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Get Out of My Driveway! *Collins v. Virginia* Protects Curtilage from Being Trampled by the Automobile Exception

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Get Out of My Driveway! *Collins v. Virginia* Protects Curtilage from Being Trampled by the Automobile Exception

Abstract

In *Collins v. Virginia* (2018), the U.S. Supreme Court held that the automobile exception cannot justify a warrantless search of an automobile parked in a home's curtilage because the automobile exception pertains solely to the search of the automobile, not to the intrusion upon the Fourth Amendment privacy interest in the home's curtilage. After giving an overview of relevant Fourth Amendment jurisprudence concerning the curtilage doctrine and the automobile exception as well as the history of the exclusionary rule, this article examines the majority, concurring, and dissenting opinions in *Collins* and discusses the implications of this important decision. *Collins* preserves the heightened Fourth Amendment protection afforded to the home and its curtilage by refusing to further expand the automobile exception. *Collins* is also notable for Justice Thomas's concurrence, which questions the Court's authority to impose the exclusionary rule upon the states. Given the changing composition of the Court, the Court's eventual reconsideration of the exclusionary rule's applicability to the states is a possibility that bears watching.

Keywords: Fourth Amendment, automobile exception, curtilage, exclusionary rule, warrant, search

Get Out of My Driveway! *Collins v. Virginia* Protects Curtilage from Being Trampled by the Automobile Exception

I. Introduction

Generally, the police are required to obtain a warrant prior to conducting a search to comply with the Fourth Amendment.¹ This protection is especially important for preserving privacy in the home and its immediately surrounding area, or curtilage.² Thus, unless there are exigent circumstances, when a police officer conducts a search of a home or its curtilage, the officer must first obtain a warrant.³

While police officers are generally required to obtain a warrant prior to conducting a search, this requirement is subject to certain exceptions -- including the automobile exception.⁴ Under the automobile exception, police may conduct a warrantless search of an automobile without violating the Fourth Amendment, as long as the search is supported by probable cause.⁵ But what happens when these two doctrines, the automobile exception and the curtilage doctrine, intersect? Are the police required to obtain a warrant prior to searching an automobile which is parked within a home's curtilage?

In *Collins v. Virginia* (2018),⁶ the U.S. Supreme Court was confronted with this question. The Court held that the automobile exception cannot justify a warrantless search of an automobile parked in a home's curtilage because the automobile exception pertains only to the search of the automobile, not to the separate intrusion represented by an officer's entry of the

¹ See Kendra Hillman Chilcoat, *The Automobile Exception Swallows the Rule: Florida v. White*, 90 J. Crim. L. & Criminology 917, 918 (1999-2000); Lewis R. Katz, *The Automobile Exception Transformed: The Rise of a Public Place Exemption to the Warrant Requirement*, 36 Cas. W. Res. L. Rev. 375, 383 (1986).

² Brent E. Newton, *The Real-World Fourth Amendment*, 43 Hastings Const. L.Q. 759, 786 (2016).

³ Laura K. Donohue, *The Fourth Amendment in a Digital World*, 71 N.Y.U. Ann. Surv. Am. L. 553, 564 (2017).

⁴ Chilcoat, *supra* note 1, at 917-19.

⁵ *Carroll v. United States*, 267 U.S. 132 (1925).

⁶ *Collins v. Virginia*, 584 U.S. _____, 201 L. Ed. 2d 9 (2018).

curtilage to gain access to the automobile.⁷ In so holding, the Court refused to expand the automobile exception in a way which would impede the heightened Fourth Amendment protection accorded to the home and its curtilage,⁸ thus preserving the idea of home as inviolable castle which underpins Fourth Amendment jurisprudence.⁹ In addition to this important holding, another notable aspect of *Collins* is Justice Thomas's concurrence, which questions the Court's authority to impose the exclusionary rule upon the states and suggests that the Court should re-examine this issue in the near future.¹⁰

This article examines the Court's analysis in *Collins* and the implications of the Court's decision. The article begins with an overview of relevant Fourth Amendment jurisprudence concerning the curtilage doctrine and the automobile exception to provide context for the *Collins* decision. It then traces the history of the exclusionary rule, providing a foundation for understanding Justice Thomas's argument. The article next examines the majority, concurring, and dissenting opinions in *Collins*. Finally, the implications of this important decision are discussed.

II. Overview of Relevant Fourth Amendment Jurisprudence

The Fourth Amendment protects our persons, houses, papers, and effects from unreasonable searches and seizures.¹¹ In determining whether the conduct of a government actor constitutes a search within the meaning of the Fourth Amendment, the Court traditionally analyzed whether a person's property rights were physically intruded upon.¹² In *Katz v. United*

⁷ *Collins*, 201 L. Ed. 2d at 20-24.

⁸ *See id.*

⁹ *See* Stephanie M. Stern, *The Inviolable Home: Housing Exceptionalism in the Fourth Amendment*, 95 Cornell L. Rev. 905, 906, 912-15 (2010).

¹⁰ *Collins*, 201 L. Ed. 2d at 24-29 (Thomas, J., concurring).

¹¹ U.S. Const. amend. IV.

¹² Jeremy J. Justice, *Do Residents of Multi-Unit Dwellings Have Fourth Amendment Protections in Their Locked Common Area After Florida v. Jardines Established the Customary Invitation Standard*, 62 Wayne L. Rev. 305,

States (1967),¹³ the Court adopted a new approach to analyzing whether a search has occurred by focusing on whether the government conduct violated a person's reasonable expectation of privacy.¹⁴ After *Katz*, courts have generally used a reasonable expectation of privacy analysis to determine whether government action constitutes a search.¹⁵ With the recent resurgence of a trespass-based analysis in the Court's Fourth Amendment cases,¹⁶ however, it is clear that the reasonable expectation of privacy analysis did not supplant the traditional property rights intrusion analysis.¹⁷ Rather, there are two ways in which a government actor's conduct can be deemed to constitute a search within the meaning of the Fourth Amendment: (1) if the conduct violates a person's reasonable expectation of privacy; or (2) if the conduct violates a person's property rights, such as by committing trespass.¹⁸

In general, law enforcement officers are required to acquire a search warrant prior to conducting a search.¹⁹ By requiring prior judicial assessment of whether probable cause exists, the warrant requirement provides a judicial check of executive branch power.²⁰ While there are some exceptions to the search warrant requirement, unless a search comes within one of the well delineated exceptions to the warrant requirement, a warrantless search is presumed to be unreasonable.²¹

A. Fourth Amendment Protection of the Sanctity of the Home and Its Curtilage

311-13 (2017); *see, e.g.*, *Olmstead v. United States*, 277 U.S. 438 (1928); *McDonald v. United States*, 335 U.S. 451, 456 (1948).

¹³ *Katz v. United States*, 389 U.S. 347, 357 (1967) (Harlan, J., concurring).

¹⁴ Justice, *supra* note 12, at 314-15; *Katz*, 389 U.S. at 357.

¹⁵ Justice, *supra* note 12, at 315.

¹⁶ *See, e.g.*, *United States v. Jones*, 565 U.S. 400 (2012); *Florida v. Jardines*, 569 U.S. 1 (2013).

¹⁷ *Jones*, 565 U.S. at 407-12; Justice, *supra* note 12, at 317-20.

¹⁸ *Jones*, 565 U.S. at 407-12; Justice, *supra* note 12, at 309-10, 317-20.

¹⁹ *See Andrew Wrona, How Far Can the Automobile Exception Go? How Searches of Computers and Similar Devices Push It to the Limit*, 43 J. Marshall L. Rev. 1119, 1120 (2010); *Katz, The Automobile Exception Transformed*, *supra* note 1, at 383.

²⁰ *See Wrona, supra* note 19, at 1120-21; *Katz, The Automobile Exception Transformed*, *supra* note 1, at 384.

²¹ *See Wrona, supra* note 19, at 1120-22; *Katz, The Automobile Exception Transformed*, *supra* note 1, at 385.

Protecting the privacy of the home is at the heart of the Fourth Amendment protection against unreasonable searches and seizures.²² Because of the primacy of privacy in the home, in the absence of exigent circumstances, a search warrant is generally required to conduct a search of the home.²³ Without a warrant, a search of the home is presumptively unreasonable, in violation of the Fourth Amendment.²⁴

The courts have extended the heightened Fourth Amendment protection afforded to the home to the curtilage, which is the area immediately surrounding the home and associated with the intimacies of home life.²⁵ The courts generally determine whether an area is curtilage on a case-by-case basis.²⁶ This determination is critical because open fields, the area outside of the curtilage, are not protected by the Fourth Amendment.²⁷ In *United States v. Dunn* (1987),²⁸ the Court established four factors to be considered when determining whether an area is part of the curtilage of a home: (1) the area's proximity to the home; (2) the area's location within an enclosure which encircles the home; (3) the purposes for which the area is used; and (4) the measures employed to shield the area from public observation.²⁹ However, these factors should not be mechanically applied, but rather should be considered useful only in so far as they shed light on the relevant question of whether the area is so intimately associated with the home that it should receive the same Fourth Amendment protection as the home does.³⁰ Some areas around

²² See Brendan Peters, *Fourth Amendment Yard Work: Curtilage's Mow-Line Rule*, 56 Stan. L. Rev. 943, 948 (2004); *Payton v. New York*, 445 U.S. 573, 589-90 (1980).

²³ See Amelia L. Diedrich, *Secure in Their Yards? Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment*, 39 Hastings Const. L.Q. 297, 303-05 (2011).

²⁴ Diedrich, *supra* note 23, at 305.

²⁵ See Vanessa Rownaghi, Comment, *Driving Into Unreasonableness: The Driveway, the Curtilage, and Reasonable Expectations of Privacy*, 11 Am. U.J. Gender Soc. Pol'y & L. 1165, 1165-66, 1177 (2003); *Oliver v. United States*, 466 U.S. 170 (1984).

²⁶ Rownaghi, *supra* note 25, at 1175-76.

²⁷ *Hester v. United States*, 265 U.S. 57 (1924); *Oliver v. United States*, 466 U.S. 170 (1984).

²⁸ *United States v. Dunn*, 480 U.S. 294 (1987).

²⁹ *Dunn*, 480 U.S. at 301.

³⁰ *Id.*

the home may be deemed a classic example of curtilage, without any explicit analysis of the *Dunn* factors, such as when the Court deemed a front porch to be an obvious example of curtilage.³¹

By treating the curtilage as, in effect, an extension of the home, the court provides a buffer area around the home which protects the private activities of a household from government intrusion.³² Thus, a warrantless search of a home's curtilage is presumed to be unreasonable, and therefore violate the Fourth Amendment, unless there are exigent circumstances justifying the warrantless intrusion.³³

Police officers, however, like any member of the public, are free to observe the curtilage as they pass by³⁴ and are even free to enter the curtilage along the standard path leading to a home's front door for the purpose of knocking on the front door, as any visitor may do, since such conduct does not constitute a search within the meaning of the Fourth Amendment.³⁵ There is no search when law enforcement officers observe the curtilage from a vantage point where the officer has a right to be, such as from an airplane in navigable airspace³⁶ or from the officer's position on a public street,³⁷ because any expectation of privacy in items which are left in plain view out in the open of a home's curtilage where anyone can see them is not an expectation the courts are prepared to recognize as reasonable.³⁸ However, before entering the curtilage to

³¹ Florida v. Jardines, 569 U.S. 1, 7 (2013); Orin Kerr, *Collins v. Virginia and "the Conception Defining the Curtilage": A Familiar Idea "Easily Understood From Our Daily Experience" -- or Is It?*, The Volokh Conspiracy, May 29, 2018 3:44 pm, <https://reason.com/volokh/2018/05/29/collins-v-virginia-and-a-thought-on-curt>

³² Peters, *supra* note 22, at 951, 955-57; Kerr, *Collins v. Virginia and "the Conception Defining the Curtilage," supra* note 31; Oliver v. United States, 466 U.S. 170 (1984).

³³ Diedrich, *supra* note 23, at 305-06.

³⁴ California v. Ciraolo, 476 U.S. 207, 213-14 (1986).

³⁵ Florida v. Jardines, 569 U.S. 1 (2013).

³⁶ Ciraolo, 476 U.S. at 213-14.

³⁷ See Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 Mich. L. Rev. 801, 813 (2004).

³⁸ Ciraolo, 476 U.S. at 213-14; Diedrich, *supra* note 23, at 307-09; Donohue, *supra* note 3, at 589-94.

conduct a search or seizure within the curtilage based on such an observation, law enforcement officers must secure a warrant (absent exigent circumstances).³⁹ The mere fact that an item, even if it is contraband, within the curtilage can be freely observed by passersby from an area where the public has a right to be cannot justify a warrantless entry of the curtilage by police officers for the purpose of conducting a search or seizure.⁴⁰ For areas of the curtilage where there is an implied invitation for the public to enter the property for a limited purpose, such as the implied invitation for people to travel the path which leads from the street to the front door – a path which often includes a portion of the driveway -- to knock on the front door to pay a visit, police entry of that particular area does not constitute a search as long as the police officer does not exceed the scope of the implicit license,⁴¹ such as by employing a drug-sniffing dog on a front porch.⁴²

B. The Automobile Exception to the Fourth Amendment Search Warrant Requirement

In *Carroll v. United States* (1925),⁴³ the Court established the automobile exception to the search warrant requirement.⁴⁴ Due to the mobility of automobiles, their highly regulated nature, and the lesser expectation of privacy in automobiles, the Fourth Amendment does not require that the police obtain a warrant before conducting a search of an automobile, as long as

³⁹ See *Horton v. California*, 496 U.S. 128, 136-37 (1990); *Texas v. Brown*, 460 U.S. 730, 739 (1983) (plurality opinion) (for the plain view doctrine to justify a seizure, the object seized must be in plain view from a lawful vantage point at time of observation and the law enforcement officer must have a lawful right of access to the object at the time of seizure); Alameda County District Attorney's Office, Plain View, Point of View, Winter 2015, http://le.alcoda.org/publications/point_of_view/files/W15_Plain_View.pdf (last accessed July 25, 2018); Federal Law Enforcement Training Center (FLETC), Plain View (podcast), <https://www.fletc.gov/audio/plain-view-mp3> (last accessed July 25, 2018).

⁴⁰ See *Horton*, 496 U.S. at 136-137; *Brown*, 460 U.S. at 739 (plurality opinion); Alameda County District Attorney's Office, *supra* note 39; FLETC, *supra* note 39.

⁴¹ See Andrew Eppich, *Wolf at the Door: Issues of Place and Race in the Use of the "Knock and Talk" Policing Technique*, 32 B.C.J.L. & Soc. Just. 119, 129-30 (2012).

⁴² *Florida v. Jardines*, 569 U.S. 1, 7 (2013).

⁴³ *Carroll v. United States*, 267 U.S. 132 (1925).

⁴⁴ *Chilcoat*, *supra* note 1, at 919.

the police have probable cause for the search.⁴⁵ Under the automobile exception, the police may conduct a search with a scope as extensive as could be authorized if conducted with a warrant.⁴⁶ Thus, if the police have probable cause to believe evidence of a crime is contained anywhere within the automobile, including in the trunk or inside containers, the police may conduct a warrantless search of those areas.⁴⁷

Under the automobile exception, the courts do not examine on a case-by-case basis whether there were exigent circumstances to justify a search without a warrant.⁴⁸ Thus, the courts will not inquire into whether the automobile being searched was in fact in danger of being moved before the police would be able to secure a warrant.⁴⁹ Rather, the automobile exception is a categorical exception – if the item searched is an automobile and the police have probable cause to search it, then a warrantless search of the automobile does not violate the Fourth Amendment.⁵⁰ To constitute an “automobile” within the meaning of the automobile exception, the vehicle must be readily mobile.⁵¹

C. The Intersection of the Automobile Exception and the Curtilage Doctrine

Over time, the automobile exception has expanded by making clear that it is a categorical exception which applies even when there is no actual exigency (such as when the automobile has already been immobilized by law enforcement),⁵² allowing the search of containers found within

⁴⁵ *Id.* at 919-26; Wrona, *supra* note 19, at 1128-30; Katz, *The Automobile Exception Transformed*, *supra* note 1, *passim*.

⁴⁶ United States v. Ross, 456 U.S. 798, 825 (1982); Katz, *The Automobile Exception Transformed*, *supra* note 1, at 408.

⁴⁷ Ross, 456 U.S. at 825; California v. Acevedo, 500 U.S. 565, 580 (1991); Chilcoat, *supra* note 1, at 922-23; Wrona, *supra* note 18, at 1125, 1130-32; Katz, *The Automobile Exception Transformed*, *supra* note 1, at 408.

⁴⁸ See Katz, *The Automobile Exception Transformed*, *supra* note 1, *passim*; see, e.g., Maryland v. Dyson, 527 U.S. 465 (1999); Pennsylvania v. Labron, 518 U. S. 938 (1996).

⁴⁹ See Katz, *The Automobile Exception Transformed*, *supra* note 1, *passim*.

⁵⁰ See Katz, *The Automobile Exception Transformed*, *supra* note 1, *passim*; Maryland v. Dyson, 527 U.S. 465 (1999).

⁵¹ See Katz, *The Automobile Exception Transformed*, *supra* note 1, *passim*.

⁵² California v. Carney, 471 U.S. 386, 391 (1985).

the automobile,⁵³ and even applying the automobile exception to motor homes when relevant factors indicate it is being used as an automobile.⁵⁴ Another area where the automobile exception has the potential to expand is when the police conduct a search of an automobile parked in a home's curtilage. Does such a search come within the automobile exception and thus not require a warrant? Or is a warrant required given the heightened Fourth Amendment protection afforded to the curtilage?

The lower courts have on occasion been confronted with the issue of what happens when the police want to search an automobile which is located within the curtilage of a home. This has resulted in a circuit split, with the Seventh,⁵⁵ Eighth,⁵⁶ and Ninth Circuits⁵⁷ (as well as Alabama⁵⁸) holding that the automobile exception permits a warrantless search of an automobile parked on the defendant's private residential property and the Fifth⁵⁹ and Tenth Circuits⁶⁰ (as well as Georgia⁶¹ and Illinois⁶²) either holding or opining that the automobile exception, at least in the absence of actual exigent circumstances in the case at hand, does not apply to searches of automobiles conducted on the defendant's private residential property.⁶³ With the lower courts grappling with how to resolve the collision of two Fourth Amendment doctrines, the automobile exception to the warrant requirement and the heightened Fourth Amendment protection afforded to the curtilage of a home, this split of authority set the stage for the Court to resolve the issue in

⁵³ California v. Acevedo, 500 U.S. 565, 580 (1991).

⁵⁴ California v. Carney, 471 U.S. 386 (1985); Carol A. Chase, *Privacy Takes a Back Seat: Putting the Automobile Exception Back on Track After Several Wrong Turns*, 41 B.C.L. Rev. 71, 73-85 (2000).

⁵⁵ United States v. Hines, 449 F.3d 808, 810-15 (7th Cir. 2006).

⁵⁶ United States v. Blaylock, 535 F.3d 922, 926-27 (8th Cir. 2008).

⁵⁷ United States v. Hatley, 15 F.3d 856, 859 (9th Cir. 1994).

⁵⁸ Harris v. State, 948 So.2d 583, 597 (Ala. Ct. Crim. App. 2006).

⁵⁹ United States v. Fields, 456 F.3d 519, 524-25 (5th Cir. 2006); United States v. Beene, 818 F.3d 157 (5th Cir. 2016).

⁶⁰ United States v. DeJear, 552 F.3d 1196, 1202 (10th Cir. 2009).

⁶¹ State v. Vickers, 793 S.E.2d 167, 171 (Ga. Ct. App. 2016).

⁶² Redwood v. Lierman, 772 N.E.2d 803, 813 (Ill. App. Ct. 2002).

⁶³ Petition for a Writ of Certiorari, at 18-24, Collins v. Virginia, 584 U.S. ____, 201 L. Ed. 2d 9 (2018). Retrieved from <http://www.scotusblog.com/wp-content/uploads/2017/03/16-1027-cert-petition.pdf>

Collins, where the Court finally weighed in on whether the automobile exception applies when the automobile is located within the curtilage of the home.

III. A Brief History of the Exclusionary Rule

Another noteworthy aspect of *Collins* is Justice Thomas's concurrence in which he calls for the Court to reconsider the propriety of the Court's imposition of the exclusionary rule upon the states.⁶⁴ In light of this call to revisit this issue, a brief exposition of the history of the exclusionary rule will provide a helpful foundation before examining the Court's opinions in *Collins*.

The exclusionary rule provides a mechanism for excluding evidence obtained in violation of a defendant's constitutional rights from criminal court proceedings.⁶⁵ It is a remedy created by the judiciary to deter law enforcement officials from violating constitutional rights.⁶⁶ The exclusionary rule has long been thought necessary due to the impracticality of using costly civil litigation as a deterrent and skepticism about the effectiveness of administrative complaint procedures due to the problems inherent in relying on the executive branch to police its own members.⁶⁷

A. Establishment of the Exclusionary Rule

Prior to the establishment of the exclusionary rule, the Bill of Rights, including the Fourth Amendment, was little more than a paper tiger.⁶⁸ Even though the Constitution forbid unreasonable searches and seizures, there was little to dissuade law enforcement officers from

⁶⁴ *Collins*, 201 L. Ed. 2d at 24-29 (Thomas, J., concurring).

⁶⁵ Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 Chi.-Kent L. Rev. 191, 200 (2010).

⁶⁶ *Id.*

⁶⁷ *See Id.* at 201-02; Orin Kerr, *Why Does the United States Have an Exclusionary Rule?*, The Volokh Conspiracy, July 19, 2008 4:14 pm, <http://volokh.com/posts/1216498467.shtml>

⁶⁸ *See* Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom*, 78 Marq. L. Rev. 45, 46 (1994).

getting so wrapped up in their pursuit of enforcing the criminal law that they trampled on constitutional rights in the process.⁶⁹ Thus, the Fourth Amendment was largely a right in name only, as there was not a feasible, effective enforcement mechanism or remedy.⁷⁰

In *Weeks v. United States* (1914),⁷¹ the U.S. Supreme Court first established the exclusionary rule.⁷² However, this rule was only applicable in federal courts.⁷³ Furthermore, it only applied when federal law enforcement officials, not state or local law enforcement officials, violated constitutional rights to obtain evidence.⁷⁴ Therefore, state and local law enforcement officials could violate a suspect's constitutional rights to obtain evidence the suspect had violated federal law and then hand that evidence over "on a silver platter" to federal officials for a federal prosecution.⁷⁵ The Court, however, closed this particular loophole when it overruled the silver platter doctrine in *Elkins v. United States*.⁷⁶

B. Applicability of the Exclusionary Rule to the States

Even with that loophole closed, the exclusionary rule only applying in federal courts posed a problem since regulation of criminal conduct is primarily a state issue and thus the vast majority of criminal prosecutions are for violations of state law and occur in state courts.⁷⁷ In *Mapp v. Ohio* (1961),⁷⁸ the Court made the exclusionary rule applicable to the states.⁷⁹

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Weeks v. United States*, 232 U.S. 383 (1914).

⁷² Donohue, *supra* note 3, at 565.

⁷³ Thomas K. Clancy, *The Fourth Amendment's Exclusionary Rule as a Constitutional Right*, 10 *Ohio St. J. Crim. L.* 357, 358 (2012).

⁷⁴ *Id.* at 360.

⁷⁵ William Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 *Wash. U. L. Q.* 621, 628 (1975); Jared M. Smith, *The Evolution of the Exclusionary Rule: From Weeks v. United States and Mapp v. Ohio to Herring v. United States and Hudson v. Michigan*, 2 *Grove City C. J. of L. & Pub. Pol'y* 215, 227-28.

⁷⁶ *Elkins v. United States*, 364 U.S. 206 (1960); Geller, *supra* note 75, at 630; Smith, *supra* note 75, at 227-28.

⁷⁷ See Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on Camreta v. Greene and Davis v. United States*, *Cato Sup. Ct. Rev.* 237, 240 (2010).

⁷⁸ *Mapp v. Ohio*, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

⁷⁹ Clancy, *Exclusionary Rule as a Constitutional Right*, *supra* note 73, at 364-65.

Thereafter, evidence obtained through an unconstitutional search or seizure could not be admitted into evidence at trial in state courts to prove guilt.⁸⁰ This, of course, provides a disincentive to police officers who may be tempted to violate the Fourth Amendment to build a case against a suspect since any evidence obtained in this manner could not be used to prove the case at trial.⁸¹ The line of cases from *Weeks* to *Mapp* transformed the Fourth Amendment from a paper tiger, which promised rights with no enforcement mechanism, to a constitutional provision with a serious bite.⁸²

The reasoning of the plurality opinion in *Mapp* indicates the exclusionary rule is an individual's constitutional right and the exclusionary rule serves multiple purposes, including deterring law enforcement officers from violating Fourth Amendment rights, facilitating consistency between federal and state courts (and thereby preventing federal law enforcement officers from handing evidence obtained in violation of constitutional rights over to state and local prosecutors for use in prosecutions in state courts), and preserving judicial integrity by refusing to allow the courts to become complicit in constitutional rights violations.⁸³ However, in subsequent years, the Court has retreated from that position and now takes the view that the exclusionary rule is a creation of the Court, not a personal constitutional right, and that its purpose is deterrence of police misconduct.⁸⁴ This shift has undermined the robustness of the exclusionary rule, which has been narrowed in application due to the Court's focus on the rule's deterrent purpose.⁸⁵

⁸⁰ See Caldwell & Chase, *supra* note 68, at 47-48.

⁸¹ *Id.*

⁸² *Id.* At 46-48.

⁸³ Michael J. Daponte, *Comment: Discretion and the Fourth Amendment Exclusionary Rule: A New Suppression Doctrine Based on Judicial Integrity*, 30 McGeorge L. Rev. 1293, 1297-1302 (1999).

⁸⁴ *Id.*; *United States v. Calandra*, 414 U.S. 338, 348 (1974).

⁸⁵ Clancy, *Irrelevancy of the Fourth Amendment*, *supra* note 65, at 200-01.

C. Erosion of the Exclusionary Rule

The Court has slowly eroded the exclusionary rule over time by restricting the rule's application to situations in which the Court deems the benefit of deterring law enforcement officials' misconduct to outweigh the cost to the courts' truth-finding capacity.⁸⁶ Using this cost-benefit analysis approach, the Court has restricted the application of the exclusionary rule by establishing certain exceptions, such as the good faith exception.⁸⁷ Under the good faith exception, evidence will not be excluded when it was obtained while acting in objectively reasonable reliance on: (1) a warrant subsequently found to have been issued without probable cause;⁸⁸ (2) a statute later held to be unconstitutional;⁸⁹ (3) the court clerk's computer records, which were inaccurate (unbeknownst to the police officer);⁹⁰ or (4) binding precedent which was subsequently overruled.⁹¹ In each of the aforementioned situations, the costs of excluding the evidence would outweigh the benefits because the exclusionary rule could not serve its deterrent purpose since there was no police misconduct, as the police officer acted in objectively reasonable reliance on a third party (a party other than law enforcement) – a judge, the legislature, the court clerk's office, or the appellate court.⁹² The cost-benefit calculation is clearly informed by the premise that the exclusionary rule's purpose is deterrence of police misconduct, not errors of the judicial or legislative branches of government.⁹³

⁸⁶ Catherine Cruikshank, *Dismantling the Exclusionary Rule: United States v. Leon and the Courts of Washington – Should Good Faith Excuse Bad Acts?*, 9 U. Puget Sound L. Rev. 415, 415-17, 422-31 (1985); Clancy, *Irrelevancy of the Fourth Amendment*, *supra* note 65, at 200-01; *see generally* Clancy, *Exclusionary Rule as a Constitutional Right*, *supra* note 73.

⁸⁷ *United States v. Leon*, 468 U.S. 897 (1984); Cruikshank, *supra* note 86, at 425-31.

⁸⁸ *Leon*, 468 U.S. at 897-900, 922-25.

⁸⁹ *Illinois v. Krull*, 480 U.S. 340, 340-42, 346-55 (1987).

⁹⁰ *Arizona v. Evans*, 514 U.S. 1, 2-3, 10-16 (1995).

⁹¹ *Davis v. United States*, 131 S. Ct. 2419, 2423-24 (2011); Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 Wm. & Mary Bill Rts. J. 821 (2013).

⁹² Kinports, *supra* note 91, at 824-28.

⁹³ *Id.*; Cruikshank, *supra* note 86, at 428-29.

The Court's restriction of the application of the exclusionary rule based on a cost-benefit calculation is not limited to situations where law enforcement officers acted in good faith while reasonably relying on the work of judicial or legislative branch actors.⁹⁴ In *Hudson v. Michigan* (2006),⁹⁵ the Court employed a cost-benefit analysis when it decided that the exclusionary rule would not apply when law enforcement officers violate the knock and announce requirement for the execution of search warrants, regardless of the officer's culpability.⁹⁶ Because there is no strong incentive to violate the knock and announce requirement since such violations are unlikely to yield more evidence, the Court deemed it unnecessary to apply the exclusionary rule to knock and announce violations in the modern context, given the professionalization of policing and the availability of civil litigation as a remedy.⁹⁷ Thus, there is a general exception to the exclusionary rule for knock and announce violations, even when police officers act in bad faith, because the cost of applying the rule to such violations outweighs any benefits.⁹⁸

The Court has also refused to apply the exclusionary rule to cases of Fourth Amendment violations committed due to law enforcement negligence which is attenuated from the police officer's constitutional rights violation.⁹⁹ In *Herring v. United States*,¹⁰⁰ the Court found that the exclusionary rule did not apply to evidence obtained as a result of an arrest made in reliance on another police department's computer records indicating an outstanding arrest warrant where those computer records were in error due to police department negligence in failing to update the records.¹⁰¹ The Court focused on the arresting officer's lack of a culpable mental state and

⁹⁴ Kinports, *supra* note 91, at 829.

⁹⁵ *Hudson v. Michigan*, 547 U.S. 586 (2006).

⁹⁶ *Hudson*, 547 U.S. at 594-96; Kinports, *supra* note 91, at 829.

⁹⁷ *Hudson*, 547 U.S. at 597-98; Kinports, *supra* note 91, at 829.

⁹⁸ Kinports, *supra* note 91, at 829.

⁹⁹ *Herring v. United States*, 555 U.S. 135 (2009); Kinports, *supra* note 91, at 830-32.

¹⁰⁰ *Herring v. United States*, 555 U.S. 135 (2009).

¹⁰¹ *Herring*, 555 U.S. at 135, 141-48.

reasoned that application of the exclusionary rule to a case of isolated negligence would not further the rule's deterrent purpose.¹⁰² Once again, the Court found that the costs of applying the exclusionary rule would outweigh any benefits.¹⁰³

The Court's modern view of the exclusionary rule's origin and rationale has laid the groundwork for the ongoing erosion of the rule and possibly even reconsideration of the rule's continued existence at some point.¹⁰⁴ If the rule is solely justified by deterrence, then it should not be applied when this would serve no deterrent purpose.¹⁰⁵ Also, if the rule is merely a judicial creation, rather than a constitutional right, then the Court is free to reconsider the wisdom of the exclusionary rule entirely, particularly if the Court decides modern conditions render the exclusionary rule less necessary than it was at the time of its adoption.¹⁰⁶ Furthermore, if the exclusionary rule is a court-created rule of evidence, rather than a constitutional right, this may call into question the propriety of the Court making the exclusionary rule applicable to the states.¹⁰⁷

D. Other Remedies for Fourth Amendment Violations

The other remedies for Fourth Amendment violations include administrative complaint procedures and civil litigation pursuant to 42 U.S.C. § 1983.¹⁰⁸ However, these remedies have limitations with regard to serving as an effective deterrent to violations of Fourth Amendment rights.¹⁰⁹ Administrative complaint procedures are problematic because they rely on the

¹⁰² Herring, 555 U.S. at 135, 141-48; Clancy, *Irrelevancy of the Fourth Amendment*, *supra* note 65, at 203-07; Kinports, *supra* note 91, at 830-32.

¹⁰³ Herring, 555 U.S. at 135, 141-48; Kinports, *supra* note 91, at 830-32.

¹⁰⁴ Clancy, *Irrelevancy of the Fourth Amendment*, *supra* note 65, at 200.

¹⁰⁵ *Id.* at 200-01.

¹⁰⁶ *Id.* at 200-02; Hudson v. Michigan, 547 U.S. 586, 597-99 (2006).

¹⁰⁷ Clancy, *Exclusionary Rule as a Constitutional Right*, *supra* note 73, at 366-67, 371, 390.

¹⁰⁸ Clancy, *Irrelevancy of the Fourth Amendment*, *supra* note 65, at 201-02; Hudson, 547 U.S. at 597-99.

¹⁰⁹ Clancy, *Irrelevancy of the Fourth Amendment*, *supra* note 65, at 203.

executive branch policing its own members.¹¹⁰ Civil litigation is often impractical due to the costs of litigation and the inability to establish substantial damages in many cases.¹¹¹ Holding the police accountable through civil litigation is also limited by the doctrine of qualified immunity, as the police can only be held liable if there was a violation of a clearly established constitutional right.¹¹²

Given the limitations of these alternative remedies, the continuing erosion of the exclusionary rule is concerning. Will the rule eventually be eroded to the point that the Fourth Amendment once again becomes an empty promise, with no feasible and effective remedy?¹¹³ Will the exclusionary rule die a death by a thousand cuts?

IV. *Collins v. Virginia* (2018)

In *Collins v. Virginia* (2018),¹¹⁴ the Court was confronted with the issue of whether the automobile exception applies when the automobile is located in a home's curtilage.¹¹⁵ This case deals with the intersection of two important Fourth Amendment doctrines – the automobile exception to the warrant requirement and the curtilage doctrine, which extends the heightened Fourth Amendment protection afforded to the home to the home's curtilage.¹¹⁶ Given that the Court had repeatedly expanded the automobile exception since its inception,¹¹⁷ would the court

¹¹⁰ Samuel Walker & Carol Archbold, *Mediating Citizen Complaints against the Police: An Exploratory Study*, 2000 J. Disp. Resol. 231, 232-34 (2000); Kerr, *Why Does the United States Have an Exclusionary Rule?*, *supra* note 67.

¹¹¹ Clancy, *Irrelevancy of the Fourth Amendment*, *supra* note 65, at 203; see Kerr, *Fourth Amendment Remedies*, *supra* note 77, at 242; David E. Steinberg, *The Drive Toward Warrantless Auto Searches: Suggestions from a Back Seat Driver*, 80 B.U.L. Rev. 545, 564 (2000); Andrew E. Taslitz, *Hypocrisy, Corruption, and Illegitimacy: Why Judicial Integrity Justifies the Exclusionary Rule*, 10 Ohio State J. of Criminal Law 419, 427-28 (2013).

¹¹² Clancy, *Irrelevancy of the Fourth Amendment*, *supra* note 65, at 196-97; Kerr, *Fourth Amendment Remedies*, *supra* note 77, at 241.

¹¹³ See Taslitz, *supra* note 111, at 424-30.

¹¹⁴ *Collins v. Virginia*, 584 U.S. ___, 201 L. Ed. 2d 9 (2018).

¹¹⁵ *Collins*, 201 L. Ed. 2d at 16.

¹¹⁶ *Id.* at 17.

¹¹⁷ Chase, *supra* note 54, at 73-85.

draw a line at the curtilage and refuse to allow the automobile exception to expand in a manner which would trample the Fourth Amendment protection normally afforded to the curtilage?

A. Facts of *Collins v. Virginia*

While investigating traffic violations involving a motorcyclist who evaded detention, police discovered the motorcycle was likely stolen and in Ryan Collins' possession.¹¹⁸ After seeing photographs showing the motorcycle parked in a home's driveway on Collins' Facebook profile, a police officer parked on the street near that house and observed a motorcycle covered by a tarp parked at the top of the driveway.¹¹⁹ The officer walked up the driveway, removed the tarp, and saw a motorcycle similar in appearance to the motorcycle involved in the traffic violations.¹²⁰ The officer ran a check on the license plate and vehicle identification number to confirm it was a stolen vehicle, took a photograph of the motorcycle, replaced the tarp, and returned to his police car on the street.¹²¹ After Collins came home, the officer knocked on the front door of the home and during the subsequent conversation Collins admitted to buying the motorcycle without title.¹²² Collins was arrested and charged with receipt of stolen property.¹²³

The trial court denied a motion to suppress the evidence acquired via the warrantless search.¹²⁴ On appeal of Collins' conviction, the Court of Appeals of Virginia affirmed, holding exigent circumstances justified the warrantless search, and the Supreme Court of Virginia also affirmed, holding that the warrantless search was proper under the automobile exception to the Fourth Amendment's warrant requirement.¹²⁵ The U.S. Supreme Court granted certiorari to

¹¹⁸ Collins, 201 L. Ed. 2d at 16.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 16-17.

¹²² *Id.* at 17.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

decide whether the automobile exception allows warrantless entry by the police into a home's curtilage for the purpose of searching an automobile parked within the curtilage.¹²⁶

B. Overview of Opinions in *Collins v. Virginia*

In an 8-1 vote, the U.S. Supreme Court found that the automobile exception does not allow a warrantless intrusion upon a home's curtilage to search a vehicle parked in the driveway and accordingly reversed the judgment of the Supreme Court of Virginia.¹²⁷ The Court remanded the case for the state courts to consider whether another exception to the warrant requirement, such as exigent circumstances, may apply and thus render the warrantless entry of the curtilage reasonable.¹²⁸

In the majority opinion, written by Justice Sotomayor, the Court clarified that the automobile exception cannot justify a warrantless intrusion into the curtilage of a home to search an automobile located within the home's curtilage because entry into the curtilage implicates a separate privacy interest.¹²⁹ Justice Thomas wrote a concurring opinion in which he agreed with the result reached by the majority, but questioned the validity of the Court imposing the exclusionary rule upon state courts and argued that the Court should reconsider this issue in a proper case.¹³⁰ In his dissent, Justice Alito opined that the search was reasonable and argued that requiring a warrant to search a vehicle parked in a house's driveway when a warrant would not be required to search that vehicle if parked on the street in front of that house made little sense.¹³¹

C. Majority Opinion in *Collins v. Virginia*

¹²⁶ *Id.* at 16.

¹²⁷ *Id.* at 24.

¹²⁸ *Id.* at 16,24.

¹²⁹ *Id.* at 19-20, 24.

¹³⁰ *Id.* at 24, 29 (Thomas, J. concurring).

¹³¹ *Id.* at 30-33 (Alito, J. dissenting).

In *Collins v. Virginia* (2018),¹³² the U.S. Supreme Court held that the automobile exception to the Fourth Amendment's warrant requirement does not allow law enforcement to make a warrantless entry into a home's curtilage for the purpose of searching an automobile parked within the home's curtilage.¹³³ In doing so, the Court clarified an issue that arises at the juncture of two Fourth Amendment doctrines: the automobile exception to the warrant requirement and the heightened Fourth Amendment protection afforded to the home and its curtilage.¹³⁴

Writing for the majority, Justice Sotomayor noted that the portion of the driveway on which the motorcycle was parked, which was adjacent to the house and was enclosed on three sides by a brick wall and the side of the house, was part of the curtilage of the home, which is treated as part of the home for Fourth Amendment purposes.¹³⁵ She observed that the officer's entry into the home's curtilage for the purpose of searching an automobile encroaches on two distinct privacy interests protected by the Fourth Amendment: an individual's privacy interest in an automobile and the individual's privacy interest in the home's curtilage.¹³⁶ Justice Sotomayor reasoned that just as the automobile exception could not justify a police officer entering a house without a warrant to search an automobile which is parked inside the house and visible through a window to all who pass by, the automobile exception cannot justify the police entering the curtilage of a house without a warrant to search an automobile which is parked within the curtilage.¹³⁷

¹³² *Collins v. Virginia*, 584 U.S. ____, 201 L. Ed. 2d 9 (2018).

¹³³ *Collins*, 201 L. Ed. 2d at 16.

¹³⁴ *Id.* at 17.

¹³⁵ *Id.* at 19.

¹³⁶ *Id.* at 19.

¹³⁷ *Id.* at 19-20.

Justice Sotomayor emphasized that the automobile exception's scope is limited to the confines of the automobile.¹³⁸ She reasoned that extending the scope of the automobile exception to permit a warrantless search of a home's curtilage to gain access to a vehicle would undermine the privacy interest in the home and its curtilage, which is at the heart of the Fourth Amendment protection against unreasonable searches and seizures.¹³⁹ Justice Sotomayor noted that such an extension is not justified based on the rationales for the automobile exception, which are based on balancing the government interest in searching a vehicle and an individual's privacy interest in a vehicle, not the privacy interest in a home.¹⁴⁰ Therefore, the Court declined to extend the scope of the automobile exception to encompass the area in which the automobile is parked when that area is protected by the Fourth Amendment, as the home and curtilage are.¹⁴¹

Justice Sotomayor observed that just as other exceptions to the warrant requirement, such as the plain view exception, require that police first have a lawful right of access, the police are required to have a lawful right of access to the vehicle before they can conduct a search of a vehicle under the automobile exception.¹⁴² She reasoned that the automobile exception cannot provide that lawful right of access to the vehicle when the vehicle is parked within the curtilage of a home because the automobile exception cannot justify encroaching upon the distinct Fourth Amendment interest in the home and its curtilage.¹⁴³ Thus, without a search warrant, entry into the curtilage of a home for the purpose of conducting a search of an automobile violates the Fourth Amendment protection afforded to the home and its curtilage.¹⁴⁴

¹³⁸ *Id.* at 20.

¹³⁹ *Id.* at 20.

¹⁴⁰ *Id.* at 18, 21.

¹⁴¹ *Id.* at 20.

¹⁴² *Id.* at 21.

¹⁴³ *Id.* at 21.

¹⁴⁴ *Id.* at 19-22.

The Court rejected the state's proposed bright line rule, which would have permitted warrantless entry into the curtilage for the purpose of searching an automobile with the exception of any enclosed structure, for several reasons.¹⁴⁵ First, there is no reason to think such a rule is necessary to reduce confusion, as police officers are accustomed to making determinations regarding whether an area is curtilage.¹⁴⁶ Second, being able to see into the curtilage from a lawful vantage point does not give law enforcement the right to make a warrantless entry into the curtilage to conduct a search.¹⁴⁷ Thus, the proposed bright line rule errs in according such importance to the absence of a structure shielding an area from public view.¹⁴⁸ Finally, the proposed rule would undermine the heightened Fourth Amendment protection afforded to the curtilage by deeming some types of curtilage, those not enclosed in a structure, as not being protected against warrantless entry for the purpose of searching an automobile and thereby privilege the affluent over those who cannot afford to buy homes with garages.¹⁴⁹

In sum, the Court held that, in the absence of exigent circumstances or consent, a search warrant is required for the police to enter the curtilage of a home for the purpose of searching an automobile parked within the curtilage.¹⁵⁰ The majority reasoned that the automobile exception cannot justify a warrantless search of a vehicle which is parked within the curtilage of a home because the scope of the automobile exception is limited to the confines of the automobile, the automobile exception cannot give the police the requisite lawful right of access to the vehicle which must be in place before a search can come within the automobile exception, and entering the curtilage of a home implicates a distinct Fourth Amendment privacy interest in the curtilage

¹⁴⁵ *Id.* at 23-24.

¹⁴⁶ *Id.* at 23.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 23-24.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 19-22.

in addition to the privacy interest in the automobile itself.¹⁵¹ Therefore, when an automobile is parked within the curtilage of a home, the automobile exception cannot obviate the usual need for a search warrant before law enforcement officers can enter the curtilage for the purpose of conducting a search – even if they seek to search an automobile.¹⁵²

D. Concurring Opinion in *Collins v. Virginia*

Justice Thomas wrote a concurring opinion¹⁵³ in which he agreed with the majority opinion's resolution of the issue presented, but wrote separately to question the Court's authority to require state courts to apply the exclusionary rule when there is a Fourth Amendment violation, as is currently required by precedent.¹⁵⁴ Justice Thomas noted that suppression of evidence in criminal trials as a means of deterring illegal searches and seizures did not exist at the time our Constitution was written.¹⁵⁵ He observed that although *Mapp* suggested the exclusionary rule was constitutionally required, in subsequent cases the Court retreated from such dicta and clarified that the exclusionary rule is not constitutionally required, but rather is a judicial creation.¹⁵⁶

Justice Thomas observed that the Court describes the exclusionary rule as federal law and assumes it is applicable in state courts.¹⁵⁷ He reasoned that since the exclusionary rule is neither constitutionally required nor enacted via federal legislation, the exclusionary rule must be federal common law – in which case the exclusionary rule is not binding on the states, as the Constitution's Supremacy Clause only makes the Constitution, federal statutes, and treaties the

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Collins v. Virginia*, 201 L. Ed. 2d 9, 24-29 (2018) (Thomas, J., concurring).

¹⁵⁴ *Id.* at 24.

¹⁵⁵ *Id.* at 25.

¹⁵⁶ *Id.* at 26-27.

¹⁵⁷ *Id.* at 27.

supreme law of the land and does not grant supremacy to the federal common law.¹⁵⁸ Justice Thomas noted that while the Court has recognized certain areas of federal judicially created law as binding on the states, this has been limited to areas involving the United States' sovereign duties and interstate or international matters – and the exclusionary rule does not pertain to either of those areas.¹⁵⁹ Aside from these limited areas, state law applies unless the issue is controlled by the Constitution or federal statute.¹⁶⁰

Justice Thomas argued that since the exclusionary rule is not constitutionally required nor created by federal statute, it is doubtful that the Court has the authority to require state courts to apply the exclusionary rule.¹⁶¹ Accordingly, Justice Thomas urged the Court to reconsider this issue in light of the Court's modern precedents, which do not support mandating that state courts apply the exclusionary rule.¹⁶²

E. Dissenting Opinion in *Collins v. Virginia*

In his dissenting opinion,¹⁶³ Justice Alito opined that the search was reasonable and thus did not violate the Fourth Amendment.¹⁶⁴ In Justice Alito's estimation, requiring a warrant for the police to walk up a driveway of a house to search a motorcycle but permitting a warrantless search of a motorcycle parked at the curb in front of that house is unreasonable because it out of step with the practical realities of life.¹⁶⁵ Justice Alito emphasized that a finding that the search occurred within the curtilage is not determinative, as the relevant issue is whether the search was reasonable.¹⁶⁶

¹⁵⁸ *Id.* at 27-28.

¹⁵⁹ *Id.* at 28-29.

¹⁶⁰ *Id.* at 29.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Collins v. Virginia*, 201 L. Ed. 2d 9, 29-32 (2018) (Alito, J., dissenting).

¹⁶⁴ *Id.* at 29.

¹⁶⁵ *Id.* at 30.

¹⁶⁶ *Id.* at 31.

Justice Alito argued that there is no good reason the automobile exception should not apply to a search of an automobile parked in a driveway of a house since the rationales for the automobile exception are no less valid when a vehicle is parked in a driveway than when the vehicle is parked along the curb of the house on a public street.¹⁶⁷ A vehicle parked in the driveway of a house and covered with a tarp is no less readily mobile than if the vehicle were parked at the curb in front of that house on a public street and covered with a tarp.¹⁶⁸ And no greater privacy interests are at stake when a motorcycle is parked in the driveway of a house rather than being parked on the street at the curb in front of that house, as a police officer's brief walk up the driveway of a house, during which the officer cannot see anything that was not already visible from the street, does not impair any real privacy interests.¹⁶⁹

Justice Alito stressed that the automobile exception is an exigency-based categorical exception premised on the inherent exigency presented by automobiles' ready mobility.¹⁷⁰ Thus, a case-specific inquiry into whether obtaining a warrant was impractical is unnecessary.¹⁷¹ Justice Alito proposed that courts conduct a case-specific inquiry regarding the degree of intrusion on privacy interests to determine whether a search of an automobile located on private property is reasonable.¹⁷² Thus, a warrantless search of an automobile parked in the driveway of a home in full view of anyone on the street pursuant to the automobile exception is reasonable since walking up the driveway is no more than a negligible intrusion on privacy interests, as in the present case; whereas, a warrantless search of an automobile parked inside a house would be unreasonable due to the greater intrusion on privacy interests such a search would entail.¹⁷³

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 32.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

V. Implications

*Collins v. Virginia*¹⁷⁴ establishes the rule that the automobile exception cannot justify a warrantless search of an automobile parked within the curtilage of a home because that exception applies only to the search of the automobile, not to the separate intrusion upon the curtilage to gain access to the automobile.¹⁷⁵ Thus, in the absence of either consent to the search or exigent circumstances, the police must obtain a warrant prior to entering the curtilage of a home for the purpose of searching an automobile.¹⁷⁶ This clarifies an important issue which arises at the intersection of the automobile exception and the curtilage doctrine.

The Court's holding in *Collins* rebuffs an attempt to extend the automobile exception in a manner which would have seriously undermined the heightened Fourth Amendment protection afforded to a home's curtilage. This ruling ensures that the requirement for the police to obtain a warrant prior to searching a home or its curtilage cannot evaporate simply because an automobile is parked there. It is a significant win for privacy, holding the line against governmental overreaching.

While the automobile exception has expanded considerably since its inception,¹⁷⁷ *Collins* protects the curtilage from being encroached upon by the automobile exception. This is not surprising given the Court's recent resurgent emphasis on property rights infringement as a useful framework for Fourth Amendment analysis¹⁷⁸ and the Court's recent trend of erring on the

¹⁷⁴ *Collins v. Virginia*, 584 U.S. ___, 201 L. Ed. 2d 9 (2018).

¹⁷⁵ *Id.* at 16, 19-22.

¹⁷⁶ *Id.*

¹⁷⁷ Chilcoat, *supra* note 1, *passim*.

¹⁷⁸ The recent resurgence of a property rights infringement based analysis in the Court's Fourth Amendment decisions is exemplified by the Court's trespass-based Fourth Amendment analysis in *Unites States v. Jones*, 565 U.S. 400 (2012), and its reiteration in *Florida v. Jardines*, 569 U.S. 1 (2013), of the importance of protecting the curtilage. See Andrew Guthrie Ferguson, *Personal Curtilage: Fourth Amendment Security*, 55 Wm. & Mary L. Rev. 1283, 1288 (2014).

side of protecting privacy rights.¹⁷⁹ Although requiring a warrant to search an automobile parked in a home's driveway when a warrant would not be required to search an automobile parked a short distance from there on a public street in front of the home may appear arbitrary to some,¹⁸⁰ *Collins* clearly reflects the importance the Court attaches to upholding the heightened Fourth Amendment protection of a home and its curtilage and its unwillingness to use the automobile exception to chip away at that protection in service of more effective crime control.¹⁸¹

Also notable is the Court's refusal to privilege enclosed curtilage over unenclosed curtilage, which would have given greater privacy protection to the affluent than to those with more limited means.¹⁸² By clarifying that the automobile exception extends no further than the confines of the automobile itself and cannot justify warrantless entry of a home's curtilage for the purpose of searching an automobile, regardless of whether the automobile is parked on a driveway or inside a garage, the Court has preserved the heightened Fourth Amendment protection afforded to a home's curtilage for all types of curtilage, rather than deeming certain types of curtilage (enclosed structures) more worthy of protection than others.¹⁸³ Given the scholarly criticism which has been leveled at the manner in which the courts apply the curtilage doctrine to the disadvantage of the poor, who tend to occupy multiple-occupant dwellings surrounded by common areas which may not be afforded heightened protection due to the occupant's inability to exclude others from such common areas,¹⁸⁴ the Court's refusal to

¹⁷⁹ In recent years, the Court's Fourth Amendment decisions have evinced great concern for the importance of protecting privacy, particularly in light of the intrusiveness of modern technology when employed for law enforcement purposes. *See, e.g., Unites States v. Jones*, 565 U.S. 400 (2012); *Riley v. California*, 573 U.S. ___, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014); *Carpenter v. United States* 201 L. Ed. 2d 507 (2018).

¹⁸⁰ *Collins*, 201 L. Ed. 2d at 29-30. (Alito, J. dissenting opinion); John Leon, *Collins v. Virginia: Where Categorical Rules Collide*, NULRO Blog, February 23, 2018, <http://blog.northwesternlaw.review/?p=596>

¹⁸¹ *See* Leon, *Where Categorical Rules Collide*, *supra* note 180.

¹⁸² *Collins v. Virginia*, 201 L. Ed. 2d 9, 23-24 (2018).

¹⁸³ *Id.* at 19-24.

¹⁸⁴ Diedrich, *supra* note 23, at 319-320; Eppich, *supra* note 41, at 130-32.

privilege costly enclosed structures, such as garages within the curtilage, over more affordable unenclosed spaces, such as driveways or carports within the curtilage,¹⁸⁵ while explicitly noting the economic discriminatory effect such a rule would have is an encouraging step in the right direction.

In *Collins*, the Court treated the determination of whether the area where the motorcycle was parked was curtilage as an easy call.¹⁸⁶ However, it is unclear whether this finding is uniquely tied to the unusual facts in *Collins*, where the motorcycle was parked on a portion of the driveway which was close to the house and within a semi-private nook enclosed on three sides by retaining walls and the side wall of the house.¹⁸⁷ It is unknown whether the Court would deem a more typical situation of an automobile parked in a driveway in front of a house's attached garage, with no walls around the area providing any semblance of privacy, and not far from the public street as a similarly easy call or whether the Court would apply the *Dunn* factors to determine on a case-by-case basis whether each particular driveway is curtilage.¹⁸⁸ Will the Court deem driveways, generally, a classic example of curtilage, as the Court has labeled front porches?¹⁸⁹ Only time will tell, as we must await future court decisions on this issue.

The final outcome for the petitioner in *Collins* remains to be seen. Mr. Collins may not ultimately prevail on remand if the state appellate court finds there were exigent circumstances justifying the warrantless intrusion into the curtilage in this case. Even if the state appellate court finds there was a Fourth Amendment violation and Mr. Collins thus prevails on remand, any attempts by Mr. Collins or other similarly situated individuals to hold the police civilly liable

¹⁸⁵ *Collins*, 201 L. Ed. 2d at 23-24.

¹⁸⁶ Kerr, *Collins v. Virginia and "the Conception Defining the Curtilage," supra* note 31.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Florida v. Jardines*, 569 U.S. 1 (2013).

for a past warrantless search of an automobile parked within the curtilage of a home in the absence of exigent circumstances will likely fail due to qualified immunity since the law will likely be deemed as not having been clearly established prior to *Collins*.

But regardless of what may happen in any of these existing individual cases, *Collins* establishes an important rule which the police must follow going forward, thus giving guidance to both law enforcement officers and courts regarding the interplay of the automobile exception and the curtilage doctrine. In *Collins*, the Court has clearly sent the message that the automobile exception does not permit warrantless intrusion into a home's curtilage for the purpose of searching an automobile.¹⁹⁰ Going forward, any attempts to rely on the automobile exception as a justification for a warrantless search of an automobile parked in a home's curtilage will fail under the precedent set by *Collins* and, if the search cannot be upheld on other grounds (such as exigent circumstances or consent), any evidence obtained through such a search will be inadmissible in a criminal trial as evidence of guilt. Furthermore, a civil suit to remedy such a constitutional rights violation should not be barred by qualified immunity, as *Collins* has now clearly established this area of law.

Collins is also notable for Justice Thomas's concurring opinion in which he clearly signaled he will be looking for any opportunity to re-examine the applicability of the exclusionary rule to criminal prosecutions in state courts.¹⁹¹ The composition of the Court is currently undergoing a shift to the right due to the upcoming replacement of recently retired Justice Kennedy, who has often played a pivotal role as a swing vote.¹⁹² Given the age of some

¹⁹⁰ *Collins v. Virginia*, 201 L. Ed. 2d 9, 16 (2018).

¹⁹¹ *Id.* at 29 (Thomas, J., dissenting).

¹⁹² See Lawrence Hurley, *Justice Kennedy to retire, Trump has chance to reshape Supreme Court*, Reuters, June 17, 2018, <https://www.reuters.com/article/us-usa-court-kennedy/justice-kennedy-to-retire-trump-has-chance-to-reshape-supreme-court-idUSKBN1JN2OF>

of the other Justices, the current President may have further opportunities to appoint additional conservative Justices, depending on the timing of any further departures from the Court and the length of the President's tenure in office.¹⁹³ As the Court gains more conservative Justices, Justice Thomas may be able to recruit new Justices and persuade some of the existing conservative Justices to join him in pushing for the Court to reconsider its authority to impose the exclusionary rule upon state courts. Given the recent trend in the Court's Fourth Amendment jurisprudence towards severely limiting the application of the exclusionary rule based on a cost-benefit analysis to only situations where applying the exclusionary rule has the potential to ostensibly effectively deter future police misconduct (and the Court's corresponding acknowledgment that the exclusionary rule is a judicial creation with a deterrent purpose, not a constitutional right),¹⁹⁴ the idea that the Court may be headed towards an eventual re-examination of whether the exclusionary rule can apply to the states is not far-fetched. And this would not be the first time that the Court eventually adopted a view on an important constitutional issue which Justice Thomas had previously espoused in a concurring opinion, in which no other Justices joined.¹⁹⁵

If the Court were to grant certiorari in a future case to reconsider the issue of whether the Court has the authority to impose the exclusionary rule upon state courts and decide to overrule *Mapp*, this could greatly undermine our constitutional rights. Given that the vast majority of prosecutions occur in the state courts,¹⁹⁶ if the exclusionary rule were no longer applicable to the

¹⁹³ See *id.*

¹⁹⁴ Clancy, *Exclusionary Rule as a Constitutional Right*, *supra* note 73, at 367-383.

¹⁹⁵ See Kenneth Jost, *Thomas's Lone-Wolf Call to Abolish Exclusionary Rule*, Jost on Justice, June 3, 2018, <http://www.jostonjustice.com/2018/06/thomass-lone-wolf-call-to-abolish.html> (noting that Justice Thomas's concurring opinion, in which no other Justices joined, in *Printz v. United States*, 1997, calling for the Court to reconsider whether there is a Second Amendment personal right to bear arms was followed eleven years later by the Court's decision in *District of Columbia v. Heller*, 2008)

¹⁹⁶ Kerr, *Fourth Amendment Remedies*, *supra* note 77 at 240.

states, in those states which do not have a state equivalent of the exclusionary rule the Fourth Amendment and other important provisions of the Bill of Rights may be rendered largely ineffectual due to a lack of feasible remedies and effective disincentives to trampling on constitutional rights in the pursuit of crime control objectives.¹⁹⁷ In those states that do not have their own exclusionary rule, there would be little effective redress for Fourth Amendment violations, as civil lawsuits are often impractical in light of the resources necessary to bring litigation and administrative complaint procedures can be problematic since they rely on the executive branch policing its own members.¹⁹⁸ Additionally, the Court's recent jurisprudence has signaled a troubling trend of ruling in favor of the police on qualified immunity issues,¹⁹⁹ further eroding any possibility that civil liability could be an effective deterrent to constitutional violations by the police.²⁰⁰

Overruling *Mapp* has the potential to significantly undermine the strides which have been made in the professionalization of law enforcement, as there will be less incentive for police departments to invest in the continual training necessary to keep officers abreast of developments in constitutional law.²⁰¹ Furthermore, if the exclusionary rule were to cease being available as a remedy against unconstitutional conduct committed by state and local police, this might hinder the development of case law concerning the contours of the Fourth Amendment, as criminal

¹⁹⁷ See Jost, *supra* note 195.

¹⁹⁸ Walker & Archbold, *supra* note 110, at 232-34; Kerr, *Why Does the United States Have an Exclusionary Rule?*, *supra* note 67; Clancy, *Irrelevancy of the Fourth Amendment*, *supra* note 65, at 203; see Kerr, *Fourth Amendment Remedies*, *supra* note 77, at 242; Steinberg, *supra* note 111, at 564; Taslitz, *supra* note 111, at 427-28.

¹⁹⁹ William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 82-86 (2018).

²⁰⁰ Jost, *supra* note 195; Leah Litman, *SCOTUS Term: Collins v. Virginia And Remedial Shell Games*, PrawfsBlawg, May 31, 2018 10:11 am, <http://prawfsblawg.blogs.com/prawfsblawg/2018/05/scotus-term-collins-v-virginia-and-remedial-shell-games.html>

²⁰¹ See Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule (Law and Truth - The Twenty-First Annual National Student Federalist Society Symposium on Law and Public Policy - 2002)*, 26 Harv. J. L. & Pub. Pol'y 119, 121-26 (2003) (arguing that police departments' reactions to *Mapp* reveal that they were not focused on training their personnel regarding search and seizure law prior to *Mapp* and making the case that this is evidence the exclusionary rule is necessary).

defendants would be less likely to raise Fourth Amendment issues for the courts to resolve – and this is particularly concerning since today’s rapid technological developments give rise to a great need for the courts to decide how settled Fourth Amendment principles apply in light of new technologies.²⁰² Finally, overruling *Mapp* would harm the legitimacy of the courts, as seeing the courts accept evidence obtained in violation of constitutional rights, and thereby implicitly sanction such violations, would undermine public confidence in the courts as a body which upholds the law.²⁰³

VI. Conclusion

Collins v. Virginia (2018)²⁰⁴ sets an important precedent which prevents the automobile exception from undermining the curtilage doctrine. *Collins* establishes that the police cannot rely on the automobile exception to enter the curtilage of a home without a warrant for the purpose of searching an automobile.²⁰⁵ Instead, when the police have probable cause to search an automobile and that automobile is parked within a home’s curtilage, the police must secure a warrant before conducting the search to justify the intrusion upon the curtilage (unless there are exigent circumstances or there is consent to the search).²⁰⁶

This is an important victory for the privacy we all enjoy in our homes and their curtilage. The fact that an automobile, which the police have probable cause to search, is parked in the curtilage of a home does not give the police carte blanche to enter the curtilage and conduct a search without a warrant.²⁰⁷ *Collins* reminds the police that, in the absence of exigent circumstances or consent, they must get a warrant before conducting a search within the curtilage

²⁰² Kerr, *Fourth Amendment Remedies*, *supra* note 77, at 237-40, 253-61.

²⁰³ Taslitz, *supra* note 111, at 467-68.

²⁰⁴ *Collins v. Virginia*, 584 U.S. ___, 201 L. Ed. 2d 9 (2018).

²⁰⁵ *Collins*, 201 L. Ed. 2d at 16, 19-22.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

of a home, regardless of what item is the object of the search -- even if it is an automobile.²⁰⁸ This preserves the important judicial check on executive branch power inherent in requiring a judicial determination of probable cause prior to a search of a home or its curtilage.²⁰⁹ It also clarifies the interplay of two doctrines, the automobile exception and the curtilage doctrine, for law enforcement and the lower courts.

In the wake of a long-term expansion of the automobile exception which begged the question of whether this expansion would see no end,²¹⁰ *Collins* serves as an important signal that the automobile exception does have an important limit: it stops at the edges of the automobile and thus cannot justify intrusion upon the area surrounding the automobile when an automobile is parked in a home's curtilage.²¹¹ As we move into an era where cars increasingly incorporate new technologies which result in automobiles containing far more information than they did in the past, it remains to be seen whether the Court will further reign in the automobile exception.²¹² Given our ability in modern times to quickly obtain warrants through electronic means²¹³ and the wealth of information which may be present in automated and connected cars,²¹⁴ as such technologically advanced vehicles become more common, how might the Court further halt or reverse the expansion of the automobile exception? Will the Court carve out an exception to the automobile exception prohibiting warrantless searches of the technology incorporated into automobiles, similar to the *Riley v. California* (2014)²¹⁵ holding requiring a

²⁰⁸ *Id.*

²⁰⁹ See Wrona, *supra* note 19, at 1120-21; Katz, *The Automobile Exception Transformed*, *supra* note 1, at 383-85; Diedrich, *supra* note 23, at 305-06.

²¹⁰ See Chilcoat, *supra* note 1, *passim*.

²¹¹ Collins, 201 L. Ed. 2d at 19-22.

²¹² See generally Lindsey Barrett, *Herbie Fully Downloaded: Data-Driven Vehicles and the Automobile Exception*, 106 Geo. L. J. 181 (2017).

²¹³ Sherry Colb, *The Automobile Exception and the Private Driveway*, Dorf on Law, October 11, 2017, <http://www.dorfonlaw.org/2017/10/the-automobile-exception-and-private.html>

²¹⁴ Barrett, *supra* note 212, at 184-88.

²¹⁵ *Riley v. California*, 573 U.S. ___, 134 S. Ct. 2473 (2014).

warrant for searches of cell phones found on persons incident to arrest?²¹⁶ Or might the Court reconsider the automobile exception altogether in light of the privacy concerns raised by the great amount of data stored in such vehicles and the relative speed with which warrants can now be obtained?²¹⁷ As the distinctions between automobiles and computers blur due to advances in technology,²¹⁸ will the Court reconsider the wisdom of having an automobile exception? Whether the court will put the brakes on the automobile exception in the future due to the implications of technological advances remains to be seen, but for now the Court has at least imposed an important limit on the previously ever-expanding automobile exception: the automobile exception goes no further than the confines of the automobile itself.²¹⁹

Justice Thomas's concurrence raises the specter of what the future may hold for an exclusionary rule which has been under sustained attack for many years now. While it remains to be seen whether anything will become of Justice Thomas's musings regarding his skepticism of the Court's authority to impose the exclusionary rule on the states, as the Court's composition shifts to the right, this bears watching.²²⁰ If Justice Thomas is able to persuade enough Justices that the Court should reconsider *Mapp*, this has the potential for a seismic shift in the remedies available to criminal defendants whose constitutional rights have been violated and a consequent retrenchment of *Mapp*'s legacy of professionalizing policing by removing incentives for police departments to maintain proper accountability mechanisms and police training on legal issues.²²¹

²¹⁶ Barrett, *supra* note 212, at 197-201.

²¹⁷ See generally Barrett, *supra* note 212.

²¹⁸ Barrett, *supra* note 212, at 185-97.

²¹⁹ Collins v. Virginia, 201 L. Ed. 2d 9, 19-22 (2018).

²²⁰ See Jost, *supra* note 195; Hurley, *supra* note 192.

²²¹ See *Kamisar*, *supra* note 201, at 121-26.