SUPREME COURT OF THE UNITED STATES

No. 97–1147

MINNESOTA, PETITIONER *v.* WAYNE THOMAS CARTER

MINNESOTA *v.* MELVIN JOHNS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

[December 1, 1998]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

I join the opinion of the Court because I believe it accurately applies our recent case law, including *Minnesota* v. *Olson*, 495 U. S. 91 (1990). I write separately to express my view that that case law– like the submissions of the parties in this case– gives short shrift to the text of the Fourth Amendment, and to the well and long understood meaning of that text. Specifically, it leaps to apply the fuzzy standard of "legitimate expectation of privacy"– a consideration that is often relevant to whether a search or seizure covered by the Fourth Amendment is "unreasonable"– to the threshold question whether a search or seizure covered by the Fourth Amendment *has occurred*. If that latter question is addressed first and analyzed under the text of the Constitution as traditionally understood, the present case is not remotely difficult.

The Fourth Amendment protects "[t]he right of the people to be secure in *their* persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U. S. Const., Amdt. 4 (emphasis added). It must be acknowledged that the phrase "their . . . houses" in this provision is, in isolation, ambiguous. It could mean "their

respective houses," so that the protection extends to each person only in his *own* house. But it could also mean "their respective and each other's houses," so that each person would be protected even when visiting the house of someone else. As today's opinion for the Court suggests, however, *ante*, at 4–5, it is not linguistically possible to give the provision the latter, expansive interpretation with respect to "houses" without giving it the same interpretation with respect to the nouns that are parallel to "houses"– "persons, . . . papers, and effects"– which would give me a constitutional right not to have your person unreasonably searched. This is so absurd that it has to my knowledge never been contemplated. The obvious meaning of the provision is that *each* person has the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects.

The Founding-era materials that I have examined confirm that this was the understood meaning. (Strangely, these materials went unmentioned by the State and its *amici*– unmentioned even in the State's reply brief, even though respondents had thrown down the gauntlet: "In briefs totaling over 100 pages, the State of Minnesota, the amici 26 attorneys general, and the Solicitor General of the United States of America have not mentioned one word about the history and purposes of the Fourth Amendment or the intent of the framers of that amendment." Brief for Respondents 12, n. 4.) Like most of the provisions of the Bill of Rights, the Fourth Amendment was derived from provisions already existing in state constitutions. Of the four of those provisions that contained language similar to that of the Fourth Amendment,[1] two used the same ambiguous "their" terminology.

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[1] Four others contained provisions proscribing general warrants, but unspecific as to the objects of the protection. See Va. Const. §10 (1776);

See Pa. Const., Art. X (1776) ("That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure . . . "); Vt. Const., ch. I, §XI (1777) ("That the people have a right to hold themselves, their houses, papers, and possessions free from search or seizure . . . "). The other two, however, avoided the ambiguity by using the singular instead of the plural. See Mass. Const., pt. I, Art. XIV (1780) ("Every subject has a right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions"); N. H. Const. §XIX (1784) ("Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions"). The New York Convention that ratified the Constitution proposed an amendment that would have given every freeman "a right to be secure from all unreasonable searches and seizures of *his* person *his* papers or *his* property," 4 B. Schwartz, The Roots of the Bill of Rights 913 (1980) (reproducing New York proposed amendments, 1778) (emphases added), and the Declaration of Rights that the North Carolina Convention demanded prior to its ratification contained a similar provision protecting a freeman's right against "unreasonable searches and seizures of *his* person, *his* papers and property," *id.*, at 968 (reproducing North Carolina proposed Declaration of Rights, 1778) (emphases added). There is no indication anyone believed that the Massachusetts, New Hampshire, New York, and North Carolina texts, by using the word "his" rather than "their," narrowed the protections contained in the Pennsylvania and Vermont Constitutions.

That "their . . . houses" was understood to mean "their

Del. Const., Art. I, §6 (1776); Md. Const., Art. XXIII (1776); N. C. Const., Art. XI (1776).

respective houses" would have been clear to anyone who knew the English and early American law of arrest and trespass that underlay the Fourth Amendment. The people's protection against unreasonable search and seizure in their "houses" was drawn from the English common-law maxim, "A man's home is *his* castle." As far back as *Semayne's Case* of 1604, the leading English case for that proposition (and a case cited by Coke in his discussion of the proposition that Magna Carta outlawed general warrants based on mere surmise, 4 E. Coke, Institutes 176–177 (1797)), the King's Bench proclaimed that "the house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house." *Semayne* v. *Gresham*, 5 Co. Rep. 91a, 93a, 77 Eng. Rep. 194, 198 (K.B. 1604). Thus Cooley, in discussing Blackstone's statement that a bailiff could not break into a house to conduct an arrest because "every man's house is looked upon by the law to be his castle," 3 W. Blackstone, Commentaries on the Laws of England 288 (1768), added the explanation: "[I]t is the defendant's own dwelling which by law is said to be his castle; for if he be in the house of another, the bailiff or sheriff may break and enter it to effect his purpose . . . ." 3 W. Blackstone, Commentaries on the Laws of England 287, n. 5 (T. Cooley 2d rev. ed. 1872). See also *Johnson* v. *Leigh*, 6 Taunt. 246, 248, 128 Eng. Rep. 1029, 1030 (C. P. 1815) ("[I]n many cases the door of a third person may be broken where that of the Defendant himself cannot; for though every man's house is his own castle, it is not the castle of another man").[2]

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[2] JUSTICE KENNEDY seeks to cast doubt upon this historical evidence by the carefully generalized assertion that "scholars dispute [the] proper interpretation" of "the English authorities." *Post*, at 2. In support of this, he cites only a passage from *Payton* v. *New York*, 445 U. S. 573 (1980), which noted "a deep divergence among scholars" as to whether *Semayne's Case* accurately described one aspect of the common

Of course this is not to say that the Fourth Amendment protects only the Lord of the Manor who holds his estate in fee simple. People call a house "their" home when legal

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law of arrest. *Id.*, at 592. Unfortunately for purposes of its relevance here, that aspect had nothing whatever to do with whether one man's house was another man's castle, but pertained to whether "a constable had the authority to make [a] warrantless arrest in the home on mere suspicion of a felony." *Ibid.* The "deep divergence" is a red herring.

JUSTICE KENNEDY also attempts to distinguish *Semayne's Case* on the ground that it arose in "the context of civil process," and so may be "of limited application to enforcement of the criminal law." *Post*, at 2. But of course the distinction cuts in precisely the opposite direction from the one that would support JUSTICE KENNEDY's case: if one man's house is not another man's castle for purposes of serving civil process, it is *a fortiori* not so for purposes of resisting the government's agents in pursuit of crime. *Semayne's Case* itself makes clear that the King's rights are greater: "And all the said books, which prove, that when the process concerns the King, that the sheriff may break the house, imply that at the suit of the party, the house may not be broken: otherwise the addition (at the suit of the King) would be frivolous." 5 Co. Rep. 92b, 77 Eng. rep., at 198. *See also id.*, at 92a, 77 Eng. Rep., at 197 ("In every felony the King has interest, and where the King has interest the writ is *non omittas propter aliquam libertatem*; and so the liberty or privilege of a house doth not hold against the King"); *id.*, at 91b, 77 Eng. Rep., at 196 ("J. beats R. so as he is in danger of death, J. flies, and thereupon hue and cry is made, J. retreats into the house of T. they who pursue him, if the house be kept and defended with force . . . may lawfully break the house of T. for it is at the [King's] suit").

Finally, JUSTICE KENNEDY suggests that, whatever the Fourth Amendment meant at the time it was adopted, it does not matter, since "the axiom that a man's home is his castle . . . has acquired over time a power and an independent significance justifying a more general assurance of personal security in one's home, an assurance which has become part of our constitutional tradition." *Post*, at 2. The issue in this case, however, is not "personal security in one's home," but personal security in someone else's home, as to which JUSTICE KENNEDY fails to identify *any* "constitutional tradition" other than the one I have described– leaving us with nothing but his personal assurance that some degree of protection higher than that (and higher than what the people have chosen to provide by law) is "justif[ied]."

title is in the bank, when they rent it, and even when they merely occupy it rent-free– *so long as they actually live there*. That this is the criterion of the people's protection against government intrusion into "their" houses is established by the leading American case of *Oystead* v. *Shed*, 13 Mass. 520 (1816), which held it a trespass for the sheriff to break into a dwelling to capture a boarder who lived there. The court reasoned that the "inviolability of dwelling-houses" described by Foster, Hale, and Coke extends to "the occupier or any of his family . . . who have their domicile or ordinary residence there," including "a boarder or a servant" "who have made the house *their* home." *Id.*, at 523 (emphasis added). But, it added, "the house shall not be made a sanctuary" for one such as "a stranger, or perhaps a visitor," who "upon a pursuit, take[s] refuge in the house of another," for "the house is not *his* castle; and the officer may break open the doors or windows in order to execute his process." *Ibid*. (emphasis in original).

Thus, in deciding the question presented today we write upon a slate that is far from clean. The text of the Fourth Amendment, the common-law background against which it was adopted, and the understandings consistently displayed after its adoption make the answer clear. We were right to hold in *Chapman* v. *United States*, 365 U. S. 610 (1961), that the Fourth Amendment protects an apartment tenant against an unreasonable search of his dwelling, even though he is only a leaseholder. And we were right to hold in *Bumper* v. *North Carolina*, 391 U. S. 543 (1968), that an unreasonable search of a grandmother's house violated her resident grandson's Fourth Amendment rights because the area searched "was *his* home," *id.*, at 548, n. 11 (emphasis added). We went to the absolute limit of what text and tradition permit in *Minnesota* v. *Olson*, 495 U. S. 91 (1990), when we protected a mere overnight guest against an unreasonable search of his hosts' apartment. But whereas it is plausible to regard a

person's overnight lodging as at least his "temporary" residence, it is entirely impossible to give that characterization to an apartment that he uses to package cocaine. Respondents here were not searched in "their . . . hous[e]" under any interpretation of the phrase that bears the remotest relationship to the well understood meaning of the Fourth Amendment.

The dissent believes that "[o]ur obligation to produce coherent results" requires that we ignore this clear text and four-century-old tradition, and apply instead the notoriously unhelpful test adopted in a "benchmar[k]" decision that is 31 years old. *Post*, at 5, citing *Katz* v. *United States*, 389 U. S. 347 (1967). In my view, the only thing the past three decades have established about the *Katz* test (which has come to mean the test enunciated by Justice Harlan's separate concurrence in *Katz*, see *id.*, at 360) is that, unsurprisingly, those "actual (subjective) expectation[s] of privacy" "that society is prepared to recognize as 'reasonable,'" *id.*, at 361, bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable. When that self-indulgent test is employed (as the dissent would employ it here) to determine whether a "search or seizure" within the meaning of the Constitution has *occurred* (as opposed to whether that "search or seizure" is an "unreasonable" one), it has no plausible foundation in the text of the Fourth Amendment. That provision did not guarantee some generalized "right of privacy" and leave it to this Court to determine which particular manifestations of the value of privacy "society is prepared to recognize as 'reasonable.'" *Ibid.* Rather, it enumerated ("persons, houses, papers, and effects") the objects of privacy protection to which the *Constitution* would extend, leaving further expansion to the good judgment, not of this Court, but of the people

through their representatives in the legislature.[3]

The dissent may be correct that a person invited into someone else's house to engage in a common business (even common monkey-business, so to speak) *ought* to be protected against government searches of the room in which that business is conducted; and that persons invited in to deliver milk or pizza (whom the dissent dismisses as "classroom hypotheticals," *post*, at 2, as opposed, presumably, to flesh-and-blood hypotheticals) ought *not* to be protected against government searches of the rooms that they occupy. I am not sure of the answer to those policy questions. But I am sure that the answer is not remotely contained in the Constitution, which means that it is left— as *many*, indeed *most*, important questions are left— to the judgment of state and federal legislators. We go beyond our proper role as judges in a democratic society

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[3]The dissent asserts that I "undervalu[e]" the *Katz* Court's observation that "the Fourth Amendment protects people, not places." *Post*, at 7, n. 3, citing 389 U. S., at 351. That catchy slogan would be a devastating response to someone who maintained that *a location* could claim protection of the Fourth Amendment— someone who asserted, perhaps, that "primeval forests have rights, too." Cf. Stone, Should Trees Have Standing?— Toward Legal Rights For Natural Objects, 45 S. Cal. L. Rev. 450 (1972). The issue here, however, is the less druidical one of whether respondents (who are people) have suffered a violation of *their* right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U. S. Const., Amdt. 4. That the Fourth Amendment does not protect places is simply unresponsive to the question of whether the Fourth Amendment protects people in other people's homes. In saying this, I do not, as the dissent claims, clash with "the *leitmotif* of Justice Harlan's concurring opinion" in *Katz*, *post*, at 7, n. 3; *au contraire* (or, to be more Wagnerian, *im Gegenteil*), in this regard I am entirely in harmony with that opinion, and it is the dissent that sings from another opera. See 389 U. S., at 361 (Harlan, J., concurring): "As the Court's opinion states, 'the Fourth Amendment protects people, not places.' The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.'"

when we restrict the people's power to govern themselves over the full range of policy choices that the Constitution has left available to them.