (1969).

20 See *Nishikawa v Dulles*, 356 US 129, 143 (1958) (Harlan dissenting).

21 See *Anderson*, 470 US at 575.

22 *State v Pena*, 869 P2d 932, 936 (Utah 1994) (explaining that appellate courts review legal determinations de novo because they "have traditionally been seen as having the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction").

23 See, for example, id at 936. See also Steven Alan Childress and Martha S. Davis, 1 *Federal Standards of Review* § 2.14 (Lexis 3d ed 1999).

der a decision;[24] and (4) due to the doctrine of stare decisis, every appellate decision contributes to building a stable body of law.[25] In contrast, "trial judges often must resolve complicated legal questions without benefit of extended reflection [or] extensive information."[26]

Because it requires taking an entirely fresh look at the question, de novo review provides an appellate court more flexibility in reaching a decision but requires a greater expenditure of judicial resources.[27] It is only justified when it minimizes judicial error and creates settled law for the circuit or, in the case of the Supreme Court, for the nation. Because clear error review is less intensive than de novo review, it preserves the appellate court's limited resources for those matters it is "best situated to decide."[28]

As mentioned above, circuit courts historically reviewed curtilage decisions for clear error, granting broad deference to the trial judge. The Fifth Circuit was the first to establish a clear error standard of review for Fourth Amendment curtilage determinations,[29] and it was followed by every circuit to take up the question prior to *Ornelas*.[30] The circuit courts offered two reasons to review Fourth Amendment curtilage determinations for clear error. First, the circuits held that

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24 See *Salve Regina College v Russell*, 499 US 225, 232 (1991).

25 See *State Oil Co v Khan*, 522 US 3, 20 (1997).

26 *Salve Regina*, 499 US at 232 (quotation marks omitted), citing Dan T. Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 Minn L Rev 899, 923 (1989).

27 See, Note, *Developments in the Law: Injunctions*, 78 Harv L Rev 994, 1071 (1965) ("The major advantage of [clear error review] is that it preserves much of the flexibility of de novo review but is less wasteful of judicial resources.").

28 *United States v McConney*, 728 F2d 1195, 1201 n 7 (9th Cir 1984) ("It can hardly be disputed that application of a non-deferential standard of review requires a greater investment of appellate resources then [sic] does application of the clearly erroneous standard."). See also Richard A. Posner, *The Federal Courts: Challenge and Reform* 176 (Harvard 1996) (noting that one result of more deferential review standards is "to reduce the incentive to appeal by making it more difficult to obtain a reversal"); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv L Rev 441, 454 (1963):

> [I]f one set of institutions has been granted the task of finding the facts and applying the law and does so in a manner rationally adapted to the task, in the absence of institutional or functional reasons to the contrary we should accept a presumption against mere repetition of the process on the alleged ground that, after all, error *could* have occurred.

For the opposite perspective, see Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 Vand L Rev 437, 485 (2004) (arguing that appellate courts may be able to evaluate facts in a way that adds to, rather than simply duplicates, trial courts' efforts, and that even minor gains in factual accuracy should be highly valued in criminal cases).

29 See *Hodges v United States*, 243 F2d 281, 283 (5th Cir 1957).

30 See *United States v Reilly* ("*Reilly I*"), 76 F3d 1271, 1275 (2d Cir 1996); *United States v Friend*, 50 F3d 548, 552 (8th Cir 1995); *United States v Benish*, 5 F3d 20, 24 (3d Cir 1993); *United States v Knapp*, 1 F3d 1026, 1029 (10th Cir 1993); *United States v Brady*, 993 F2d 177, 178–79 (9th Cir 1993); *United States v Berrong*, 712 F2d 1370, 1374 (11th Cir 1983); *Saiken v Bensinger*, 546 F2d 1292, 1295–97 (7th Cir 1976).

under *Dunn*, which provides the Supreme Court's test for determining whether a particular area is within the curtilage, each curtilage determination required reviewing a distinct set of facts, something typically the province of trial courts.[31] Second, curtilage determinations are inherently localized decisions, and trial judges are the more capable local decisionmakers.[32]

However, this formerly unified standard is no more. A split has developed over the application of *Ornelas* to the review of Fourth Amendment curtilage determinations. As discussed below, *Ornelas* created a mixed standard of review for findings of probable cause in warrantless automobile searches and investigatory *Terry* stops.[33] *Ornelas* did not, however, directly address curtilage determinations.

B. The Impact of *Ornelas* on Standards of Review in Fourth Amendment Jurisprudence

Trial courts' rulings on whether the Fourth Amendment requires suppression of evidence gathered in warrantless searches of automobiles and police stops are subject to a mixed standard of review.[34] *Ornelas* held that the ultimate determination of whether police have reasonable suspicion to make an investigatory stop or probable cause to conduct a warrantless search of a car is reviewed de novo, while "findings of historical fact" are reviewed for clear error.[35] Appellate courts also must grant "due weight" to "inferences drawn from those facts by resident judges and local law enforcement officers."[36] The Court defined the reasonable suspicion needed to make an investigatory stop as a "particularized and objective basis" to suspect the person stopped of criminal activity.[37] The Court explained that the probable cause required to make "a warrantless search of a car [ ] valid"[38] is present when "the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found."[39]

Ornelas offered three reasons to review decisions about reasonable suspicion and probable cause de novo. First, sweeping deference to lower courts creates "varied results . . . inconsistent with the idea of

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31 See, for example, *Reilly I*, 76 F3d at 1276.

32 See Part III.C.

33 *Terry* stops are limited warrantless searches based on reasonable suspicion. See *Terry v Ohio*, 392 US 1, 30 (1968).

34 *Ornelas*, 517 US at 699.

35 See id.

36 Id.

37 Id at 696, quoting *United States v Cortez*, 449 US 411, 417–18 (1981).

38 *Ornelas*, 517 US at 693, citing *California v Acevedo*, 500 US 565, 569–70 (1991).

39 *Ornelas*, 517 US at 696, citing *Brinegar v United States*, 338 US 160, 175–76 (1949).

a unitary system of law."[40] Second, independent review is necessary for appellate courts to clarify and control the legal rules for probable cause and reasonable suspicion.[41] Third, de novo review "tends to unify precedent" and "come[s] closer to providing law enforcement officers with a defined 'set of rules which . . . makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'"[42]

However, the Court noted that local magistrates are best suited to make certain factual determinations. It also reaffirmed that appellate deference to magistrates' presearch probable cause decisions provides an important incentive for police to obtain a warrant before searching.[43] This was particularly important because the court of appeals in *Ornelas* had adopted clear error review of warrantless searches, reasoning that de novo review would be "inconsistent with the 'great deference' paid when reviewing a decision to issue a warrant."[44] The Supreme Court's reversal was based, in part, on the purpose of this apparent inconsistency. "[P]olice are more likely to use the warrant process if the scrutiny applied to a magistrate's probable-cause determination to issue a warrant is less than that for warrantless searches. Were we to eliminate this distinction, we would eliminate the incentive."[45] Thus, the warrant decisions made by magistrate judges and the facts found by trial judges "in light of the distinctive features and events of the community" were explicitly exempted from de novo review.[46]

C. The Post-*Ornelas* Circuit Split

Ornelas essentially established a bifurcated standard of review in Fourth Amendment search and seizure cases: de novo review of a trial court's assessment of warrantless police activity and deferential review of both a magistrate's warrant finding and a trial court's factual

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40 *Ornelas*, 517 US at 697.

41 Id.

42 Id at 697–98, quoting *New York v Belton*, 453 US 454, 458 (1981).

43 See *Ornelas*, 517 US at 699, citing *Gates*, 462 US at 236. See also notes 68–71 and accompanying text.

44 517 US at 698.

45 Id at 699. Some are puzzled by the Court's decision to bifurcate review into deferential review of searches pursuant to a warrant and nondeferential review of warrantless stops and searches. See, for example, Arthur G. Lefrancois, *The October 1995 Supreme Court Term: Selected Criminal Cases*, 21 Okla City U L Rev 423, 446 (1996):

> [T]o the extent that [concerns about guidance and uniformity] militate in favor of the holding that reasonable suspicion and probable cause issues are mixed questions of law and fact and so subject to de novo review, one might have thought the same would be true even if there had been an initial judicial determination below of probable cause, namely a warrant.

46 See *Ornelas*, 517 US at 699.

findings and inferences. After *Ornelas*, a split developed between the circuits over the standard of review in Fourth Amendment curtilage determinations: one group engages in de novo review of all Fourth Amendment decisions while the other maintains clear error review of curtilage determinations.

1. De novo jurisdictions.

The de novo circuits hold that *Ornelas* mandates de novo review of all Fourth Amendment legal inquiries, including curtilage findings. The Ninth Circuit was the first to apply *Ornelas* this way, abandoning in *United States v Johnson*[47] earlier precedent holding that curtilage determinations were factual inquiries reviewed for clear error.[48] The First and Fourth Circuits followed the Ninth as a matter of first impression,[49] while the Tenth Circuit overruled existing precedent to adopt the de novo standard for curtilage determinations.[50] These circuits hold that *Ornelas* mandates de novo review of every Fourth Amendment legal inquiry. As the Ninth Circuit put it, determining the extent of curtilage is a matter of determining whether government intrusion into private property "infringes upon the personal and societal values protected by the Fourth Amendment."[51] To the de novo circuits, making such a finding requires a "legal value judgment," not

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47 256 F3d 895 (9th Cir 2001) (en banc).

48 See id at 913 n 4. Police found marijuana on the defendant's property while pursuing a fleeing suspect. An en banc panel split into separate majorities regarding the bounds of the defendant's curtilage. The first majority remanded to the district court to determine whether the police were within the defendant's curtilage when they found the marijuana. See id at 897–98, 909 (Ferguson majority). A second majority held that after *Ornelas*, curtilage findings were subject to de novo review on appeal. See id at 898, 913 (Kozinski majority).

Judge Paez cast the deciding sixth vote, concurring with Part III.A of the Kozinski opinion, which set the de novo standard of review, and also joining Part V of the Ferguson opinion, which remanded the case to the district court for an initial curtilage determination. While it appears that de novo review of curtilage findings is the settled standard in the Ninth Circuit, that holding is not uncontroverted. Judge Tashima concurred with the Ferguson majority, arguing that the Kozinski decision's standard of review holding was merely dicta because it was unnecessary to the disposition of the case. See id at 919–20. A minority of judges joined Part III.B of the Kozinski opinion, which argued that the de novo standard of review was a holding of the circuit because the curtilage issue was "germane to the eventual resolution of the case." See id at 914.

However, recent cases suggest that judges throughout the Ninth Circuit have embraced de novo review of curtilage determinations. See, for example, *United States v Barajas-Avalos*, 377 F3d 1040, 1054 (9th Cir 2004) ("We review de novo the question whether an area of land is protected under the Fourth Amendment as the curtilage of a dwelling house."), citing *Johnson*, 256 F3d at 909 n 1.

49 See *United States v Diehl*, 276 F3d 32, 38 (1st Cir 2002); *United States v Breza*, 308 F3d 430, 435 (4th Cir 2002).

50 *United States v Cousins*, 455 F3d 1116, 1121 n 4 (10th Cir 2006), cert denied 127 S Ct 162 (2006), overruling *United States v Swepston*, 987 F2d 1510, 1513 (10th Cir 1993).

51 Id, quoting *Oliver v United States*, 466 US 170, 182–83 (1984).

merely factual analysis.[52] They further hold that "the application of the law to the facts is not the kind of issue peculiarly within the province of the district courts"[53] and cite *Ornelas* for the principle that "[i]ndependent review [of curtilage determinations] is . . . necessary if appellate courts are to maintain control of, and to clarify, the legal principles" related to such determinations.[54]

Having adopted the standard of review from *Ornelas*, these de novo circuits are careful to specify that "antecedent factual findings" made by district courts are reviewed for clear error, while the final determination of whether an area is curtilage is subject to de novo review.[55]

2. Clear error jurisdictions.

Several circuits continue to review curtilage decisions for clear error. The Seventh Circuit cites *Ornelas* for the proposition that in order to prevail on appeal of a denial of his motion to suppress evidence, a defendant-appellant must show that the curtilage determinations of the magistrate and district judges were clearly erroneous.[56] The Third and Fifth Circuits currently retain the clear error standard, but have not reviewed any curtilage determinations since *Ornelas*.[57] The Sixth Circuit refused to follow circuits articulating de novo review on the grounds that existing precedent mandates clear error review of curtilage determinations.[58]

Other circuits have taken different approaches. The Eighth and Eleventh Circuits apply a mixed standard of review—similar to the

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52 See *Johnson*, 256 F3d at 912.

53 Id at 913.

54 *Diehl*, 276 F3d at 38, quoting *Ornelas*, 517 US at 697.

55 See *Breza*, 308 F3d at 435.

56 See *United States v Shanks*, 97 F3d 977, 979 (7th Cir 1996). In *Diehl*, the First Circuit criticized the *Shanks* court for "inexplicably cit[ing] *Ornelas* without discussion in applying a clearly erroneous standard." 276 F3d at 38 n 2.

57 See *Hodges*, 243 F2d at 283; *Benish*, 5 F3d at 24. The Third Circuit has issued four rulings since *Ornelas* containing curtilage issues, but has yet to address *Ornelas* directly. See generally *United States v Charles*, 29 Fed Appx 892 (3d Cir 2002); *Estate of Smith v Marasco*, 318 F3d 497 (3d Cir 2003); *United States v Lee*, 359 F3d 194 (3d Cir 2004); *Estate of Smith v Marasco*, 430 F3d 140 (3d Cir 2005).

58 *United States v Biles*, 100 Fed Appx 484, 488 (6th Cir 2004), citing *Daughenbaugh v City of Tiffin*, 150 F3d 594, 597 (6th Cir 1998) ("Although we believe that the above-cited decisions of the First, Fourth, and Ninth Circuits are sound, we are nevertheless bound by *Daughenbaugh*, which was decided two years after *Ornelas*."). However, the preference for clear error review in *Daughenbaugh* was only dicta as the *Daughenbaugh* court was not actually engaging in clear error review of the trial judge's curtilage determination in a criminal case. *Daughenbaugh* was an appeal from summary judgment in a § 1983 civil case that the appellate court reviewed de novo, as are all summary judgment determinations. See 150 F3d at 597.

Ornelas standard—to review the denial of a motion to suppress.[59] Yet these circuits do not follow the trend of the de novo circuits, instead treating curtilage determinations as findings of fact and subjecting them to clear error review. Also, neither the Eighth nor the Eleventh Circuit has directly addressed the impact of *Ornelas* on review of curtilage determinations.

The Second Circuit has dealt directly with *Ornelas*, but neither adopted de novo review nor offered a justification for maintaining clear error. In *United States v Reilly*[60] ("*Reilly I*"), issued shortly before *Ornelas*, the Second Circuit joined the "unanimous decisions of the other Circuits" holding that determining the scope of curtilage "relies essentially on factual determinations" and adopted clear error review.[61] The court noted that deference to the trial court was particularly important in reviewing curtilage determinations because "[e]very curtilage determination is distinctive and stands or falls on its own unique set of facts."[62] After *Ornelas*, the federal government applied for a rehearing in *United States v Reilly*[63] ("*Reilly II*"), which the Second Circuit granted. *Reilly II* reaffirmed the district court in a one page decision, "assum[ing] without deciding" that the de novo standard applied, and concluding that the outcome of the case would not change.[64]

It is difficult to characterize *Reilly II*. Both majorities in the *Johnson* case discuss it as if it were dispositive in favor of de novo review,[65] but the Second Circuit has subsequently cited the *Reilly* cases for the proposition that a noncurtilage denial of a motion to suppress is re-

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59 See *United States v Gerard*, 362 F3d 484, 486–88 (8th Cir 2004); *United States v Vorsteg*, 134 Fed Appx 419, 420 (11th Cir 2005), quoting *United States v Berrong*, 712 F2d 1370, 1374 (11th Cir 1983). The type of review appellate courts give motions to suppress is the same as the bifurcated standard in *Ornelas*. See, for example, *United States v Ramirez*, 473 F3d 1026, 1032 n 3 (9th Cir 2007); *United States v Castro-Higuero*, 473 F3d 880, 885 (8th Cir 2007); *United States v Buckner*, 473 F3d 551, 553 (4th Cir 2007); *United States v Jaime*, 473 F3d 178, 181 (5th Cir 2006); *United States v Taylor*, 471 F3d 832, 839 (7th Cir 2006); *United States v Jackson*, 470 F3d 299, 306 (6th Cir 2006); *United States v Coplin*, 463 F3d 96, 100 (1st Cir 2006), citing *Ornelas*, 517 US at 699; *United States v West*, 458 F3d 1, 13 (DC Cir 2006); *Cousins*, 455 F3d at 1121; *United States v Mosely*, 454 F3d 249, 252 (3d Cir 2006); *United States v Mills*, 412 F3d 325, 328 (2d Cir 2005); *United States v Lyons*, 403 F3d 1248, 1250 (11th Cir 2005). The Federal Circuit has not established a standard of review for suppression hearings.

60 76 F3d 1271 (2d Cir 1996).

61 Id at 1275.

62 Id, quoting *United States v Depew*, 8 F3d 1424, 1426 (9th Cir 1993).

63 91 F3d 331 (2d Cir 1996).

64 See id at 331.

65 See *Johnson*, 256 F3d at 901 (Ferguson majority), 913 (Kozinski majority) (pointing to *Reilly II* as one of several cases showing that "[n]o court that has considered *Ornelas* has ruled [against adopting de novo review]").

viewed for clear error.[66] Also, as a practical matter it seems unlikely that the *Reilly II* court actually engaged in full de novo review.

This suggests that, at a minimum, the Second Circuit has not fully adopted the de novo circuits' position that all Fourth Amendment inquiries are subject to de novo review.

II. *ORNELAS* DOES NOT MANDATE DE NOVO REVIEW FOR CURTILAGE DETERMINATIONS

The clear error circuits have not yet explained their continued use of clear error review post-*Ornelas*. This Part argues first that *Ornelas* actually mandates deferential review, at least where the curtilage determination is made at the warrant review stage. Additionally, though *Ornelas* sets the standard of review for determinations of probable cause and reasonable suspicion, curtilage determinations are neither. Instead, curtilage determinations are tied directly to the warrant process. Therefore, *Ornelas* does not mandate de novo review of curtilage determinations.[67] Finally, this Part argues that reviewing Fourth Amendment curtilage determinations deferentially could lead to improved disclosure of police practices at the warrant stage, thereby increasing Fourth Amendment protections of the home and the curtilage.

A. *Ornelas* Decentralizes Review of Searches Made Pursuant to Warrants

The de novo circuits maintain that every Fourth Amendment inquiry should be reviewed de novo. The Supreme Court, however, mandates clear error review of searches pursuant to warrants.[68] This lesser scrutiny applies even though such "sweeping deference" to magistrates will invariably create a situation where "the Fourth Amendment's incidence" is somewhat decentralized and depends on each magistrate's individual conclusion about whether the police have presented sufficient evidence to show probable cause.[69]

This decentralized process requires many magistrates to make curtilage findings at the warrant stage in order to determine whether police were legally able to enter the property and gather information. When this happens, *Ornelas* requires the reviewing court to apply

66 See *United States v Santa*, 180 F3d 20, 29 (2d Cir 1999), citing *Reilly I*, 76 F3d at 1276.

67 There are some cases where a curtilage determination is not made by either the magistrate or the trial court. See, for example, *Johnson*, 256 F3d at 905, 909 (Ferguson majority). In such instance, the appellate court should remand the case to the trial court for the initial curtilage determination. Id at 909.

68 See *Ornelas*, 517 US at 699. See also *Illinois v Gates*, 462 US 213, 235–36 (1983); *United States v Ventresca*, 380 US 102, 108 (1965).

69 *Ornelas*, 517 US at 697.

more deferential scrutiny than it would if it were reviewing a warrantless search after the fact.[70] The reviewing court must verify that the magistrate had substantial basis for making the curtilage finding, but it must also grant proper deference to findings the magistrate made in issuing a warrant.

The Supreme Court's insistence on different standards of review for warrantless searches and searches conducted pursuant to warrants highlights two key points. First, the Court thinks that de novo review is more likely to lead to the suppression of evidence gathered without a warrant. Second, the Court continues to believe that the warrant requirement increases Fourth Amendment protections by encouraging police to get approval for a search from a neutral and detached magistrate who makes factual inferences ex ante. A search is arguably less likely to exceed its proper bounds when police have to first persuade a magistrate of their probable cause and when the warrant issued "particularly describ[es] the place to be searched and the persons or things to be seized."[71]

B. Curtilage: The Last Boundary of the Warrant Requirement

Curtilage determinations are different than the legal question of what constitutes probable cause and should therefore continue to be reviewed for clear error. *Ornelas* only subjects decisions about whether police have reasonable suspicion for a *Terry* stop, or probable cause for a warrantless search, to de novo review.[72] The de novo circuits argue that there is "no conceptual difference between calling an area 'curtilage' and telling an officer he had 'probable cause' or 'reasonable suspicion.'"[73] Yet the de novo circuits overlook a major conceptual difference in the direct connection between the curtilage and the home. Unlike an automobile search[74] or a custodial arrest,[75] which are constitutionally acceptable even if conducted without a warrant, a warrant is still required for searches and seizures within the home and

70 See id at 699. See also *Gates*, 462 US at 238–39.

71 *United States v Chadwick*, 433 US 1, 9 (1977). But see Silas J. Wasserstrom and Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 Georgetown L J 19, 34 (1988) ("[T]he 'rubber stamp' quality of magistrate review of warrant applications is an open scandal, and the Court has done little to show it takes its own procedures seriously. On the contrary, it has failed to impose minimal standards to ensure that magistrates understand the meaning of probable cause.").

72 See 517 US at 696.

73 *Johnson*, 256 F3d at 912 (Kozinski majority) (citation omitted).

74 See *Carroll v United States*, 267 US 132, 153 (1925).

75 See *United States v Watson*, 423 US 411, 414–15 (1976).

curtilage. This heightened level of constitutional protection afforded the home makes curtilage determinations inherently different.[76]

The de novo circuits therefore misinterpret the impact of *Ornelas* on the review of curtilage determinations. Curtilage determinations, unlike probable cause decisions, are not legal conclusions. Instead, the extent of the curtilage defines a boundary within which police must meet a higher standard before conducting a search. Police may constitutionally engage in behavior outside the curtilage that is presumed unreasonable within the curtilage. Because the boundary determines the legal requirements, the curtilage determination is frequently precedent to, and outcome determinative for, the finding of probable cause.

Identifying the distinction between the curtilage determinations and probable cause determinations is not dispositive of whether curtilage determinations ought to be subject to clear error review or de novo review. It does, however, support the negative conclusion that *Ornelas* does not mandate de novo review of curtilage determinations. Part III makes the positive argument that clear error review is the correct standard for curtilage determinations, both for reasons of judicial efficiency and to maintain consistency with Supreme Court precedent, the common law heritage of curtilage, and other forms of decentralized constitutional factfinding.

C. The Potential Impact of Clear Error Review on Police Practices

As discussed above, courts support the warrant process for several important reasons. First, by requiring police to specify beforehand where they wish to search and what they hope to find, the warrant requirement limits the invasiveness of searches.[77] Second, requiring police to first provide an affidavit stating a sufficient basis for issuance of the warrant ensures that they actually have probable cause to search the home or curtilage. Finally, requiring that the warrant decision be made before the search is performed reduces the risk of cognitive bias in magistrates, who may be sympathetic to law enforcement goals.[78]

Typically, the warrant process involves curtilage determinations in the following manner. The police enter a person's property and gather information that suggests crime is afoot. They then use that informa-

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76 See, for example, *California v Ciraolo*, 476 US 207, 212–13 (1986) ("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.").

77 See, for example, *Chadwick*, 433 US at 9.

78 Compare Ronald J. Allen, et al, *Criminal Procedure: Investigation and Right to Counsel* 502 (Aspen 2d ed 2005) ("Judges decide suppression motions after the search has happened . . . [so i]t would be natural for judges to 'tilt' toward finding probable cause in such cases.").

tion to swear an affidavit before a magistrate judge, who may issue a warrant if the affidavit shows probable cause that a crime has occurred or is about to be committed. However, the magistrate may not issue the warrant if the police violated the Fourth Amendment to obtain the evidence in their affidavit.

This pattern mitigates the benefits of requiring that police obtain warrants before a search. If a curtilage invasion happens, it occurs before the magistrate sees the affidavit. The magistrate is then essentially faced with a curtilage determination after the fact—the police found something and would now like a warrant to search the suspect's property more thoroughly. If the magistrate is already sympathetic to law enforcement goals, this information can reintroduce cognitive bias. Thus, it is potentially problematic to rely on the magistrate's curtilage determination at the warrant stage.

There is a second reason to question deference to a magistrate's curtilage determination. The Kozinski majority from *Johnson* makes a compelling argument that "[i]f law enforcement officers are to respect the Fourth Amendment rights of the citizens they serve, they must have the kind of guidance that transcends any one judge's view of a particular case."[79] Deference to each initial factfinder's curtilage determinations risks leaving police without sufficient guidance because every magistrate could interpret similar facts differently, with some drawing curtilage boundaries in one way and some in another. The differences from jurisdiction to jurisdiction might leave police unsure of how they should operate. Nevertheless, the Supreme Court intentionally left such potential uncertainty in place by mandating deference to warrant determinations.[80]

Indeed, while deferring to a magistrate's curtilage determination may put pressure on the benefits of the warrant requirement, it may also lead to improved police practices when the magistrate makes curtilage determinations after the initial incursion. While some instruction probably filters through the administrative hierarchy after circuit courts hand down Fourth Amendment decisions, police officers get direct feedback from the magistrate when they submit a flawed warrant request and their request is denied. They thus receive more immediate education about the reasonable extent of curtilage at the warrant stage than at any other stage in the investigatory process.

Additionally, if appellate courts defer to a magistrate's curtilage findings, police officers have an incentive to clearly identify the boundary lines of the property and their incursion onto it to ensure the

79 *Johnson*, 256 F3d at 913 (Kozinski majority).

80 See notes 44–46 and accompanying text.

magistrate has substantial basis to make a curtilage determination.[81] If the police attempt to hide information, reviewing courts have discretion to reverse all of the magistrate's findings on the grounds that the magistrate lacked substantial basis for issuing the warrant.[82] Evidence seized in violation of the Fourth Amendment would then be suppressed and the rationale of the warrant requirement—slowing down overly eager police officers—would still be satisfied.

To summarize, *Ornelas* does not mandate de novo review of curtilage determinations. Instead, at least when curtilage determinations are made pursuant to a warrant hearing, *Ornelas* mandates clear error review. Curtilage determinations are not probable cause determinations and should not be treated as though they were.

III. *DUNN* MANDATES CLEAR ERROR REVIEW OF CURTILAGE DETERMINATIONS

A. The Common Law Heritage of Curtilage Determinations

The Supreme Court has said that the Fourth Amendment protects "people—and not simply 'areas'—against unreasonable searches and seizures."[83] That articulation understates the importance of homes in Fourth Amendment jurisprudence. The Fourth Amendment protects both "people" and "areas," but the protection for each is measured and implemented in different ways.

Under the Fourth Amendment, the people have a right to be secure in their homes against unreasonable searches and seizures. But, as has been discussed above, that protection goes beyond the home's four corners and reaches to the edge of the curtilage. In *Dunn*, the Supreme Court established a four factor test for determining the extent of curtilage. The *Dunn* test asks: (1) how close the claimed curtilage is to the home (the proximity prong); (2) whether the area and the home share a common fence or barrier (the common enclosure prong); (3) how the residents use the area (the use of property prong); and (4) what the steps taken by the resident to protect the area from observation by passersby are (the visibility prong).[84] This test can only be understood in the context of its history.

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81 When a magistrate has substantial basis to make a determination, police can rely on that determination even if the magistrate issues the warrant in error. This is known as the good faith warrant exception. See *United States v Leon*, 468 US 897, 921 (1984) ("Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.").

82 See, for example, *Reilly I*, 76 F3d at 1283.

83 *Katz v United States*, 389 US 347, 353 (1967).

84 See 480 US at 301.

1. Supreme Court precedent.

The Supreme Court made its first Fourth Amendment curtilage determination by defining what was not curtilage. In *Hester v United States*,[85] the Court cited Blackstone's discussion of burglary at common law and wrote that "the distinction between the [open fields] and the house is as old as the common law."[86] Under the common law of burglary, the protection granted the home was extended to the curtilage, but no further.[87] In applying this concept to Fourth Amendment searches, the Court extended Fourth Amendment protections of the home to the curtilage, but not to open fields—property outside of the curtilage.[88]

The Court stepped back from this property-driven concept of the Fourth Amendment in *Katz v United States*.[89] *Katz* concluded that Fourth Amendment protections "cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[90] Historically, the line between the curtilage and open fields had been a fence line,[91] and some commentators thought *Katz* was the beginning of the end for "outmoded property concepts" in Fourth Amendment cases.[92] Instead, courts began to base Fourth Amendment protections on whether an individual has "exhibited an actual (subjective) expectation of privacy" in a particular area, and whether that expectation of privacy is "one that society is prepared to recognize as 'reasonable.'"[93]

When a split developed over whether the *Katz* test established privacy rights in open fields, the Supreme Court resolved it by looking to the common law concept of curtilage to measure the extent of Fourth Amendment protections of property.[94] The Court held, in *Oliver v United States*,[95] that "open fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to

85 265 US 57 (1924).

86 Id at 59 (holding that police were not within the curtilage of the home but instead in open fields when they seized incriminating evidence), citing William Blackstone, 4 *Commentaries on the Laws of England* *223, 225–26 (Chicago 1979).

87 See Blackstone, 4 *Commentaries* at *225 (cited in note 86).

88 See *Hester*, 265 US at 59, citing Blackstone, 4 *Commentaries* at *223, 225–26 (cited in note 86).

89 389 US 347 (1967).

90 Id at 353.

91 See Blackstone, 4 *Commentaries* at *225 (cited in note 86) (defining curtilage to include those buildings that are "parcel of the mansion-house, though not under the same roof or contiguous . . . for the capital house protects and privileges all its branches and appurtenants").

92 See, for example, *United States v Williams*, 581 F2d 451, 453 (5th Cir 1978), citing *The Supreme Court, 1967 Term*, 93 Harv L Rev 63, 189 (1968).

93 *Katz*, 389 US at 361 (Harlan concurring).

94 See *Oliver v United States*, 466 US 170, 179–80 (1984).

95 466 US 170 (1984).

shelter from government interference or surveillance."[96] The Court held that society does not recognize a privacy interest in open fields, regardless of the efforts of individuals to keep passersby from observing things in the open field.[97]

In so deciding, the *Oliver* Court looked at the explicit language of the Fourth Amendment and limited the scope of its protection to the Constitution's text. This decision reaffirmed that the constitutionally protected boundaries of curtilage were coterminous with the common law boundaries of curtilage. *Oliver* also held that *Hester*'s open field doctrine was consistent with *Katz*'s privacy based protections.[98] The Court looked to *Katz* to define the Fourth Amendment protections afforded to persons, while relying on the common law to define the Fourth Amendment umbrella protecting houses.[99]

Courts making curtilage determinations must inquire about the area's proximity to the home, the existence of common enclosures, use of the area, and its visibility; the answers to these questions inform "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."[100] This common law background for *Dunn*'s curtilage factors reveals a great deal about the correct standard of review for Fourth Amendment curtilage determinations. Two analogous areas of the common law, the law of burglary and the castle defense to homicide, demonstrate how appellate courts have historically deferred to the curtilage determinations of an initial factfinder.

2. Common law deference to initial factfinders in burglary and castle defense cases.

Because the Supreme Court uses the common law concept of curtilage to set the bounds of the Fourth Amendment, appellate courts should review curtilage determinations in Fourth Amendment search cases with the same deferential review they use for curtilage determinations in castle doctrine and burglary cases. Similarly, the curtilage concept in common law burglary should animate the special protections afforded the home by the Fourth Amendment.[101]

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96 Id at 179.

97 See id.

98 See id at 176 n 6.

99 See id at 180 ("At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,' and therefore has been considered part of home itself for Fourth Amendment purposes."), quoting *Boyd v United States*, 116 US 616, 630 (1886).

100 *Dunn*, 480 US at 301.

101 See *Hester*, 265 US at 59.

Burglary cases are analogous to Fourth Amendment searches in how they determine the liability of an individual who enters the curtilage. Historically, burglary was a capital offense,[102] limited to the "most alarming forms of breaking and entering."[103] Breaking into "a distant barn, warehouse, or the like" was not the capital crime of burglary because those areas are not "under the same privileges, nor looked upon as a man's castle of defence."[104] On the other hand, breaking into buildings within the curtilage was treated as if it were a burglary of the home itself, subject to the heightened penalty of a capital sentence.[105] Likewise, there are special sanctions—suppression of evidence as well as civil sanctions—that can be leveled against police entering the home and its curtilage in violation of the Fourth Amendment. Burglary statutes in many states codify these common law curtilage distinctions and treat a burglary within the curtilage as a burglary within the home for sentencing purposes.[106]

Similarly, the common law of murder contains a castle doctrine justification protecting individuals within their home or curtilage in a fashion analogous to the suppression remedy. The castle doctrine permits an individual to use lethal force in self defense within the home or curtilage, even though use of such force outside the curtilage would not be justified.[107] Similarly, defendants can suppress damaging evidence at trial if police obtained it in violation of the constitutional protection afforded the curtilage.[108] The area outside the curtilage, however, is not protected and evidence gathered there cannot be suppressed. In every case, the law provides greater protection to residents inside the curtilage than outside.

In many burglary and castle doctrine cases, the curtilage's extent determines the outcome,[109] and the common law places these curtilage

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102 See Blackstone, 4 *Commentaries* at *223 (cited in note 86).

103 *United States v Redmon*, 138 F3d 1109, 1130 (7th Cir 1998) (Posner dissenting).

104 Blackstone, 4 *Commentaries* at *225 (cited in note 86).

105 See id.

106 See, for example, *Martinez v State*, 700 S2d 142, 143–44 (Fla Dist Ct App 1997) (finding the defendant did not commit burglary of a dwelling because the garage was not part of the curtilage of the home); *United States v Branson*, 200 Fed Appx 939, 941 (11th Cir 2006) (noting that "under Florida['s burglary] law, the terms 'structure' and 'dwelling' include both the roofed area of a building *and* 'the curtilage thereof'") (citation omitted). See also generally Annotation, *Burglary: Outbuildings or the Like as Part of "Dwelling House,"* 43 ALR 2d 834 (1955).

107 Most American jurisdictions extend the castle doctrine to the curtilage of the dwelling house. See Joshua Dressler, *Understanding Criminal Law* § 18.02[C][3] at 228 (Lexis 3d ed 2001). But see *People v Riddle*, 649 NW2d 30, 36 (Mich 2002) (limiting the castle doctrine "to the home and its attached appurtenances").

108 See notes 3–5 and accompanying text.

109 See, for example, *Williams v State*, 163 S 663, 666 (Ala App 1935); *State v Ginns*, 10 SCL (1 Nott & McCord) 583, 586 (SC Const Ct App 1819).

determinations squarely in the hands of juries, the initial factfinders.[110] For example, failure to give jury instructions on the self defense justification when the homicide potentially occurred within the defendant's curtilage is reversible error.[111]

To summarize, reviewing Fourth Amendment curtilage determinations only for clear error is faithful to the common law heritage of curtilage. While there is, of course, a conceptual difference between a constitutional inquiry into Fourth Amendment protections and a common law criminal trial, there is also a close connection. The stakes in criminal trials are just as high, and sometimes higher. Under the castle doctrine, curtilage determinations can mean the difference between heavy criminal sanctions—such as life in prison or the death penalty—and justified self defense. The severity of a burglary is also often dependent on whether the crime occurred within a home or its curtilage. Appellate courts leave these important decisions as factual questions in the hands of juries. They should do the same with trial judges' decisions on the scope of the curtilage.

B. Clear Error Review of Curtilage Determinations Preserves Judicial Resources

Appellate courts defer to the jury's curtilage determination in castle doctrine and burglary cases for the same reason they should defer to the initial factfinder in Fourth Amendment curtilage cases: the initial factfinder, whether jury, magistrate, or trial judge, is likely to have better access to factual information.[112] Thus, clear error review of curtilage determinations reduces appellate workload and preserves appellate resources for cases in which they can reduce error efficiently.

Curtilage determinations under *Dunn* are precisely the sorts of fact-bound questions "of which much more is likely to be known to the trial court than to the appellate court."[113] Every curtilage determination is distinctive and stands or falls on its own unique set of facts. Indeed, cases from clear error jurisdictions identify the four-factor test

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110 *State v Blue*, 565 SE2d 133, 140 (NC 2002); *Bowen v State*, 117 S 204, 210 (Ala 1928). But see *State v Hamilton*, 660 S2d 1038, 1045 n 12 (Fla 1995) ("It would also be unworkable, in our view, to require a court and jury to apply a constitutional privacy analysis to determine the extent of the 'curtilage' every time a burglary was charged.").

111 See, for example, *Jones v State*, 398 S2d 360, 363 (Ala Crim App 1981); *Gainer v State*, 391 A2d 856, 857–58 (Md Ct Spec App 1978).

112 See, for example, *Dykes v State*, 39 S2d 21, 22 (Ala App 1948) ("Many of these instructions sought to state the right of the accused to defend himself when on his own premises. . . . We are not privileged to review this inquiry very accurately.").

113 *Estate of Merchant v CIR*, 947 F2d 1390, 1393 (9th Cir 1991).

as "involv[ing] purely factual determinations."[114] The *Dunn* factors are tools that aid a court in determining whether an "area harbors the intimate activity associated with the sanctity of a man's home and the privacies of life," but making these determinations requires a factual analysis.[115] And as discussed in Part I.A, trial level decisionmakers are particularly skilled at this type of inquiry.

Additionally, *Ornelas* requires that appellate courts grant due weight to the factual inferences of "resident judges."[116] There is great demand for the resources of appellate courts. They should be preserved for those circumstances in which they can better reduce judicial error.

The de novo circuits believe that reviewing curtilage determinations de novo does not drain appellate resources because appellate courts can review curtilage findings more easily than probable cause determinations, which require a de novo standard of review under *Ornelas*.[117] The de novo circuits state that because the curtilage determinations depend on "the layout of the property and the uses to which it is put"—objective factors easily gleaned from the trial record—they are properly subject to de novo review.[118] The de novo circuits essentially seek to justify the additional cost of de novo curtilage review by arguing that it is a smaller relative burden than the probable cause requirement.

This argument, however, overlooks the additive burden of de novo review. *Ornelas* mandates de novo review as a way for appellate courts to develop consistent precedent regarding what is a reasonable *Terry* stop and what is sufficient probable cause for an automobile search.[119] *Ornelas* concludes that it is possible to define acceptable police practices uniformly across state boundaries and between communities. "[D]e novo review tends to unify precedent and will come closer to providing law enforcement officers with a defined set of rules which, in most instances, makes it possible to reach a correct determination beforehand" about whether there is probable cause or reasonable suspicion sufficient to justify an invasion of privacy.[120] On the other hand, the Court has held that district court findings based on "physical or documentary evidence or inferences from other facts" should be re-

114 See, for example, *United States v Swepston*, 987 F2d 1510, 1513 (10th Cir 1993) (holding that one defendant's chicken shed was within the curtilage of his home, but the other defendant's marijuana gardens were not within the curtilage), overruled by *United States v Cousins*, 455 F3d 1116, 1121 n 4 (10th Cir 2006), cert denied 127 S Ct 162 (2006).

115 *Swepston*, 987 F2d at 1513, quoting *Dunn*, 480 US at 300–01.

116 See 517 US at 699.

117 See, for example, *Johnson*, 256 F3d at 913 (Kozinski majority).

118 Id at 913.

119 See *Ornelas*, 517 US at 696.

120 Id at 697.

viewed for clear error precisely because "[d]uplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources."[121] Unless de novo review of curtilage determinations significantly reduces the odds of erroneous determinations, the added burden is unjustified, regardless of its relative ease.

C. Curtilage Determinations Are Properly Decentralized

As discussed above, trial courts are the judicial bodies best situated to make efficient curtilage determinations. Fourth Amendment curtilage findings are incompatible with broad unifying principles because they are tied to local community values and property laws, which are inherently decentralized. These fact-based, localized inquiries play to the strengths of a trial court. Indeed, *Reilly I* held that *Dunn* and *Oliver* have already unified curtilage law as much as is practically possible:

> [T]he broad question of whether one can have a reasonable expectation of privacy in curtilage is a matter of law . . . settled by *Dunn*, just as the question of whether one can have a reasonable expectation of privacy in open fields is a question of law . . . settled by *Oliver*. Conversely, the question of whether a particular person has a reasonable expectation of privacy in a particular part of her or his land . . . so as to make that piece of land part of that person's curtilage, is the type of factual inquiry suited to primary resolution by a district court.[122]

The Second and Third Circuits recognize that curtilage may extend farther in a rural setting that it does in an urban or suburban setting.[123] The Idaho and New Mexico Supreme Courts have reached similar conclusions.[124] The community in which curtilage is located informs the inquiry into whether an expectation of privacy is one that society will view as reasonable.

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121 *Anderson v City of Bessemer City*, 470 US 564, 565, 574–75 (1985). See also Part I.A.

122 *Reilly I*, 76 F3d at 1275 n 1.

123 See id at 1277 ("On a large parcel of land, a pond 300 feet away from a dwelling may be as intimately connected to the residence as is the backyard grill of the bloke next door."); *United States v Acosta*, 965 F2d 1248, 1256 (3d Cir 1992) ("[For] extent-of-curtilage questions in urban areas, certain factors may be less determinative in a city setting because of the physical differences in the properties.") (citation omitted); *United States v Arboleda*, 633 F2d 985, 992 (2d Cir 1980) ("In a modern urban multifamily apartment house, the area within the 'curtilage' is necessarily much more limited than in the case of a rural dwelling subject to one owner's control."), quoting *Commonwealth v Thomas*, 267 NE2d 489, 491 (Mass 1971).

124 See note 130 and accompanying text.

Trial courts are better suited to make this localized inquiry. Dicta from *Ornelas* even invokes this principle when describing proper appellate deference to resident judges and local officers, acknowledging that "what may not amount to reasonable suspicion at a motel located alongside a transcontinental highway at the height of the summer tourist season may rise to that level in December in Milwaukee."[125]

As further evidence of the decentralized and factual nature of curtilage determinations, even the de novo circuits grant surprising deference to the initial factfinder, as deference to factual findings on the *Dunn* factors is effectively the same as deference to the trial court's curtilage determination. For example, the Fourth Circuit in *United States v Breza*[126] ostensibly adopted a mixed review of curtilage determinations under *Ornelas*—clear error review of factual determinations but de novo review of the ultimate conclusion regarding whether the property in question was curtilage.[127] However, the *Breza* court appears to treat the lower court's decision on particular *Dunn* factors as a factual determination reviewable for clear error.

Breza held that the district court's findings regarding the common enclosure prong and the use of property prong were not clearly erroneous.[128] How then should courts treat the visibility and proximity prongs, if the common enclosure and use of property prongs are reviewed for clear error?[129]

The visibility prong is best left in the hands of the initial factfinder, reviewable for clear error. Trial judges are best suited to evaluate evidence, especially when that evidence indicates the subjective intent of the parties in question. The visibility prong combines both the resident's subjective intent to hide his property from onlookers and the community's understanding of what constitutes protecting property from onlookers.

The proximity prong should also be reviewed for clear error. The distance within which a reasonable expectation of privacy attaches will depend on the community. A ranch house in Kaycee, Wyoming, is more remote and less exposed than a townhouse in Chicago, Illinois.[130]

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125 517 US at 699.

126 308 F3d 430 (4th Cir 2002).

127 See id at 432; *Cousins*, 455 F3d at 1122.

128 See 308 F3d at 436.

129 The *Breza* court failed to specify a standard of review for the proximity prong or for the visibility prong.

130 Indeed, the Idaho Supreme Court has held that the Idaho Constitution requires trial courts to consider differences in custom and terrain throughout the state, as "the curtilage of a home located within the city limits of Boise may not be the same as the curtilage of a ranch located in one of Idaho's rural counties." *State v Webb*, 943 P2d 52, 57 (Idaho 1997), citing *State v Sutton*, 816 P2d 518, 524 (NM App 1991):

While any judge can hear evidence on patterns of traffic and community expectations, *Ornelas* urges deference to resident judges in part because local decisionmakers have an intimate understanding of their community's expectation of privacy that appellate judges could not duplicate without considerable cost and effort.

Measuring reasonable behavior by community standards is a situation where the trial court's closer proximity to the "data of practical human experience" makes it the superior factfinder, and its determinations should thus be reviewed for clear error.[131] Expectations about how far intimate activities extend from the home vary between communities. Curtilage determinations under *Dunn* require the same sort of factual inference about whether the area in question is so intimately tied to the home itself that it falls under the home's Fourth Amendment protection.[132]

The de novo circuits maintain that because the Supreme Court has extended *Ornelas* beyond the Fourth Amendment, the decision mandates plenary review of all mixed questions of law and fact in all Fourth Amendment inquiries.[133] This argument fails to recognize that the Supreme Court has decentralized other factual constitutional inquiries under the Fourth and Fifth Amendments.

In consent to search cases, for example, courts inquire whether the individual in the home had a recognizable expectation of privacy in the residence. The Supreme Court has appealed to property law, which varies from state to state, in "determining the presence or absence of the privacy interests protected" by the Fourth Amendment.[134] These property laws inform and influence the "widely shared social expectations" in consent cases, in which police must determine whether the consenting party has authority to permit a search of the home.[135] Relying on local property laws to determine both the subjective expectations of the defendant and whether those expectations are objectively reasonable will lead to variations in Fourth Amendment protec-

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> In New Mexico, lot sizes in rural areas are often large, and land is still plentiful. Our interpretation and application of the state constitution must take into account the possibility that such differences in custom and terrain gave rise to particular expectations of privacy when the state constitution was adopted.

131 *United States v McConney*, 728 F2d 1195, 1204 n 7 (9th Cir 1984), citing *Commissioner of Internal Revenue v Duberstein*, 363 US 278, 289 (1960).

132 *Johnson*, 256 F3d at 902 (Ferguson majority) ("[T]he conception defining curtilage—as the area around the home to which the activity of home life extends—is a familiar one easily understood from our daily experience."), quoting *Dunn*, 480 US at 302.

133 See, for example, *Johnson*, 256 F3d at 912–13 n 3 (Kozinski majority) ("If the Court concludes *Ornelas* applies outside the Fourth Amendment context, a fortiori it would seem to apply to analogous determinations within the Fourth Amendment framework.").

134 *Rakas v Illinois*, 439 US 128, 144 n 12 (1978).

135 *Georgia v Randolph*, 547 US 103, 111 (2006).

tion from state to state and from locality to locality, as the courts endeavor to comprehend the social expectations created by those property rights. Indeed, the circuit courts review a district court's determination that an individual consented to a search for clear error, effectively decentralizing that key Fourth Amendment inquiry.[136]

Search and seizure protections also vary from state to state. State constitutions frequently provide more protection than the federal Constitution.[137] Courts in New York and Oregon have held that their respective state constitutions offer privacy protection to "open field" land in addition to the curtilage.[138] Judges and jurors from those states will have an understanding of Fourth Amendment protections that differs from judges and jurors in other states, in part because of the different legal structure under which they live.

Fourth Amendment jurisprudence is also decentralized in airplane overflight cases, where the right to privacy depends on the frequency and elevation of air traffic passing overhead.[139] Because some areas experience more overflight than others, the determination of whether police have searched the property in a Fourth Amendment sense by conducting an overflight varies among communities.[140]

Additionally, in Fifth Amendment takings cases, the Supreme Court in *Kelo v City of New London*[141] held that courts should defer to local legislative bodies and planning boards when they decide a taking

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136 See, for example, *United States v Elkins*, 300 F3d 638, 647 (6th Cir 2002).

137 See Kathryn R. Urbonya, *Fourth Amendment Federalism? The Court's Vacillating Mistrust and Trust of State Search and Seizure Laws*, 35 Seton Hall L Rev 911, 963–67 n 353 (2005).

138 See *People v Scott*, 593 NE2d 1328, 1336–38 (NY 1992) (holding that the New York Constitution protects privacy in open fields owned by landowners who mark their property with "No Trespassing" signs); *State v Dixson*, 766 P2d 1015, 1022 (Or 1988) ("If the individual has a privacy interest in land outside the curtilage of his dwelling, that privacy interest will not go unprotected [by the Oregon constitution] simply because of its location.").

139 See *Florida v Riley*, 488 US 445, 451 (1989) (plurality) (holding that a police overflight revealing drugs was not an unconstitutional search in part because the police had a legal right to fly at that elevation). O'Connor's critical fifth vote depended not merely on the fact that the overflight was legal, but also on the fact that there was no evidence that overflights were infrequent in that area. See id at 455 (O'Connor concurring). The key inquiry is whether "members of the public travel with sufficient regularity [at that elevation over the area in question] that [an individual's] expectation of privacy was not one that society is prepared to recognize as reasonable." Id at 454 (quotation marks and citation omitted).

140 Compare *United States v Allen*, 675 F2d 1373, 1380–81 (9th Cir 1980) (holding that a defendant who ran a smuggling operation in an area routinely traversed by Coast Guard helicopters had no reasonable expectation of privacy); *United States v DeBacker*, 493 F Supp 1078, 1081 (WD Mich 1980) ("[A]irplane flights over local farm lands [ ] at low altitudes (200 feet) are not infrequent."), with *National Organization for Reform of Marijuana Laws v Mullen*, 608 F Supp 945, 957–58 (ND Cal 1985) (holding that, where residents live in the country with no reason to expect "repeated and highly disruptive buzzings and low-level helicopter surveillance of their homes," a helicopter search was a violation of their Fourth Amendment rights).

141 545 US 469 (2005).

is for public use.[142] The law eschews "intrusive scrutiny" and "afford[s] legislatures broad latitude in determining what public needs justify the use of the takings power."[143] Federal jurisprudence also defers to "state courts in discerning local public needs."[144]

Kelo has triggered litigation on the state level[145] and an outburst of state and community legislation.[146] This frenetic, localized response promises to create a patchwork definition of public needs from state to state and community to community. As a result of Supreme Court deference, the constitutional protection of the takings clause has been decentralized.

Under *Ornelas*, the Supreme Court demands centralized constitutional decisionmaking for, among other things, *Terry* stops, warrantless automobile searches, and determinations of whether fines are constitutionally excessive. In contrast, the Court decentralizes constitutional decisionmaking for consent searches, overflight searches, and public use determinations. *Ornelas* and *Dunn*, read together, mandate similarly decentralized review of curtilage determinations.

CONCLUSION

Ornelas only partially reshaped appellate review of Fourth Amendment determinations, leaving some aspects of the legal landscape untouched. While several circuits have interpreted *Ornelas* to change all of Fourth Amendment review, two lines of precedent argue in favor of retaining deferential, clear error review for curtilage determinations. In *Ornelas*, the Supreme Court maintained deferential review of searches pursuant to warrant as a mechanism for encouraging police to use the warrant process. This Comment points out the positive effects that would stem from encouraging a close look at the curtilage issue at the warrant stage—something best accomplished through clear error review of Fourth Amendment curtilage determinations. In *Dunn*, the Court embraced a common law definition of curtilage, including clear error review of curtilage determinations. Like other areas of constitutional factfinding, decentralized review is appropriate in curtilage cases because the nature of the inquiry is directly tied to local community reality. In summary, the added burden

142 See id at 480.

143 Id at 483.

144 Id at 482.

145 See, for example, *City of Norwood v Horney*, 853 NE2d 1115, 1122 (Ohio 2006) (holding that the city had not justified its taking as a public use under the Ohio Constitution).

146 In 2006, forty-six states considered eminent domain legislation, twenty-six states enacted statutes, and constitutional amendments were approved for ballot initiatives in three more states. National Conference of State Legislatures, *State Legislative Response to Kelo* (Annual Meeting, 2006), online at http://www.ncsl.org/programs/natres/annualmtgupdate06.htm (visited Apr 16, 2008).

of reviewing Fourth Amendment curtilage determinations de novo is a game not worth the candle, particularly in light of the advantages held by resident judges when making curtilage determinations.