

States that have Rejected the "Open Fields" Doctrine:

Montana Constitution

ARTICLE II. **Section 10. Right of privacy.** The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Section 11. Searches and seizures. The people shall be secure in their persons, papers, electronic data and communications, homes and effects from unreasonable searches and seizures. No warrant to search any place, to seize any person or thing, or to access electronic data or communications shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

State v Bullock: 1995

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The open fields doctrine was first established in [*Hester v. United States* \(1924\), 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898](#). In *Hester*, the Court held that the Fourth Amendment protects "persons, houses, papers, and effects," and is not extended to the open fields. [*Hester*, 265 U.S. at 59, 44 S.Ct. at 446](#) (citing 4 Bl. Comm. 223, 225, 226). Shortly thereafter, the Supreme Court clarified that the Fourth Amendment provides protection from invasion of one's house or curtilage. [*Olmstead v. United States* \(1928\), 277 U.S. 438, 466, 48 S.Ct. 564, 568, 72 L. Ed 944, 951](#).

Subsequently, however, that Court recognized that the Fourth Amendment protects people — not places — from unreasonable searches. [*Katz*, 389 U.S. 347, 88 S.Ct. 507](#).^[1] In *Katz*, the Court stated that the Fourth Amendment protects individual privacy against certain kinds of government intrusion, but its protections go further and often do not relate to privacy. [*Katz*, 389 U.S. at 350, 88 S.Ct. at 510](#). A person's right to privacy, or right to be let alone, is largely left to the law of the states. [*Katz*, 389 U.S. at 350-51, 88 S.Ct. at 510-11](#). What a person knowingly exposes to the public is not protected, but what an individual seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. [*Katz*, 389 U.S. at 351, 88 S.Ct. at 511](#). Finally, the Court discredited the previous notion that property interests control the government's right to search and seize. [*Katz*, 389 U.S. at 353, 88 S.Ct. at 512](#).

States are free to grant citizens greater protections based on state constitutional provisions than the United States Supreme Court divines from the United States Constitution. [*State v. Sawyer* \(1977\), 174 Mont. 512, 515, 571 P.2d 1131, 1133](#) (overruled on other grounds by [*State v. Long* \(1985\), 216 Mont. 65, 700 P.2d 153](#)). We have chosen not to "march lock-step" with the United States Supreme Court, even when applying nearly identical language. [*State v. Johnson* \(1986\), 221 Mont. 503, 512, 719 P.2d 1248, 1254](#). In addition, we have held that Montana's unique constitutional language affords citizens a greater right to privacy, and therefore, broader protection than the Fourth Amendment in cases involving searches of, or seizures from, private property. [*Sawyer*, 571 P.2d at 1133](#).

We conclude that in Montana a person may have an expectation of privacy in [*76*76*](#) an area of land that is beyond the curtilage which the society of this State is willing to recognize as reasonable, and that where that expectation is evidenced by fencing, "No Trespassing," or similar signs, or "by some other means [which] indicate[s] unmistakably that entry is not permitted" (*Scott*, 583 N.Y.S.2d at 930, [*593 N.E.2d at 1338*](#)), entry by law enforcement officers requires permission or a warrant. As in our prior decisions, however, this requirement does not apply to observations of private land from public property.

Oregon Constitution

Article 1

Section 9. Unreasonable searches or seizures. No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.—

State v Dixon: 1988

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Our prior decisions establish that Article I, section 9, does not protect property alone; in a broader sense, it also protects an individual's "privacy interest," which we have defined as an interest in freedom from certain forms of governmental scrutiny. State v. Campbell, supra, 306 Or. at 170, 759 P.2d 1040. In *Campbell*, the police used a radio transmitter to monitor the movements of the defendant's automobile as it travelled on public streets. The police did not search the automobile itself, or any other "effect" of the defendant, but this court nevertheless held that the use of the transmitter was a search under Article I, section 9, because:

"[I]f the state's position in this case is correct, no movement, no location and no conversation in a 'public place' would in any measure be secure from the prying of the government. There would in addition be no ready means for individuals to ascertain when they were being scrutinized and when they were not. That is nothing short of a staggering limitation upon personal freedom. We could not be faithful to the principles underlying Article I, section 9, and conclude that such forms of surveillance were not searches." *Id.* at 172, 759 P.2d 1040.

The rationale underlying the curtilage concept as it was used at common law — to provide a zone of protection to sleeping residents from the "midnight terror" of burglary — simply is not the same as the rationale underlying Article I, section 9, or, for that matter, the Fourth Amendment, each of which protects the privacy of the individual from warrantless invasion and scrutiny by the government and its minions. Reliance on the common-law concept of curtilage to justify excluding land outside the curtilage from the protections of either constitutional provision is misplaced. Dixon, 766 P.2d at 1023.

Allowing the police to intrude into private land, regardless of the steps taken by its occupant to keep it private, would be a significant limitation on the occupant's freedom from governmental scrutiny. Article I, section 9, does not permit such freewheeling official conduct.

An individual's privacy interest in land he or she has left unimproved and unbounded is not sufficient to trigger the protections of Article I, section 9. Thus, it is not sufficient that the property in question is privately owned, or that it is shielded from view by vegetation or topographical barriers, because those features do not necessarily indicate the owner's intention that the property be kept private. A person who wishes to preserve a constitutionally protected privacy interest in land outside the curtilage must manifest an intention to exclude the public by erecting barriers to entry, such as fences, or by posting signs. This rule will not unduly hamper law enforcement officers in their attempts to curtail the manufacture of and trafficking in illegal drugs, because it does not require investigating

officers to draw any deduction other than that required of the general public: if land is fenced, posted or otherwise closed off, one does not enter it without permission or, in the officers' situation, permission or a warrant. [Dixson, 766 P.2d at 1024.](#)

New York Constitution

Article 1, section 12 [Security against unreasonable searches, seizures and interceptions] §12. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

People v Scott: 1992

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We believe that under the law of this State the citizens are entitled to more protection. A constitutional rule which permits State agents to invade private lands for no reason at all — without permission and in outright disregard of the owner's efforts to maintain privacy by fencing or posting signs — is one that we cannot accept as adequately preserving fundamental rights of New York citizens. Such a rule is contrary to New York decisions, particularly those adopting the *Katz* rationale in search and seizure cases. It is also incompatible with Justice Brandeis' *Olmstead* dissent declaring the "right to be ⁴⁸⁷~~487~~ let alone — the most comprehensive of rights and the right most valued by civilized men" ([*Olmstead v United States, supra, at 478*](#)) — a core principle reflected in our cases vindicating a broader privacy right in areas other than search and seizure

[W]here landowners fence or post "No Trespassing" signs on their private property or, by some other means, indicate unmistakably that entry is not permitted, the expectation that their privacy rights will be respected and that they will be free from unwanted intrusions is reasonable. *Scott*, 593 N.Y.S.2d at 930, [593 N.E.2d at 1338.](#)

New York Court of Appeals Declares an Open Field Posted with "No Trespassing" Signs Protected from Warrantless Searches and Seizures under the New York State Constitution – St John's Law Review article <https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1728&context=lawreview>

"Judge Hancock, writing for the majority in the Scott case, explained that although the defendant's Fourth Amendment rights had not been violated under the rationale set forth by the Supreme Court in *Oliver v. United States*, it was necessary to ascertain whether the New York State Constitution provided broader protection. Judge Hancock concluded that *Oliver* seemed directly at odds with the basic concept developed in an earlier Supreme Court decision, *Katz v. United States*, that the Fourth Amendment protects a person's privacy interests rather than particular places, and "more particularly, it protects people from unreasonable government intrusions into areas where they have expectations of privacy. Based on this conclusion, the Scott court expressly rejected the *Oliver* rationale, and held that citizens are entitled to greater protection under the New York State Constitution. The court determined that

society would view the defendant's privacy expectations as reasonable. Thus, the court found that under the rule of Katz and the laws of New York, the defendant possessed a protectable privacy interest."

"In pursuit of the preservation of fundamental rights of New York citizens, it is submitted that the Scott court correctly declined to adopt the Supreme Court's position in *Oliver*. By utilizing the "reasonable expectation of privacy" test articulated in *Katz*, the court has eliminated the open fields doctrine and prescribed broad privacy rights for New Yorkers."

Washington Constitution

Article 1 SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

State v Johnson: 1994

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In our judgment, the presence of the long history of territorial and state laws prohibiting trespass indicates that Washington places important emphasis on a person's right to exclude others from his or her private property, regardless of the size or developed state of that property. This factor is adequately met to permit analysis under Const. art. 1, § 7.

Washington has rejected the "open fields" doctrine of *Oliver v. United States*, 466 U.S. 170, 80 L.Ed.2d 214, 104 S.Ct. 1735 (1984). *Myrick*, 102 Wn.2d at 512. For purposes of Const. art. 1, § 7, "Neither the open fields doctrine of *Oliver*, which looks to the nature of the property viewed, nor the reasonable expectations test of *Katz* [*v. United States*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967)] are solely dispositive, but rather, each serves as a factor [that may be used] in determining whether the entry onto the property unconstitutionally intruded into a person's 'private affairs'." *State v. Crandall*, 39 Wn. App. 849, 853-54, 697 P.2d 250 (quoting *Myrick*, 102 Wn.2d at 510-11), review denied, 103 Wn.2d 1036 (1985). Unlike Fourth Amendment law, where it has been determined that a person's expectation of privacy in an "open field", even if subjectively manifested, is not deemed objectively reasonable or "legitimate", see *Oliver*, 466 U.S. at 182-83, our state constitution does not foreclose a person's ability to protect his or her private affairs in an "open field". *Myrick*, 102 Wn.2d at 510-11.

Vermont Constitution

Chapter 1 **Article 11. [Search and seizure regulated]**

That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.

State v Kirchoff: 1991

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We begin by acknowledging that this "walk-on" search would be permissible under the federal constitution. The United States Supreme Court has held that the Fourth Amendment permits the police to conduct a warrantless search of an area in which a person does not have a "reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360, 88

[S.Ct. 507, 516, 19 L.Ed.2d 576 \(1967\) \(Harlan, J., concurring\)](#). In [Oliver v. United States](#), 466 U.S. 170, 179, 104 S.Ct. 1735, 1742, 80 L.Ed.2d 214 (1984), that Court held that an expectation of privacy in "open fields" will not be deemed reasonable for Fourth Amendment purposes. That is, "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." *Id.* at 178, 104 S.Ct. at 1741; see [State v. Byrne](#), 149 Vt. 224, 227, 542 A.2d 276, 278 (1988). "Open fields" is a term of art and denotes areas that may be neither open nor fields as those words are used in common speech; it refers generally to land that is unoccupied or undeveloped. [Oliver](#), 466 U.S. at 180 n. 11, 104 S.Ct. at 1742 n. 11. Woods, in particular, may be open fields. As the warrantless search in this case was not of "the area immediately surrounding the home," an area known in law as "the curtilage," defendant's Fourth Amendment rights were not violated.

Our decision, however, need not rest on the drafters' choice of one word over another. Even if we cannot say with confidence that the scope of the term "possessions" mandates a right of privacy in real estate, it certainly does not rule out such a right. We strive to honor not merely the words but the underlying purposes of constitutional guarantees, and to give meaning to the text in light of contemporary experience. "We do not construe constitutional provisions of this sort the way we do statutes, whose drafters can be expected to indicate with some comprehensiveness and exactitude the conduct they wish to forbid or control and to change those prescriptions when they become obsolete." [Oliver](#), 466 U.S. at 186-87, 104 S.Ct. at 1745-46 (Marshall, J., dissenting) (citing [McCulloch v. Maryland](#), 17 U.S. (4 Wheat.) 316, 407, 4 L.Ed. 579 (1819)). Instead, our duty is to discover and protect the core value that gave life to Article 11. In the case of Fourth Amendment-Article 11 jurisprudence, the value traditionally protected is "freedom from unreasonable government intrusions into ... legitimate expectations of privacy." [Oliver](#), 466 U.S. at 187, 104 S.Ct. at 1746 (Marshall, J., dissenting) (quoting [United States v. Chadwick](#), 433 U.S. 1, 7, 97 S.Ct. 2476, 2481, 53 L.Ed.2d 538 (1977)).

While generally there is not an expectation of privacy in unoccupied lands, such is not the case where the landowner has taken steps, such as fencing or posting, to indicate that privacy is exactly what is sought. The *Oliver* Court informs us that an individual's expectations of privacy in land—regardless of steps taken to establish that expectation—can never be legitimate. *Id.* at 182, 104 S.Ct. at 1743. This per se approach cannot be squared with Article 11—nor, we believe, can it be squared with the Fourth Amendment principles of *Katz*. Undoubtedly, people will confine their "intimate activities" to narrower areas as "government interference or surveillance" grows more intrusive and pervasive. But constitutional rights should not succumb to waning expectations or fluctuations in the degree of government intrusion "society" is willing to condone.

Furthermore, the police and courts are accustomed to enforcing the law against trespass, 13 V.S.A. § 3705; deciding whether a search intrudes upon protected Article 11 interests will in most cases be no more arduous. See [Oliver](#), 466 U.S. at 195-96, 104 S.Ct. at 1750 (Marshall, J., dissenting).

We stated recently that Article 11 protects the people of the state "from unreasonable, warrantless governmental intrusion into affairs which they choose to keep private." [State v. Zaccaro](#), 154 Vt. at 91, 574 A.2d at 1261. *Oliver's* per se rule, that a person may never legitimately demand privacy under the Fourth Amendment in his or her land beyond the borders of the curtilage, fails to guarantee that right. We now hold that a lawful possessor may claim privacy in "open fields" under Article 11 of the Vermont Constitution where indicia would lead a reasonable person to conclude that the area is private. On the other hand, Article 11 does not afford protection against searches of lands where steps have not been

taken to exclude the public. By this standard, we seek to protect the constitutional rights of those who have sought privacy in their lands, while not preventing police from using evidence of affairs that were not kept private—that were, in *Katz's* terms, "knowingly expose[d] to the public." [389 U.S. at 351, 88 S.Ct. at 511.](#)

We appreciate the concern that drug-related activities are a major social problem. We do not believe, however, that the solution is a declamation of martial law that reduces the warrant requirement to an easily discarded "technicality." The rule announced here does not significantly hamper the police from investigating suspected criminal activity. It does require police to [997*997](#) obtain a warrant, based upon probable cause, before they enter land where it is apparent to a reasonable person that the owner or occupant intends to exclude the public. The rule brings the practice of law enforcement into compliance with our fundamental law, which empowers the judiciary to guard the rights of the people through the warrant process.

The right expressed in Article 11—that invasion of a citizen's land by a law enforcement officer is prohibited—is at the very heart of the preservation of the liberty and freedom of human beings guaranteed by the Vermont Constitution. Although Article 11's protection is limited in some respects—a properly obtained warrant permits entry onto a citizen's land and only "unreasonable" searches and seizures are prohibited—this right remains a central force.

Finally, while I share some of Justice Peck's concern about the problems of law enforcement officers, I believe that, if those problems result from our Constitution or laws, the way to overcome them is to amend the Constitution or laws. While that procedure is time consuming—especially where the Constitution is to be amended—the purpose of the provisions for amending the Constitution is to prevent precipitate action relative to it. Perhaps even more important would be for law enforcement officers to fully respect constitutional rights. In too many instances over the last few decades there have been too many cases where they did not. Although they knew what was required, they unnecessarily cut corners. This case is an example.

Tennessee Constitution

Article 1 Section 7. That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not be granted.

<https://www.agweb.com/news/policy/politics/government-cameras-hidden-private-property-welcome-open-fields>

Rainwaters and Hollingsworth v TWRA: <https://ij.org/wp-content/uploads/2020/04/Tennessee-Open-Fields-Complaint-Final.pdf>

<https://tennesseelookout.com/2022/03/23/judges-strike-down-tennessee-law-allowing-warrantless-searches-by-state-wildlife-officials/>

<https://ij.org/press-release/property-owners-cement-victory-against-warrantless-searches-and-hidden-cameras-as-state-declines-to-appeal/>