





## U.S. Supreme Court Roundup

National Conference of State Legislatures Legislative Summit August 13, 2013 Atlanta, Georgia

PRESENTED BY

Matthew K. Schettenhelm

©2013 Best Best & Krieger LLP

### Shelby County v. Holder, No. 12-96

### Voting Rights Act of 1965

Voting Rights Act of 1965 described:

"the single most effective piece of civil rights legislation ever passed by Congress."

### Too effective?

### History

## The 15<sup>th</sup> Amendment is ratified in 1870

### Two sections

(1)

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

(2)

The Congress shall have power to enforce this article by appropriate legislation.

### Direct Effect =

### Trump state laws

But...

### Stiff resistance

### For the first 100 years

### Enforcement =

### **FAILURE**

# States adopted "color-blind" alternatives:

Poll taxes
Literacy tests
Vouchers of
"good character"

### The feds tried . . .

### limited success

b/c

### litigation

...slow...

... expensive ...

### piecemeal

### Consequently

### barely improved



### August 6, 1965:

## The Voting Rights Act

### 3 key provisions

#### Section 2:

Forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."

#### Section 2:

#### Applies nationwide

#### Enforced through litigation

Section 5:

### Preclearance Requirement

#### Preclearance=

#### No changes

w/o

#### Approval of:

- 1. Federal court in D.C.; or
- 2. The Attorney General

#### Coverage test

#### Jurisdictions that:

#### 1. Imposed a voting test

### 2. Had turnout and registration below 50%

#### Originally:

**Temporary** 

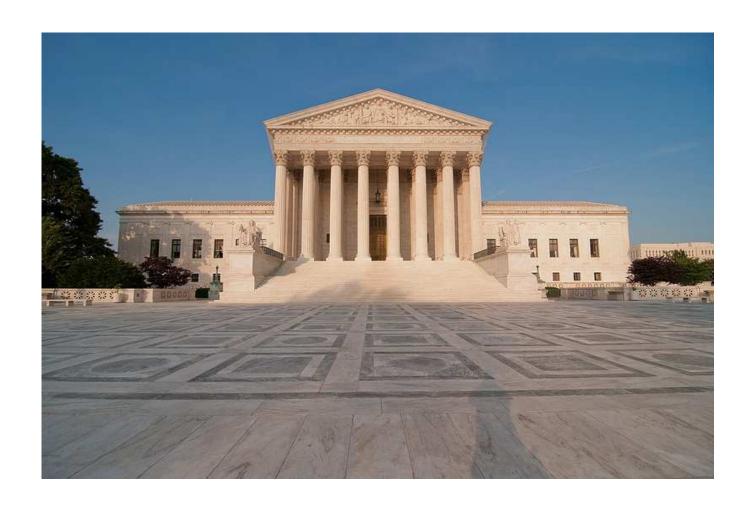
1970: + 5 years

1975: + 7 years

1982: + 25 years

2006: + 25 years

#### 2009



#### Warning

### Northwest Austin Municipal Utility District Number One v. Holder



"A small utility district raising a big question."

Is the preclearance requirement unconstitutional?

A <u>unanimous</u> Court found that Act:

### The Act imposes substantial federalism costs

### "Things have changed in the South."

"Voter turnout and registration rates now approach parity."

# These improvements "stand as a monument" to the Voting Rights Act's success.

But...

#### Past success

**Justify** 

#### **Current restrictions**

## Coverage formula: based on data more than 35 years old

But...

### The Court did not reach the constitutional issue

# Statutory grounds: the utility district could "bail out" from coverage

## Decision sent a message to Congress:

#### Do something—

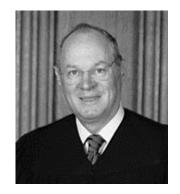
#### or we will

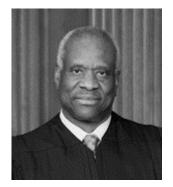
#### But Congress didn't act

#### June 25, 2013





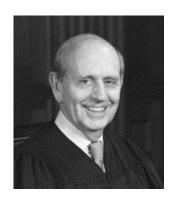






5-4









## Shelby County: Section 4(b) is unconstitutional

### Cites *Northwest Austin* more than 30 times.



# "50 years later, things have changed dramatically."



Despite considerable progress, Congress reauthorized the same requirements "as if nothing had changed."



Coverage test measures by literacy tests (long since banned) and registration and turnout numbers that have since risen dramatically



Congress can only single out states "on a basis that makes sense in light of current conditions." It cannot rely simply on the past.

#### As a result:

### Section 4(b) = unconstitutional

### Section 2 and Section 5 unaffected



# This is well within Congress's authority under the 15<sup>th</sup> Amendment



Extensive record, including about "second-generation" voting barriers (e.g. vote dilution)

#### What's the impact?

(1)

#### Jurisdictions covered by Section 4(b) may no longer need to seek preclearance

(2)

### Could lead to increased # of lawsuits:

### Section 2 remains in full effect

Section 3– "bail in" through litigation mechanism, to place states and subdivisions under preclearance

(3)

#### Congress could re-visit

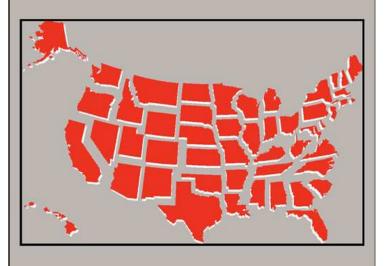
Arizona

V.

Inter Tribal Council of Arizona, Inc.

No. 12-71

#### Register To Vote In Your State By Using This Postcard Form and Guide



For U.S. Citizens

### National Voter Registration Act of 1993:

# "Each State shall <u>accept and</u> <u>use</u> the mail voter registration application form"

#### accept and use

### In 2004, Arizona voters adopted Proposition 200

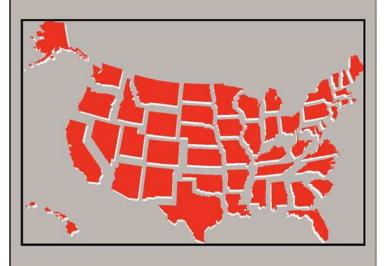
# Voters must present proof of citizenship when they register

County recorders must reject any application not accompanied by satisfactory evidence of citizenship

- (1) a photocopy of the applicant's passport or birth certificate,
- (2) a driver's license number, if the license states that the issuing authority verified the holder's U. S. citizenship,
  - (3) evidence of naturalization,(4) tribal identification, or
  - (5) [o]ther documents or methods of proof . . . established pursuant to the Immigration Reform and Control Act of 1986.

But...

#### Register To Vote In Your State By Using This Postcard Form and Guide



For U.S. Citizens

### Concrete evidence of citizenship

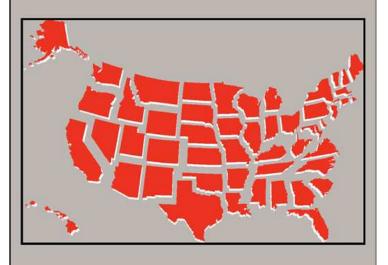
### Concrete evidence of citizenship

### Voter only attests under penalty of perjury

### Tension:

### accept and use

#### Register To Vote In Your State By Using This Postcard Form and Guide



For U.S. Citizens

### Must reject if no:

- (1) a photocopy of the applicant's passport or birth certificate,
- (2) a driver's license number, if the license states that the issuing authority verified the holder's U. S. citizenship,
  - (3) evidence of naturalization,(4) tribal identification, or
  - (5) [o]ther documents or methods of proof . . . established pursuant to the Immigration Reform and Control Act of 1986.

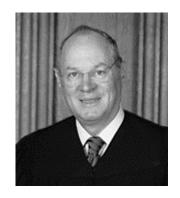
### Basic legal question

# Does the National Voter Registration Act preempt Arizona's proof of citizenship requirement?

### Yes









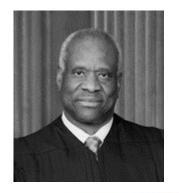




Yes

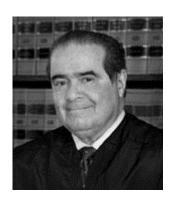


7-2



No





# "Accept and use" fairly susceptible to two interpretations



### (but one is better)

(1)

### Must accept federal form as complete and sufficient

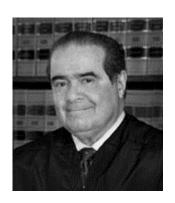
(2)

### Receive form and use it somehow

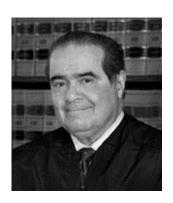
e.g.

Restaurant "accepts and uses" credit cards, even though it requires customers to show matching identification

#### Context



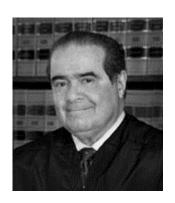
Many federal statutes use similar structure— and they require more than willing receipt



Other provisions of the Act suggest the completed federal form is itself "valid."



# States can create their own forms—but federal form must still be available



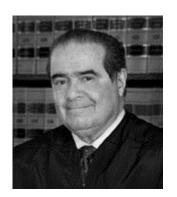
"No matter what procedural hurdles a State's own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available."



## No presumption against preemption under the Elections Clause



"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators."



Federalism concerns are somewhat weaker here:
the States' role in regulating congressional elections has always been subject to federal preemptions

But, Arizona said, . . .

Doesn't this reading of "accept and use" conflict with the Constitution's basic division of authority?

States =
establish voter
qualifications
(including citizenship)

## Feds = regulate time, place, and manner of elections



Yes, but . . .



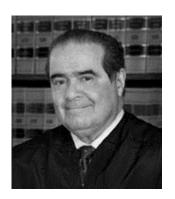
"Arizona is correct that it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications"



### But: Arizona can obtain that information in another way



#### Federal administrative process



May request that the Election
Assistance Commission alter the
Federal Form to include
information the State deems
necessary to determine eligibility

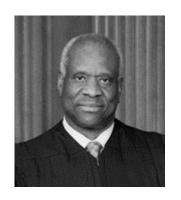


### Can challenge its decision under the Administrative Procedure Act

#### **Dissents**



"Arizona has the independent constitutional authority to verify citizenship in the way it deems necessary."



"It matters not whether the United States has specified one way in which it believes Arizona might be able to verify citizenship; Arizona has the independent constitutional authority to verify citizenship in the way it deems necessary."



## Would apply presumption against preemption



"a State 'accept[s] and use[s]' the federal form so long as it uses the form as a meaningful part of the registration process."

### What's the impact?

(1)

## Limits States' ability to control their own election processes

(2)

## Requires States to engage the federal administrative process

## City of Arlington v. FCC, No. 11-1545

# (Disclosure: BB&K represented the City of Arlington and other local governments)

## FCC can define its own statutory authority over State and local governments

#### Case has two elements

(1)

#### Administrative law

(2)

### Federalism

(1)

#### Who makes federal law?



### But Congress also delegates

(e.g.)

Central Intelligence Agency, Commodity Futures Trading Commission, Consumer Product Safety Commission, Corporation for Public Broadcasting, Defense Nuclear Facilities Safety Board, Election Assistance Commission, Environmental Protection Agency, Equal Employment Opportunity Commission, Export-Import Bank of the United States, Farm Credit Administration, Federal Communications Commission, Federal Deposit Insurance Corporation, Federal Election Commission, Federal Housing Finance, Board Federal Labor Relations Authority, Federal Maritime Commission, Federal Mediation and Conciliation Service, Federal Mine Safety and Health Review Commission, Federal Reserve System United States Consumer Financial Protection Bureau, Federal Retirement Thrift Investment Board, Federal Trade Commission, National Aeronautics and Space Administration, National Archives and Records Administration Office of the Federal Register, National Capital Planning Commission, National Labor Relations Board, National Transportation Safety Board, Nuclear Regulatory Commission, Securities and Exchange Commission, Small Business Administration, Social Security Administration, Tennessee Valley Authority, U.S. Trade and Development Agency, United States Agency for International Development, United States International

## Who decides what the law means?



## The courts do not operate alone in interpreting ambiguous statutes

#### The *Chevron* doctrine

Chevron U.S.A. Inc. v.

Natural Resources Defense

Council, Inc.,

467 U.S. 837 (1984)

## For a statute that an agency administers:

### Follow a two-step process

### Is the statute ambiguous?

## Is the agency's reading permissible?

### If so, court must defer

## But the Court had never decided one fundamental question:

## What if the ambiguous statute concerns . . .

## whether Congress intended the agency to regulate in this area at all

# Should a court defer to <u>that</u> interpretation?

(2)

#### Federalism

47 U.S.C. 332(c)(7)

# Titled "Preservation of Local Zoning Authority."

Statute imposes five limitations on State and local governments regulating cell-tower placement

# But begins with a broad preservation clause:

Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

### except here

### Nothing in this Act

### may limit

### or affect

### Leg. history:

Directed FCC to
terminate its
rulemaking, and leave
(non-RF) disputes to the
courts

# But the FCC relied on its general authority *outside* of Section 332(c)(7)

Made rules interpreting what it means to act on a request within a "reasonable period of time"

FCC claimed "reasonable period of time" was ambiguous and merited *Chevron* deference

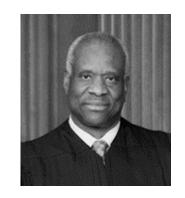
But the FCC claimed that Chevron also applied to whether its general authority extends to Section 332(c)(7)

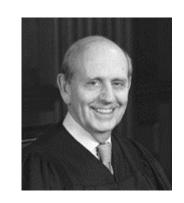
The Supreme Court granted cert. only on the abstract administrative law question: does Chevron apply to jurisdictional determinations?

### Yes









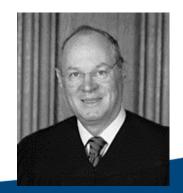


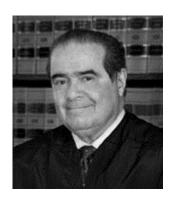


6-3





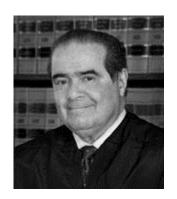




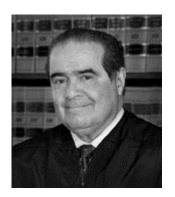
"There is no principled basis for carving out some arbitrary subset of . . . claims as 'jurisdictional.'"



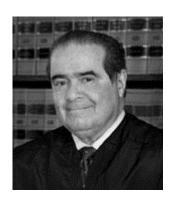
"[E]very new application of a broad statutory term can be reframed as a questionable extension of the agency's jurisdiction'"



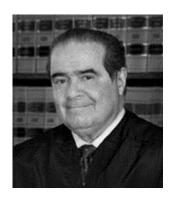
"[J]udges should not waste their time in the mental acrobatics needed to decide whether an agency's interpretation of a statutory provision is 'jurisdictional' or 'nonjurisdictional.'"



A contrary rule would jeopardize Chevron itself and encourage unelected, unaccountable judges to make policy choices.



Refused to apply *de novo* standard to decide whether an agency's general authority extends to the particular ambiguous term



A general grant of rulemaking/adjudicative authority is enough to trigger *Chevron*: will not go provision-by-provision

#### **Dissents**



"My disagreement with the Court is fundamental. It is also easily expressed: A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference."



Administrative state would leave the Framers "rubbing their eyes."



"The appropriate question is whether the delegation covers the 'specific provision' and 'particular question' before the court. A congressional grant of authority over some portion of a statute does not necessarily mean that Congress granted the agency interpretive authority over all its provisions."

### What's the impact?

# More difficult to challenge a federal agency's statutory interpretations

## Koontz v. St. Johns Water Management District, No. 11-1447

### Land use permits

### **Takings Clause**

"nor shall private property be taken for public use, without just compensation"

### Question:

When a State or local government conditions how a person may use his land

## Does it present a constitutional issue?

# A landowner, Mr. Koontz, sought to develop his property

## But he sought to build on wetlands

## Florida had adopted the Water Resources Act

water districts can regulate "construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state."

## A district can condition that construction on

Reasonable conditions

"necessary to assure" that
construction will "not be
harmful to the water
resources of the district."

## Water District offered Mr. Koontz two alternatives:

**(1)** 

# Reduce development size and deed conservation easement to the district

(2)

# Enhance approximately 50 acres of District-owned wetlands elsewhere

### Mr. Koontz refused

# District denied his application

#### Mr. Koontz sued:

Claimed it was "an unreasonable exercise of the state's police power constituting a taking without just compensation."

# Florida Supreme Court said there was no "takings" problem for two reasons:

(1)

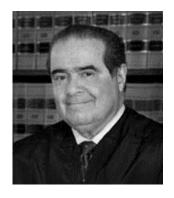
District denied the application—so it, quite literally, did not "take" anything

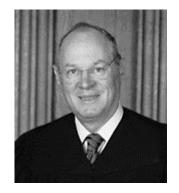
(2)

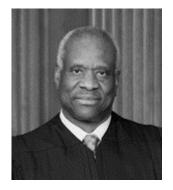
# Only required Mr. Koontz to spend \$—not surrender a property interest

## The Supreme Court reversed





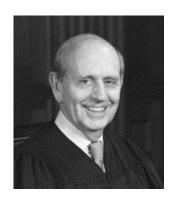






5-4









## "unconstitutional conditions" doctrine:

# The government cannot coerce a person to give up constitutional rights

"Land-use permit applications are especially vulnerable to this type of coercion"

"the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation"

### On the other hand

"[M]any proposed land uses threaten to impose costs on the public that dedications of property can offset." "Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy."



Dolan v. City of Tigard, 512 U.S. 374 (1994) and Nollan v. California Coastal Commission, 483 U.S. 825 (1987) "accommodate both realities."



Government may condition a landuse permit so long as there is a "nexus" and "rough proportionality" between the property that the government demands and the social costs of the applicant's proposal



### Rejected both elements of Florida Supreme Court's holding

(1)



# Doesn't matter that the government denied the application (instead of approving with condition)



### It's true that "nothing has been taken."



#### No "just compensation" required under the Constitution



### But the cause of action may permit other damages

(2)



Requiring applicant to spend \$ is enough—provided that there is "direct link between the government's demand and a specific parcel of real property"



## Otherwise, a permitting authority could too easily evade the *Nollan* and *Dolan* tests



Rejected the view that it will be too difficult to distinguish permit fees from taxes:



Decision "does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners."

#### Dissent



The Court's rule "threatens to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny"



Agrees that a permit denial should be treated the same as a grant with conditions



But strongly disagrees that *Nollan* and *Dolan* extend to cases where the government conditions a permit not on the transfer of real property, but on the payment of \$\$



Requiring a person to pay \$\$ is not a taking requiring just compensation (Eastern Enterprises v. Apfel, 524 U.S. 498 (1998)).



#### Significant practical harms:



The Court "extends the Takings
Clause, with its notoriously
'difficult' and 'perplexing'
standards, into the very heart of
local land-use regulation and
service delivery."



Cities and towns across the nation impose many kinds of permitting fees every day:



e.g.



to mitigate a new development's impact on the community, like increased traffic or pollution



## To cover the direct costs of providing services like sewage or water



To limit the number of landowners who engage in a certain activity, as fees for liquor licenses do.



## All now must meet *Nollan* and *Dolan*'s nexus and proportionality tests



### How is one to tell an improper exaction from a proper tax?



Also stressed that the district made no "demand": it only suggested ways that Mr. Koontz could comply



## This gives District's attorney incentive to deny, without offering alternatives



### "Nothing in the Takings Clause requires that folly."

#### What's the impact?

# Threat of increased litigation about permit conditions



#### Fourth Amendment

"right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

## If there is a "search," it must be "reasonable":

Officers have probable cause to believe they can find evidence of a crime and (usually) judge issues search warrant;



(1)

# When does a dog sniff provide "probable cause" to justify a search?

### Florida v. Harris, No. 11-564

(2)

Does a dog sniff on your porch constitute a "search" at all (and therefore require probable cause)?

### Florida v. Jardines, No. 11-1447

### Florida v. Harris, No. 11-564

# When does a dog sniff provide probable cause to justify a search?

### Officer pulled over driver for expired license plate

### Driver: visibly nervous



#### Unopened can of beer

Aldo: alerted

# Based on the alert, officer concluded he had probable cause to search truck

# Found illegal drugs—but not those that Aldo was trained to find

When driver out on bail: the officer (and Aldo) pulled him over again (brake light)

#### Aldo alerted again

### Officer found nothing

# The defendant moved to suppress the evidence found in his truck:

### Aldo's alert did not give officer probable cause

### The Florida Supreme Court agreed:

### Not enough that the dog was trained and certified

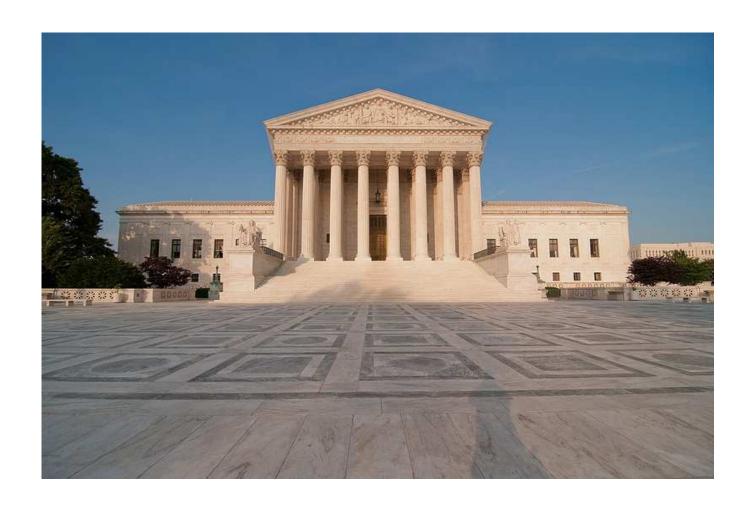
#### State must present:

the dog's training and certification records, an explanation of the meaning of the particular training and certification, field performance records (including any unverified alerts), and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability.

### Court stressed evidence of performance history

#### Under this test:

# An officer who did not keep full performance records could never establish probable cause



### Is all that required?

9-0

No.



The probable cause test asks only whether the facts would lead a reasonable person to belief that contraband or evidence of a crime is present.



### Test cannot be reduced to a precise definition



# Court has consistently used an "all-things-considered" approach



# The Florida Supreme Court's "check list" approach:



# "the antithesis of a totality-of-the-circumstances analysis."



#### Performance tests often have "relatively limited import"



### So the Court provided a framework:



## A court may presume a dog's alert provides probable cause if:



#### bona fide organization has certified dog's reliability; or



## the dog has recently and successfully completed a training program



## Defendant must have opportunity to challenge that evidence



Key question: whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime



"A sniff is up to snuff when it meets that test."



#### Aldo's sniff passed.



### State showed adequate training



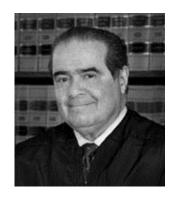
# And the defendant failed to rebut based on Aldo's performance

(2)

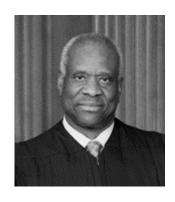
#### Florida v. Jardines, No. 11-1447

Does a dog sniff on your porch constitute a "search" at all (and therefore require probable cause)?

#### Yes







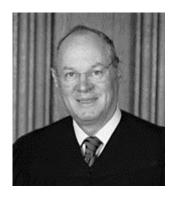


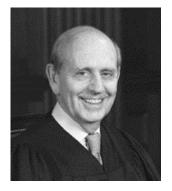


5-4









Police received an unverified tip that marijuana was being grown in defendant's home

### Officer watched home for 15 minutes

## Approached his home with drug-sniffing dog

### Dog caught scent and engaged in "bracketing"

### After dog sniffed base of front door, he sat.

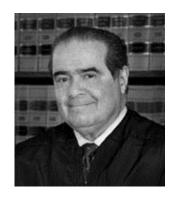
# This is trained behavior indicating the odor's strongest point.

## Based on this, the officer received a warrant to search the residence

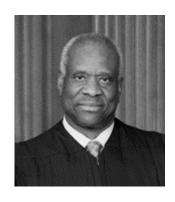
#### Search revealed marijuana

Defendant moved to suppress marijuana plants b/c dog investigation was an unreasonable search

Florida Supreme Court: use of dog was a "search" and was not supported by probable cause







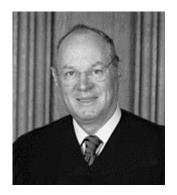




5-4









It was a "search."



This is a straightforward case.



Found search based on "trespass" theory; no need to ask whether "reasonable expectation of privacy."



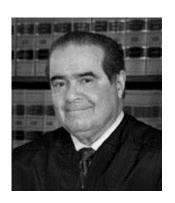
Under the Fourth Amendment, "the home is first among equals."



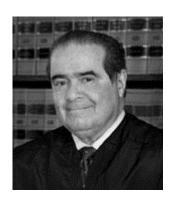
The Court has always ruled that curtilage—area immediately surrounding the house—enjoys the full protection of a "house."



Officers entered that protected space, and engaged in conduct not explicitly or implicitly permitted by the homeowner



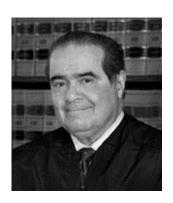
### Homeowners do grant visitors a license



It "does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-ortreaters."



But homeowners do not grant an implicit license to visitors to search with a dog



"To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to — well, call the police."



Because this is a trespass, don't have to ask whether officers violated defendant's "reasonable expectation of privacy."



The Fourth Amendment's propertyrights baseline "keeps easy cases easy."

#### Concurrence









Would find search on both "property rights" and "reasonable expectation of privacy" grounds



"For me, a simple analogy clinches this case."



A stranger carrying super-highpowered binoculars, stands on your porch, doesn't knock, and can see your home's furthest corners.



The stranger has both "trespassed" by exceeding his license, and violated your reasonable expectation of privacy

### Dissent



Not a search.



The Court manufactures a rule of trespass that does not exist.



Visitors have a license to use a walkway to approach a front door and remain there a brief time



#### That's all that occurred here



And a homeowner has no expectation of privacy with respect to odors that can be smelled in places where members of the public may lawfully stand



#### Stresses decision's narrowness:



Because it is based only on trespass, it does not apply when a dog alerts on a public sidewalk or street

### What's the impact?

### Harris:

## States can use dogs without satisfying "inflexible checklist"

### Jardines:

## Clarifies contours of permissible police behavior

Physical intrusions of "houses, papers, and effects" will constitute a "search."

# Investigations in or near a house likely to be subject to closer judicial scrutiny

# Dan's City Used Cars, Inc. v. Pelkey, No. 12-52

Does federal law preempt state-law claims about the storage and disposal of a car after it has been towed? No.

## The case is the story of Robert Pelkey.

During a February snowstorm, Mr. Pelkey had been confined to his bed with a serious medical condition

## His apartment building towed his car

### (Pelkey didn't know)

Soon after, Mr. Pelkey was admitted to the hospital for a procedure to amputate his foot

## During the procedure, he had a heart attack

## He remained in the hospital until April

### (Pelkey still didn't know)

## The towing company, Dan's City, scheduled an auction

## Even after Pelkey asked Dan's not to proceed,

## Dan's disposed of the car—and kept the proceeds

# Pelkey claimed Dan's violated the New Hampshire Consumer Protection Act

# Dan's argued that Pelkey's claims were preempted by federal law.

### Specifically:

# Federal Aviation Administration Authorization Act of 1994

"[A] State ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... with respect to the transportation of property."

### Enacted in 1980

# Deregulates trucking industry (following model of airline industry)

#### Goal:

Ensure that States would not undo federal deregulation with regulation of their own



Pelkey's claims escape preemption.



Claims are not "related to" the service of a motor carrier "with respect to the transportation of property."

"[A] State ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... with respect to the transportation of property."



The state law regulates disposal of vehicles "once their transportation—here, by towing—has ended."



## Claims are also unrelated to a "service" the motor carrier provides its customers



Here, the only "service" ended months before the conduct on which Pelkey's claims are based



Pelkey's claims are far removed from Congress' driving concern.



Pelkey's claims are far removed from Congress's driving concern.



Rejects argument that because the statute lists exceptions to preemption, and those exceptions do not reach these claims, the claims must be preempted.



"Exceptions to a general rule, while sometimes a helpful interpretive guide, do not in themselves delineate the scope of the rule."

### What's the impact?

## Reinforces limits of express preemption

### Thank you for attending.

#### Matthew K. Schettenhelm

Best Best & Krieger LLP

Washington D.C.

Phone: (202) 785-0600

Email: matthew.schettenhelm@bbklaw.com

www.bbklaw.com



#### **Credits**

- Images (creative commons licensed via Flickr):
  - Selma March Trading Cards NPS: http://www.flickr.com/photos/tradingcardsnpsyahoocom/7222972614/
  - Supreme Court Bldg-Mark Fischer: <a href="http://www.flickr.com/photos/fischerfotos/7432022562/">http://www.flickr.com/photos/fischerfotos/7432022562/</a>
  - U.S. Capitol-TexasGOPVote.com: <a href="http://www.flickr.com/photos/60064824@N03/5486339525/">http://www.flickr.com/photos/60064824@N03/5486339525/</a>
  - Police dog-Clotee Allochuku: http://www.flickr.com/photos/clotee\_allochuku/6069598467/
- Presentation style: Lessig (roughly)

