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Will the New Roberts Court Revive a Formalist Approach to Fourth Amendment Jurisprudence?

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Will the New Roberts Court Revive a Formalist Approach to Fourth Amendment Jurisprudence?

ROGER ANTONIO TEJADA*

ABSTRACT

While all Chief Justices leave behind distinctive periods of judicial thought and practice, the quantitative and qualitative data presented in this article show that the Roberts Court in particular stands out in the development of Fourth Amendment precedent. The key cases that shaped the search and seizure doctrine before and during his rise show that, contrary to what many may expect, Chief Justice Roberts will likely oversee limited, pro-defendant decisions that could grant additional legitimacy to the Court's crime-control jurisprudence. On the other hand, the new Justices' voting records and writings suggest that there are several potential coalitions that could form and force his hand, effectively reviving a more formalist approach. Those possibilities, however, do not necessarily signal the end of varied, even unexpected, outcomes for Fourth Amendment cases. Instead, even when one accounts for the new Court's composition, this research suggests that there is in fact no conservative supermajority that will do away with Fourth Amendment protections because of the complex history and nature of the search and seizure doctrine and each Justice's distinctive approach to it. Especially as the Court continues to grapple with the intersection of rapid technological change and the third-party doctrine, Robert's legacy and the future of this new Court may hinge on whether, and how, the Chief Justice adopts a formalist approach to the Fourth Amendment—marking another distinct change in this impactful arena of American jurisprudence.

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INTRODUCTION

Who is on the bench has always influenced the fate of American jurisprudence, and Fourth Amendment cases are no exception. But the distinctive periods in the development of Fourth Amendment precedent follow the identity of the Chief Justice in particular. So then, what mark will Chief Justice Roberts leave on Fourth Amendment jurisprudence? How, if at all, will the new composition of the Court influence him?

Some scholars argue that the Fourth Amendment has been, and may continued to be, irrelevant in the Roberts Court.[1] Others argue that, as the Justices continue to consider the implications of rapidly advancing technologies in the digital age, the Court has actually strengthened Fourth Amendment protections, tracking the doctrinal resurgence of the warrant requirement.[2] This article posits that the creation of a conservative supermajority in the last three years will usher in a new chapter in the Roberts Court's jurisprudence. However, given the fact-intensive nature of Fourth Amendment cases and in light of the Roberts Court's particular approach to the reasonableness doctrine, this ideological divide does not translate into clean predictions. What then does this broader ideological split mean for the Court's reading of the Fourth Amendment? I argue that based on a confluence of

1. *See, e.g.*, Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI.-KENT L. REV. 191, 191–92 (2010).

2. *See, e.g.*, Benjamin J. Priester, *A Warrant Requirement Resurgence? The Fourth Amendment in the Roberts Court*, 93 ST. JOHN'S L. REV. 89, 89–90 (2019).

factors—including the jurisprudence's history, Roberts's own ideological development, his goals for the Court, and the various positions taken by the newest members of the Court—we should expect limited, pro-defendant decisions that grant additional legitimacy to the Court's crime-control jurisprudence.

Part I of this article begins with an abridged history of how previous Courts have shaped Fourth Amendment jurisprudence. This historical section not only lays the foundation of the doctrine itself but also reveals how the inner workings of the Court have influenced its development. Then in Part II, I consider how the Roberts Court influenced Fourth Amendment doctrine in both halves of its first decade, highlighting how the Chief Justice's personal perspective has evolved alongside changes to the Court. Part III offers predictions on what we may expect from our newest Justices—Gorsuch, Kavanaugh, Barrett, and Jackson—in the coming years by analyzing their past positions on Fourth Amendment questions before and during their time on the high court. This article explores in Part IV how these various positions might influence how the Court will collectively address pressing Fourth Amendment questions—focusing on how technological advancements could implicate the third-party doctrine. In the end, the qualitative and quantitative data support the conclusion that given the changes in the Court's composition and the nature of search and seizure doctrine, there is not currently a conservative supermajority that will do away with Fourth Amendment protections as some might expect.

I. A HISTORY OF FOURTH AMENDMENT JURISPRUDENCE

One could argue that the history of the Fourth Amendment resembles a pendulum, changing course as the Court seeks to balance the individual's right to privacy with our society's need for swift, righteous justice.[3] Whether a majority of the Justices favor a more formalist approach, which includes originalist and textualist interpretations, or prefer a case by case approach, which often aligns with purposivist interpretations and seeks to account for the totality of the circumstances, can dramatically shift this balance.[4]

3. *See generally* THOMAS N. MCINNIS, THE EVOLUTION OF THE FOURTH AMENDMENT (2009).

4. *See* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986), https://scholarlycommons.law.case.edu/caselrev; Richard H. Fallon Jr., *Three Symmetries between Textualist and Purposivist Theories of Statutory Interpretation - and the Irreducible Roles of Values and Judgment within Both*, 99 CORNELL L. REV. 685 (2014), http://scholarship.law.cornell.edu/clr/vol99/iss4/1; *Legal Information Institute, statutory interpretation*, CORNELL L. SCH. (June 2023), https://www.law.cornell.edu/wex/statutory_interpretation; *Legal Information Institute, legal formalism*, CORNELL L. SCH. (June 2023),

But no matter one's approach, everything starts with the text. The Amendment, in its entirety, states: "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."[5] While the first century did not see many Fourth Amendment claims that required courts to interpret the meaning of this text, "the 1914 decision *Weeks v. United States*[6] marks the birth of the modern Fourth Amendment."[7] The Court used this case to pronounce the rule that evidence obtained in violation of the Fourth Amendment must be excluded—known today as the exclusionary rule within the warrant requirement.[8] This rule seeks to protect individual liberty by limiting what courts will consider after police impropriety; but this pivotal case also created tensions that strike at the core of the Amendment's jurisprudence.

If the *Weeks* decision created one force on the pendulum, then the concept of reasonableness represents another core, recurring tension in Fourth Amendment jurisprudence that influences this pendulum's path, often in the opposite direction. The legal innovation of considering reasonableness in Fourth Amendment cases dates back to the 1925 decision of *Carroll v. United States*.[9] The Court "adopted the view that the Fourth Amendment did not condemn all warrantless searches, but only those that the justices did not find to be 'reasonable' in the circumstances."[10] Thus *Carroll* arguably forged a nascent connection between reasonableness and a less formalist approach to Fourth Amendment cases.

Each subsequent Chief Justice has had to manage the exclusionary rule, reasonableness, and their associated concepts as the composition of the Court and external pressures changed. During the post-World War I period, Fourth Amendment jurisprudence reflected the internal divisions between Roosevelt and Truman appointees who lacked a shared perspective on civil

https://www.law.cornell.edu/wex/legal_formalism; *see infra* note 7 and 16 (noting the development of the reasonable expectation of privacy test).

5. U.S. CONST., amend. IV.

6. 232 U.S. 383 (1984).

7. Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment Search and Seizure Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 933 (2010).

8. *Weeks*, 232 U.S. at 394–96; *see also* United States v. Robinson, 414 U.S. 218, 224 (1973) ("Because the rule requiring exclusion of evidence in violation of the Fourth Amendment was first enunciated in *Weeks v. United States* . . . it is understandable that all of this Court's search-and-seizure law has been developed since that time.").

9. 267 U.S. 132 (1925).

10. Davies, *supra* note 7, at 937.

liberties issues.[11] "The central issue for search doctrine during this postwar period was the relative importance to be assigned to the *Weeks* warrant requirement versus the *Carroll* reasonableness formulation. Ultimately, the balance in search cases tipped toward a flexible 'reasonableness' interpretation and away from a rigorous search warrant requirement."[12]

Fourth Amendment jurisprudence shifted again with the "due process revolution," largely attributed to the Warren Court. "The left-of-center Warren Court majority … reversed direction and made a number of changes that strengthened search and seizure protections, particularly the search warrant requirement."[13] The Warren Court also extended the exclusionary rule to state proceedings in *Mapp v. Ohio*.[14] The extension of federal standards to less professionalized state agencies "led to a sharp increase in the number of search and seizure cases."[15] Once again the pendulum swung toward protecting individual liberty.

After Justice Goldberg replaced Justice Frankfurter on the Court, the Warren Court had a strong liberal wing. "The Justices then proceeded to 'selectively' incorporate virtually all of the criminal procedure provisions of the federal Bill of Rights."[16] In *Katz v. United States*, the Warren Court extended Fourth Amendment protections to private conversations, and Justice Harlan's concurrence created the "reasonable expectation of privacy" test to determine the reasonableness of Fourth Amendment searches and seizures.[17] A couple of years later, in *Chimel v. California*, the Court limited the scope of a warrantless search if made incident to a lawful arrest in a residence in the area in which the arrestee could potentially reach for a weapon or evidence.[18]

Many consider the Supreme Court's incorporation decisions—applying the Fourth Amendment to the states and granting federal oversight—as prodefendant. However, the Warren Court also "expanded police power or

11. *Id.*

12. *Id.* at 938.

13. *Id.*

14. 367 U.S. 643 (1961).

15. Davies, *supra* note 7, at 938.

16. *Id.* at 984. Here, Davies references *Gideon v. Wainwright*, 372 U.S. 335 (1963) (codifying the right to appointed counsel), *Fay v. Noia*, 370 U.S. 907 (1962) (enlarging federal habeas corpus review of state convictions), *Ker v. California*, 369 U.S. 846 (1962) (underscoring the entire Fourth Amendment applied to the states), *Aguilar v. Texas*, 378 U.S. 108 (1964), *abrogated* by Illinois v. Gates, 462 U.S. 213 (1983), and *Spinelli v. United States*, 393 U.S. 410 (1969) (creating a two-prong standard for probable cause based on an informant's tip to ensure veracity undergirding probable cause) to demonstrate the Warren Court's evolution.

17. *See generally* 389 U.S. 347 (1967); *id*. at 360–61 (Harlan, J., concurring).

18. 395 U.S. 752 (1969).

confirmed expansive police power in significant ways."[19] First, although Chief Justice Warren's opinion in *Terry v. Ohio* extended Fourth Amendment protections to the "stop and frisk" setting, it lowered the standard from probable cause to reasonable suspicion.[20] The Court also "significantly undermined the protections offered by the warrant requirement," facilitated warrantless searches of cars, and destabilized the rationale underpinning the exclusionary rule.[21]

Despite these pro-police decisions, the Warren Court faced political criticism for their "liberal" revolution because some believed that incorporating the Fourth Amendment increased the likelihood that those guilty of committing violent crimes could be "let off."[22] This belief likely gained popularity due to the fact that "almost three-quarters of search and seizure cases in the 1960s were decided in favor of the defendant, coupled with a rise in actual crime."[23]

If the Warren Court was liberal with its Fourth Amendment cases, then the Burger and Rehnquist Courts are its direct counterparts, both well-known for systematically dismantling the Warren Court's perceived gains for individual privacy.[24] Many attribute this shift to President Nixon's appointments strategy, which focused on choosing jurists who opposed the Warren Court's stance on criminal justice and procedure.[25] Nixon's appointment of Burger, "an outspoken critic of the Warren Court's criminal procedure rulings, as Chief Justice[,] makes this point clear. These [crime-control] Justices provided a dependable pro-government majority and weaken[ed] or even eviscerate[ed] the substance of search and seizure standards and largely eliminat[ed] the consequences of unconstitutional intrusions."[26]

This campaign's goals—broadening "reasonableness" to expand law enforcement discretion and undermine earlier protections—largely

19. Davies, *supra* note 7, at 979.

20. 392 U.S. 1 (1968).

21. Davies, *supra* note 7, at 987–90.

22. *Id.* at 938. However, the factual basis for this assertion is contested. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973); *Impact of the Exclusionary Rule on Federal Criminal Prosecutions*, U.S. GEN. ACCT. OFFICE (GGD-79-45) (1979).

23. MICHAEL C. GIZZI & R. CRAIG CURTIS, THE FOURTH AMENDMENT IN FLUX: THE ROBERTS COURT, CRIME CONTROL, AND DIGITAL PRIVACY 13 (2017).

24. Davies, *supra* note 7, at 938.

25. *Id.* at 939, 993 ("In all of these appointments, President Nixon chose nominees known for varying degrees of hostility toward the Warrant Court's pro-defendant rulings. Indeed, one insider has reported that President Nixon had two salient criteria for appointees: opposition to the Warrant Court's criminal procedure rulings and opposition to busing as a remedy for segregated schools.") (citing John W. Dean, THE REHNQUIST CHOICE 57 (2001)).

26. *Id.* at 939 (internal quotations omitted).

succeeded.[27] The government won seventy-nine percent of search and seizure cases in the first several years of the Burger Court.[28] In effect, "instead of requiring state courts to apply higher federal standards, the Burger Court majority [struck] down state rulings that went beyond their view of appropriate federal standards," weakening past incorporation efforts.[29] After Justice Stevens replaced Justice Douglas on the Court, the law-and-order tilt waned significantly and the government-defendant split was nearly even.[30] The Burger Court's pro-government stance intensified, however, when Justice O'Connor replaced Justice Stewart, again providing a reliable fifth pro-government vote.[31] From 1982 through 1986, the government won eighty-one percent of search and seizure cases before the Court.[32] But ultimately, the "conservative majority continued to use the *Katz* reasonable [] expectation of privacy formulation as a way to justify narrowing rather than expanding the scope of Fourth Amendment protections."[33]

This trend only intensified with subsequent appointments. Justice Rehnquist became Chief Justice when Burger retired, and then Antonin Scalia joined the high court.[34] In the next five years, Justices Kennedy, Souter, and Thomas would replace Justices Powell, Brennan, and Marshall respectively as they retired.[35] The Rehnquist Court then enjoyed a consistent conservative majority for nearly two decades.[36] With Rehnquist at the helm, the Court limited Fourth Amendment protections in routine law enforcement practices, broadened police authority, and created various exceptions to cure police misconduct.[37] The Court also "advanced a permissive construction of

27. *Id.*

28. *Id.* at 995.

29. *Id.*

30. *Id.* at 1001.

31. *Id.* at 1003.

32. *Id.*

33. *Id.* (internal marks omitted). The Court eviscerated the need for probable cause by getting rid of the *Aguilar-Spinelli* two-prong standard and adopted a flexible totality of the circumstances approach in *Illinois v. Gates*, 462 U.S. 213 (1983). The Burger Court also created a good faith exception to the exclusionary rule and in short order broadened the good faith exception in *United States v. Leon*, 468 U.S. 897 (1984). The Burger Court also recognized the "inevitable discovery doctrine that would apply where the government proved that the police would have discovered evidence constitutionally had they not previously discovered it unconstitutionally." *Id.* at 1013.

34. *Justices 1789 to Present*, SUP. CT. OF THE U.S. (2023), https://www.supremecourt.gov/about/members_text.aspx (last visited Nov. 20, 2023).

35. *Id.*

36. Davies, *supra* note 7, at 1014.

37. *Id.* at 1016–18.

the reasonable suspicion standard for *Terry* detentions and frisks."[38] Moreover, the "Rehnquist Court majority [] effectively eradicated any vestige of privacy a driver or owner might have in an automobile."[39] The resulting search-and-seizure case law shows that the government won seventy-seven percent of cases before the Court.[40]

By the time President George W. Bush appointed John Roberts to Chief Justice in September 2005, the exclusionary rule had become more of an exclusionary exception.[41] The Court's reasonableness doctrine watered down probable cause and distorted the warrant requirement to something more akin to a qualified suggestion. This historical overview shows that, as expected from a legal realist frame, "the direction of search rulings has shifted as the ideological outlook of the swing vote justice has shifted."[42] With this background on search-and-seizure jurisprudence in mind, as well as the impact of past Justices' ideological viewpoints on the shape that the jurisprudence takes, we can now examine the impact of the Roberts Court on Fourth Amendment doctrine to date.

II. THE FOURTH AMENDMENT IN THE *"EARLY"* ROBERTS COURT

A. The First Five Years: 2005 to 2010

As an attorney in the Reagan White House, John Roberts "was hard at work on what he called, in a memorandum, the campaign to amend or abolish the exclusionary rule."[43] It was unclear, however, if this enthusiasm would drive Roberts' Fourth Amendment jurisprudence, or that of the entire Court. The first few years made matters only more confusing as "the Roberts Court granted few petitions for certiorari to review cases addressing the Fourth Amendment. This lull contrasts with the Rehnquist era, when it was not unusual for the Court to have six or more cases on the Fourth Amendment every year."[44] Regardless, the Court retained its pro-government tilt even as Roberts replaced Chief Justice Rehnquist and Justice Alito then replaced

38. *Id.* at 1019.

39. *Id.* at 1020.

40. *Id.* at 1015.

41. *John G. Roberts's biography in Current Members*, SUP. CT. OF THE U.S. (2023), https://www.supremecourt.gov/about/biographies.aspx (last visited Nov. 20, 2023).

42. Davies, *supra* note 7, at 1036.

43. Wayne R. Lafave, *The Smell of* Herring*: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. & CRIMINOLOGY, Summer 2009, 757, 759 fn.14 (cleaned up) (citing Adam Liptak, *Supreme Court Edging Closer to Repeal of Evidence Ruling*, N.Y. TIMES (Jan. 31, 2009) at A1).

44. Clancy, *supra* note 1, at 191.

Justice O'Connor.[45] These replacements signaled that the chipping away would continue. And it did.

The Court decided its first Fourth Amendment case in the Roberts Court era, *Georgia v. Randolph*, for the defendant.[46] The majority held that without a search warrant, the police could not constitutionally search a house when one resident objects while another consents.[47] It is important to note, however, that Chief Justice Roberts penned his first written dissent in this case, balking at the majority's reasoning.[48] Roberts was uneasy with the majority altering a "great deal of established Fourth Amendment law" and creating an "arbitrary rule."[49] While *Randolph* was pro-defendant, this dissent partially confirmed the hypothesis that Roberts, and the Roberts Court, would be "generally pro-government in criminal procedure cases," and embrace a more formalist approach.[50]

Shortly thereafter, the Court confirmed its preference for law-and-order with its sweeping decisions in *Hudson v. Michigan*[51] and *Herring v. United States*.[52] In *Hudson*, "the Court affirmed the Michigan State Court of Appeals refusing to exclude evidence gathered in legally questionable circumstances."[53] The police officers violated *Hudson*'s Fourth Amendment rights when they failed to abide by the knock-and-announce rule while executing a search warrant.[54] Despite this violation, the majority opinion written by Justice Scalia determined "that a violation of the knock-and-announce rule does not require suppression of evidence discovered in the search."[55] He concluded that the interests protected by the rule had "nothing to do with the seizure of evidence."[56] In that sense, *Hudson* seems to put forth just one

45. GIZZI & CURTIS, *supra* note 23, at 83.

46. 547 U.S. 103 (2006).

47. *Id.* at 106.

48. *See* David I. Hudson, Jr., *Fourth Amendment Case Shows Cracks in the Court: Chief Justice Calls Majority's Ruling 'Random' and 'Arbitrary'*, 5 No. 12 ABA J. E-REPORT 2 (2006) [hereinafter David Hudson].

49. *Randolph*, 547 U.S. at 141–42 (Roberts, C.J., dissenting).

50. David Hudson, *supra* note 48.

51. 547 U.S. 586 (2006).

52. 555 U.S. 135 (2009).

53. TRACEY MACLIN, THE SUPREME COURT AND THE FOURTH AMENDMENT EXCLUSIONARY RULE 314 (1st ed. 2012).

54. GIZZI & CURTIS, *supra* note 23 at 8; *Hudson*, 547 U.S. at 588–89 (2009).

55. ROBERT M. BLOOM & MARK S. BRODIN, CRIMINAL PROCEDURE: THE CONSTITUTION AND THE POLICE 5 (9th ed. 2020).

56. The Court enumerated the following interests: preventing "violence in supposed self-defense by the surprised resident," giving the suspect "the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry," and giving residents "the 'opportunity to prepare themselves for' the entry of the police." *Hudson*, 547 U.S. at 594.

more exception to the myriad already attached to the exclusionary rule. However, the Court went further when it suggested that other remedies—such as access to section 1983 civil rights suits and political pressure to discipline police departments—may provide viable, if not outright superior alternatives, thus undermining the very need for the exclusionary rule altogether.[57] A couple of years later, the *Herring* Court "permitted the admission of illegally obtained evidence when 'all that was involved was isolated [police] carelessness,'" thus carving out an explicit exception for a wide range of police misconduct.[58] This decision broadened the good faith exception to the exclusionary rule and implied that to exclude evidence one would essentially have to prove outright malfeasance by police officers.[59] Some prominent scholars decried the *Herring* decision, asserting that the Court had "elevated the social costs of suppression, particularly the risk of releasing criminals into society to the center of an analysis now on a collision course with the suppression remedy."[60] Thus "Supreme Court watchers anticipate[d] a fresh assault on the Fourth Amendment exclusionary rule by the Roberts Court," in the wake of these decisions.[61]

Altogether, "[i]t [was] not surprising, then, that many early Roberts Court search and seizure decisions were entirely consistent with the Rehnquist Court's decisions. In its first five terms, 73 percent of the fifteen search and seizure decisions favored law enforcement interests."[62] The few pro-defendant cases like *Georgia v. Randolph* "fit the model of being corrective measures."[63] In other words, instead of expanding Fourth Amendment protections, the rulings from this era are very narrow, only limiting aggressive policing when it has gone a step too far.[64] A perfect example is

57. *Id.* at 597–98; Russell L. Weaver, *The Fourth Amendment, the Exclusionary Rule, and the Roberts Court: Normative and Empirical Dimensions of the Over-deterrence Hypothesis*, 85 CHI.-KENT L. REV. 209, 209 (2010); David Hudson, *supra* note 48, at 597 ("We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost a half century ago.").

58. *See* Weaver, *supra* note 57, at 209; *Herring*, 555 U.S. at 148 (quoting People v. Defore, 242 N.Y. 13, 21, (1926) ("In such a case, the criminal should not 'go free because the constable has blundered.'")).

59. *See* Weaver, *supra* note 57, at 209.

60. BLOOM & BRODIN, *supra* note 55, at 5.

61. *Id.*

62. GIZZI & CURTIS, *supra* note 23, at 8, 83.

63. *Id.* at 16; *see also id.* at 14 ("As police are given more authority and Fourth Amendment protections are diminished, they tend to use that power to aggressively combat crime. When this increase in discretionary authority is combined with a get tough on crime political environment and a war on drugs, the police tend to push the boundaries of the Fourth Amendment. Sometimes the Court grants the desired accommodations, but occasionally, when it seems like the system is being pushed too far, the Court responds with decisions that provide a check on the system.").

64. *Id.* at 14.

Arizona v. Gant.[65] In ruling for the defendant, the *Gant* Court walked back twenty-eight years of precedent based on *New York v. Belton*—which permitted a vehicle search, including any containers found inside like luggage or clothing, after any arrest to ensure officer safety and the preservation of evidence.[66] The officers at issue in *Gant* did not even pretend either of those enumerated reasons existed; instead, the rationale given by the arresting officer was simply: "Because I can."[67] By limiting *Belton*'s bright-line rule, the Court corrected a glaring hole in search-and-seizure jurisprudence, "bringing vehicle searches incident to arrest back in sync with their original rationale."[68]

But given the structure of Fourth Amendment jurisprudence and the fact-intensive nature of analysis in this context, we should still expect a few pro-defendant cases even from the most conservative, pro-crime-control courts—as evidenced by similar defendant win rates in the Burger and Rehnquist Courts. That said, the Roberts Court in its first five years "expanded the good faith exception to the exclusionary rule and [] decided two cases strengthening the exigent circumstance exception for entry to a home . . . The jurisprudence of [crime-control] was still in ascendance."[69] The key cases that mark this period, however, cannot fully explain, or even predict, the changes in the years to come.

B. The Next Five Years: 2010 to 2015

"The Court's approach to the Fourth Amendment has appeared to be in a state of uncertainty since 2010, as almost half of its search and seizure decisions have favored the defendant, after more than a quarter-century where 75 percent of cases have favored the state."[70] However, this statistical shift does not tell the whole story. Crime control continued to be the thrust of the Court's Fourth Amendment jurisprudence. That said, there were important changes—including several key appointments, these Justices' ideologies, and technological innovations—that explain this near parity in search and seizure cases.

Notable shifts that emerge between 2010 and 2015—specifically the defendants' forty-seven percent win rate in the twenty-one search and seizure cases granted certiorari during this period—came on the heels of

65. 556 U.S. 332 (2009).
66. 453 U.S. 454, 461–63 (1981).
67. GIZZI & CURTIS, *supra* note 23, at 16.
68. *Id.* at 17.
69. *Id.* at 83.
70. *Id.* at 7.

Justices Sotomayor and Kagan joining the Court.[71] One explanation may be the fact that Justice Sotomayor is slightly more liberal than Justice Stevens, whom she replaced.[72] Justice Souter's replacement, Justice Kagan, is considerably more liberal than her moderate predecessor.[73] You can see these ideological differences in their voting patterns: for example, Souter voted with defendants forty-four percent of the time compared to Kagan's seventy-one percent.[74] Even though they joined Ginsburg and Breyer on the liberal wing of the Court, Justices Kagan and Sotomayor's statistics did not change the five-member conservative majority's pursuit of crime-control jurisprudence.

And to some degree, that conservative coalition maintained its influence by insulating many law enforcement actions from the reach of the exclusionary rule. The Court in *Davis v. United States* held that the exclusionary rule did not apply where police conducted a search relying on then binding, but subsequently overruled judicial precedent.[75] While the holding was pro-government, the opinion's reasoning and tone underscored the continuation of crime-control jurisprudence. *Davis* "provided a ringing endorsement" of *Herring*:[76] "Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield 'meaningfu[l]' deterrence, and culpable enough to be 'worth the price paid by the justice system.'"[77] This case thus suggested that the Court would soon greatly limit or outright abolish the exclusionary rule altogether, as previously discussed in *Herring*.[78] Indeed, there were a string of cases that seemed to herald this conclusion. The Court in *Maryland v. King* held that police may collect DNA samples from arrestees at the time of the arrest without a judicial warrant.[79] Then, a year later, the Court decided in *Heien v. North Carolina* that even though an

71. *Id.* at 8.

72. *Id.* at 18 ("Justice Sotomayor is slightly more liberal than Justice Stevens, who ruled for defendants in 67 percent of cases. In her first six years, Sotomayor [was] on the liberal side in 71 percent of cases.").

73. *Id.* at 18.

74. *Id.*

75. 564 U.S. 229, 240 (2011).

76. Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183, 1189 (2012).

77. *Davis*, 564 U.S. at 240 (quoting *Herring*, 555 U.S. at 144).

78. Davies, *supra* note 7, at 1189; *see also* Gary Kowaluk, *From the Legal Literature: How the Roberts Court is Limiting Use of the Exclusionary Rule*, 51 CRIM. L. BULLETIN 1, Art. 8, at 314 (Winter 2015) ("[T]he *Davis* and *Herring* decisions turned the exclusionary rule from an automatic remedy for constitutional violations to one which requires two separate analyses, one to see if there was a rights violation, and the other to determine the level of culpability of the police in making the rights violation…the Court has decoupled the once automatic application of the exclusionary rule into rights and remedies analyses.").

79. 569 U.S. 435 (2013).

officer misunderstood the applicable law when he made a traffic stop, a court may nevertheless find that the stop was reasonable.[80]

But there was another significant, and unexpected, change on the Court that limited this crime-control impulse: Justice Scalia. As a "consistent, reliable conservative during the Rehnquist Court, Scalia ruled for the state in 79 percent of search and seizure cases," but between 2010 and 2015 he only voted for the government half the time.[81] Scalia's brand of originalism caused this change; he pushed to ensure that when the Court read the Fourth Amendment, its interpretations were compatible with understandings held at the Founding. Scalia authored "stinging rebukes of the Court's crime-control mentality and logic," and his voting patterns may seem "both unpredictable and idiosyncratic," to some outside observers.[82] But in fact, Scalia voted with the majority in nine out of the ten pro-defendant rulings in this period.[83]

Scalia's shift during this second half of the Roberts Court put established coalitions in flux. Justice Scalia—often joined by Ginsburg, Sotomayor, and Kagan—only needed to get one additional vote to safeguard Fourth Amendment protections. And, depending on the specific facts, this coalition could secure a fifth vote from Justices Thomas, Breyer, Roberts, or Kennedy.[84] *Florida v. Jardines* exemplifies this phenomenon.[85] Justices Thomas, Ginsburg, Sotomayor, and Kagan joined Scalia's majority opinion in which he argued that "the original understanding of the Fourth Amendment was violated when there was a physical intrusion into a constitutionally protected place" such as one's porch.[86] This case which turned on a diverse coalition supporting a largely originalist interpretation suggests that "one must pay attention to the small-group dynamics of the Court to understand its decisional output," even if that does not tell the whole story.[87]

The fraught intersection of technology with the Fourth Amendment offers another likely explanation for the Court's shift to near parity in its holdings. In *United States v. Jones*[88] and *Riley v. California*,[89] a unanimous court held for the defendants and hinted at some changes to the Court's Fourth Amendment jurisprudence. Unlike other decisions that appear to be

80. 574 U.S. 54 (2014).
81. Davies, *supra* note 7, at 1189.
82. GIZZI & CURTIS, *supra* note 23, at 18–19.
83. *Id.* at 88.
84. *Id.*
85. 569 U.S. 1 (2013).
86. GIZZI & CURTIS, *supra* note 23, at 19.
87. *Id.* at 17.
88. 565 U.S. 400 (2012).
89. 573 U.S. 373 (2014).

corrective measures meant to restrain police when they push the limits of the Fourth Amendment too far, the Court in these two cases tentatively explored a potential rebalancing between individual privacy and the government's crime-control interest.

In *Jones*, the Court held that installing a GPS tracking device on defendant Jones's vehicle and following him for a month, all without a warrant, constituted an unlawful search under the Fourth Amendment.[90] The majority opinion authored by Justice Scalia and accompanying concurrences show how, despite reaching the same conclusion, the Court still could not find consensus around a reasonableness focused or formalist approach to resolve tensions surrounding the search and seizure doctrine. Scalia emphasized an originalist formulation of the Fourth Amendment which provided protections against trespass onto personal property. As the controlling vote, Justice Sotomayor wrote in her concurrence that the Fourth Amendment applied both when there was a reasonable expectation of privacy and where there was a physical trespass. Justice Alito's concurrence by comparison focused on the privacy interest, but disagreed with Scalia's originalist formulation requiring trespass to property. If we take a step back, then we can see that these writings—in addition to exposing continued disagreements on proper interpretation—also collectively do not set up a new ideological spectrum. Instead, this reconfiguration appears more akin to musical chairs with different voices that continue to complicate the Court's attempts to keep up with technological change.

In the next case, *Riley*, the Court unanimously agreed that the Fourth Amendment did not permit a warrantless search of a cell phone incident to arrest. Roberts offered a "sweeping endorsement of digital privacy," in his majority opinion and stressed the pervasiveness and immense storage capacity of cell phones as a key reason to heighten the privacy interest.[91] He wrote that "[a] cell phone search would typically expose to the government far more than the most exhaustive search of a house."[92] The Court reached this holding notably untethered to Scalia's originalist trespass doctrine, the long-established *Katz* expectation of privacy, or Scalia's "further evidence of the crime" limitation on searches incident to arrest.[93] This new reasoning implied that digital privacy was sufficiently anomalous such that it failed to fit into any of the Court's then current conceptions of the Fourth Amendment. Despite different formulations of the correct analytical approach, the

90. *Jones*, 565 U.S. at 400.

91. GIZZI & CURTIS, *supra* note 23, at 98; *see also* Alan Butler, *Get a Warrant: The Supreme Court's New Course for Digital Privacy Rights after* Riley v. California, 10 DUKE J. CONST. L. & PUB. POL'Y 45, 51, 54–55 (2015).

92. *Riley*, 573 U.S. at 396.

93. GIZZI & CURTIS, *supra* note 23, at 98.

message was clear: there is something different about cases involving advanced technology that Justices across the political spectrum find suspect. Perhaps, "Fourth Amendment cases involving the application of technology are responsible for some of the tension within the Roberts Court."[94] If that is indeed the case, then this tension will likely grow as both individuals and police agencies increasingly rely on technology, a trend that will only further complicate the Roberts Court's efforts to modernize Fourth Amendment jurisprudence.

III. THE ROBERTS COURT FROM 2016 TO 2022 AND BEYOND

Before drilling down on predictions for how the new Justices may think about and vote on Fourth Amendment cases, there are some emerging trends worth highlighting. These data points—looking at the Court as a whole in addition to each new Justice's take on the Fourth Amendment—show that there is no conservative supermajority that will do away with Fourth Amendment protections, even when one accounts for the Court's new composition and the nature of search and seizure doctrine.

A. The Court as a Whole

"[T]he Roberts Court appears to be sending mixed messages in its Fourth Amendment case law, sometimes seeming to depart significantly from Rehnquist Court precedents, but in other cases in the same term ruling in a way that is completely consistent with the jurisprudence of crime-control."[95] The overall win rates for defendants may have increased in the early years of the Roberts Court, but "there is no clear evidence of a new pattern favoring the individual."[96] Quite to the contrary, the crime-control regime created by the Burger and Rehnquist Courts has solidified. Moreover, save for cases involving technology, "[m]any of the [pro-defendant] decisions of the Rehnquist and Roberts Courts have [merely] served as a corrective measure to restore balance within the framework of the jurisprudence of crime-control."[97]

But again there is more to this story. Despite conservatives' consistent majority, the Roberts Court's pro-defendant ruling rate has continued to grow since the beginning of the 2016 term.[98] In the eleven cases presided

94. *Id.* at 8.

95. *Id.* at 12.

96. *Id.* at 7.

97. *Id.* at 15–16.

98. The Supreme Court Database's modern data set corroborates this trend. Users must filter by range of terms and Fourth Amendment. *See* Harold J. Spaeth, et al., *2022 Supreme Court*

over in this period, the Court has held for defendants sixty-four percent of the time.[99] Such a high win rate over that period has not existed since the highly liberal Warren Court.[100]

However, the Roberts Court has not really surprised many court watchers because, as expected, most of its liberal holdings have been corrective measures that are small and technical. For example, in *Manuel v. City of Joliet*, the Court clarified that Fourth Amendment protections continue throughout the legal process of a criminal case, including pretrial detention.[101] The holding in that sense was more of a due process clarification than an expansion of substantive Fourth Amendment rights.[102]

Not all pro-defendant cases have been so limited in scope though. In *Carpenter v. United States*, a divided court held that the government's warrantless acquisition of the defendant's cell-site location information violated his Fourth Amendment right against unreasonable searches and seizures.[103] Chief Justice Roberts wrote the majority opinion, which Justices Ginsburg, Breyer, Sotomayor, and Kagan joined. He first acknowledged that the Fourth Amendment protects both property interests and reasonable expectations of privacy, a statement that nods to both wings of the Court and manifests the Chief Justice's consensus building focus.[104] Notably, the Court declined to extend the third-party doctrine, which says there is no reasonable expectation of privacy in information disclosed to another party besides the defendant and the government.[105] The majority instead reasoned that the third-party doctrine should not apply to cell-site location information due to the highly intrusive nature of information it could share—echoing the rationale from *Riley*[106]—and because at least in this case there was no proof that the individual took repeated, affirmative acts to expose that information.[107]

Database, WASH. UNIV. SCH. OF L., Release 1 (2022), http://www.supremecourtdatabase.org (last visited Nov. 16, 2023) [hereinafter Supreme Court Database].

99. *Id.*

100. *Id.*

101. 580 U.S. 357, 368 (2017).

102. This distinction comports with the idea that "[w]hile the primacy of the jurisprudence of [crime-control was] not in jeopardy, there [were] due process challenges emerging in how the Court interprets the Fourth Amendment." GIZZI & CURTIS, *supra* note 23, at 12.

103. 138 S.Ct. 2206 (2018).

104. *Compare id.* at 2213–14 (asserting that there is "no single rubric [that] definitively resolves which expectations of privacy are entitled to protection."); *with id.* at 2214 (stating that the Court still paid "attention to Founding-era understandings [] when applying the Fourth Amendment to innovations in surveillance tools.").

105. *Id.* at 2219–20.

106. *See Riley*, 573 U.S. at 396.

107. *Carpenter*, 138 S.Ct. at 2220.

The remaining Justices each filed their own dissent to offer their formalist interpretations. Like in many other lines of jurisprudence, Justices Thomas, Alito, and Gorsuch utilized a Founding era-focused approach centered on the "original understanding" of the Fourth Amendment.[108] Justice Alito also took issue with the court "allow[ing] a defendant to object to the search of a third party's property," and chided the majority's textual analysis by calling it "revolutionary."[109] Justice Thomas and then newly appointed Justice Gorsuch specifically advocated in their dissent for the Court to return to the property-based approach to the Fourth Amendment that Justice Scalia had revitalized in *Jones*.[110]

Carpenter confirms that the Court and the Chief Justice in particular approach technology cases quite differently. Unlike in past technology cases—such as *Jones*, in which a formalist interpretation prevailed, or *Riley* with its untethered interpretative approach—*Carpenter* was not unanimous: only Roberts joined his liberal counterparts to support a hybrid approach. Indeed, *Carpenter* suggests that Chief Justice Roberts's general disposition to create cohesion and build goodwill between Justices on different ends of the ideological spectrum may have motivated his decision.[111] Similarly, the Chief Justice's focus on preserving the legitimacy of the Court may help explain this lineup.[112]

Regardless, *Carpenter* underscores the importance of the Court's composition and internal dynamics. After the Court lost Justice Scalia's distinct voice in the Fourth Amendment debate, it was unclear how or whether any pro-defendant coalitions could form.[113] But at least in the area of digital

108. *Id.* at 2238–39 (Thomas, J., dissenting) (arguing that privacy "was not part of the political vocabulary of the [founding]. Instead, liberty and privacy rights were understood largely in terms of property rights.") (internal quotations omitted); 2247, 2255 (Alito, J., dissenting); 2264–68 (Gorsuch, J., dissenting).

109. *Id.* at 2247.

110. *See id.* at 2235–47 (Thomas, J., dissenting); 2262–72 (Gorsuch, J., dissenting).

111. *See* Jeffrey Rosen, *Roberts's Rules*, THE ATLANTIC (Jan./Feb. 2007) ("People naturally tend to focus on the controversial cases, but Roberts says he has tried to promote unanimity in less high-profile cases, too . . . Roberts said he intended to use his power to achieve as broad a consensus as possible.").

112. See *id.* ("Roberts praised justices who were willing to put the good of the Court above their won ideological agendas . . . Roberts, said, 'it would be good to have a commitment on the part of the Court to acting as a Court, rather than being more concerned about the consistency and coherency of an individual judicial record.'"); *see also id.* ("Roberts was proud of his relative success in encouraging unanimity, especially in less visible cases . . . 'I think it's bad, long-term, if people identify the rule of law with how individual justices vote.").

113. By 2010, Justice Scalia "authored fifteen majority opinions and has dissented or concurred with an opinion fifteen times. Scalia's majority opinions, like Rehnquist's, could be used as a broad survey of modem Supreme Court search-and-seizure jurisprudence and are often known by their names: *Hicks* [*v. Ferreyra*, 64 F.4th 156 (2023)], *Griffin* [*v. Wisconsin*, 483 U.S. 868 (1987)], *Murray* [*v. United States*, 487 U.S. 533 (1988)], [*Illinois v.*] *Rodriguez* [497 U.S.

privacy, Chief Justice Roberts has, at least at times, taken up the mantle of unpredictable coalition building. Now we can turn to the question of how our newest Justices may influence the Court's Fourth Amendment jurisprudence and affect its internal dynamics.

B. The Court's Newest Justices

1. Justice Gorsuch

Justice Gorsuch is overall slightly less conservative than Scalia, whom he replaced, but that ideological label does not always explain his views on the Fourth Amendment. His solo dissent in *Carpenter*, which focused on the original understanding of the provision, and his joint concurrence a year later in *Byrd v. United States* suggest that he may prefer a more consistent formalist approach.[114] The Court in *Byrd*, by analogizing to *Jones* and applying the reasonable expectation of privacy test, unanimously held that a driver of a rental car, who has the renter's permission to drive it but is not listed as an authorized driver, does have a reasonable expectation of privacy against government searches of the vehicle.[115] Justice Gorsuch joined Justice Thomas's concurrence to reassert Scalia's trespass theory based on the specified property interests articulated in the Amendment, arguably a hybrid textualist and originalist perspective.[116]

But then only a few days later, instead of signing onto Justice Alito's dissent which focused on precedent or Justice Thomas's originalist concurrence, Justice Gorsuch joined the majority in *Collins v. Virginia*, which ruled in favor of the defendant and declined to extend the automobile exception to the warrant requirement.[117] The justification for maintaining this restriction? "Expanding the scope of the automobile exception in this way would both undervalue the core Fourth Amendment protection afforded to the home and its curtilage and 'untether' the automobile exception 'from the justifications

177 (1990)], [*California v.*] *Hodari D.* [499 U.S. 621 (1991)], *Vernonia School District* [*v. Acton*, 515 U.S. 646 (1995)], *Whren* [*v. United States*, 517 U.S. 806 (1996)], [*Wyoming v.*] *Houghton* [526 U.S. 295 (1999)], *Kyllo* [*v. United States*, 533 U.S. 27 (2001)], *Devenpeck* [*v. Alford*, 543 U.S. 146 (2004)], *Hudson,* [*United States v.*] *Grubbs* [547 U.S. 90 (2006)], *Scott v. Harris* [550 U.S. 372 (2007)], and *Virginia v. Moore* [553 U.S. 164 (2008)]. His profound influence is undeniable: in *Hodari D.*, he redefined the concept of a seizure. In *Kyllo*, he broadly attacked the expectation of privacy test and laid the groundwork for redefining what interests are protected by the Amendment. In *Bond* and *Hicks*, he clarified the concept of a search; in *Hudson* [], he broadly attacked and undermined the exclusionary rule. In short, Scalia has crafted majority opinions that have fundamentally influenced most aspects of Fourth Amendment jurisprudence." Clancy, *supra* note 1, at 194.

114. 138 S.Ct. 1518 (May 14, 2018).

115. *Id.* at 1522.

116. *Id.* at 1532 (J., Thomas, concurring).

117. *Compare id.* at 1663, 1671–72 (May 29, 2018); *with id.* at 1675 (J., Thomas, concurring); *and id.* at 1680 (J., Alito, dissenting).

underlying' it," a precedential, but notably purposivist argument aligned with the reasoning in *Riley*.[118] Even though he may add a consistent conservative voice to the Court's Fourth Amendment debate, Justice Gorsuch's interpretative approach—sometimes drawing on an original understanding approach that harkens back to arguments from Justice Scalia's writings, textualism, and even purposivism—may still lead to pro-defendant or pro-government rulings.[119]

2. Justice Kavanaugh

President Trump appointed Justice Kavanaugh to replace Justice Kennedy—a Justice who many saw as a moderate, conservative voice on the Fourth Amendment because he often served as the swing vote until Scalia's change in jurisprudence.[120] Though he was a swing vote, Justice Kennedy voted for the state seventy-five percent of the time during the Rehnquist Court and seventy-two percent of the time when he was part of the Roberts Court.[121] Will Justice Kavanaugh be more liberal, more conservative, or on par with Justice Kennedy? Ultimately, Kavanaugh's record on the D.C. Circuit Court of Appeals and on the Court thus far shows that he will closely align with the views of Justice Kennedy, for whom he clerked.[122]

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118. *Id.* at 1671–72 (citing *Riley*, 134 S.Ct. at 2485).

119. Amy Howe, *Gorsuch and the Fourth Amendment*, SCOTUSBLOG (Mar. 17, 2017), https://www.scotusblog.com/2017/03/gorsuch-fourth-amendment/; Damon Root, *Gorsuch Pushes Stronger Fourth Amendment Protections*, REASON (July, 2021), https://reason.com/2021/06/10/gorsuch-pushes-stronger-fourth-amendment-protections/. *But see* Sophie J. Hart & Dennis M. Martin, *Judge Gorsuch and the Fourth Amendment*, 69 STAN. L. REV. ONLINE 132, 138 (2017) ("True, Judge Gorsuch has adopted Justice Scalia's bright-line trespass test for searches of personal property…Conversely, Judge Gorsuch seems not just to tolerate but to prefer case by case reasonableness inquiries when it comes to stop and frisks."); Jacob Sullum, *SCOTUS Contender Amy Coney Barrett's Mixed Record on Criminal Cases*, REASON (Sept. 21, 2020), https://reason.com/2020/09/21/scotus-contender-amy-coney-barretts-mixed-record-in-criminal-cases/ ("Neil Gorsuch, the judge President Donald Trump picked to replace Scalia, has shown an even stronger inclination to uphold the rights of the accused and to question the conduct of police officers and prosecutors, repeatedly breaking with fellow conservatives such as Samuel Alito and Clarence Thomas.").

120. *See* Amanda Laufer, *The Pendulum Continues to Swing in the Wrong Direction and the Fourth Amendment Moves Closer to the Edge of the Pit: The Ramifications of* Florence v. Board of Chosen Freeholders, 42 SETON HALL L. REV. 383 (2012) (citing THOMAS N. MCINNIS, THE EVOLUTION OF THE FOURTH AMENDMENT (2009)); and John D. Castiglione, Hudson *and* Samson: *The Roberts Court Confronts Privacy, Dignity, and the Fourth Amendment*, 68 LA. L. REV. 63, 107 (2007) (referring to Justice Kennedy as "the wavering ally.")).

121. *See* Supreme Court Database, *supra* note 98.

122. *See* Orin Kerr, *Judge Kavanaugh on the Fourth Amendment*, SCOTUSBLOG (July 20, 2018), https://www.scotusblog.com/2018/07/judge-kavanaugh-on-the-fourth-amendment/ ("With that said, it's also worth noting that Rehnquist's views in Fourth Amendment cases also weren't too far from that of Kennedy, the justice for whom Kavanaugh clerked and whose place Kavanaugh has been nominated to fill.").

Given the Court's decades-long crime-control jurisprudence, it is not surprising that many cases seen before lower courts tend to be pro-government, "unanimous and pretty easy" decisions.[123] It is nonetheless noteworthy that then-Judge Kavanaugh sided with the government in each of his authored opinions relating to police searches and government surveillance.[124] In fact, then-Judge Kavanaugh's opinions on the D.C. Circuit Court of Appeals strongly support the hypothesis that he will be a consistent pro-government voice on the high court.[125]

In addition to his voting record, how Judge Kavanaugh writes and thinks about the provision is also illuminating: "he is wary of novel theories that would expand Fourth Amendment protection. And he often sees the Fourth Amendment's requirement of reasonableness as giving the government significant latitude."[126] In turn, one might think that Judge Kavanaugh would prefer formalism. But it also seems that "[i]n a close case that requires balancing of interests, the cases suggest, Kavanaugh is more likely to approach the case from the government's perspective than from the individual's."[127]

For example, when Judge Kavanaugh dissented *in United States v. Askew*, he argued that the Fourth Amendment should allow an officer to unzip someone's clothing so as to facilitate identification during a *Terry* stop.[128] He explained that public safety—specifically the government interest in protecting officer safety during encounters with hostile suspects—outweighed the individual's expectation of privacy in their person.[129] This explanation may show that Judge Kavanaugh will examine cases with a more purposivist lens if doing so will support his crime-control jurisprudence.

Kavanaugh asserted a similar public safety rationale in his *Klayman v. Obama* concurrence to justify applying the special needs exception to the exigent circumstances doctrine.[130] He voted to uphold the constitutionality of the National Security Agency's bulk telephone metadata program because the government designed it to prevent terrorism, so "[i]n [his] view, that critical national security need outweighs the impact on privacy occasioned by

123. *Id.*

124. *See id.*

125. *See id.* ("One takeaway from Kavanaugh's speech is that his Fourth Amendment views probably aren't too far from Rehnquist's. Rehnquist was a pretty reliable voice for law enforcement interests in Fourth Amendment cases. The affinity may be revealing.").

126. *Id.*

127. *Id.*

128. 529 F.3d 1119, 1152 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

129. *Id.*

130. 805 F.3d 1148, 1149 (D.C. Cir. 2015) (Kavanaugh, J., concurring).

this program."[131] In fact, Kavanaugh wrote that this program was "entirely consistent" with the Fourth Amendment and "fit[] comfortably within the Supreme Court precedents applying the special needs doctrine."[132] *Klayman* thus reveals Judge Kavanaugh's willingness to blend formalist and functionalist lines of reasoning in the Fourth Amendment context.

His dissent in *National Federation of Federal Employees-IAM v. Vilsack* further underscores his strong crime-control focus.[133] There Judge Kavanaugh explained that—even though there was no evidence that the residential job corps program for at risk youth at issue had some sort of drug problem—a drug testing program would be necessary to maintain discipline and meet the government's "strong and indeed compelling interest in maintaining a drug-free workforce."[134] Again, we see him put his general support for the government's crime-control interests before any specific approach.

Now-Justice Kavanaugh's early voting record on the Fourth Amendment suggests that he will not substantially disrupt the balance of the Court because his reasoning echoes that of Justice Kennedy. In his first Fourth Amendment case, *Mitchell v. Wisconsin*, he joined a 5-4 split decision authored by Justice Alito in which the Court held that when a driver is unconscious and cannot be given a breathalyzer test, the exigent circumstances doctrine generally permits obtaining a blood test without a warrant.[135] Justice Kavanaugh also joined Justice Thomas's majority opinion in *Kansas v. Glover*, which held that when a police officer lacks information to the contrary, it is reasonable under the Fourth Amendment for the officer to assume that the driver of a vehicle is its owner and subsequently conduct an investigative stop if the owner's license has been revoked.[136] Thomas's reasoning focused on precedent and centered a pro-law enforcement safety rationale that resembles then-Judge Kavanaugh's dissent in *Askew*.[137] Thus, we should often expect Justice Kavanaugh to join coalitions that support and write from a public safety, pro-law enforcement point of view, but not always.

It is important to note that Kavanaugh joined Justices Breyer, Sotomayor, and Kagan to support Justice Roberts' pro-defendant majority opinion in *Torres v. Madrid*, which held that applying physical force to the body of a person with the intent to restrain is a seizure, even if the force fails

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131. *Id.*
132. *Id.* at 1148–49.
133. 681 F.3d 483, 500 (D.C. Cir. 2016) (Kavanaugh, J., dissenting).
134. *Id.* at 501 (Kavanaugh, J., dissenting).
135. 139 U.S. 2525 (2019).
136. 140 U.S. 1183 (2020).
137. *Id.* at 1187–88.

in subduing the person.[138] This vote suggests that Kavanaugh may support clear limitations on law enforcement action to protect personal privacy, at least in this particular context.[139] Perhaps of equal importance, the *Torres* opinion leans into textual and originalist reasoning, even citing to a Websters Dictionary definition of "seizure" from 1828, which appears consistent with Kavanaugh's past formalist variations.[140] Meanwhile Justices Alito and Thomas joined Justice Gorsuch's clearly formalist dissent to argue the opposite and assert that "neither the Constitution nor common sense" supported the majority's broad definition of what constitutes a seizure.[141] His decision to join the diverse *Torres* coalition could support the argument that Justice Kavanaugh, much like Justice Roberts, may generally agree with crime-control jurisprudence, but he is unconvinced by the formalist approach that the most conservative wing of the Court has taken in deciding search and seizure cases.

3. Justice Barrett

Unlike the relatively small ideological differences between Justices and their replacements—Souter and Sotomayor, Stevens and Kagan, and Kavanaugh and Kennedy—Justice Barrett, a former Scalia clerk, replaced the very liberal Justice Ginsburg.[142] Justice Barrett's confirmation triggered the Court's first deep ideological shift in decades, creating a solid conservative supermajority that has quickly changed many areas of law.[143] But will the addition of Justice Barrett foreshadow a similar trend in the Fourth Amendment context?

In short, it is still unclear how Justice Barrett will influence the debate. Then-Judge Barrett's votes and opinions on the Seventh Circuit Court of Appeals suggest that she will consistently vote with the government, much like Justice Kavanaugh. In cases that questioned police actions, then-Judge Barrett sided with law enforcement officers eighty-six percent of the time.[144]

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138. 141 S.Ct. 989 (2021).

139. *Id.* at 1003. But perhaps Kavanaugh joined this opinion specifically because Roberts explicitly left open the officers' possible entitlement to qualified immunity. *Id.*

140. *Id.* at 995–96.

141. *Id.* at 1003 (Gorsuch, J., dissenting).

142. *See* Michael D. Shear & Elizabeth Dias, *Barrett Clerked for Scalia. Conservatives Hope She'll Follow His Path*, N.Y. TIMES (Oct. 13, 2020), https://www.nytimes.com/2020/09/26/us/politics/amy-coney-barrett-conservatives.html.

143. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2248 (2022); New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022).

144. *See generally Amy Coney Barrett Sided With Law Enforcement In Nearly Nine Out Of Every Ten Cases*, ACCOUNTABLE.US (Oct. 24, 2020), https://www.accountable.us/wp-content/uploads/2020/10/ACB-Law-Enforcement-Report.pdf ("Amy Coney Barrett Sided with Police In 86% of Cases When Their Actions Came Before Her Court").

This statistic includes excessive force and qualified immunity cases.[145] It also includes many cases that fell squarely within Supreme Court and Seventh Circuit precedent subject to stare decisis.[146] One might be tempted to assume her views on search and seizure disputes based on this seemingly overwhelming percentage.[147]

However, "[i]t is clear from Barrett's record that she does not reflexively side with the government in criminal cases," and this observation extends to criminal procedure cases specifically.[148] Instead, her opinions "present a mixed picture. While she is often skeptical of the government's arguments when it tries to put or keep people in prison, Justice Barrett has sometimes rejected claims by defendants and prisoners that her colleagues found credible."[149]

But for now, we simply do not have enough written by Justice Barrett herself to know for sure. The Court has only accepted two search and seizure cases since Justice Barrett joined: *Caniglia v. Strom*[150] and *Lange v. California*.[151] Both were 9-0 pro-defendant rulings that clarified the contours of the Fourth Amendment without actively discussing the tensions between individual liberty and government interests in public safety. Neither case pronounced any broad Fourth Amendment protection; instead, these cases are *Randolph*-style corrective measures, only limiting the exigent circumstance exceptions to protect the home from certain police tactics. These holdings align with the longstanding conception of the home as special, regardless of whether the issue is approached with a property- or privacy-based theory of the Fourth Amendment.[152]

Justice Barrett had the opportunity in both cases to endorse formalist interpretations, and yet she didn't. Writing on behalf of the Court in *Caniglia*, Justice Thomas clarified that the community caretaking exception to the warrant requirement does not allow officers to enter a home in order to transport a potentially suicidal defendant to a hospital for psychiatric

145. *See generally id.*; *see e.g.,* Sanzone v. Gray, 884 F.3d 736 (7th Cir. 2018); Est. of Biegert by Biegert v. Molitor, 968 F.3d 693 (7th Cir. 2020); *see also* Andrew Chung & Lawrence Hurley, *Analysis: U.S. Supreme Court nominee Barrett often rules for police in excessive force cases*, REUTERS (Oct. 25, 2020, 2:33 AM PDT), https://www.reuters.com/article/us-usa-court-barrett-police-analysis/analysis-u-s-supreme-court-nominee-barrett-often-rules-for-police-in-excessive-force-cases-idUSKBN27A0C1.

146. *See generally* Accountable.us, *supra* note 144; *see, e.g.,* Crosby v. City of Chicago, 949 F.3d 358 (7th Cir. 2020), *as amended on denial of reh'g and reh'g en banc* (Mar. 6, 2020).

147. *See generally* Accountable.us, *supra* note 144.

148. *See* Sullum, *supra* note 119.

149. *Id.*

150. 141 S.Ct. 1596 (2021).

151. 141 S.Ct. 2011 (2021).

152. *See e.g., Collins*, 138 S. Ct. at 1671; *Jardines*, 569 U.S. at 7.

evaluation.[153] Interestingly, Justice Barrett did not join Chief Justice Roberts,[154] Justice Alito,[155] or Justice Kavanaugh's concurrences.[156] Then the Court in *Lange* held that the pursuit of a fleeing misdemeanor suspect does not categorically qualify as an exigent circumstance justifying a warrantless entry into a home.[157] It is significant that although he joined in the judgment, Justice Thomas concurred to note that the majority's case by case analysis in *Lange* was subject to historical, categorical exceptions.[158] He, as expected, advocates for a formalist approach, and yet Justices Alito, Gorsuch, and Barrett—all self-proclaimed originalists—did not sign onto this opinion, while Justice Kavanaugh did.[159] But most importantly for this analysis, Justice Barrett again did not join any *Lange* concurrences. Silence, of course, is not the same as acceptance or rejection.

So, at least for the moment, we can only deduce trends about Justice Barrett's potential votes from her lower court opinions. On one hand, her writings indicate that she may be more of a moderate conservative—akin to Justices Kennedy and Kavanaugh.[160] But given Justice Barrett's penchant for originalism, she may become a wild card in the search and seizure context, much like Justice Gorsuch and her influential mentor, Justice Scalia.[161]

4. Justice Jackson

In replacing Justice Breyer, Justice Ketanji Brown Jackson is the most recent addition to the Court and, like the other recent additions to the Court, we cannot be sure how she may influence the ideological composition or internal dynamics of the Court.[162] While both Breyer and Jackson are

153. *Caniglia*, 141 S.Ct. at 1600.

154. *Id.* at 1600 (C.J., Roberts concurring and with whom J., Breyer joined).

155. *Id.* (J., Alito, concurring).

156. *Id.* at 1602 (J., Kavanaugh, concurring).

157. *Lange*, 141 S.Ct. at 2025.

158. *Id.* at 2026 (J., Thomas, concurring, and with whom J., Kavanaugh, joined).

159. Kavanagh also wrote separately. *Id.* at 2025 (J., Kavanaugh, concurring).

160. *See* United States v. Watson, 900 F.2d 892 (7th Cir. 2018) (holding an anonymous tip did not provide reasonable suspicion for police to stop a car in which they found a man with a felony record who illegally possessed a gun); Torry v. City of Chicago, 932 F.3d 579 (7th Cir. 2019) (holding that the Fourth Amendment does not govern how an officer proves he had reasonable suspicion, and therefore they need not have independent memory of what they knew at the time).

161. *See* United States v. Kienast, 907 F.3d 522, 527–28 (7th Cir. 2018) (holding that the good faith exception to the exclusionary rule applied following the rationale that suppression is a "judge-made rule meant to deter future Fourth Amendment violations" and there would be no such deterrent effect on the FBI agents' actions).

162. Adam Liptak, *Justice Jackson, a Former Law Clerk, Returns to a Transformed Supreme Court*, N.Y. TIMES (July 18, 2022), https://www.nytimes.com/2022/07/18/us/politics/ketanji-brown-jackson-scotus.html. Like the other recent additions, Justice Jackson also clerked for the Justice whom she replaced, Justice Breyer. *Id.*

ideological liberals, this change is very important in the search and seizure context. Justice Breyer was the "least reliable liberal on the Court and the one most likely to join the conservative bloc."[163] During his time on the Rehnquist Court, he voted for liberal outcomes 35.9 percent of the time; then despite the Roberts Court's near parity and pro-defendant lean in the last decade, Justice Breyer only sided with the liberal wing in forty-three percent of cases.[164] Justice Jackson may vote differently because of her "expertise on sentencing guidelines, background as a public defender and criminal defense attorney, and years as a district judge," which are all experiences that might make her "a bit more sympathetic to criminal defendants than Breyer."[165] However, the Court did not grant certiorari on a single Fourth Amendment search and seizure case in the 2021, 2022, or the current 2023 Term.[166] Therefore, we will not see the newly minted Justice vote on any case in the near future. At first glance, the differences between Justice Breyer and Justice Jackson may seem irrelevant as conservatives continue to hold a solid 6-3 majority on the Court. This ideological division is unlikely to change for many constitutional issues, but perhaps Fourth Amendment cases, particularly in the search and seizure context, differ enough to upset this assumed power dynamic.

The qualitative and quantitative data points provided by the newest Justices' past and recent writings reject the hypothesis that the Court's 6-3 split will neatly map onto Fourth Amendment jurisprudence. Indeed, the fact-intensive nature of search and seizure cases—as well as the competing and overlapping approaches to the Amendment itself—may diminish the importance of the Justices' ideological dispositions, at least for moderate members of the Court.

IV. THE ROBERTS COURT'S POTENTIAL FORMALIST COALITIONS

As described above, it is impossible to prognosticate precisely as to the future of Fourth Amendment jurisprudence based on the Court's current composition alone. Perhaps instead the future of formalist coalitions on the

163. GIZZI & CURTIS, *supra* note 23, at 20.

164. *See id.*

165. Robert Barnes, *How Ketanji Brown Jackson will recast the Supreme Court*, WASH. POST (Apr. 7, 2020), https://www.washingtonpost.com/politics/2022/04/07/supreme-court-ketanji-brown-jackson/. That said, Justice Jackson's District Court record shows that she will not be a rubber stamp in favor of criminal defendants in search and seizure cases. *See* CONG. RES. SERV., R-47050, THE NOMINATION OF JUDGE KETANJI BROWN JACKSON TO THE SUPREME COURT 47 (2022).

166. *See generally* OYEZ, *2021-2022 Term*, https://www.oyez.org/cases/2021; OYEZ, *2022-2023 Term*, https://www.oyez.org/cases/2022; OYEZ, *2023-2024 Term*, https://www.oyez.org/cases/2023 (last visited Dec. 20, 2023).

Roberts Court rests on how the Justices address two overlapping, thorny topics: technological progress and the scope of the third-party doctrine.

Gorsuch is the most likely Justice to advocate for a formalist approach to Fourth Amendment jurisprudence in these areas because he has already attempted to expand the third-party doctrine by analogizing between technologies. Returning to his *Carpenter* dissent, Justice Gorsuch argued that location data produced by cell phones should be treated as a bailment.[167] In doing so, he "adapts common law principles that imbued the founding era with today's practice of storing our important digital papers and effects with companies that can secure them better than we can ourselves."[168] Justice Gorsuch attempted to marry an original understanding of the Fourth Amendment to present day issues during his time on the Tenth Circuit when he advocated for treating an email as "a constitutionally protected paper or effect."[169] While his textualist reading of the Fourth Amendment did not gain support in *Carpenter*, the current composition of the Court suggests there may be sufficient support to accept this view.

Gorsuch may easily persuade Justices Thomas and Alito to join him based on classic formalist arguments themselves. Justice Thomas, a longtime formalist, is the most likely candidate to vote with Gorsuch in light of his dissent in *Carpenter*, which emphasized the originalist property-based approach as the most appropriate way to determine Fourth Amendment questions surrounding emergent technology. Justice Alito is the next most likely vote for similar reasons. He specifically advocated for Scalia's originalist trespass to property theory in his *Jones* concurrence and the third-party doctrine rationale in his textualist *Carpenter* dissent. It therefore seems that Alito's strong conservative bend may lead him to join pro-government decisions regardless of the approach taken to reading the Fourth Amendment.

Justice Barrett could become the next member to join this potential formalist coalition because of her distinct brand of originalism. However, her Seventh Circuit opinions also hint that she is willing to scrutinize certain government actions, like incarceration, based on the facts of the case. Justice Barrett has yet to write enough to show whether she will embrace or reject

167. *Carpenter*, 138 S.Ct. at 2269 (Gorsuch, J., dissenting) ("Just because you entrust your data—in some cases, your modern-day papers and effects—to a [third-party] may not mean you lose any Fourth Amendment interest in its contents. Whatever may be left of Smith and Miller, few doubt that e-mail should be treated much like the traditional mail it has largely supplanted—as a bailment in which the owner retains a vital and protected legal interest.").

168. Jim Harper, *To Protect Privacy, Ketanji Brown Jackson Should Outflank the Court's Textualists*, AM. ENTER. INST. (Apr. 5, 2022), https://www.aei.org/technology-and-innovation/to-protect-privacy-kbj-could-outflank-the-courts-textualists/.

169. In *United States v. Ackerman*, Gorsuch argued that if "rummaging through private papers or effects would seem [to be a pretty obvious] 'search.'" and "if opening and reviewing 'physical' mail is generally a 'search'—and it is—[then] why not "virtual" mail [searches] too?" 831 F.3d 1292, 1304 (10th Cir. 2016) (internal citations omitted).

the judicially-created privacy approach, so she may yet step into the shoes of her unpredictable mentor. Therefore until we hear from her directly, Justice Barrett could complicate Gorsuch and others' efforts to issue opinions that wholly endorse a formalist approach in the search and seizure context.

The next two most likely, but still relatively unpredictable votes may come from the Chief Justice and Justice Kavanaugh. They both see themselves as institutionalists—an identity that may motivate them to join the formalist coalition in an effort to clean up the Court's Fourth Amendment jurisprudence while retaining their pro-government tilt.[170] Chief Justice Roberts's twin desires—maintaining the Court's legitimacy through narrow rulings and finding ways to bridge ideological gaps—cuts against this analysis. However, that may change if any of the liberal Justices also buy in. Gorsuch and others might bring Justice Kavanaugh into the formalist fold by invoking precedent that appeals to his public safety concerns as articulated in his writings both from the D.C. Circuit and his time thus far on the Court.

The liberal Justices may also join a formalist coalition depending on how the supermajority articulates its arguments. For example, Justice Jackson's confirmation interviews suggest that she is amenable to engaging with her counterparts on their own textualist terms.[171] It would be unsurprising if Justices Kagan and Sotomayor also follow along based on a specific textual analysis. The Justices may also see how the past can haunt the present: the rulings from the Burger, Rehnquist, and early Roberts Court show that the reasonable expectation of privacy test can be too permissive and ultimately allow judges to shade the fact-intensive inquiry toward their preferred outcome. Kagan and Sotomayor may therefore embrace formalism to restrain judicial advocacy inapposite to their views.

However, we still should not expect the most conservative Justices to side reliably with any formalist coalition. The Chief Justice and others may fail to persuade Justices Thomas and Alito to vote for pro-defendant holdings simply out of principle. But this article foresees cases in which the newly created four-Justice center on the Court—including Gorsuch, Kavanaugh, and Barrett—may be amenable to certain pro-defendant rulings rooted in originalism or textualism. Either that or the liberal wing can negotiate with

170. *See* Adam Liptak, *A Supreme Court Term Marked by a Conservative Majority in Flux*, N.Y. TIMES (July 2, 2021), https://www.nytimes.com/2021/07/02/us/supreme-court-conservative-voting-rights.html.

171. Press Release, Senator Dick Durbin, Durbin Questions Judge Ketanji Brown Jackson on her Judicial Philosophy During Second Day of her Nomination Hearing to the Supreme Court (Mar. 22, 2022), https://www.judiciary.senate.gov/press/dem/releases/durbin-questions-judge-ketanji-brown-jackson-on-her-judicial-philosophy-during-second-day-of-her-nomination-hearing-to-the-supreme-court ("I focusing on original public meaning because I'm constrained to interpret the text."); *see also Confirmation Hearing Before the S. Comm. on the Judiciary*, 117th Cong. (2022).

these Justices and settle on a few corrective measure cases, similar to the limited holdings in *Caniglia* and *Lange*. That is, unless digital privacy is involved, and then it's anyone's guess, at least for now.

CONCLUSION

Altogether, this article posits that at least three factors will eventually pull Roberts into the formalist coalition: the Court's newly minted ideological dynamics, the Chief Justice's longstanding desire to restore legitimacy to the Court, and the somewhat inevitable Fourth Amendment challenges based on digital privacy controversies. While it remains unclear how the new four-Justice center will approach search and seizure cases, this new Roberts Court is very unlikely to revert to a seventy-five percent government win rate or pronounce a holding that would greatly shift additional power to law enforcement—as completely doing away with the exclusionary rule would.[172] This Court is also not a new Warren Court, even though its outcomes in search and seizure cases are increasingly pro-defendant.

Instead we can think of the Court as biding its time. That is, at least until the Justices, perhaps led by Roberts, can resolve the internal inconsistencies between the trespass theory and the *Katz* reasonable expectation of privacy test. Perhaps the Chief Justice may find that the formalist approach will allow him to unify the Court while staying true to his moderate jurisprudence that would preserve some safeguards installed by the exclusionary rule. After all, as Justice Scalia demonstrated, a formalist approach can convince even the most conservative members of the Court to join pro-defendant rulings. Roberts may likewise decide to engage in the Fourth Amendment debate on a clearer analytical battlefield because, at least from the outside, he appears increasingly unable to control the Court's conservative supermajority.

As a result of these unresolved tensions, we therefore should continue to expect the Court to grant certiorari in very few Fourth Amendment cases, a trend similar to the Chief Justice's first ten years on the Court. The few Fourth Amendment cases that they may take will likely provide corrective measures when crime-control tactics have gone too far. In doing so, these decisions could provide legitimacy to the Court's search-and-seizure jurisprudence while maintaining the crime-control jurisprudence painstakingly developed throughout the Burger, Rehnquist, and early Roberts Court. This Court, however, has also relied heavily on a history and tradition analytical framework to decide other constitutional issues over the last two terms, so we may finally see the Court do away with the reasonable expectation of

172. Weaver, *supra* note 57, at 237. ("Simply from the standpoint of preserving institutional prerogatives, it seems unlikely that a majority of the Justices would surrender their substantial power over a major issue.").

privacy test, at least while it is not directly tied to the formalist conception of property. Thus, in light of the systemic consequences that almost any change to criminal procedure sets into motion, how and whether Chief Justice Roberts embraces a formalist approach to Fourth Amendment jurisprudence will significantly determine his Court's legacy.

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