

Information Otherwise Unknowable: *Carpenter* as a Window into the Judicial Decision-Making Process

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I. INTRODUCTION

Here are some of the factors that judges and scholars have identified as influencing on how a judge decides a case: logic;¹ experience;² precedent;³ policy preferences;⁴ legal ideology;⁵ political ideology;⁶ a desire to appear independent;⁷ the judge's method of constitutional interpretation;⁸ a desire to limit workload;⁹ an orientation toward social and political elites;¹⁰ a tendency towards rationality;¹¹ a need for the esteem of others;¹² the doctrine of stare decisis;¹³ the ability to translate a stance into an effective written opinion;¹⁴ the type of reasoning process used by the judge;¹⁵ the need to

1. See generally WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Oxford Univ. Press 2016) (1765).

2. See generally O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 471 (1897).

3. See generally MICHAEL J. GERHARDT, THE POWER OF PRECEDENT (2008).

4. HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 7 (1999) (explaining that some argue “that precedent is not influential” because “it merely cloaks the justices’ personal policy preferences”).

5. See Lawrence Baum, *Motivation and Judicial Behavior: Expanding the Scope of Inquiry*, in THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 3, 19 (David Klein & Gregory Mitchell eds., 2010) (identifying good legal policy as the ultimate goal of most judicial decisions).

6. See generally, e.g., Christopher Zorn & Jennifer Barnes Bowie, *Ideological Influences on Decision Making in the Federal Judicial Hierarchy: An Empirical Assessment*, 72 J. POL. 1212 (2010).

7. April Hefner, *Honorable John G. Roberts, Jr., Chief Justice of the United States, Speaks at Belmont University*, BELMONT U. (Feb. 7, 2019), <http://news.belmont.edu/honorable-john-g-roberts-jr-chief-justice-of-the-united-states-speaks-at-belmont-university/> [<https://perma.cc/2K8J-452W>].

8. E.g., GERHARDT, *supra* note 3, at 95 (discussing textualist versus living constitution philosophies of constitutional interpretation).

9. Jennifer K. Robbennolt, Robert J. MacCoun & John M. Darley, *Multiple Constraint Satisfaction in Judging*, in THE PSYCHOLOGY OF JUDICIAL DECISION MAKING, *supra* note 5, at 27, 32.

10. NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 25 (2019).

11. See generally RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (7th ed. 2007).

12. Neal Devins & Will Federspiel, *The Supreme Court, Social Psychology, and Group Formation*, in THE PSYCHOLOGY OF JUDICIAL DECISION MAKING, *supra* note 5, at 85, 92 (“[T]he types of people who end up with judicial positions tend to be those who care a great deal about the esteem of others.”).

13. LAWRENCE S. WRIGHTSMAN, THE PSYCHOLOGY OF THE SUPREME COURT 112 (2006).

14. See Dahlia Lithwick, *Anthony Kennedy’s Right to Choose: The Justice Who Cares About Dignity and Autonomy Should Vote Against Texas’ Abortion Law.*, SLATE (Nov. 17, 2015, 3:08 PM), <https://slate.com/news-and-politics/2015/11/kennedy-and-supreme-court-should-vote-against-texas-abortion-law-in-cole.html> [<https://perma.cc/J2GM-56UN>].

15. E.g., Brandon L. Bartels, *Top-Down and Bottom-Up Models of Judicial Reasoning*, in THE PSYCHOLOGY OF JUDICIAL DECISION MAKING, *supra* note 5, at 41, 41.

project stability, predictability, and legitimacy;¹⁶ the need to act strategically with respect to other judges so as to garner support in an opinion;¹⁷ and a judge's level of integrity, intellect, expertise, competence, education, training, and temperament.¹⁸ And now here are more: values,¹⁹ norms and tradition,²⁰ ethics and morals,²¹ intuition,²² the attitudinal disposition of the judge,²³ a desire to garner unanimous decisions,²⁴ situational determinants,²⁵ the disposition of the Office of the Solicitor General,²⁶ a desire to "do justice,"²⁷ the number of amicus briefs filed and the number of such briefs authored by academics at elite law schools,²⁸ the coalitional dynamics of the court,²⁹ the roll of a die,³⁰ how long it has been since the judge has eaten,³¹ and whether the judge has overeaten at lunch.³²

16. THOMAS G. HANSFORD & JAMES F. SPRIGGS II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* 12–13 (2006) (discussing the necessity of stability, predictability, and legitimacy for compliance).

17. WRIGHTSMAN, *supra* note 13, at 192.

18. *Id.* at 22–23.

19. *Id.* at 124 (explaining the wider latitude Supreme Court Justices have to rely on values).

20. GERHARDT, *supra* note 3, at 3–4 (explaining how precedent can often include norms and traditions that Justices have chosen to follow).

21. *E.g.*, Lithwick, *supra* note 14 (quoting Justice Kennedy's discussion of making sure his decisions accord with his own sense of ethics and morality).

22. *See generally* Jonathan Haidt, *Moral Psychology and the Law: How Intuitions Drive Reasoning, Judgment, and the Search for Evidence*, 64 *ALA L. REV.* 867 (2013) (arguing that intuition comes before strategic reasoning in legal thought).

23. ROBERT J. HUME, *JUDICIAL BEHAVIOR AND POLICYMAKING: AN INTRODUCTION* 34 (2018).

24. *See* LAWRENCE S. WRIGHTSMAN, JR., *TEN LITTLE-KNOWN FACTS ABOUT THE SUPREME COURT* 24 (2016) (discussing Justice Roberts's minimalist approach in an attempt to foster unanimity).

25. WRIGHTSMAN, *supra* note 13, at 236.

26. Lawrence S. Wrightsman, *Persuasion in the Decision Making of U.S. Supreme Court Justices*, in *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING*, *supra* note 5, at 57, 65.

27. *See* LORD DENNING, *THE FAMILY STORY* 174 (1981).

28. DEVINS & BAUM, *supra* note 10, at 46, 48.

29. Devins & Federspiel, *supra* note 12, at 89.

30. Birte Englich, Thomas Mussweiler & Fritz Strack, *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making*, 32 *PERSONALITY & SOC. PSYCHOL. BULL.* 188, 190, 194–95 (2006).

31. *See generally* Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 *PROC. NAT'L ACAD. SCI.* 6889 (2011).

32. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 162 (1973).

Like any decision, a judge's ruling results from a complex interaction of a variety of influences. Some of these are imposed by external forces such as the rules built into the legal system for deciding cases. At minimum, a judge must at least feign respect for precedent and nod towards the doctrine of stare decisis. Such procedural maxims apply equally to all judges—as do sentencing guidelines, rules of statutory interpretation, and the like. But then there are internal influences, which might be particular to a given judge or to groups of judges, and which might guide their decision, whether they admit to it or not, such as their method of constitutional interpretation, or their underlying political ideology. And these are the internal forces of which judges are aware. There are still yet scores of other psychological biases that might dispose a judge without the judge ever having knowledge of the bias's influence.

When a judge decides a case, the judge provides—through a legal opinion—a written blueprint for the decision, meant to both justify the decision in the instant case and provide a record for future judges deciding like cases. These opinions preserve in fossil-like form the reasoning of their authors, building the logic of the decision from the ground up: describing the facts of the underlying dispute, introducing the relevant authority, and describing in detail why certain precedent controls the decision and others does not. These opinions are meant to provide a snout-to-tail explanation of a decision's rationale—at least in theory.

But in practice, however, legal opinions offer only the tip of the iceberg of all of the different factors that influence a judge's decision. Certain statistical models, for example, are able to predict judicial decisions blindly, based solely on the existing policy preferences of the judges.³³ Moreover, decades of psychological research has demonstrated that not only are people influenced by unconscious decision-making processes, but that even where people are informed of such unconscious processes, they often refuse to believe that such processes, even if real, actually influence *their* decisions.³⁴ Compounding this effect, people—judges included—also have a tendency to justify gut-level instincts with elaborate logical arguments that they arrive at only in an effort to defend their intuition.³⁵ A cynic can therefore view written judicial opinions as often little more than elaborate post hoc justifications for the initial instincts of judges. In other words, it is often

33. See, e.g., Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1154 (2004); Zorn & Bowie, *supra* note 6, at 1212.

34. See, e.g., John M. Darley & Bibb Latané, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J. PERSONALITY & SOC. PSYCHOL. 377 (1968); Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231, 233 (1977).

35. See generally Haidt, *supra* note 22.

difficult to glean from Supreme Court opinions what factors *actually* influenced the decision-making of the Justices.

Sometimes, though, we are allowed a slightly more revealing peek behind the curtain. In 2018, the United States Supreme Court decided *Carpenter v. United States*—a 5–4 decision regarding the Fourth Amendment protection attached to cell phone location records.³⁶ *Carpenter* was not completely split along traditional ideological lines, featured a wide range of precedential lines and theories of Fourth Amendment jurisprudence for the Justices to choose from, and featured four different dissents by the opposed Justices. As a result—and much like other Supreme Court cases involving the use of new technology—*Carpenter* provides a unique window into the judicial decision-making process because many of the chief predictors for Supreme Court decision-making—ideological preference, precedent, coalitional side-taking—play a somewhat less instrumental role, and other aspects of the decision-making process rise to the surface and are rendered more susceptible to analysis.

This Article will attempt to capitalize on this rare window. After detailing many of the major factors that influence judicial decision-making, the Article will also delve into many of the underexplored influences on judicial psychology before turning finally to an analysis of how these various factors manifest in *Carpenter*. Part II provides overviews of the membership of the United States Supreme Court, the process by which the Court decides cases, and the effect of precedent on the Court. Part III discusses the various theories of what psychological forces influence Court decisions. Part IV analyzes *Carpenter* and reflects on other privacy decisions of the last sixty years.

II. SCOTUS: MEMBERSHIP, THE DECISION PROCESS, AND PRECEDENT

A. Membership on the United States Supreme Court

The membership of the United States Supreme Court determines the decisions the Court announces. “[T]he Supreme Court is a political institution in the broadest sense, in that its members often possess long-term aspirations for what is best for the country, and their judicial opinions reflect these aspirations.”³⁷ When a President nominates someone for a vacancy on the United States Supreme Court, the President may be seeking

36. 138 S. Ct. 2206, 2206 (2018).

37. WRIGHTSMAN, *supra* note 13, at 4.

someone who has “absolute personal and professional integrity, a lucid intellect, professional expertise and competence, appropriate professional educational background or training, the capacity to communicate clearly (especially in writing), and judicial temperament.”³⁸

Some see politics as increasingly more polarized between Republican and Democratic camps, a trend that many believe began with the Republican landslide in Congress in 1994.³⁹ This polarization in the legislature may have had some effect on the judiciary.⁴⁰ Two scholars theorize that the Justices have begun to act more as advocates in oral arguments by directing challenging comments and questions at the attorneys representing the opposition while directing reinforcing comments and leading questions at the attorneys representing the side with which they agree or deflecting difficult comments and questions made by other Justices.⁴¹

The Justices are political figures, although not in the same sense as the President and members of Congress; however, some observers view the Court as more political than others. Two scholars opine that ideology plays an increasingly important role in a President naming a nominee to the United States Supreme Court. They point out that all five Justices appointed by Republican Presidents are conservatives with connections to the Federalist Society.⁴² When he was still a Presidential candidate, President Trump enlisted the aid of the Federalist Society and the Heritage Foundation to compile a list of potential nominees to the United States Supreme Court; Justice Kavanaugh made that list in 2017.⁴³ Three liberal Justices, Justices Ginsburg, Breyer, and Sotomayor, have been keynote speakers at the American Constitution Society national convention; the American Constitution Society is a significant liberal organization.⁴⁴

Chief Justice Roberts is one of the five members of the United States Supreme Court who have connections to the Federalist Society but is the only one of the five who is not active in the organization.⁴⁵ Chief Justice Roberts spoke at the organization’s annual meeting,⁴⁶ yet he does not see the Court as political, or at least professes not to see the Court as political,

38. *Id.* at 22–23.

39. Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices as Advocates*, 94 NOTRE DAME L. REV. 1161, 1178–83 (2019).

40. *Id.* at 1185–87.

41. *Id.* at 1163–64, 1172.

42. DEVINS & BAUM, *supra* note 10, at xi.

43. *Id.* at xii. “The Federalist Society was established in 1982 as a counterbalance to what its founders saw as a liberal bias in the legal academy . . .” *Id.* at 43. Since 1982, “the Society has grown to become a major center of activity, a reference group, and a participant in the legal and policy debates on behalf of conservatives.” *Id.*

44. *Id.* at 43–44.

45. *Id.* at xi.

46. *Id.*

and has stated: “People need to know that we’re not doing politics. We’re doing something different. We’re applying the law.”⁴⁷ In a 2017 speech, Chief Justice Roberts expressed his desire that the public not perceive the Court as engaging in politics in deciding cases.⁴⁸ He saw a “real danger that the partisan hostility that people see in the political branches will affect the nonpartisan activity of the judicial branch.”⁴⁹

On the other hand, Senator Sheldon Whitehouse, a prominent Democrat, criticized what he perceived to be the political nature of the Roberts Court:

As a former U.S. attorney and state attorney general, I have spent my share of time in the courtroom before state and federal judges whose commitment to neutral principles and fairness made even losing parties respect their decisions. Today, that confidence is undermined by the Roberts Court’s undeniable pattern of political allegiance. Under Roberts, justices appointed by Republican presidents have, with remarkable consistency, delivered rulings that advantage big corporate and special interests that are, in turn, the political lifeblood of the Republican Party. The “Roberts Five” are causing a crisis of credibility that is rippling through the entire judiciary.⁵⁰

One of the enduring legacies of a President are the Justices he or she appoints to the Court.⁵¹ The nomination of a Justice is unremoved from the realm of politics. A Republican President typically nominates a conservative

47. Hefner, *supra* note 7.

48. DEVINS & BAUM, *supra* note 10, at 143.

49. *Id.*

50. Sheldon Whitehouse, *Sen. Whitehouse: There’s a ‘Crisis of Credibility’ at the U.S. Supreme Court*, NAT’L L.J. (Feb. 15, 2019, 2:50 PM), https://www.law.com/nationallawjournal/2019/02/15/sen-whitehouse-theres-a-crisis-of-credibility-at-the-u-s-supreme-court/?kw=Sen.%20Whitehouse:%20There%27s%20a%20%27Crisis%20of%20Credibility%27%20at%20the%20U.S.%20Supreme%20Court&utm_source=email&utm_medium=enl&utm_campaign=afternoonupdate&utm_content=20190215&utm_term=nlj [https://perma.cc/T6R2-MCP5]. He added:

There are 79 5-4 decisions with no Democratic appointee joining the majority since Roberts became chief justice; and 73 of them implicate issues important to powerful Republican political interests. The score in those 73 cases for the big Republican interests is 73-0. On this Republican judicial romp, the Roberts Five have been cavalier with any doctrine, precedent or congressional finding that gets in their way.

Id. Senator Whitehouse divides the seventy-three decisions into four categories, the third of which is “decisions to restrict civil rights and condone discrimination, reflecting the worldview that corporations know best, that courts have no business remedying historical discrimination and that views and experiences outside the white, male, Christian mainstream of the Republican Party merit lower legal standing.” *Id.* He added: “The court’s so-called conservatives often abandon conservative judicial principles to reach the desired outcome.” *Id.*

51. *See* DEVINS & BAUM, *supra* note 10, at 25.

Justice and a Democratic President typically nominates a liberal Justice.⁵² President H.W. Bush nominated Clarence Thomas, a conservative-leaning Justice.⁵³ President Clinton nominated two liberal-leaning Justices: Ginsburg and Breyer.⁵⁴ President George W. Bush nominated two conservative-leaning Justices: Roberts and Alito.⁵⁵ President Obama nominated two liberal-leaning Justices: Kagan and Sotomayor.⁵⁶ President Trump nominated two conservative-leaning Justices: Gorsuch and Kavanaugh.⁵⁷

Less commonly, the decisions of a Justice may depart from what the President who nominated the Justice was anticipating. Two scholars opine that the Justices “are oriented toward individuals and groups who are part of the social and political elites of the country.”⁵⁸ President Trump accused President George H.W. Bush of erring in nominating Justice Roberts because of Roberts’ vote in the 5–4 majority in 2012 to uphold the Affordable Care Act.⁵⁹ President Reagan nominated Justice Kennedy, who turned out to provide the swing vote in many cases.⁶⁰ In 2005, Justice Kennedy explained his method of deciding a case as follows:

But after you make a judgment you must then formulate the reason for your judgment into a verbal phrase, into a verbal formula. And then you have to see if that makes sense, if it’s logical, if it’s fair, if it accords with the law, if it accords with the Constitution, if it accords with your own sense of ethics and morality. And, if at any point along this process you think you’re wrong, you have to go back and do it all over again. And that’s, I think, not unique to the law, in that any prudent person behaves that way.⁶¹

Justice Kennedy is an example of a Justice who appears to ground his decisions in instinct rather than ideology. But this too is not without its perils. Neal Devins and Will Federspiel offer that “[w]ithout strong ideological pre-commitments to a particular group, Supreme Court justices are likely to value power and image in ways that make them resistant to forging a majority coalition.”⁶² In addition, some judges want to appear above the political fray: “[T]he desire to appear independent may prompt some justices

52. *See id.*

53. *Current Members*, SUP. CT. U.S., <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/2JTG-LS5S>].

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. DEVINS & BAUM, *supra* note 10, at 25.

59. DAVID A. KAPLAN, *THE MOST DANGEROUS BRANCH: INSIDE THE SUPREME COURT’S ASSAULT ON THE CONSTITUTION* 50 (1st ed. 2018).

60. *See* Devins & Federspiel, *supra* note 12, at 93.

61. Lithwick, *supra* note 14.

62. Devins & Federspiel, *supra* note 12, at 93.

to engage in a type of behavior known as reactance.”⁶³ Psychologists typically define reactance as a motivational reaction when someone feels that others are limiting that person’s choices.⁶⁴

In fact, judges on the whole might be thought of as a particular breed of attorney; not every attorney aspires to become a judge. “Accepting a judgeship entails accepting relatively significant constraints on personal activities and behaviors as well as a significant reduction in monetary . . . prestige (and an increase in potential power).”⁶⁵ Some theorize about what attracts certain attorneys to serve on the bench: “[T]he types of people who end up with judicial positions tend to be those who care a great deal about the esteem of others.”⁶⁶ A prominent attorney usually has to sacrifice monetary reward when the attorney becomes a member of the judiciary.⁶⁷ “Impression management figures prominently in the willingness of a Supreme Court Justice to join forces with others and forge a majority coalition.”⁶⁸

Because of the nebulosity of this majority coalition, the tenor of the decisions of the United States Supreme Court evolves over time with the necessary changes in Court membership. Justices new to the Court replace the Justices leaving the Court through death or retirement. “The changes in Supreme Court preferences that can result from the arrival of new justices have real implications on the future meaning and authority of precedents set by prior courts.”⁶⁹ The President nominates a person to fill a vacant seat while keeping in mind a particular direction in which the President would like the Court to head. Generally speaking, that direction is usually synonymous with the President’s underlying political ideology.

Prior to President Trump’s nomination of Justice Gorsuch, the Court comprised four conservative Justices and four liberal Justices, with Justice Kennedy usually the deciding vote.⁷⁰ Justice Gorsuch’s nomination did not alter this balance. However, Justice Kennedy’s retirement at the end of the Court’s October 2017 term gave President Trump the opportunity

63. *Id.*

64. *See id.*

65. *Id.* at 92.

66. *Id.*

67. DEVINS & BAUM, *supra* note 10, at 11.

68. Devins & Federspiel, *supra* note 12, at 92.

69. HANSFORD & SPRIGGS, *supra* note 16, at 129.

70. Alicia Parlapiano & Jugal K. Patel, *With Justice Kennedy’s Retirement, the Supreme Court Loses Its Center*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/interactive/2018/06/27/us/politics/kennedy-retirement-supreme-court-median.html> [<https://perma.cc/M9PX-GYFH>].

to nominate Justice Kavanaugh, a conservative. After Justice Kavanaugh's confirmation, one journalist had the following view of Chief Justice Roberts: "The chief justice's yearning for conciliatory and take-it-slow decision-making may be intensifying with the departure of Justice Anthony Kennedy last July and the arrival of his successor, Brett Kavanaugh, who over time may prove to be a more hard-line conservative than the 'swing vote' Kennedy."⁷¹ By early 2019, Chief Justice Roberts had sided with the four liberal Justices several times in rebuking lower courts for their failure to follow United States Supreme Court precedent.⁷²

A President typically has the opportunity to nominate one or two Justices; however, fewer Presidents nominate Chief Justices.⁷³ Chief Justice Roberts is the seventeenth Chief Justice in the Nation's history.⁷⁴ The President's choice of someone to serve as Chief Justice is crucial because a powerful Chief Justice, such as Chief Justice Earl Warren, can significantly alter the course of legal history. Chief Justice Roberts was the youngest Justice on the Court at the time President George W. Bush nominated Chief Justice Roberts.⁷⁵ "[H]e was known as a consummate legal mind; a virtuoso with a pen, lucid and wry; and at least most of the time, a thoughtful administrator."⁷⁶

When Chief Justice Roberts assumed his leadership role on the Court in 2005, one of his goals was to encourage consensus building among the Justices resulting in more unanimous decisions.⁷⁷ He explained:

I have eight extraordinarily accomplished colleagues who work hard and have a particular view, and they, I think, also are committed to having us work together as much as possible. I think unanimous, or close to unanimous, decision is much more effective, much more acceptable, than a sharply divided five-four, or even worse, you know, four-three-two.⁷⁸

71. Tony Mauro, *Why Roberts Sided with Liberals Blocking Restrictive Louisiana Abortion Law*, NAT'L L.J. (Feb. 8, 2019, 12:19 PM), <https://www.law.com/nationallawjournal/2019/02/08/why-roberts-sided-with-liberals-blocking-restrictive-louisiana-abortion-law/> [<https://perma.cc/FWB4-A9TC>].

72. Tony Mauro, *Chief Justice Roberts Joins Liberal Wing to Snub Alabama Court in Death Case*, NAT'L L.J. (Feb. 27, 2019, 2:52 PM), <https://www.law.com/nationallawjournal/2019/02/27/chief-justice-roberts-joins-liberal-wing-to-snub-alabama-court-in-death-case/> [<https://perma.cc/U43Z-DAYT>].

73. *See Supreme Court Nominations (Present-1789)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> [<https://perma.cc/AJ42-DSH9>].

74. *Supreme Court of the United States: Chief Justices*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/supreme-court-united-states-chief-justices> [<https://perma.cc/LS2E-8P68>].

75. KAPLAN, *supra* note 59, at 99.

76. *Id.*

77. *See* WRIGHTSMAN, *supra* note 24, at 93–94.

78. Mauro, *supra* note 71.

In that role, he has taken a “minimalist approach,” which has resulted in a greater percentage of unanimous decisions.⁷⁹ When Chief Justice Roberts was questioned “whether he was making progress in his goal of reducing the number of 5-4 decisions, Roberts said, ‘Well, you know, some days are better than others.’”⁸⁰

B. Deciding Cases

For the Supreme Court, the judicial decision-making process begins long before a case is heard on its merits. Justices are largely in control of choosing which cases to hear; the jurisdiction of the United States Supreme Court is largely discretionary. Through accepting or declining to accept a petition for writ of certiorari, the Justices select which cases the Court will hear and decide.⁸¹ The Justices’ votes on whether to grant or deny a petition for writ of certiorari can be strategic. The crucial tipping point is when there are three votes to grant the petition and a single Justice wavering on the decision. The final decision of the holdout Justice could be made in favor of granting the petition, if the Justice wants the Court to reverse the lower court decision. In contrast, a Justice could vote against granting the petition if the Justice is afraid that granting the petition might mean that the Court would ultimately decide to reverse a lower court decision with which the Justice agrees.⁸²

The Court decides a relatively small number of cases in full opinion each year. The cases initially filed with the Court undergo a very discriminating selection process: one study showed that the Court hears less than 75 cases of the 7,000 to 8,000 petitions filed during an October through June Court term.⁸³ The Justices’ law clerks are the first ones to review the filed cases and write memos suggesting whether the Court should grant certiorari on the filed cases.⁸⁴ The law clerks typically graduated from prestigious law

79. WRIGHTSMAN, *supra* note 24, at 24.

80. Mauro, *supra* note 71.

81. *Supreme Court Procedures*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> [<https://perma.cc/GB4X-Y8QM>].

82. HUME, *supra* note 23, at 116.

83. Jacobi & Sag, *supra* note 39, at 1198. That number of cases heard has remained fairly constant since 2010; between 1960 and 1990, the number of cases heard dropped from approximately 175 to 100 and the drop continued, although less precipitously, until 2010. *Id.* at 1197.

84. *Supreme Court Procedures*, *supra* note 81.

schools and previously clerked for federal intermediate court judges; by tradition, each of the Associate Justices hires four law clerks and the Chief Justice hires four or five.⁸⁵ Several of the present Justices clerked for Supreme Court Justices, with Chief Justice Roberts clerking for Justice William H. Rehnquist, Justice Kagan clerking for Justice Thurgood Marshall, Justice Gorsuch clerking for then-retired Justice Byron R. White and Justice Anthony M. Kennedy, and Justice Kavanaugh clerking for Justice Kennedy.⁸⁶

Although a Justice's law clerks split the workload, the time requirement necessary to review the petitions is intense. The Court established the "cert pool" tradition in 1973 to ease the law clerks' workload.⁸⁷ A pool law clerk writes a memo circulated to the chambers of the Justices participating in the pool; the memo makes a recommendation whether the Court should grant a petition for writ of certiorari.⁸⁸ The easier path to follow for a pool law clerk is to recommend that the Court not grant a petition; an outlier recommendation would be to grant a petition, as there are few petitions granted among the thousands of petitions filed with the Court each year. Retired Justice John Paul Stevens speculated that the use of the cert pool contributed to the decreasing number of petitions granted by the Court.⁸⁹ Justice Kavanaugh experienced writing pool memos while clerking at the Court and commentators view Justice Kavanaugh's decision to join the cert pool as him carrying out his promise to be a team player.⁹⁰ Only two Justices, Alito and Gorsuch, opted out of the Court's cert pool.⁹¹ The decision of Justices Alito and Gorsuch not to be part of the cert pool means that those Justices and their clerks must review the petitions for writ of certiorari themselves.⁹² A law clerk writing for a single Justice can be more candid than one writing a pool memo.⁹³ Some contend that the cert pool puts too heavy an emphasis on the opinion of a single law clerk.⁹⁴ The law clerk memo recommendation does carry a lot of weight, although the Justices say that they personally review the petitions.⁹⁵ One empirical study concludes that the Court grants certiorari in those cases likely to affect lower court decisions: "[T]he Court grants cert to the case that will most significantly

85. *Id.*

86. *Current Members, supra* note 53.

87. Tony Mauro, *Unlike Gorsuch, Kavanaugh Jumps into SCOTUS Cert Pool*, NAT'L L.J. (Oct. 11, 2018, 2:07 PM), <https://www.law.com/nationallawjournal/2018/10/11/unlike-gorsuch-kavanaugh-jumps-into-scotus-cert-pool/> [<https://perma.cc/V47A-4ZSV>].

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

shape future lower court case outcomes in the direction that the Court prefers.”⁹⁶

The Chief Justice plays a vital role in the decision-making process because the Chief Justice is the one who chairs the judicial conference; in that role, the Chief Justice summarizes the case and is the one who first voices an opinion on how the Court should decide a case.⁹⁷ If in the majority, the Chief Justice is the one who determines which Justice will author the majority opinion.⁹⁸ The Chief Justice also chairs (1) conferences in which the Justices decide which petitions for writ of certiorari the Court will grant, (2) oral arguments, and (3) post oral argument conferences in which the Justices discuss how to decide cases.⁹⁹ The ability to steer the Court in conferences and oral argument potentially provides the Chief Justice a power not shared by the Associate Justices.¹⁰⁰ Chief Justice Roberts, however, apparently sees himself as having only a modest role in Court deliberations: “I do think it’s a worthy objective—not at all costs, I mean—if you have strongly held views on a particular approach to a case, and that results in a five to four decision, well, that’s the way it is. But I do think it’s worth trying to get broader views.”¹⁰¹

At the post oral argument conference, the most senior Justice in the majority assigns one of the Justices to write the majority opinion.¹⁰² Scholars note the importance of assigning a majority opinion to a Justice:

The author of the initial opinion draft can significantly affect the policy the Court produces because the opinion writer’s first draft establishes the initial position over which the justices bargain. Depending on the writer’s preference, the first draft can be crafted broadly or narrowly, can ignore or apply precedents, and can fashion various kinds of policy. Moreover, the opinion writer is in a position to accept or reject bargaining offers from his or her colleagues.¹⁰³

96. Álvaro Bustos & Tonja Jacobi, *Judicial Choice Among Cases for Certiorari 1* (Dec. 16, 2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2886398 [<https://perma.cc/SXL9-FXGW>].

97. CONG. RESEARCH SERV., *RL32821, THE CHIEF JUSTICE OF THE UNITED STATES: RESPONSIBILITIES OF THE OFFICE AND PROCESS FOR APPOINTMENT 4* (2005).

98. *Id.*

99. *Supreme Court Procedures*, *supra* note 81.

100. WRIGHTSMAN, *supra* note 13, at 200.

101. Mauro, *supra* note 71.

102. *Supreme Court Procedures*, *supra* note 81.

103. WRIGHTSMAN, *supra* note 13, at 81 (quoting LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 126 (1998)).

Typically, the Chief Justice assigns to himself the task of authoring the majority opinion in difficult cases, which are often the cases interpreting the Constitution.¹⁰⁴

The number and type of judicial opinions pronounced by the Court often offer insight. Some 200 years ago, Chief Justice John Marshall instituted a policy of the Court issuing one opinion.¹⁰⁵ Previously, each Justice had issued his own opinion, which made it difficult to determine the exact nature of the Court ruling in a case.¹⁰⁶ As time went on, the Court gradually fell from the tradition of issuing a single opinion, with some Justices writing concurring opinions and some writing dissenting opinions. Recently, the percentage of nonunanimous opinions has climbed to 50%–60%.¹⁰⁷ The appearance of a higher percentage of non-unanimous decisions may have the effect of making the Court seem “more fragmented, less stable, and less predictable.”¹⁰⁸

Chief Justice John Marshall also began the tradition of the Chief Justice writing the majority opinion in important constitutional cases; this tradition has continued unabated.¹⁰⁹ The majority opinion may, however, evolve over time as the author revises the opinion to incorporate language suggested by various Justices such that the final majority opinion has become a collaborative effort of a number of Justices.¹¹⁰ The “report vote” is the agreement of at least a majority of the Justices with the finalized majority opinion.¹¹¹ Other Justices may prepare dissenting opinions and those in the majority may prepare concurring opinions.¹¹² The initial draft of the majority opinion is subject to being revised any number of times based on the reaction of the other Justices.¹¹³ The other Justices have a great deal of bargaining power because they can threaten to write concurring and dissenting opinions if they decide that the majority opinion does not contain language sufficient to address their viewpoints.¹¹⁴ The decision to write a concurring or a dissenting opinion requires a Justice to commit time to author the opinion—sometimes a significant amount of time, if a long opinion is required.¹¹⁵ As a result, a Justice may find difficulty in carving out the requisite time needed, especially

104. *Id.*

105. M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2008 SUP. CT. REV. 283, 313.

106. *See id.* at 284.

107. WRIGHTSMAN, *supra* note 24, at 101.

108. *Id.* at 102.

109. WRIGHTSMAN, *supra* note 13, at 81.

110. *Id.* at 105.

111. *Id.* at 83.

112. *Supreme Court Procedures*, *supra* note 81.

113. *Id.*

114. *Id.*

115. *Id.*

if the final decision in a case comes at the end of the Court term when time is at a premium.

Other than appearing together during oral argument and engaging in discussion during their conferences, the Justices may have little personal interaction with each other, and commentators have described the atmosphere at the Court as similar to nine separate law firms rather than a single law firm with nine partners.¹¹⁶ Chief Justice Roberts is attempting to combat this fragmentation by creating a more cohesive atmosphere for the Court, believing that the Court is “most effective when we operate and function as a court rather than nine separate individuals.”¹¹⁷

Court observers perceive the Office of the Solicitor General to be influential in decisions reached by the United States Supreme Court, with the Court more often siding with the office, whether the office appears before the Court as an advocate or as *amicus curiae*. One author theorizes that the influence of the Office of the Solicitor General differs depending on whether a case is ideological or nonideological: “in ideological cases the justices are less susceptible to persuasion from the Office of the Solicitor General, despite the high regard with which these attorneys are held, because their minds have been made up.”¹¹⁸ Extremely experienced attorneys who regularly appear before the United States Supreme Court staff the Solicitor General’s Office.¹¹⁹ “The solicitor general’s office participates in approximately two-thirds of the cases that the Supreme Court decides on the merits each year, and it wins most of them.”¹²⁰ Some attribute this success to the high level of familiarity and experience the Solicitor General’s office has with appearing before the Court, while others attribute this success to the high level of advocacy of the office and the long-term relationship between the Court and the office.¹²¹

Court observers scrutinize the activities of the Justices “to a degree that is unusual and almost certainly unique among courts in the United States.”¹²² Legal analysts ramp up this scrutiny as the Court nears the end of its term in June when the Court announces a majority of its decisions.¹²³ Typically,

116. WRIGHTSMAN, *supra* note 13, at 86.

117. WRIGHTSMAN, *supra* note 24, at 148.

118. Wrightsman, *supra* note 26, at 65.

119. HUME, *supra* note 23, at 185.

120. *Id.*

121. *Id.*

122. DEVINS & BAUM, *supra* note 10, at 23.

123. *See id.* at 29.

the Court announces some of its most important and difficult decisions near the end of June; these are often decisions on cases in which the Court heard oral argument months earlier.¹²⁴ Many times, the Court disposes of its most difficult cases by reversing lower court decisions. Each year the Court accepts a petition for writ of certiorari in only a small percentage of the approximately 8,000 cases petitioned to the Court.¹²⁵ Although one reason for the Court granting a petition is to settle a split among the circuits, another reason may be to overturn a lower court decision.

Other indicators of the ultimate decision of the Court that academics have studied is the pattern in which the Justices ask questions during oral argument¹²⁶ and how the Justices use humor during oral argument.¹²⁷ With respect to questions, some claim that there is more questioning in oral argument of the attorney representing the losing party in the case—a claim that is backed up with empirical support.¹²⁸ Within the last thirty years, “‘the disagreement gap’—the difference between the number of words a Justice speaks to the Petitioner versus the Respondent in a given case—became a much more reliable predictor of voting behavior on the Court.”¹²⁹ One scholar opines that the Justices’ patterns of questioning during oral argument is more closely tied to the Justices’ preliminary votes in conference following oral argument than it is to the Justices’ alignment in the Court’s opinion when ultimately announced.¹³⁰

When it comes to humor, the law professors Tonja Jacobi and Matthew Sag assert that “[h]umor is a weapon of advocacy, and it is a particularly powerful one because the advocates are unarmed against it—not only by their formally inferior status to the Justices, but also because the rules of the Court admonish them to avoid using humor themselves.”¹³¹ In an empirical study of Court humor from the 1955 Court term through the 2017 Court term, Jacobi and Sag found “‘that the justices most often use courtroom humor when they will eventually vote against the side the advocate is representing, when an advocate is losing an argument, and when an advocate

124. *Supreme Court Procedures*, *supra* note 81.

125. *E.g.*, *The Supreme Court 2016 Term: The Statistics*, 131 HARV. L. REV. 403, 410 tbl.II (2017).

126. WRIGHTSMAN, *supra* note 24, at 46; Jacobi & Sag, *supra* note 39, at 1162.

127. *See* Tonja Jacobi & Matthew Sag, *Taking Laughter Seriously at the Supreme Court*, 72 VAND. L. REV. 1423, 1429 (2019).

128. WRIGHTSMAN, *supra* note 24, at 48–49.

129. Jacobi & Sag, *supra* note 127, at 1429.

130. *See* WRIGHTSMAN, *supra* note 24, at 63.

131. Jacobi & Sag, *supra* note 127, at 1429.

is inexperienced.”¹³² They concluded that “the justices use humor as a tool of rhetoric and advocacy and an expression of power and dominance.”¹³³

Some theorize on the importance of the number of *amicus curiae* briefs supporting the opposing parties in a case as well as the interest groups expressing support for particular parties in impacting the ultimate decisions that the Justices make.¹³⁴ Professors who author *amicus* briefs may have an edge, as a survey of the Justices’ law clerks showed that 88% of the clerks gave “closer attention” to *amicus* briefs submitted by professors at elite law schools.¹³⁵

Justices have a number of options in the type of opinions they may offer. A unanimous decision is the best indicator of the Court being in consensus, particularly when it is unaccompanied by any concurring opinions. Justices may be more willing to join in a majority opinion if that opinion is narrow; a narrowly drafted opinion serves as precedent in fewer future cases. As a result, this approach results in more unanimous decisions. This minimalist approach results in the Court sidestepping difficult constitutional questions and has the disadvantage of not answering important questions that observers anticipated that the Court would answer.¹³⁶ One scholar compared unanimous versus nonunanimous Court decisions and found that “unanimous decisions, as expected, were lower in complexity than nonunanimous decisions.”¹³⁷

A Justice might concur in the majority decision, yet write a separate concurring opinion, or a Justice might concur with the majority judgment but not in the majority opinion. The appearance of a concurring opinion indicates that the author is not entirely in consensus with the majority of the Court. Obviously, a dissenting opinion indicates an explicit disagreement with the majority and multiple dissenting opinions reflects an even greater fracture among the Justices. As one scholar notes, “it’s the divisive cases that typically matter most.”¹³⁸ A Justice may choose to write a dissenting opinion to show the Justice’s independence, to attack the reasoning of the majority opinion, to give voice to the Justice’s views on the case, or to express the theory upon which the Justice believes the Court should decide a similar case.

132. *Id.* at 1430.

133. *Id.* at 1495.

134. DEVINS & BAUM, *supra* note 10, at 48.

135. *Id.* at 46.

136. *See* WRIGHTSMAN, *supra* note 24, at 26.

137. WRIGHTSMAN, *supra* note 13, at 106.

138. KAPLAN, *supra* note 59, at 18.

Concurring and dissenting opinions tend to weaken the impact of the majority opinion.¹³⁹ Understanding this, Chief Justice Roberts “has been advocating for more narrow, unanimous decisions.”¹⁴⁰ Dissenting opinions are more likely in important cases in which the dissenting Justice feels that the Justice needs to voice his or her views.¹⁴¹ A case that centers on a tension between a fundamental individual constitutional right and protection of society may produce a number of opinions and the number of opinions may grow if the legal basis for the decision is subject to varying interpretation.¹⁴² In addition, a dissent can “expose holes in the thinking of the majority, they strengthen the conviction of those who disagree, and they further widen debate.”¹⁴³

The Court may issue more closely split decisions with only five Justices joining in the majority opinion in the more difficult cases concerning the tough ideological issues.¹⁴⁴ “Decisions and dissents in some cases lay bare the differing values and attitudes of justices.”¹⁴⁵ Some think that reaching a decision in an ideological case is more time consuming, as gauged by the length of time between oral argument and the date on which the Court announces a decision.¹⁴⁶ Prior to Justice Kennedy’s retirement from the Court at the end of the October 2017 term, Justice Kennedy often provided the pivotal vote in close decisions of the Court.¹⁴⁷ Justice Kennedy’s position on these close, narrowly decided cases was not consistently in the liberal nor in the conservative camps, which some observers see as reflecting an open-mindedness; others claim Justice Kennedy was indecisive and, therefore, could easily be persuaded.¹⁴⁸

Some commentators see the Court as losing some of its legitimacy when it reaches a case by the majority opinion collecting only five votes.¹⁴⁹ Others view such a fractured decision as inevitable in a hard-fought, contentious case.¹⁵⁰ “1. Social actors, including the justices, make choices to achieve certain goals. 2. Social actors, including justices, act strategically in that their choices depend upon what they expect the other actors to do. 3. These choices are constrained by an institutional setting in which they are made.”¹⁵¹

139. WRIGHTSMAN, *supra* note 13, at 100.

140. Wrightsman, *supra* note 26, at 70.

141. WRIGHTSMAN, *supra* note 13, at 100.

142. *Id.*

143. *Id.* at 101.

144. *See* WRIGHTSMAN, *supra* note 24, at 94.

145. WRIGHTSMAN, *supra* note 13, at 123.

146. Wrightsman, *supra* note 26, at 66.

147. WRIGHTSMAN, *supra* note 24, at 94.

148. *Id.* at 89–90.

149. *See id.* at 87.

150. *Id.*

151. WRIGHTSMAN, *supra* note 13, at 136.

Deciding a case before the United States Supreme Court requires a significant amount of interaction among the Justices. The Justice assigned to write the majority opinion might search for consensus by wording the opinion to garner the requisite number of votes to maintain a majority. In that way, the author of the opinion must be cognizant of the known views of other Justices to incorporate those views into the opinion and may be hoping to persuade some initially in the minority to join the majority. There is often a give-and-take among the Justices, with an effective legal argument potentially persuading a Justice to switch sides. Many of the most difficult cases before the Court have been decided on a 5–4 vote.¹⁵² The language of an opinion may have the effect of causing a Justice to switch sides. Some Justices may be more skillful and effective in shaping the content of a particular opinion. Considering that it is a lifetime appointment to the United States Supreme Court and Justices may work together for years, a spirit of cooperation may be useful in reaching consensus.

A United States Supreme Court decision settles the controversy between the parties to the case, but perhaps more importantly, the decision predicts how the Court will decide future cases and governs the activity of lower courts. Because the Court issues such a small number of opinions each year, the legal community carefully scrutinizes the wording of Court cases to determine how courts will apply the case in the future. Although the judgment in a case is obviously important to the parties to the case, the rationale for the decision may be much more crucial to certain Justices. The author of the majority opinion could influence a Justice to join in the majority opinion; in the alternative, the Justice could decide to join in only the judgment but not in the reasoning and write a separate concurring opinion because of a divergence from the reasoning of the majority opinion.¹⁵³ Certain decisions may be the product of bargaining among the Justices. More Justices joining in the majority may be the result of more effective bargaining by the author of the majority opinion, while more concurring and dissenting opinions could be the product of bargaining that did not proceed so successfully.¹⁵⁴

The doctrine of *stare decisis*, which we will discuss in detail shortly, is perhaps the most oft-cited constraint on decision-making, but, as we have already discussed, it is certainly not the only one. A judge on an appellate

152. See WRIGHTSMAN, *supra* note 24, at 87.

153. HUME, *supra* note 23, at 110.

154. See *id.* at 112–13.

court is constrained by the presence of the other judges who participate in deciding the case. On the United States Supreme Court, a Justice has to consider the viewpoints of the other Justices. The Justices work in a rarified atmosphere: “[T]he Justices are very much part of a network of super-elite lawyers that includes former Supreme Court clerks, the Office of the Solicitor General, and the Supreme Court bar, that is, private sector lawyers who regularly practice before the Supreme Court.”¹⁵⁵ The Justices among them bring a wealth of legal knowledge and different Justices might want to follow disparate doctrines as controlling on a case. A benefit of multiple viewpoints and the discussion among the Justices is that an opinion might be better reasoned than an opinion reached by fewer participants. To garner sufficient votes for a majority opinion, the author must take into account the differing viewpoints. Any concurrences and dissents can be useful in identifying any weaknesses in the reasoning employed in the majority decision. In addition, the Justices consider that each Court decision will be subject to scrutiny by other judges, attorneys, the press, interest groups, and the public. The high visibility of the Court provides another constraint on the wording of the decision.

In sum, while a Justice’s legal and political ideologies may be primary drivers of their ultimate position in a given case, these are not unchecked influences. The need to negotiate with—and recruit—other Justices in pursuit of a majority vote provides one check, as does the need to project stability and retain the public’s confidence. As Benjamin Cardozo once observed, “Justice is not to be taken by storm. She is to be wooed by slow advances.”¹⁵⁶ But perhaps the biggest constraint on ideological activism is rooted in the effect of precedent.

C. *The Effect of Precedent*

The Court has to justify and support its decision through written opinion. Judge Kozinski stated, “Under our law judges do in fact have considerable discretion in certain of their decisions: [including] interpreting language in the Constitution The larger reality, however, is that judges exercise their powers subject to very significant constraints.”¹⁵⁷ Judges “may choose relevant analogies (or precedents) as better or worse, applicable or inapplicable, not because of any particular desired outcome but rather because of their own preexisting knowledge.”¹⁵⁸ Commentators immediately analyze new Court decisions; the author of an opinion must provide sufficient reasoning

155. DEVINS & BAUM, *supra* note 10, at 25.

156. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 133 (1924).

157. Robbennolt, MacCoun & Darley, *supra* note 9, at 27.

158. Barbara A. Spellman, *Judges, Expertise, and Analogy*, in *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING*, *supra* note 5, at 149, 149.

to bolster the Court's legitimacy. "[J]udges may, in fact, be following the idealized decision-making process to the letter, and be unmotivated toward finding a particular result, yet may usually still reach the predicted result."¹⁵⁹

In other words, the result in a case may coincide with a judge's principles, yet the judge may not have consciously manipulated the wording in the decision to reach the desired result. "Understanding precedent requires recognizing that we can break with some particular precedents, but we cannot break away from precedent."¹⁶⁰ Although the Court is deciding the particular case before the Court, the Justices are well aware that the principles set forth in the case apply to other cases with similar facts. "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . ."¹⁶¹ To be persuasive, an opinion must be consistent with current society in which technology plays a central role—as we will discuss shortly. "Nor can these expressions [of the principles of constitutional law] be fully understood apart from the cultural, political, social, legal, and historical contexts in which they are made or subsequently evaluated."¹⁶² An opinion must also provide predictability to guide courts in future decisions.

Court precedents vary in the weight of authority accorded them, with some accorded more weight than others; for example, some decisions of Chief Justice John Marshall are considered super precedents that will continue to contain foundational principles for the United States government. "Because the Court is a critical interpreter of (and actor) in historical events, its precedents preserve, illuminate, and reflect contemporary perspectives on the nation's social, political, and legal traditions."¹⁶³

Scholars have recognized "the interactive effect between the precedent vitality and the ideological distance between the precedent and the Court."¹⁶⁴ The Court has the option of overruling precedent, but the Court exercises caution in taking this step. "[A]ll the current justices, as well as the vast majority in American history, place a premium not just on correctly deciding

159. *Id.*

160. GERHARDT, *supra* note 3, at 203.

161. THE FEDERALIST NO. 78, at 383 (Alexander Hamilton) (Terence Ball ed., 2003).

162. GERHARDT, *supra* note 3, at 203.

163. *Id.* at 164.

164. HANSFORD & SPRIGGS, *supra* note 16, at 91.

questions, but on the institutional value of stability—avoiding needless chaos, uncertainty, and instability—in constitutional law.”¹⁶⁵

Overruling precedent is problematic in that, if not carefully done, the Court can weaken its legitimacy; following precedent lends stability to the law and increases the Court’s legitimacy. “As ideological distance increases, the hazard or likelihood of a precedent being overruled also increases. But this effect is conditioned by the extent to which the precedent is vital.”¹⁶⁶ Some may say that the Court is engaging in judicial activism when it overrules a prior decision of the Court.¹⁶⁷ In other words, the Court does not take the decision to overrule precedent lightly. “Standards abound in constitutional law . . . includ[ing] the balancing tests the Court employs for determining the reasonableness of searches or seizures.”¹⁶⁸ The Court can cast an outmoded Court doctrine aside. “The easiest way to overrule a decision is by persuading the Court to change its mind rather than amending the Constitution.”¹⁶⁹

Following the doctrine of *stare decisis* in deciding a case provides guidance for a judge and has the added benefit of constraining the judge. “[O]verrul[ing] too many precedents not only sets a bad example—a bad precedent—because it provides no incentive to respect the work of its predecessors, but also invites other branches and lower courts to view its decisions with the same lack of respect with which it views previous decisions.”¹⁷⁰ This constraint makes the final decision in the case more palatable both for the parties in the case and for judges, attorneys, and the public who consider the case as precedent to decide future cases that have substantially similar facts. “[C]ourt decisions are not self-executing and thus third parties must implement them before they have any real effect. Since legitimacy encourages compliance, it enhances the power of courts and facilitates their ability to cause legal and political change.”¹⁷¹ Precedent-setting cases operate as rules that are set against the backdrop of generally accepted legal principles that provide a framework for the legal structure of the country’s government. “A healthy respect for precedent means learning to live with decisions with which one disagrees.”¹⁷²

The doctrine of *stare decisis* lends stability and predictability to the country’s legal system. “[Chief Justice] Roberts acknowledged that predictability, stability, consistency, and reliance are values to be taken into account in

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165. GERHARDT, *supra* note 3, at 188.
166. HANSFORD & SPRIGGS, *supra* note 16, at 91.
167. See WRIGHTSMAN, *supra* note 24, at 18, 28.
168. GERHARDT, *supra* note 3, at 99.
169. *Id.* at 101.
170. *Id.* at 195.
171. HANSFORD & SPRIGGS, *supra* note 16, at 19.
172. GERHARDT, *supra* note 3, at 195.

constitutional adjudication, and it would seem to follow that these values ought to count in most cases.”¹⁷³ Thus, the fabric of society has endorsed precedent-setting cases, which serve to guide judges in their future decisions. “It follows that there may be at least some instances in which the values promoted by fidelity to precedent are compelling.”¹⁷⁴ The country’s legal system is an adversarial one in which the judge determines the distribution of rights between the parties litigating. The judge’s reasoning justifies this distribution and legitimizes the decision to the public. A judge writes an opinion to make the decision appear to be objective, with the judge constrained by prior case law. However, where opposing attorneys can make reasoned arguments in favor of their clients, it is clear that the judge’s decision is not as constrained as the judge’s reasoning would make it seem. “Much of the literature asserts (at least implicitly) that precedent acts either as a constraint that operates across the board or as a ‘cloak’ that never actually influences the Court.”¹⁷⁵ The wording of the Court opinion may be more important than the judgment in a case because the reasoning is what sets forth the legal rule to be followed in future cases. The legal community scrutinizes each word of a Court opinion to glean insight into the direction that the Court may be heading in future cases.

Still, judges and legal scholars differ as to the appropriate weight that precedent should be given. Lord Denning, who some view as one of the greatest of British judges from the past century, stated:

My root belief is that the proper role of a judge is to do justice between the parties before him. If there is any rule of law [that] impairs the doing of justice, then it is the province of the judge to do all he legitimately can to avoid that rule—or even to change it—so as to do justice in the instant case before him.¹⁷⁶

This nearly combative view has been circumvented by others who simply expand their view of precedent. Michael Gerhardt, for example, defines precedent as “*any* past constitutional opinions, decisions, or events which the Supreme Court . . . invest[s] with normative authority.”¹⁷⁷ This means that precedent is not limited to the Court’s prior decisions and may include “norms (such as avoiding ruling on constitutional issues whenever possible) . . . and traditions (such as producing opinions for the Court and not seriatim)

173. *Id.*

174. *Id.*

175. HANSFORD & SPRIGGS, *supra* note 16, at 12–13 (citations omitted).

176. DENNING, *supra* note 27, at 174.

177. GERHARDT, *supra* note 3, at 3.

that the justices have deliberately chosen to follow.”¹⁷⁸ Precedent has an immense effect and its golden rule is that “justices must be prepared to treat others’ precedents as they would like their own to be treated or risk their preferred precedents being treated with the same kind of disdain they show others.”¹⁷⁹

For his part, Chief Justice Roberts expressed the following concerning precedent during his confirmation hearing before the Senate Judiciary Committee:

Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to the ball game to see the umpire. Judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath.¹⁸⁰

During his confirmation hearing, “John Roberts avoided controversy by rejecting fidelity to any particular theory of constitutional interpretation. Instead, he espoused a philosophy of ‘judicial modesty.’ He likened judging to umpiring, and he referred to himself as a proponent of ‘bottom-up’ judging, which included a healthy degree of respect for *stare decisis*.”¹⁸¹ In a similar vein, Justice Kavanaugh stated that he would be “hardworking, even-keeled, open-minded, independent and dedicated to the Constitution.”¹⁸² At his swearing in ceremony, Justice Kavanaugh stated that “a good judge must be an umpire, a neutral and impartial arbitrator.”¹⁸³ Before the Senate Judiciary Committee Justice Kavanaugh explained, “I don’t decide cases based on personal or policy preferences.”¹⁸⁴

Harvard Law Professor Cass Sunstein advocates minimalism in judicial writing, meaning that the decision should be fairly narrow, rather than broad.¹⁸⁵ “Minimalism has the principal virtue of reducing judicial interference as much as possible with democratic authorities’ own, independent constitutional judgments.”¹⁸⁶ A benefit of writing a narrow decision is that more Justices might be inclined to join in the decision than if the decision were broader. “Cass Sunstein’s theory of judicial minimalism suggests, for example, the

178. *Id.*

179. *Id.* at 3–4.

180. MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE* 143–44 (2011).

181. GERHARDT, *supra* note 3, at 193–94.

182. DEVINS & BAUM, *supra* note 10, at xvi.

183. *Id.* at xv.

184. *Id.*

185. WRIGHTSMAN, *supra* note 24, at 21.

186. GERHARDT, *supra* note 3, at 150.

Court should generally undertheorize, which means leaving some things undecided. He proposes some decisions should be narrow (confined to their particular facts) and shallow (reasoned thinly), while others should be narrow and deep (more narrowly reasoned).¹⁸⁷ Chief Justice Roberts is a fan of the minimalist approach to writing opinions.¹⁸⁸ Both Chief Justice Roberts and Justice Alito assert that they are “genuinely committed to judicial modesty or constitutional humility”;¹⁸⁹ in other words, they are “pro-precedent.”¹⁹⁰ These terms indicate that the two jurists respect precedent and are minimalists in that their chosen path is to reach narrow decisions that do as little damage as possible to earlier Court decisions. Justice Scalia was and Justice Thomas is at the opposite extreme of the spectrum in being more likely to question the wisdom of adhering to an earlier Court case as precedent.¹⁹¹ Notwithstanding, the Justices on today’s Court “appear to value precedent more than justices have in the past.”¹⁹²

Following the doctrine of stare decisis gives the law stability and predictability, which enhance Court legitimacy. However, the law is bound to change as social practices and technology move society in new directions. “[T]he values of precedents increase the more often they are cited. Conversely, the values of precedents decrease the less often they are cited—or more often they are criticized.”¹⁹³ A precedent may become so outmoded and inconsistent with contemporary practices that the Court must overrule the case either in whole or in part. “[D]istinguishing, narrowing, and occasionally overruling precedent are acts which the Constitution authorizes.”¹⁹⁴ Explicit overruling of constitutional precedent in the area of Fourth Amendment search and seizure is the fourth most prevalent area for overrule, following due process, the commerce clause, and the Fifth Amendment.¹⁹⁵ “An implicitly overruled precedent no longer is law, even as applied to the fact situation it initially purported to resolve, while a seriously narrowed precedent retains sufficient vitality to resolve fact situations identical to that which it originally settled.”¹⁹⁶

187. *Id.* (footnotes omitted).

188. *See* WRIGHTSMAN, *supra* note 24, at 24.

189. GERHARDT, *supra* note 3, at 7.

190. HUME, *supra* note 23, at 78.

191. *Id.*

192. *Id.*

193. GERHARDT, *supra* note 3, at 109.

194. *Id.* at 8.

195. *Id.* at 10.

196. *Id.* at 35.

Explicit overruling of precedent occurs more frequently when there has been a change in the Court's membership since the Court decided the precedent-setting case.¹⁹⁷ "Legal scholars increasingly suggest that the Court is much more of a follower than a leader with respect to constitutional change."¹⁹⁸ Predictably, then, the most far-ranging discussions of earlier cases decided by the Court in a Court opinion tend to be those in which the Court is "either expressly or clearly reconsidering prior decisions."¹⁹⁹ Textualists, like Justices Scalia and Thomas, advocate that the Court remain faithful to the Constitution as written and as the Founding Fathers would have interpreted the Constitution when the country adopted it. However, skeptics warn that "[t]he Framers and Ratifiers failed to anticipate every contingency, they often failed to reach consensus on more specific language, and they agreed on general terms for different, often complex reasons."²⁰⁰ Other Justices recognize that the Court must interpret the Constitution in light of evolving social practices and technology: "The abstractness of a written constitution limits its ability to guide concrete decisions taken in its name, and increases the likelihood of unpredictability in its construction."²⁰¹ The legal model of following precedent in decision-making "assumes that the intent of the framers is clear and discernible. Not all judges agree. Each article of the Constitution is remarkably succinct."²⁰²

While a Justice's particular take on precedent is informative, a singular focus on any one method that controls how a judge decides a case would be misplaced. "The legal model relies on precedents. But the decision whether a given precedent [applies] is a subjective one."²⁰³ Lawrence Wrightsman notes that this subjectivity may ultimately come down to how a judge reacts to the legal briefs that they are presented with:

[A] judicial opinion, the written statement of a judge's decision on the disposition of a case, may be partially based on that judge's attitude—his or her evaluative reaction to a stimulus object (legal briefs, in this context). In written form, the judicial opinion becomes the behavioral component of the attitude.²⁰⁴

A judge's particular attitude may conflict with the interests of others involved in the case, including the litigants, other judges on the court, special interests, and so on. It does not really matter whether the interest is collegial, legal, or ideological, and some observers argue that, compared other judges, "Supreme

197. *Id.* at 11.

198. *Id.* at 107.

199. *Id.* at 4.

200. *Id.* at 95.

201. *Id.*

202. WRIGHTSMAN, *supra* note 13, at 114–15.

203. *Id.* at 120.

204. *Id.* at 121.

Court justices have greater discretion to base their decisions on their values or on public policy goals.”²⁰⁵

III. PSYCHOLOGY AND THE UNITED STATES SUPREME COURT

A. *The Psychology of the Ideology-Precedent Spectrum*

One thing that a Justice’s ideology and the Justice’s view of precedent have in common is that these influences are often explicit. A Justice’s track record in politically divisive cases provides a fairly straightforward snapshot of the Justice’s ideological stance. Likewise, a Justice’s written opinion can provide evidence of the Justice’s stance on precedent. These important predictors of judicial decision-making are often either observable or deducible. Somewhat less obvious are the myriad influences on a judge’s decision-making that might be categorized as psychological.

The discipline of psychology may shed some light on what motivates judges in deciding cases by helping to identify the factors involved in judicial decision-making that are not so easily captured by written opinions. In particular, it can help to illuminate how Justices navigate the tension that sometimes arises between ideology and precedent in deciding cases. As this Article has discussed, scholars have developed various models that they use in predicting United States Supreme Court decision-making: “At one end of the spectrum are those who herald the importance of *stare decisis* as perhaps the single most important factor in judicial decisions.”²⁰⁶ However, some judges may cite precedent as a subterfuge for achieving a result that lines up with their ideology. “At the other end of the spectrum are those who argue that precedent is not influential, that it merely cloaks the justices’ personal policy preferences.”²⁰⁷ At times, judges write opinions with a mixture of motives. Finally, there are also “those who argue that precedent can occasionally influence the justices but also believe that nonlegal factors can be just as important.”²⁰⁸

Justices are, after all, human beings and “even in their court decisions, they reflect many human qualities. . . . [J]ustices are predictable only within limits. Legal philosophies and personal attitudes go only so far in predicting.

205. *Id.* at 124.

206. SPAETH & SEGAL, *supra* note 4, at 7.

207. *Id.*

208. *Id.*

Situational determinants may intrude.”²⁰⁹ Wrightsman argues that a “sophisticated understanding of judicial decision making should explicitly incorporate the notion that judges simultaneously attempt to further numerous, disparate, and often conflicting, objectives.”²¹⁰

Even if guided by a particular policy choice, Justices typically bolster the reasoning and the judgment in a case by citing to precedent-setting cases to legitimize the opinion. “The most widely shared assumption is that judges as decision makers act primarily or entirely on the goal of making good legal policy.”²¹¹ Some believe that judges engage in second-order reasoning when deciding cases.²¹² Second-order reasoning is involved when a judge feels guided by a requirement of following higher order rules, such as precedent in interpreting the United States Constitution, when the judge otherwise would be guided by other factors.²¹³ “Second-order reasoning is deemed central to the judicial function in that it forces judges to abide by a hierarchy of reasons, and specifically, to yield to higher order considerations even when they feel that doing so leads to suboptimal or unwise outcomes for the case at hand.”²¹⁴

The legal model posits that judges follow precedent and legal principle because following precedent lends stability to the law.²¹⁵ A judge whose decision differs from what one might expect based on the judge’s policymaking preferences might feel strongly influenced to rule in a certain way because of a powerful precedent that controls the decision.²¹⁶ One scholar uses a cooperative model pursuant to which “justices support *stare decisis* not because they normatively feel that they ought to, but because the long-term survival of their policy goals depends on it.”²¹⁷ Because of the doctrine of *stare decisis*, observers make business decisions based on their understanding of the direction in which court decisions are heading.²¹⁸

One might hope that judges engage in second-order reasoning to promote stability and legitimacy in case law. Of course, certain facts distinguish a case presently under consideration from a precedent-setting earlier case and a judge is bound to follow prior precedent only if the facts in the two cases

209. WRIGHTSMAN, *supra* note 13, at 236.

210. Robbennolt, MacCoun & Darley, *supra* note 9, at 28.

211. Baum, *supra* note 5, at 19.

212. CATHERINE VALCKE, *COMPARING LAW: COMPARATIVE LAW AS RECONSTRUCTION OF COLLECTIVE COMMITMENTS* 156 (2018).

213. See Dan Simon, *In Praise of Pedantic Eclecticism: Pitfalls and Opportunities in the Psychology of Judging*, in *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING*, *supra* note 5, at 131, 132–33.

214. *Id.* at 133.

215. See HUME, *supra* note 23, at 71.

216. See *id.* at 76.

217. SPAETH & SEGAL, *supra* note 4, at 13.

218. HUME, *supra* note 23, at 74.

are substantially similar. The attorney representing one of the parties will argue that the present case is substantially similar to the precedent-setting case such that the judge is bound to rule in conformity with the prior precedent. The opposing attorney might very well argue that there are differences so significant between the case under consideration and the potentially precedent-setting case that the prior case is not controlling on the present decision. Similarly, the judge deciding the case could find leeway to determine either that the earlier case controls or does not control in the present case.

Another theory, sometimes referred to as the attitudinal model, is that Justices decide cases in conformity with their ideological preferences.²¹⁹ Pursuant to this model, judges follow their own policymaking preferences rather than follow a precedent that would have seemed to direct judges in a different direction.²²⁰ The legal model of decision-making, pursuant to which Justices follow precedent, does not fully describe how the Justices decide cases. “The legal model bleaches the decision-making process of its colorful human ingredients; it can be portrayed as an ultralogical, if not mechanical, analysis of applications of relevant statu[t]es and decisions.”²²¹ By the same token, the attitudinal model of decision-making, pursuant to which Justices are guided by their biases, does not fully describe how the Justices decide cases: “The attitudinal model, taken to its extreme, fails to recognize the constraints upon the judge as a professional person.”²²²

Still another theory is that Justices act strategically to reach their long-term objectives.²²³ “[S]trategic models propose that judges do not simply vote in ways that are plainly consistent with their attitudes, but make decisions that take into account the ways that the predicted actions of other players (such as their colleagues . . .) influence the feasibility of attaining their desired ends.”²²⁴ According to this strategic model of decision-making in the United States Supreme Court, “strategic considerations might lead the justices to take into account the prospective reactions of their colleagues as well as a variety of groups outside the Court, including . . . the general

219. *Id.* at 34.

220. *See id.* at 76.

221. WRIGHTSMAN, *supra* note 13, at 23.

222. *Id.*

223. Tonja Jacobi, *Competing Models of Judicial Coalition Formation and Case Outcome Determination*, 1 J. LEGAL ANALYSIS 411, 412–13 (2009).

224. Robbennolt, MacCoun & Darley, *supra* note 9, at 29.

public.”²²⁵ Judges may calculate how they can achieve the preferred outcome: “Strategic judges seek to affect the impressions of other people only for instrumental reasons—to win support for their positions from colleagues, to avoid negative reactions to their court’s decisions from other policy makers and the public . . . so they can continue to make legal policy.”²²⁶ At times, appellate court judges seek to gather a majority of the court in support of a particular opinion. “Thus, judges may agree to decisions that do not completely effect their policy preferences to avoid results that depart even further from their preferences or may draft opinions in ways that do not perfectly represent their preferences in the instant case, but that will garner the necessary votes.”²²⁷

Some scholars see an interplay between the strategic and attitudinal models of decision-making. They reason that “Supreme Court justices are strategic, and they argue that strategic considerations affect what the justices do in most stages of decision making. But in voting on the outcome of cases, they argue, justices have no strategic reasons to depart from their most preferred policy positions.”²²⁸

Tonja Jacobi theorizes that a Justice must balance a desire for the Court majority opinion to reach the outcome the Justice prefers—“optimization of outcome determination”—against the Justice garnering the votes of at least a majority of the Justices—“judicial coalition maximization.”²²⁹ Thus, a Justice weighs a number of factors in reaching a decision. “The processing of information, analysis of alternatives, and selection among those alternatives that culminate in judges’ choices are hardly straightforward. Even if we conceive of judicial decision making primarily in motivational terms, cognitive processes surely intervene between goals and choices.”²³⁰ A Justice balances numerous factors in arriving at the course the Justice follows: “It is clear that judicial decision making implicates a wide variety of objectives. Judges may be required to balance, for example, a desire to follow precedent against preferred policy preferences, or to balance the effort needed to act strategically against a desire to limit workload, among other goal conflicts.”²³¹ A Court observer should consider a number of theories if the observer wishes to analyze the factors a Justice considered in reaching a decision. “Considering judges as decision makers who must reconcile numerous objectives in carrying out a variety of different decision

225. Baum, *supra* note 5, at 6.

226. *Id.* at 18.

227. Robbennolt, MacCoun & Darley, *supra* note 9, at 29.

228. Baum, *supra* note 5, at 7.

229. Jacobi, *supra* note 223, at 412.

230. Baum, *supra* note 5, at 8.

231. Robbennolt, MacCoun & Darley, *supra* note 9, at 32.

tasks provides an avenue toward a more nuanced view of the cognitive complexity of judicial decision making and may lead to increasingly sophisticated hypotheses about judicial behavior.”²³²

B. *Extra-Legal Factors and Unconscious Decision-Making*

In addition to the many psychological influences that judges are conscious of, there are numerous unconscious processes that might be influencing judicial decisions behind the scenes. Psychologists have long recognized the powerful influence of unconscious psychological processes on human decision-making, and judges, by virtue of being human, are no exception to such influences.²³³

Of all the work done on unconscious processing, perhaps most relevant for the judicial decision-making process is the work done by the psychologist Jonathan Haidt on what he calls the social intuitionist model of judgment.²³⁴ According to Haidt and many other psychologists, there is a mountain of evidence demonstrating that judgment and justification are two different processes; with respect to many moral judgments—the kind often involved in disputes at the level of the Constitution and the Supreme Court—the directional arrow goes backwards.²³⁵ In his words, “Intuitions come first, strategic reasoning second.”²³⁶ Thus, those subscribing to this model might plausibly claim that a judge often reaches a judgment in a case by following a gut reaction to the proper resolution and, afterwards, constructs the description of the path of reasoning pursued to justify the preordained result. In other words, it may indeed be the case that a judge’s stated ideology or use of precedent are not in fact guiding the decision at all but are in fact being used as tools to justify an intuition that is otherwise reduced to a gut feeling.

232. *Id.* at 37.

233. *See generally* Nisbett & Wilson, *supra* note 34 (discussing evidence that people are sometimes unaware of the stimuli that affect their responses).

234. *See generally* Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001) (discussing evidence to support the social intuitionist model as an alternative to rationalist models).

235. *See* Jonathan Haidt & Selin Kesebir, *Morality*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 797 (Susan T. Fiske, Daniel T. Gilbert & Gardner Lindzey eds., 5th ed. 2010); Jonathan Haidt, *The New Synthesis in Moral Psychology*, 316 SCIENCE MAG., May 2007, at 998; *see also* Carlton J. Patrick, *The Long-Term Promise of Evolutionary Psychology for the Law*, 48 ARIZ. ST. L.J. 995 (2016); Carlton J. Patrick, *A New Synthesis for Law and Emotions: Insights from the Behavioral Sciences*, 47 ARIZ. ST. L.J. 1239 (2015).

236. Haidt, *supra* note 22, at 869.

Let us look again at the quote from Justice Kennedy discussed earlier, where he explained his method of deciding a case as follows:

But after you make a judgment you must then formulate the reason for your judgment into a verbal phrase, into a verbal formula. And then you have to see if that makes sense, if it's logical, if it's fair, if it accords with the law, if it accords with the Constitution, if it accords with your own sense of ethics and morality. And, if at any point along this process you think you're wrong, you have to go back and do it all over again. And that's, I think, not unique to the law, in that any prudent person behaves that way.²³⁷

One reading of Kennedy's quote is that he is simply articulating the judicial embodiment of the social intuitionist model: first the judge makes a decision, and then, only after deciding, does the judge check that judgment against all of the various principles that are thought to, in fact, produce that judgment. It is the intuition, not the principles, that truly inform the decision. The principles are merely the buttresses with which the judge constructs the written opinion.

Other findings in psychology are also illuminating. Brandon Bartels, applying "social psychological insights on the cognitive processes of judgment" to judicial decision-making, draws a distinction between top-down and bottom-up processing that judges might use to guide their decisions.²³⁸ On the one hand, some judges think of a broad context when faced with a determination. "In a top-down reasoning process, the generic predispositions, perception, or theories people bring to a judgment context dictate how they process the new information in front of them."²³⁹ Other judges scrutinize the facts of the particular case: "[B]ottom-up processing involves objective scrutiny of the information, facts, or evidence at hand."²⁴⁰

Neal Devins and Lawrence Baum also employ insights from social psychology, but in a slightly different way. They analyze the psychological motivation of Justices to earn the respect of the network of individuals within which they interact.²⁴¹ The two scholars see the networks of the Justices as comprised of elite individuals.²⁴² "Today's Justices are not simply partisan Democrats and Republicans. They are also graduates of the Harvard and Yale Law Schools who interface with the affluent and well educated, especially other elites in the legal profession, academy, and media."²⁴³ Justices Thomas and Sotomayor had more humble beginnings than the other Justices; even so, they both attended Yale Law School and became acclimatized to a rarified

237. Lithwick, *supra* note 14.

238. Bartels, *supra* note 15, at 41.

239. *Id.* at 43.

240. *Id.* at 44.

241. DEVINS & BAUM, *supra* note 10, at 10.

242. *Id.*

243. *Id.* at xi.

environment.²⁴⁴ Thus, Devins and Baum see that the current Justices seek the approval and respect of these elites, whose norms are “maintaining collegiality and acting on the basis of law.”²⁴⁵ Devins and Baum posit that this desire to have a good reputation among the elites, to maintain collegiality, and to follow the law leads to many unanimous opinions in Court cases but also leads to unpredictable votes in certain nonunanimous decisions like *Carpenter*.²⁴⁶

Besides being members of the elite, the Justices are unlike most of the country’s population. Members of the judiciary, particularly those on the United States Supreme Court, differ significantly from the general public in age, race, education, and sex, as well as their lack of participation in the criminal justice system as suspects. As a result, judges are likely to have a different concept of privacy than suspects. One study surveying 1,200 individuals made the following five findings:

- (1) [I]n general, the U.S. public has greater concerns for privacy than are reflected in current judicial doctrine. . . .
- (2) current judicial doctrine includes several relative judgments—e.g., giving no protection to emails held by an internet provider, but absolute protection to a bedroom—that do not reflect actual expectations of privacy in the United States. . . .
- (3) the ubiquitous practice of judgment in hindsight (i.e., with knowledge that a search has found evidence of crime) strongly decreases the likelihood that people will find violations of reasonable expectations or privacy. . . .
- (4) the pervasive practice of developing Fourth Amendment doctrine through criminal defendants’ suppression motions (in the third person) also decreases the likelihood of finding a violation. . . .
- (5) whites and older persons (beyond age 41)—such as those who dominate the U.S. state and federal judiciary—are less likely to find that police investigative practices invade privacy.²⁴⁷

Thus, case law findings of which police practices invade an individual’s reasonable expectation of privacy may not coincide with the view held by society. Justice Alito was very well aware of the disconnect between the Justices and the public when he stated: “[J]udges are apt to confuse their

244. *Id.* at 11.

245. *Id.*

246. *See id.*

247. Bernard Chao et al., *Why Courts Fail to Protect Privacy: Race, Age, Bias, and Technology*, 106 CALIF. L. REV. 263, 267 (2018) (numerals and spacing added).

own expectations of privacy with those of the hypothetical reasonable person.”²⁴⁸

The psychology of group dynamics is also relevant to appellate court decisions. “[T]o achieve their most preferred policy outcome, judges on collegial [meaning multimember] courts must consider the likely actions of their colleagues on the bench to determine their best course of action”²⁴⁹ Even if a Justice has a strong ideological bent, a Justice does not base a decision solely on ideology: “Justices may be primarily seekers of legal policy, but they are not unconstrained actors who make decisions based only on their own ideological attitudes.”²⁵⁰ A Justice has to consider the viewpoints of other Justices: “[J]ustices are strategic actors who realize their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act.”²⁵¹ A Justice may feel an affinity with others on the court in that those Justices tend to align with their decisions, and certain Justices may tend to be in the majority in certain types of cases. “[A] majority coalition [is] a group of ideologically simpatico justices who are able to issue unambiguous, far-reaching decisions, as opposed to fact-specific decisions of limited consequence.”²⁵² Justices may pay more attention to other Justices in a coalition. “Because members of a coalition on the Court will tend to hold similar, but not identical, views on a given issue, the opinions of the other members of the coalition will tend to be more influential to each other than any opinions of noncoalition members.”²⁵³ One of the Justices, such as Justice Kennedy often did, might side with one coalition on some types of issues and with another coalition on other types of issues: “‘Swing’ justices exercise power by writing consequential concurring opinions that limit the reach of the majority’s ruling or by insisting that their legal policy preferences are reflected in the majority opinion.”²⁵⁴

248. *United States v. Jones*, 565 U.S. 400, 427 (2012) (Alito, J., concurring).

249. Wendy L. Martinek, *Judges as Members of Small Groups*, in *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING*, *supra* note 5, at 73, 73–74.

250. *Id.* at 74 (quoting EPSTEIN & KNIGHT, *supra* note 103, at 10).

251. *Id.* (quoting EPSTEIN & KNIGHT, *supra* note 103, at 10).

252. Devins & Federspiel, *supra* note 12, at 85.

253. *Id.* at 89.

254. *Id.* at 91.

[Justices'] political attitudes undoubtedly play some role in their judgments and decisions, but many other aspects of a judge's psychological make-up and of the social-psychological setting in which a judge acts will be influential as well, with some of these influences pushing the judge toward idealized normative behavior and some pushing the judge away from judicial ideals.²⁵⁵

Some theorize that United States Supreme Court Justices “pursue multiple goals; they act in ways that maximize their goals, and the institutions within which they operate sometimes affect their goals. Thus, sometimes they must do things that fail, in the short run, to achieve their goals.”²⁵⁶ A Justice may carefully consider the likely actions of the other Justices in the language and line of reasoning the Justice employs in crafting an opinion. “The writers of draft opinions must always count votes, and thus they must be careful to draft opinions that do not jeopardize defections from the majority. Sometimes they must put aside their most preferred opinions to generate a definitive ruling for the Court.”²⁵⁷ Of course, another strategy for a Justice is to conform to the Justice's preferred policy and influence others to follow by bolstering the preferred policy with references to as many precedents as are available.²⁵⁸ When a Justice decides to overturn a previous precedent, a Justice may buttress the overruling by persuasive authority in the absence of primary authority.²⁵⁹

IV. *CARPENTER V. UNITED STATES*

The previous parts of this Article have given a broad overview of some of the main influences on judicial decision-making, with a particular focus on how these influences manifest in Supreme Court decision-making. Explicitly, there are two primary pillars: a Justice's policymaking preferences, particularly the Justice's jurisprudential ideology and political leanings, on the one hand, and the effect of precedent, including the Justice's precedential philosophy and the doctrine of stare decisis, on the other. Implicitly, there are also a number of other psychological factors that influence a Justice's decision-making outside of conscious awareness, including an inclination to use reason to justify intuition and the influence of coalitional dynamics.

255. Gregory Mitchell, *Evaluating Judges*, in *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING*, *supra* note 5, at 221, 223.

256. WRIGHTSMAN, *supra* note 13, at 131–32.

257. *Id.* at 139.

258. HUME, *supra* note 23, at 106.

259. *Id.* at 106–07.

With this rubric in hand, we turn now to the Court’s landmark 2018 decision in *Carpenter v. United States*.

A. An Introduction to Technology and the Fourth Amendment

For more than 200 years, the Fourth Amendment to the United States Constitution has protected citizens’ “persons, houses, papers, and effects against unreasonable searches and seizures.”²⁶⁰ Over those same years, the federal courts have been interpreting that language to weigh the conflict between, on one hand, the privacy afforded the individual against, on the other hand, the intrusion necessitated by law enforcement in gathering evidence of criminal activity. Many feel that citizens must view this interpretation as legitimate for them to conform when case law restricts their behavior.²⁶¹ The foundation of the Fourth Amendment is the tension between police investigation of criminal wrongdoing and a citizen’s right to privacy.²⁶² Psychology aides understanding of the forces behind Fourth Amendment interpretation by reviewing the motivation of judges in deciding Fourth Amendment cases and the behavior of citizens reacting to Fourth Amendment interpretation.

Self-interested entrepreneurs and landowners were the key actors who drove the American Revolutionary War and who, for the most part, took it upon themselves to remain informed about each other’s self-interests.²⁶³ They recognized that even a law-abiding citizen has the right to keep certain information hidden and should not be forced to open otherwise private areas to public view. Their understanding of self-interest in safeguarding certain areas of their lives safe from disclosure to law enforcement authority informed the Constitution, which recognizes that the perils of political power are best mitigated by structural checks against the exercise of power by anyone, even those who seem—however falsely—to be free of conflicts.

The individual’s desire to enjoy this freedom from disclosure guaranteed under the United States Constitution is necessarily in tension with society’s need for law enforcement to control crime by stopping and preventing crimes

260. U.S. CONST. amend. IV.

261. See, e.g., John Darley et al., *Psychological Jurisprudence: Taking Psychology and Law Into the Twenty-First Century*, in *TAKING PSYCHOLOGY AND LAW INTO THE TWENTY-FIRST CENTURY* 35, 42–43 (James R.P. Ogloff ed., 2002). But see DEBRA LIEBERMAN & CARLTON PATRICK, *OBJECTION: DISGUST, MORALITY, AND THE LAW* 193–95 (2018) (arguing that overcoming public objection to certain legal rulings should rightly be considered an issue of information dissemination and winning the public confidence in the judgment rather than conforming to initial public opinion).

262. See Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1457–66 (1996).

263. See James W. Ely, Jr., *Economic Liberties and the Original Meaning of the Constitution*, 45 SAN DIEGO L. REV. 673, 674, 687 (2008).

from occurring. Even an individual accused of committing a crime has the right to due process to safeguard the individual's Fourth Amendment right. When law enforcement officers violate an individual's legitimate expectation of privacy by search and seizure, the remedy is to bar any evidence gathered from use at trial.²⁶⁴

What are the two biggest challenges in interpreting the Fourth Amendment? Answering this question requires understanding the tension between privacy and law enforcement, and why that tension makes many cases involving privacy difficult ones to decide. These cases are difficult because they require the judiciary to draw lines; the division between privacy and law enforcement causes consternation, as precedent and legal theory must support the rationale and the standard separating the realm in which citizens are entitled to privacy from law enforcement intrusion into what would otherwise remain private. These privacy decisions have become increasingly onerous in the twenty-first century, when changes seem to come at lightning speed. Consequently, one might readily agree that the two biggest challenges the courts face in interpreting the Fourth Amendment are fast-moving advances in technology and rapid changes in social practice.

Advancing technology has been a hurdle in interpreting the Fourth Amendment for quite a while. Some claim that the United States Supreme Court has not been a forerunner in technology for more than 170 years.²⁶⁵ It was not too long ago that Judge Posner noted, "Recent U.S. Supreme Court cases involving technology-related issues indicate that several Justices are embarrassingly ignorant about computing and communication methods that many Americans take for granted."²⁶⁶ We are in a time of rapid technological change and a doctrine announced within a person's lifetime may not survive when technology causes the doctrine to become outmoded. Commentators have long perceived the Court as behind, rather than in front, of the ball when considering how it should deal with technology.²⁶⁷ Of course, the Court is not the only government institution that is relatively clueless about emerging technology. Daniel Solove claims: "There may be a few in Congress with

264. *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963).

265. Susan Freiwald & Stephen Wm. Smith, Comment, *The Carpenter Chronicle: A Near-Perfect Surveillance*, 132 HARV. L. REV. 205, 205 (2018).

266. RICHARD A. POSNER, REFLECTIONS ON JUDGING 79 (2013) (quoting Mark Grabowski, *Are Technical Difficulties at the Supreme Court Causing a "Disregard of Duty"?*, 3 CASE W. RES. J.L. TECH. & INTERNET 93, 93 (2011)).

267. *E.g.*, Grabowski, *supra* note 266, at 96–97.

a good understanding of the technology, but many lack the foggiest idea about how new technologies work.”²⁶⁸

Law enforcement authorities seem eager and are motivated to use new technology to gather evidence. For example, one area of concern is the law enforcement practice of combining two or more technologies, such as facial recognition with officer-worn body cameras²⁶⁹ and use of software-linked tasers, patrol car mounted or officer-worn cameras, drones, and cell phones.²⁷⁰ The term “dataveillance” refers to the ability of computers to conduct visual or other surveillance, manipulate that with captured data, and produce and transmit results.²⁷¹ Another area of concern is law enforcement’s use of radio frequency identification, pursuant to which law enforcement authorities transmit personal identifying information wirelessly.²⁷² Law enforcement has the capability to use cell-site simulators to intercept cell phone data such as a caller’s location, text messages, and phone calls; even if law enforcement does obtain a warrant to intercept signals from a particular user’s cell phone, the interception is controversial in that it scoops up digital information from other cell phones as well.²⁷³ Besides this potential spillover problem, there is a potential aggregation problem in that, where a massive amount of data has been collected, law enforcement can further analyze the collected data to draw connections that may negatively impact an individual’s privacy.²⁷⁴ Technology is an area in which the legitimacy and influence of the Court might be at risk. New technology was behind the United States Supreme Court decisions in *Riley v. California*,²⁷⁵ *United States v. Jones*,²⁷⁶ and *Carpenter v. United States*.²⁷⁷

268. Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr’s Misguided Call for Judicial Deference*, 74 *FORDHAM L. REV.* 747, 771 (2005).

269. Katelyn Ringrose, *Law Enforcement’s Pairing of Facial Recognition Technology with Body-Worn Cameras Escalates Privacy Concerns*, 105 *V.A. L. REV. ONLINE* 57, 60 (2019).

270. See *All Products*, AXON, <https://www.axon.com/products> [<https://perma.cc/FX6V-LM88>].

271. M. Ryan Calo, *People Can Be So Fake: A New Dimension to Privacy and Technology Scholarship*, 114 *PENN. ST. L. REV.* 809, 822 (2010).

272. See *id.* at 814–15, 815 n.32.

273. The devices that mimic cell phone towers are popularly referred to as “StingRays,” “TriggerFish,” or international mobile subscriber identities (IMSI). Carrie Leonetti, *A Hailstorm of Uncertainty: The Constitutional Quandary of Cell-Site Simulators*, 85 *U. CIN. L. REV.* 665, 667 (2017).

274. See Matthew Tokson, *The Normative Fourth Amendment*, 104 *MINN. L. REV.* 741, 784 (2019).

275. 134 S. Ct. 2473, 2480 (2014); see *infra* notes 350–60 and accompanying text.

276. 565 U.S. 400, 400 (2012); see *infra* notes 322–49 and accompanying text.

277. 138 S. Ct. 2206, 2208–09 (2018); see *infra* notes 392–405 and accompanying text.

Another hurdle has been changes in social practice. *Carpenter* highlighted this challenge, as well as the challenge posed by new technology.²⁷⁸ Changes in social practice in the use of the telephone led to the transition from *Olmstead v. United States*²⁷⁹ to *Katz v. United States*.²⁸⁰ Since those cases, cellular telephones have evolved into a combination of a computer, a camera, and a telephone. The new social practice is for almost everyone to have a personal cell phone and to carry the phone wherever one goes. Another social practice not yet considered by the Court is the widespread use of digital smart devices that are becoming commonplace in the emerging Internet of Things. These digital smart devices, installed in various locations throughout the home, have the ability to communicate with each other through something sometimes referenced as ubiquitous computing.²⁸¹ Employers make increasing use of technology to monitor and surveil employee activity; some commentators are concerned that this data collection has a negative effect on privacy.²⁸² The ability of digital assistants to memorialize conversations and sounds may facilitate their use by law enforcement as surveillance intermediaries.²⁸³ Still another social practice is for at least the majority of the population to provide their data to large technology companies, either by posting on social networking sites or by using products of these companies to perform tasks online. Some search engines incorporate social interfaces that appear to be persons, but, in reality, these interfaces are technologically sophisticated human facsimiles to which users react as if the interfaces

278. *Carpenter*, 138 S. Ct. at 2208–09; see *infra* notes 392–405 and accompanying text.

279. 277 U.S. 438 (1928), *overruled in part by* *Katz v. United States*, 389 U.S. 347 (1947).

280. 389 U.S. 347 see *infra* notes 291–297, 456–457 and accompanying text.

281. Calo, *supra* note 271, at 814–15, 814 n.31.

282. See ALEXANDRA MATEESCU & AIHA NGUYEN, EXPLAINER: WORKPLACE MONITORING & SURVEILLANCE 1–2 (2019), https://datasociety.net/wp-content/uploads/2019/02/DS_Workplace_Monitoring_Surveillance_Explainer.pdf [<https://perma.cc/9K2U-QCEK>]; Sam Adler-Bell & Michelle Miller, *The Datafication of Employment: How Surveillance and Capitalism Are Shaping Workers' Futures Without Their Knowledge*, CENTURY FOUND. (Dec. 18, 2018), <https://tcf.org/content/report/datafication-employment-surveillance-capitalism-shaping-workers-futures-without-knowledge/?agreed=1> [<https://perma.cc/Q595-4MSD>]; see also Donald P. Boyle Jr. et al., *Strategies for Risk Mitigation in Production and Distribution of IoT Devices*, LAW.COM (Mar. 19, 2019), <https://www.law.com/legal-technews/2019/03/19/strategies-for-risk-mitigation-in-production-and-distribution-of-iot-devices/> [perma.cc/YQ3C-7J35].

283. Alexandra Carthew, Case Comment, *Searches and Seizures—Fourth Amendment and Reasonableness in General: Protection of Privacy Interests in the Digital Age*, 94 N.D. L. REV. 197, 217–18 (2019).

were human.²⁸⁴ It may not be long until personal robots perform a variety of tasks in many homes.²⁸⁵ The resulting, but largely unregulated, power of these companies to collect great swathes of personal data through social technology and to potentially share the data with the government has coined the term the “Facebook Unbound phenomenon.”²⁸⁶

These two challenges of advancements in technology and changes in social practice highlight what had become the unworkable nature of the third-party doctrine announced in *United States v. Miller*²⁸⁷ and *Smith v. Maryland*;²⁸⁸ one who is participating in the modern world has no choice but to turn over otherwise private information to a third party, thereby losing Fourth Amendment protection for the information. Changes in technology and social practice shifted too much power from the individual to law enforcement. Ryan Calo called the third-party doctrine one of the hungry doctrinal exceptions to privacy law.²⁸⁹ According to Calo, the third-party doctrine is hungry in that, prior to *Carpenter*, this exception to a reasonable expectation of privacy had become so broad that it was moving to consume a greater and greater portion of one’s privacy.²⁹⁰ The United States Supreme Court was motivated to readjust the balance of power between the individual and law enforcement as to the extent the individual should be forced to disclose otherwise private information. As further described below, *Carpenter* narrowed the third-party doctrine; however, the extent to which the third-party doctrine survives is open to discussion.

B. Technology Cases Prior to Carpenter

Katz is the 1967 United States Supreme Court case that brought the Court into the modern era because it departed from a reliance on real property-based reasoning. *Katz* stated the issue as, “Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.”²⁹¹ The Court rejected the government’s argument that law enforcement did not need a warrant prior to taping *Katz*’s end of the conversation.²⁹² The Court stated

284. See Calo, *supra* note 271, at 811, 813.

285. *Id.* at 814.

286. Ashley Deeks, *Forward: Facebook Unbound?*, 105 VA. L. REV. ONLINE 1, 5 (2019).

287. 425 U.S. 435, 435 (1976).

288. 442 U.S. 735, 735 (1979).

289. Ryan Calo, *Privacy Law’s Indeterminacy*, 20 THEORETICAL INQUIRIES L. 33, 45 (2019).

290. *See id.*

291. 389 U.S. 347, 349 (1967).

292. *Id.* at 358.

that accepting the government's argument violated the Fourth Amendment because permitting such surveillance without a warrant would cast an individual's privacy under the control of law enforcement discretion.²⁹³ The Court concluded, "[W]e hold [a warrant] to be a constitutional precondition of the kind of electronic surveillance involved in this case."²⁹⁴ In his concurrence in *Katz*, Justice Harlan gave birth to an individual's right under the Fourth Amendment to a reasonable expectation of privacy.²⁹⁵ Justice Harlan stated: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"²⁹⁶ This right provides constitutional protection for information the individual transmits with a belief that the information is private so long as the belief is reasonable.²⁹⁷

In two cases from the latter part of the 1970s, *United States v. Miller*²⁹⁸ and *Smith v. Maryland*,²⁹⁹ the police used standard investigative techniques to obtain incriminating information concerning suspects.³⁰⁰ The techniques were to subpoena bank records from banks³⁰¹ and to use a pen register to collect numbers dialed from a landline telephone.³⁰² The cases were similar in that neither case involved advanced technology; in both cases, law enforcement obtained the incriminating information from entities, namely banks and a telephone company, and not from the suspects themselves.³⁰³ The fact that law enforcement obtained the incriminating information from third parties gave birth to the third-party doctrine. The following is a more in-depth review of the two cases.

In 1976, the Court decided *United States v. Miller*,³⁰⁴ a case in which the federal Alcohol, Tobacco and Firearms Bureau obtained Miller's bank

293. *Id.* at 358–59.

294. *Id.* at 359.

295. *See id.* at 361 (Harlan, J., concurring).

296. *Id.*

297. *Id.*

298. 425 U.S. 435 (1976).

299. 442 U.S. 735 (1979).

300. *See id.* at 737; *Miller*, 425 U.S. at 437–38.

301. *Miller*, 425 U.S. at 438–39.

302. *Smith*, 442 U.S. at 737.

303. *See id.* at 737; *Miller*, 425 U.S. at 438.

304. *Miller*, 425 U.S. 435.

records from two banks by grand jury subpoena.³⁰⁵ Justice Powell, writing the majority opinion, held that:

Since no Fourth Amendment interests of the depositor are implicated here, this case is governed by the general rule that the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant, even if a criminal prosecution is contemplated at the time the subpoena is issued.³⁰⁶

Miller relied on *Katz* in arguing that he had a reasonable expectation of privacy in his bank records.³⁰⁷ However, the Court found that Miller had assumed the risk that the banks might disclose the bank records.³⁰⁸ In Justice Brennan's dissent, he pointed out that Miller's submission of information to his banks was not voluntary: "For all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account."³⁰⁹ Justice Brennan added: "In the course of such dealings, a depositor reveals many aspects of his personal affairs, opinions, habits and associations. Indeed, the totality of bank records provides a virtual current biography."³¹⁰

In 1979 in *Smith v. Maryland*, the police asked the telephone company to install a pen register at the telephone company to determine the telephone numbers dialed from suspect Smith's home telephone.³¹¹ Justice Blackmun, writing the majority opinion, stated: "We therefore conclude that petitioner in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and that, even if he did, his expectation was not 'legitimate.'"³¹² Justice Blackmun found that there was no constitutional violation: "The installation and use of a pen register, consequently, was not a 'search,' and no warrant was required."³¹³ Justices Stewart and Marshall wrote dissenting opinions.³¹⁴ In his dissent, Justice Stewart emphasized the nonvoluntary nature of a telephone subscriber providing the numbers the subscriber wishes to call to the telephone company.³¹⁵ "A telephone call simply cannot be made without the use of telephone company property

305. *Id.* at 437–39.

306. *Id.* at 444.

307. *Id.* at 442 (citing *Katz v. United States*, 389 U.S. 347, 353 (1967)).

308. *Id.* at 443.

309. *Id.* at 451 (Brennan, J., dissenting).

310. *Id.*

311. 442 U.S. 735, 737 (1979).

312. *Id.* at 745.

313. *Id.* at 745–46.

314. *Id.* at 746 (Stewart, J., dissenting); *id.* at 748 (Marshall, J., dissenting).

315. *Id.* at 746 (Stewart, J., dissenting).

and without payment to the company for the service.”³¹⁶ In his dissent, Justice Marshall highlighted the fact that the telephone company forces one who wishes to make a telephone call to provide the dialed number to the telephone company.³¹⁷ “Implicit in the concept of assumption of risk is some notion of choice. . . . By contrast here, unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance.”³¹⁸ Justice Marshall pointed out the inapplicability of the idea that Smith assumed the risk of providing telephone numbers to the telephone company.³¹⁹ “It is idle to speak of ‘assuming’ risks in contexts where, as a practical matter, individuals have no realistic alternative.”³²⁰

The Court did not confront law enforcement use of advanced communication technology to obtain incriminating information until more than three decades later in *Riley v. California*.³²¹ Between *Smith v. Maryland* and *Riley v. California*, the Court decided *United States v. Jones*,³²² a case in which law enforcement used new technology in service of the older law enforcement technique of tracking a suspect’s vehicle.³²³ Although *Jones* did not involve communication technology, it is a precursor to *Carpenter* in that, in both *Jones* and *Carpenter*, law enforcement agents were using technology to ascertain where the suspects had traveled over a time period.³²⁴

In *Jones*, Justice Scalia wrote the majority opinion in which Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor joined.³²⁵ In *Jones*, Justice Scalia stated the issue as “whether the attachment of a Global-Positioning-System (GPS) tracking device to an individual’s vehicle, and subsequent use of that device to monitor the vehicle’s movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment.”³²⁶ The Court’s holding was fairly predictable: “We hold that

316. *Id.*

317. *See id.* at 750 (Marshall, J., dissenting).

318. *Id.* at 749–50.

319. *Id.* at 750.

320. *Id.*

321. 134 S. Ct. 2480, 2480 (2014).

322. *United States v. Jones*, 565 U.S. 400 (2012).

323. *Id.* at 400–03.

324. *Compare id.* at 403 (finding the government used a tracking device to trace a vehicle’s movements for twenty-eight days), *with Carpenter v. United States*, 138 S. Ct. 2206, 2212 (2018) (finding the government used cell phone service records to track suspects over a four-month period).

325. *Jones*, 565 U.S. at 401.

326. *Id.* at 402.

the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'"³²⁷ In a perhaps surprising move, given that Court observers thought that the Court had long departed from a real property analysis of Fourth Amendment cases, Justice Scalia's opinion took an "exclusively property-based approach" to the issue³²⁸ rather than applying the reasonable expectation of privacy test from *Katz*.³²⁹ However, Justice Scalia did not discredit *Katz*. Justice Scalia explained that the Court might use the trespass concept when considering a physical intrusion made by law enforcement, but the Court might use the reasonable expectation of privacy test when considering a nonphysical intrusion.³³⁰ Justice Scalia referenced Justice Alito's concurring opinion that solely concurred in the judgment: "For unlike the concurrence, which would make *Katz* the exclusive test, we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would remain subject to *Katz* analysis."³³¹

In her concurrence in *Jones*, which concurred in the majority opinion and in the judgment, Justice Sotomayor both endorses Justice Scalia's trespass approach while introducing what has come to be referenced as the mosaic approach to considering whether law enforcement action constitutes a search under the Fourth Amendment.³³² "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."³³³ Justice Sotomayor added:

I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements. I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on.³³⁴

327. *Id.* at 404 (footnote omitted).

328. *See id.* at 405. In fact, Justice Scalia comments that the concurring opinion characterized the majority opinion as "applying '18th-century tort law'" to decide *Jones*. *Id.* at 411.

329. *Id.* at 411.

330. *Id.*

331. *Id.*

332. *Id.* at 415–16 (Sotomayor, J., concurring).

333. *Id.* at 415.

334. *Id.* at 416.

The mosaic approach comes from *United States v. Maynard*.³³⁵ *Maynard* was a consolidated appeal taken by defendants Maynard and Jones to the United States Court of Appeals for the District of Columbia Circuit.³³⁶ After the intermediate appellate court reversed Jones' conviction³³⁷—the same Jones who is the defendant in the United States Supreme Court in *Jones*—the Supreme Court granted certiorari.³³⁸

Justice Alito also concurred in the judgment in *Jones* but not in the majority opinion, and Justices Ginsburg, Breyer, and Kagan joined in Justice Alito's concurring opinion, which was longer than the majority opinion by a few pages.³³⁹ Justice Alito's main concern with the majority opinion is Justice Scalia's use of real property-based theory, which Justice Alito finds to be "highly artificial."³⁴⁰ A good portion of the concurrence explains that trespass theory in Fourth Amendment jurisprudence was no longer viable after *Katz*.³⁴¹ Then, Justice Alito explains four other problems with the reasoning of the majority opinion.³⁴² The first problem is that law enforcement might use technology to monitor a suspect's movements over an extended time period, yet without committing a trespass.³⁴³ The second problem is that a trespass could occur even if the use of the GPS attached to the car was brief, and a trespass would not have occurred had law enforcement authorities attached the GPS prior to the suspect's wife loaning the car to the suspect.³⁴⁴ The third problem is that ownership of a car varies by state, depending on a state's law governing spousal property ownership.³⁴⁵ The fourth problem is that case law is unclear as to whether trespass to chattels can occur with electronic contact.³⁴⁶

In the balance of the concurrence, Justice Alito explains how *Katz* is a difficult case to use as precedent and points out that the constant advances in technology pose difficulties in interpreting whether the Fourth Amendment applies because technology constantly provides law enforcement new and

335. 615 F.3d 544, 558, 561–62 (D.C. Cir. 2010).

336. *Id.* at 548–49.

337. *Id.* at 568.

338. *Jones*, 565 U.S. at 404.

339. *See id.* at 418–31 (Alito, J., concurring).

340. *Id.* at 419.

341. *Id.* at 421–27.

342. *Id.* at 424–27.

343. *Id.* at 424–25.

344. *Id.* at 425.

345. *Id.* at 425–26.

346. *Id.* at 426–27.

better methods to gather evidence concerning criminal suspects.³⁴⁷ Justice Alito would have stated the issue as “whether [Jones’] reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove.”³⁴⁸ In reaching a conclusion, Justice Alito used reasoning from *Maynard* and stated: “[T]he lengthy monitoring that occurred in this case constituted a search under the Fourth Amendment.”³⁴⁹

In *Riley*, the Court considered whether, in a search incident to an arrest, a police officer is required to obtain a warrant prior to searching cell phone data.³⁵⁰ The Court held that, as far as “searches of data on cell phones” is concerned, “officers must generally secure a warrant before conducting such a search.”³⁵¹ In weighing the security of the police officer in making an arrest against the privacy of the suspect, the opinion recognized the place a cell phone occupies in the everyday existence of most adults in the United States, such that the cell phone is “a pervasive and insistent part of daily life.”³⁵² The Court distinguished cell phone data from physical records, noting that cell phone data is different because of the amount and quality of the data stored on the telephone.³⁵³ The reality is that a cell phone is a “minicomputer”³⁵⁴ that contains “a cache of sensitive personal information” dating back at least to the individual’s acquisition of the cell phone.³⁵⁵ The final quality differentiating physical records from cell phone data is that most United States adults are never far away from their cell phones; this makes a search of cell phone data a much more serious intrusion on the individual’s privacy.³⁵⁶ Justice Alito authored a concurrence and stated that he wrote a separate concurring opinion “to address two points.”³⁵⁷ First, he explains that the basis of the exception permitting an officer to perform a search incident to an arrest is not “the need to protect the safety of arresting officers and the need to prevent the destruction of evidence.”³⁵⁸ Second, Justice Alito would prefer either the national or the state legislature to enact legislation that takes a more nuanced approach to the “balancing of law enforcement and privacy interests”³⁵⁹ when considering the types

347. *Id.* at 427–31.

348. *Id.* at 419.

349. *See id.* at 431.

350. 134 S. Ct. 2473, 2480 (2014).

351. *Id.* at 2485.

352. *See id.* at 2484.

353. *Id.* at 2488–89.

354. *Id.* at 2489.

355. *Id.* at 2490.

356. *Id.*

357. *Id.* at 2495 (Alito, J., concurring).

358. *Id.*

359. *Id.* at 2496–97.

of information, be it digital or nondigital, an officer might freely gather without obtaining a warrant.³⁶⁰

As explained above, one reason for the Court to grant certiorari is to reverse a lower court opinion, which happened in part in *Riley* and which happened in *Carpenter*.³⁶¹ A second reason is to resolve a split in the lower courts, which is what happened in *Riley*.³⁶² *Jones* did not involve the reversal of a lower court opinion nor did it involve a split in the lower courts.³⁶³ In *Jones*, the Court affirmed the intermediate appellate federal court decision in favor of defendant Jones.³⁶⁴ In *Riley*, a consolidated case, the Court reversed the California state intermediate appellate court decision in *Riley* in favor of the State of California but affirmed the intermediate appellate federal court decision in *Wurie* in favor of defendant Wurie.³⁶⁵ In *Carpenter*, the Court reversed the intermediate appellate federal court decision in favor of the United States.³⁶⁶

Jones, *Riley*, and *Carpenter* are similar in that all three were criminal cases with the government as one party to each case.³⁶⁷ The Office of the Solicitor General was involved in *Jones*, *Riley*, and *Carpenter*, which would be typical given that all three are criminal cases.³⁶⁸ What is atypical is that the Office of the Solicitor General represented a losing party in all three cases; however, the cases were ideological in nature with a conflict between the power of law enforcement to obtain evidence in a criminal case and the individual's right to privacy under the Fourth Amendment.³⁶⁹

The time period within which the Court granted certiorari and decided a case following oral argument may be significant in indicating the difficulty the Court faced in deciding a case. The Court in *Jones* took a little over two months, April 15, 2011 to June 27, 2011,³⁷⁰ to grant the petition for writ of certiorari and one- and one-half months, November 8, 2011 to January

360. *See id.*

361. *See supra* notes 95–96 and accompanying text.

362. *See Riley*, 124 S. Ct. at 2477.

363. 565 U.S. 400, 400 (2012).

364. *Id.* at 413.

365. *Riley*, 134 S. Ct. at 2494–95.

366. 138 S. Ct. 2206, 2223 (2018).

367. *See id.* at 2211; *Riley*, 134 S. Ct. at 2480–82; *Jones*, 565 U.S. at 402.

368. *See Office of the Solicitor General*, DEP'T JUST., <https://www.justice.gov/osg> [<https://perma.cc/8RAK-AWEY>].

369. *See supra* notes 118–21, 260–86 and accompanying text.

370. *No. 10-1259*, SUP. CT. U.S., <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/10-1259.htm> [<https://perma.cc/P3A6-YL56>].

23, 2012,³⁷¹ from oral argument to decide *Jones*. The Court in *Riley* took ten months, July 30, 2013 (*Riley*)³⁷² and August 15, 2013 (*Wurie*) to January 17, 2014,³⁷³ to grant the petition for writ of certiorari and two months, April 29, 2014 to June 25, 2014,³⁷⁴ from oral argument to decide *Riley*. In *Carpenter*, the Court took a little over eight months, September 26, 2016 to June 5, 2017,³⁷⁵ to grant the petition for writ of certiorari and almost seven months, November 29, 2017 to June 22, 2018,³⁷⁶ to issue a decision. Thus, the Court took significantly longer to grant certiorari in *Carpenter* than it did in *Jones*, and the Court took significantly longer to decide *Carpenter* than it did to decide *Jones* or *Riley*; both *Riley* and *Carpenter* were decided at the end of the Court term.

The number of opinions and the authorship of those opinions is significant in cases decided by the United States Supreme Court. Gauged by the number of opinions, *Jones* and *Carpenter* appear to have been tougher decisions for the Court than was *Riley*. Following Justice Scalia's death, Justice Gorsuch joined the Court and wrote one of the dissenting opinions in *Carpenter*.³⁷⁷ Both *Jones* and *Carpenter* had five Justices joining in the majority opinion.³⁷⁸ However, the lineup of the remaining four Justices differed significantly between *Jones* and *Carpenter*. In *Jones*, Justice Sotomayor wrote an opinion concurring with the majority opinion and Justice Alito wrote an opinion concurring in the judgment, with three other Justices joining in Justice Alito's concurring opinion.³⁷⁹ In *Jones*, Justice Alito's thirteen-page opinion concurred in the judgment of the five-Justice majority, but the concurring opinion did not join in the majority opinion.³⁸⁰ While *Jones* and *Riley* each contained one or more concurring opinions, no Justice dissented in either case.³⁸¹ In contrast, a number of the Justices dissented from *Carpenter* and each dissenting Justice wrote a lengthy dissenting opinion.³⁸² *Carpenter* contained four dissenting opinions authored by Justices Kennedy, joined

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

372. *No. 13-132*, SUP. CT. U.S., <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/13-132.htm> [<https://perma.cc/FR3S-PVDQ>].

373. *No. 13-212*, SUP. CT. U.S., <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/13-212.htm> [<https://perma.cc/SHE8-NPQA>].

374. 134 S. Ct. 2473, 2473 (2014).

375. *Carpenter v. United States*, SCOTUS BLOG, <https://www.scotusblog.com/case-files/cases/carpenter-v-united-states-2/> [<https://perma.cc/7LYS-2UQE>] [hereinafter *Carpenter v. United States*, SCOTUS BLOG].

376. *Id.*

377. 138 S. Ct. 2206, 2261 (2018) (Gorsuch, J., dissenting).

378. *Id.* at 2211 (majority opinion); *United States v. Jones*, 565 U.S. 400, 401 (2012).

379. *Jones*, 565 U.S. at 401.

380. *See id.* at 418–31 (Alito, J., concurring).

381. *See Riley v. California*, 134 S. Ct. 2473, 2479 (2014); *Jones*, 565 U.S. at 401.

382. *See Carpenter*, 138 S. Ct. at 2211.

in by Justices Thomas and Alito, Thomas, Alito, joined in by Justice Thomas, and Gorsuch.³⁸³

Of the three most recent opinions concerning technology—*Jones*, *Riley*, and *Carpenter*—*Riley* appears to have been the easiest of the three to decide. *Riley* garnered eight Justices joining in the majority opinion, with Justice Alito writing a concurring opinion that concurred in part with the majority and concurred in the judgment.³⁸⁴ As is his prerogative, Chief Justice Roberts assigned himself to author the majority opinion in both *Riley* and *Carpenter*.³⁸⁵ The length of the *Riley* majority opinion, at twenty-five pages, may indicate Chief Justice Roberts' perceived need to provide sufficient reasoning to support the judgment.³⁸⁶ Justice Alito's concurring opinion was only three pages long; although Justice Alito felt the need to write a concurring opinion, Justice Alito's concurrence in *Riley* was less than one-quarter the length of Justice Alito's concurrence in *Jones*.³⁸⁷ The membership of the Court was the same in *Jones* and *Riley*. Justice Scalia authored the majority opinion in *Jones* and joined in the majority opinion in *Riley*.³⁸⁸ The length of the *Jones* majority opinion, at eleven pages, may indicate an opinion written narrowly to gain the necessary majority vote.³⁸⁹ Justice Sotomayor's concurring opinion in *Jones* totaled five pages.³⁹⁰ Justice Alito's concurring opinion in *Jones* was longer than the majority opinion, at thirteen pages.³⁹¹

C. *The Carpenter Decision*

In the run-up to the Supreme Court's decision in *Carpenter*, Judge Stranch of the United States Court of Appeals for the Sixth Circuit foregrounded the intersection of Fourth Amendment cases that Chief Justice Roberts would echo in his opinion.³⁹² In her concurrence in the intermediate appellate court, Judge Stranch cited to both Justice Alito's concurrence

383. *Id.*

384. *Riley*, 134 S. Ct. at 2479.

385. *See Carpenter*, 138 S. Ct. at 2211; *Riley*, 134 S. Ct. at 2480.

386. *See Riley*, 134 S. Ct. at 2480–95.

387. *Compare id.* at 2495–98 (Alito, J., concurring), *with United States v. Jones*, 565 U.S. 400, 418–31 (2012) (Alito, J., concurring).

388. *See Riley*, 134 S. Ct. at 2479; *Jones*, 565 U.S. at 401.

389. *See Jones*, 565 U.S. at 402–13.

390. *Id.* at 413–18 (Sotomayor, J., concurring).

391. *Id.* at 419–431 (Alito, J., concurring).

392. 138 S. Ct. 2206, 2214–16 (2018).

and Justice Sotomayor's concurrence in *Jones*³⁹³ and stated: "[T]he sheer quantity of sensitive information procured without a warrant in this case raises Fourth Amendment concerns."³⁹⁴ Judge Stranch also pinpointed the intersection, which Justice Roberts would later highlight, of two lines of Fourth Amendment cases, "the intersection of the law governing tracking of personal location and the law governing privacy interests in business records,"³⁹⁵ as causing difficulty in that the judiciary has the unenviable task of identifying the boundary circumscribing Fourth Amendment protection.³⁹⁶ Judge Stranch closed her concurring opinion with a perhaps prophetic thought: "The runaway pace of technological development makes this task more difficult. . . . [W]e have more work to do to determine the best methods for assessing the application of the Fourth Amendment in the context of new technology."³⁹⁷

In *Carpenter*, Chief Justice Roberts stated the issue as "whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements."³⁹⁸ He took *Carpenter* out from under the shadow of the third-party doctrine. "Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection."³⁹⁹ He stated the answer to the question raised: "Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [cell site location information (CSLI)]."⁴⁰⁰

Chief Justice Roberts provided little theory to support his majority opinion overruling of *Miller* and *Smith*.⁴⁰¹ The length of the *Carpenter* majority opinion, at twelve pages, may indicate a fairly narrowly reasoned opinion.⁴⁰² Justice Kennedy's dissent and Justice Thomas's dissent were each also twelve pages in length.⁴⁰³ Justice Alito's dissent, slightly longer, was fourteen pages in length and Justice Gorsuch's dissent, at eleven pages

393. *United States v. Carpenter*, 819 F.3d 880, 893–95 (6th Cir. 2016) (Stranch, J., concurring), *rev'd*, 138 S. Ct. 2206 (2018).

394. *Id.* at 893.

395. *Id.* at 895.

396. *See id.* at 895–96.

397. *Id.* at 897.

398. *Carpenter*, 138 S. Ct. at 2211.

399. *Id.* at 2217.

400. *Id.*

401. *See id.* at 2216–20.

402. *See id.* at 2211–23.

403. *Id.* at 2223–35 (Kennedy, J., dissenting); *id.* at 2235–46 (Thomas, J., dissenting).

in length, was slightly shorter.⁴⁰⁴ The length of each of the dissenting opinions indicates that the four Justices were adamant in voicing their views on their disagreement with the majority opinion. The stated justification for overruling *Miller* and *Smith* was the invasiveness and comprehensiveness of the CSLI data; the majority opinion repeatedly cited to the concurring opinions of Justice Alito and Justice Sotomayor in *Jones* as precedent for *Carpenter*.⁴⁰⁵

There are a number of approaches to Fourth Amendment protection alluded to or that could have been used in *Carpenter*, but none of which were specifically endorsed as the underpinning of the opinion. The following section reviews some of these approaches.

D. Theories Used to Decide Fourth Amendment Cases

Can there be a single theory that would facilitate the courts in deciding Fourth Amendment cases? As shown in *Jones*, *Riley*, and *Carpenter*, the Justices have never agreed on a single theory to use in weighing police conduct against an individual's claim of privacy; nor have the Justices agreed on the breadth of a precedent.⁴⁰⁶ As more fully explained in this Section, scholars have proposed several theories that might govern the Justices' decision-making in Fourth Amendment cases, including the reasonable expectation of privacy test, the mosaic theory, the policy model, the equilibrium-adjustment theory, and the positive law model.⁴⁰⁷ In addition, with the rapid advances in technology and social practice and the few Fourth Amendment technology cases decided by the Court, a judge may feel that the Court has provided little guidance and a judge may feel the conflict among the various Court precedents that might control the judge's decision.

404. *Id.* at 2246–61 (Alito, J., dissenting); *id.* at 2261–72 (Gorsuch, J., dissenting).

405. *Id.* at 2215, 2217, 2220–22 (majority opinion).

406. Compare *id.* at 2217–20 (announcing a narrow holding and not expressing a view on other collection techniques), with *Riley v. California*, 134 S. Ct. 2473, 2477, 2484–85, 2493 (2014) (announcing a balancing test to measure the individual's privacy interest and the government's policing interest, while rejecting a clear-cut rule), and *United States v. Jones*, 565 U.S. 400, 410–11 (2012) (announcing a clear rule that the GPS device on a car represented a clear physical trespass).

407. Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480 (2011) [hereinafter Kerr, *Equilibrium-Adjustment*]; Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 314, 344, 348 (2012) [hereinafter Kerr, *Mosaic Theory*].

Is the use of the multiple theories to analyze Fourth Amendment cases a strength or a weakness? Orin Kerr suggests that, because the settings in which the Fourth Amendment cases occur are so varied, the Justices' use of a variety of different models has the advantage of allowing a judge to select which model to use depending on the particular facts of the case under review.⁴⁰⁸ Other psychological processes may shape this judgment as well: a Justice conscious of the reaction of legal analysts might select the theory that best fits the Justice's past reasoning in Fourth Amendment cases and that maintains the Justice's esteem among Fourth Amendment advocates and scholars. Because of the myriad Fourth Amendment theories to choose from, a judge might form an instinctual decision first—in the vein of Haidt's social intuitionist model—and then search for the particular theory of Fourth Amendment interpretation that best supports that instinct. This would be particularly true for new Justices who have yet to stake a position. Even aside from such considerations, each of the various tests has its own set of nuances that complicate a straightforward analysis.

The Reasonable Expectation of Privacy Test. The *Katz* reasonable expectation of privacy test has been very influential over the years, but the difficulty lies in what to examine in deciding whether an expectation of privacy is reasonable. One could concentrate on privacy from the individual's viewpoint of how likely it is for law enforcement to discover the information that the individual would otherwise consider private.⁴⁰⁹ The individual's viewpoint is problematic because individuals do not have a single viewpoint. The parameters circumscribing privacy differ in diverse settings and may be dependent on the individual's personal characteristics, such as ethnicity, age, and social standing, and social practices, which transform over time especially when technology is involved. In the alternative, one could examine the information retrieved by law enforcement and gauge the privacy level that law enforcement should accord, with the more private the information the more the Fourth Amendment should protect the information against law enforcement access.⁴¹⁰

The Mosaic Theory. The mosaic theory is the idea that longer term law enforcement surveillance permits the government to piece together a mosaic of an individual's life.⁴¹¹ Justice Sotomayor was the first Justice to endorse the mosaic theory, although not by that name, in her concurrence in *Jones*.⁴¹² Justice Alito also recognized in his concurrence in *Jones* that long-term

408. Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 507 (2007).

409. *See id.* at 508–12.

410. *See id.* at 512–15.

411. *See* Kerr, *Mosaic Theory*, *supra* note 407, at 314, 324–26, 339.

412. 565 U.S. 400, 415–16 (2012) (Sotomayor, J., concurring).

monitoring by law enforcement posed a Fourth Amendment problem; three other Justices joined in Justice Alito's concurrence.⁴¹³ The significance of the two concurrences means that at least five of the Justices felt comfortable with using the mosaic theory to a certain extent. The mosaic theory does not provide much concrete guidance in at least three respects. The mosaic theory does not provide a test to determine the length of time required before law enforcement surveillance would be objectionable under the Fourth Amendment. The mosaic theory fails to specify what type of technology would be subject to the theory. The mosaic theory does not explain which of multiple law enforcement investigations a judge should aggregate to determine whether the theory applies.

The Policy Model. The policy model examines whether the Fourth Amendment should regulate police conduct in prohibiting law enforcement access to a suspect's information by requiring law enforcement to obtain a warrant.⁴¹⁴ In the decade in which the Court decided *Smith* and *Miller*, the majority of the Justices did not view the third-party doctrine under the focus of today's social practice of the individual being required to divulge extremely private information to third parties. With today's technology and social practices, the individual has no realistic option not to divulge the information unless the individual wants to live unconnected from today's society.

The Positive Law Model. The positive law model of the Fourth Amendment looks at what activity would be unlawful for a private party to perform and equates that with a government violation of the Fourth Amendment. Several scholars have disagreed as to whether positive law serves as a floor, pursuant to which law enforcement could be more heavily regulated than private individuals, or a ceiling, pursuant to which law enforcement is coextensive with the regulation of private individuals, in regulating law enforcement collection of an individual's information.⁴¹⁵ The positive law model provides flexibility to Fourth Amendment jurisdiction by changing as a legislature enacts new legislation. One problem with the positive law model is that positive law differs among the various jurisdictions in the United States and it may differ at the different levels of government. An example of the potential conflict between local and state regulation is

413. See *id.* at 418, 431 (Alito, J., concurring).

414. See Kerr, *supra* note 408, at 519–22.

415. See William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1888–89 (2016); Richard M. Re, *The Positive Law Floor*, 129 HARV. L. REV. F. 313, 314 (2016).

the local government policies endorsing sanctuary cities. Another problem is that positive law regulation of an invasion of privacy may lag behind the emergence of the privacy invasion, or positive law may discriminate against minorities.

The Equilibrium-Adjustment Theory and the Normative Balancing Test. Orin Kerr proposes an equilibrium-adjustment theory that approaches a normative balancing test; the equilibrium-adjustment theory implements adjustment of the relative reach of law enforcement surveillance vis-à-vis personal liberty.⁴¹⁶ Under this theory, the Court broadens constitutional protection for the individual where technological progress encourages law enforcement to abuse its arbitrary and enhanced investigatory power; where technology limits law enforcement investigatory ability, the Court narrows the individual's constitutional protection to permit law enforcement to do its job.

Matthew Tokson characterizes Fourth Amendment cases as a blank slate. According to Tokson, the Fourth Amendment is a blank slate because the Constitution provides little guidance as how courts are to apply the Fourth Amendment except to the search of a home, and the challenges presented by technology and social practice exasperate the application of the Fourth Amendment.⁴¹⁷

Tokson identifies the *Katz* reasonable expectation of privacy test as a proxy test in that the test dictates the scope of Fourth Amendment protection; if the individual has an expectation of privacy and that expectation is reasonable, the Fourth Amendment protects against law enforcement interference with what the individual considers private.⁴¹⁸ The *Katz* proxy test has been inadequate over the years because Fourth Amendment privacy is extremely complex, advances in technology and social practice have made the Fourth Amendment unstable, and the potential application of the proxy test is very broad.⁴¹⁹

For Tokson, another approach is direct normative balancing, in which the Court directs the lower courts as to what considerations the courts should balance.⁴²⁰ Over time, the courts flesh out the balancing test through rules, with a court able to apply a particular rule should a case come before that court that is similar to a dispute already covered by a rule.⁴²¹ The balancing test is effective only when there is sufficient information available for a

416. See Kerr, *Equilibrium-Adjustment*, *supra* note 407, 480–82, 487.

417. Matthew Tokson, *Blank Slates*, 59 B.C. L. REV. 591, 594, 604–05 (2018).

418. *Id.* at 609–10.

419. *Id.* at 614–15.

420. *Id.* at 608.

421. *Id.*

court to perform the requisite balancing.⁴²² Both Kerr and Tokson are attempting to develop direct normative balancing tests that show some promise.⁴²³ Perhaps these tests will have some influence on future cases that the Court decides that involve both technology and the Fourth Amendment.

Kerr has also recently attempted to flesh out his equilibrium-adjustment theory with a multistep test; this test amounts to a normative balancing test that courts can use to determine if digital information receives Fourth Amendment protection against law enforcement.⁴²⁴ Three requirements must be present for the test to apply.⁴²⁵ The first requirement is that the law enforcement surveillance to obtain non-content information must involve a digital age surveillance method.⁴²⁶ The second requirement is that the individual must have created the information other than via voluntary choice; in other words, the individual created the information in a way required for the individual to engage with the modern world.⁴²⁷ The third requirement is that the information is intimate in nature and outside legitimate law enforcement investigation.⁴²⁸

Tokson has also taken a stab at a normative balancing test.⁴²⁹ At the heart of Tokson's test is the identification of "three fundamental harms: (1) the avoidance of lawful activity because of fear of surveillance; (2) the harm to relationships and communications caused by observation; and (3) the concrete psychological or physical harm suffered due to surveillance."⁴³⁰ The test first requires one to weigh the benefit of law enforcement surveillance against the three harms.⁴³¹ The second step is to consider the availability of a less invasive method of law enforcement surveillance.⁴³² The final step is to weigh the proposed surveillance method against the

422. *Id.* at 645.

423. *Id.* at 608–09; *see* Kerr, *Equilibrium-Adjustment*, *supra* note 407, at 525–26.

424. Orin S. Kerr, *Implementing Carpenter: The Digital Fourth Amendment* 3 (Univ. S. Cal. Law Legal Studies Paper, Paper No. 18-29, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3301257 [<https://perma.cc/6ZKC-TDZW>].

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.*

429. Matthew Tokson, *The Normative Fourth Amendment*, 104 MINN. L. REV. 741, 744 (2019).

430. *Id.* at 752.

431. *Id.*

432. *Id.*

fundamental harms.⁴³³ If the surveillance method outweighs the fundamental harms, then a warrant is not required under the Fourth Amendment; however, if the fundamental harms outweigh the surveillance method, then a warrant or an exception to a warrant is required.⁴³⁴

E. Analysis of Carpenter

So how well do the various factors that go into judicial decision-making that this Article has covered here predict the outcome in *Carpenter*?

First, as outlined earlier, two effective tools for gauging the anticipated reaction of the Justices are the comments and questions made during oral argument and the views the Justices expressed during the conference following the oral argument. The one-hour oral argument⁴³⁵ provides an interactive opportunity for the attorney advocates to highlight their best arguments and for the Justices to ask questions and comment. According to some, “[O]ral argument also provides a venue for the justices to communicate among themselves and begin the process of coalition formation,”⁴³⁶ and provides the Justices’ opportunity for persuasion as a prelude to the judicial conference.⁴³⁷ One could predict from the *Carpenter* oral argument that Justice Sotomayor would be ruling in favor of *Carpenter*. In two instances, the Justice spoke for over two minutes in support of *Carpenter*.⁴³⁸ In his dissent, Justice Gorsuch backed the traditional property-based approach to the Fourth Amendment and was extremely critical of using the reasonable expectation of privacy test from *Katz*.⁴³⁹ Someone attending oral argument could have predicted Justice Gorsuch’s reasoning from the Justice repeatedly pressing the Deputy Solicitor General to answer a property-based hypothetical.⁴⁴⁰ Likewise, one could have predicted the nature of Justice Alito’s eventual dissent in the decision from his behavior during the oral argument: during Justice Gorsuch’s tough questioning of the Deputy Solicitor General, Justice Alito intervened twice to offer supportive comments.⁴⁴¹

433. *Id.* at 752–53.

434. *Id.*

435. SUP. CT. R. 28(3) (“Unless the Court directs otherwise, each side is allowed one-half hour for argument.”).

436. *Jacobi & Sag, supra* note 39, at 1168.

437. *Id.* at 1208.

438. *See* Transcript of Oral Argument at 13–14, 22–24, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402).

439. *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting).

440. *See* Transcript of Oral Argument, *supra* note 438, at 51–57.

441. *See id.* at 55–56, 60–61.

Following oral argument, the Justices meet in conference to cast their initial votes on how the Court should the case.⁴⁴² At some point, the public may have a glimpse into what transpired at the judicial conference when the instructions concerning the papers of one or more Justices release the notes documenting the judicial conferences.⁴⁴³ Presumably, Chief Justice Roberts was in the majority at the conference and assigned to himself the authorship of the *Carpenter* majority opinion.⁴⁴⁴ After Chief Justice Roberts produced the first draft of the opinion, he circulated the first draft to the other Justices for their reactions.⁴⁴⁵ The first draft is typically crucial in setting the path of the decision along a particular route. Thus, Chief Justice Roberts retained a great deal of power over the *Carpenter* decision when he kept the authorship of the case for himself. As indicated by the four dissenting opinions, the first draft did produce a number of reactions, to which Chief Justice Roberts probably responded.⁴⁴⁶

Another tool to gauge the anticipated reaction of the Justices is the amicus curiae briefs filed in the case. Again, some scholars have found that the number of amicus curiae briefs, and, of those, the number filed by scholars, can indicate how the Court will rule in a case.⁴⁴⁷ In *Carpenter*, there were more than four times the number of briefs filed on behalf of Carpenter as were filed in favor of the United States.⁴⁴⁸ In addition, there were more than four times the number of briefs filed by scholars in favor of Carpenter as were filed in favor of the United States.⁴⁴⁹ Those numbers did accurately predict how the Court ruled.

442. *Supreme Court Procedures*, *supra* note 81.

443. See Marcia Coyle & Tony Mauro, *100-Year Restriction on Ginsburg Papers 'Not True,' Supreme Court Says*, NAT'L L.J. (Apr. 11, 2019), https://www.law.com/nationallawjournal/2019/04/11/100-year-restriction-on-ginsburg-papers-not-true-supreme-court-says/?kw=100-Year%20Restriction%20on%20Ginsburg%20Papers%20%27Not%20True%2C%27%20Supreme%20Court%20Says&utm_source=email&utm_medium=enl&utm_campaign=dailyheadlines&utm_content=20190412&utm_term=nlj [https://perma.cc/XZE5-MKEB]. Each Justice is free to make whatever arrangement the Justice desires about when the Justice's papers are released to the public, with the arrangements usually made known at the Justice's death. *Id.*

444. See *supra* text accompanying note 109.

445. See generally *Supreme Court Procedures*, *supra* note 81.

446. See *Carpenter v. United States*, 138 S. Ct. 2206, 2211 (2018).

447. DEVINS & BAUM, *supra* note 10, at 46, 48.

448. *Carpenter v. United States*, SCOTUS BLOG, *supra* note 375.

449. *Id.*

Carpenter, like many of the Fourth Amendment cases dealing with technology, is a special case in that the traditional pillars of judicial decision-making—a Justice’s political ideology and philosophy on the role of precedent—recede somewhat to allow less traditional aspects of judicial decision-making to rise into the foreground. This happens for two reasons. First, because there are so many different theories of Fourth Amendment jurisprudence to choose between, precedent becomes less constraining than it might otherwise be. Second, because Fourth Amendment technology cases tend not to overlap as consistently with explicit political ideologies, there is less side-taking than in, say, cases concerning abortion or substantive due process. As a result, the decisions in these cases can often be anomalous in their construction.

For example, *Carpenter* may be modern in dealing with technology, but it is very much old-fashioned in the format in which the various Justices wrote their opinions. The multiple opinions harken back to the earliest days of the Court with seriatim opinions. The Court arrived at its current practice of issuing a majority opinion because Chief Justice John Marshall preferred that practice.⁴⁵⁰ “The building of coalitions necessarily involves strategic choices not just with respect to outcomes but also content.”⁴⁵¹ The number and diversity of the theory behind the various opinions may recognize the fractures present among the Justices in latching onto a single workable theory on which the Court bases modern Fourth Amendment cases.

The far-reaching part of *Carpenter* is that one has constitutional protection for one’s detailed physical movements over a time period, that is, at least the seven days that were part of the facts of the length of surveillance.⁴⁵² There is a lack of clarity on the parameters of this protection, in that *Carpenter* does not set a minimum length on the surveillance that would qualify law enforcement action for Fourth Amendment protection nor does the case explain if surveillance can be aggregated to meet the seven-day time period. Some law enforcement authorities might interpret *Carpenter* as inapplicable to historical CSLI information a communications company captured a fair amount of time prior to by law enforcement analysis. Thus, law enforcement could argue that there is no constitutional infirmity in gathering evidence via similar CSLI information without a warrant so long as the information is of a sufficient age that one would consider it historical.⁴⁵³

450. GERHARDT, *supra* note 3, at 61.

451. *Id.* at 62.

452. *Carpenter v. United States*, 138 S. Ct. 2206, 2212–13, 2221 (2018).

453. Ringrose, *supra* note 269, at 64.

Another argument is that law enforcement can freely use contemporaneous location information collected by pinging the suspect's cell phone.⁴⁵⁴

However, the path by which the Court arrived at this far-reaching holding involved a 5–4 decision—with Justice Roberts siding with the traditionally liberal Justices and Justice Kennedy with the conservatives—that forced the majority to reckon with a complex record of Fourth Amendment jurisprudence.⁴⁵⁵ The 1967 *Katz*⁴⁵⁶ decision is not a super precedent but is extremely significant in the realm of privacy cases. The reasonable expectation of privacy theory from *Katz*⁴⁵⁷ is not without its problems of interpreting when an expectation of privacy is reasonable as applied to a particular set of facts. But even with its problems, *Katz* has been influential over the years; *Miller*⁴⁵⁸ and *Smith*,⁴⁵⁹ from 1976 and 1979, might be seen as glosses on *Katz* that were the best the Court could do at the time without being prescient to the technology revolution of the past fifty years.

Many had recognized that in the privacy realm the third-party doctrine was unworkable because the third-party doctrine was inconsistent with the public's assumption of continuing privacy for information turned over to internet service providers and via cell phones.⁴⁶⁰ Justice Sotomayor was sufficiently brave in her concurring opinion in *United States v. Jones* to acknowledge in writing that *Miller* and *Smith* had become largely unworkable, with their vitality questionable.⁴⁶¹ In her concurrence in *Jones*, Justice Sotomayor stated: “[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.”⁴⁶² Then she added: “This approach

454. See, e.g., *Andres v. State*, 254 So. 3d 283, 297 n.7 (Fla. 2018) (“[*Carpenter*] is not applicable to this case, where officers used real-time cell-site location information to locate Andres for the purposes of executing the warrant.”); *Sims v. State*, 569 S.W.3d 634, 646 (Tex. Crim. App. 2019) (“Here, Appellant did not have a legitimate expectation of privacy in his physical movements or his location as reflected in the less than three hours of real-time CSLI records accessed by police by pinging his phone less than five times.”).

455. See *Carpenter*, 138 S. Ct. at 2211, 2222–23.

456. 389 U.S. 347 (1967).

457. *Id.* at 360–62 (Harlan, J., concurring); see *supra* notes 291–97 and accompanying text.

458. 425 U.S. 435, 438–40 (1976); see *supra* notes 304–10 and accompanying text.

459. 442 U.S. 735, 735–38 (1979); see *supra* notes 311–20 and accompanying text.

460. Chao et al., *supra* note 247, at 266–67 (“[W]hen the Supreme Court is called to rule upon these new investigative techniques, the Court should refuse to apply the third party doctrine.”).

461. 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring).

462. *Id.*

is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.”⁴⁶³

Scholars criticized the *Miller* and *Smith* decisions roundly over the years,⁴⁶⁴ however, Chief Justice Roberts only garnered a bare majority to overrule those decisions, at least in part in *Carpenter*. Although the cases in which the Court explicitly overrules constitutional precedent garner the most press, the Court explicitly overruling constitutional precedent occurs only infrequently.⁴⁶⁵ Chief Justice Roberts’ majority opinion in *Carpenter* did take the bold move of questioning the continued application of *Miller* and *Smith*,⁴⁶⁶ rather than implicitly overruling the two cases *sub silentio*. However, the majority opinion is similar to other cases that implicitly overruled precedent in that *Carpenter* leaves very open the way in which courts will interpret *Carpenter* in the future. Chief Justice Roberts consciously drafted the opinion in such a narrow way that he could persuade a sufficient number of Justices to join in the majority. On top of that, Chief Justice Roberts was careful to leave *Miller* and *Smith* viable, at least to a certain extent. Obviously, the Court does not lightly overturn the third-party doctrine, even in part. The Court’s partial abrogation of the third-party doctrine was extremely slow in coming, even though most had recognized that the third-party doctrine did not continue to be viable. Even though commentators had long questioned the viability of the third-party doctrine, the Court was loath to declare its death knell.

The majority opinion in *Carpenter* incorporates the equilibrium-balancing theory, although not by name. The Court reasoned: “In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection.”⁴⁶⁷ The third-party doctrine had resulted in law enforcement having relatively free access to private information involuntarily turned over to third parties; in other words, technology and social practice aided law enforcement in a manner impossible prior to the digital age and left extremely private information accessible. The equilibrium-balancing theory recognizes the tension between law enforcement investigative

463. *Id.*

464. *See, e.g.,* Michael W. Price, *Rethinking Privacy: Fourth Amendment “Papers” and the Third-Party Doctrine*, 8 J. NAT’L SECURITY L. & POL’Y 247, 264–66 (2016).

465. *See* GERHARDT, *supra* note 3, at 9–11.

466. 138 S. Ct. 2206, 2217, 2220, 2230 (2018).

467. *Id.* at 2223. In his dissent, Justice Kennedy recognizes that the majority opinion is using a balancing test. *Id.* at 2231 (Kennedy, J., dissenting). “When the privacy interests are weighty enough to ‘overcome’ the third-party disclosure, the Fourth Amendment’s protections apply.” *Id.* at 2232.

power, on one hand, and the Fourth Amendment protection of the individual's private information. Technology and social practice tilted the pendulum in favor of law enforcement and to the detriment of individual privacy. *Carpenter* shifted the balance, which the third-party doctrine cocked toward law enforcement, back in favor of protecting the individual's personal information.

The *Carpenter* opinion anticipates the future of technology in applying to technology that law enforcement can use to provide information on one's physical movements, or even infer a criminal motive to the suspect's movements, and not being limited to CSLI metadata. In a way, the opinion is more far-reaching than the facts in presenting the cell phone metadata as more invasive than it is in actuality. The reality is that metadata places the cell phone owner within a particular neighborhood, but does not more accurately pinpoint the owner's location, and the cell site captures metadata only when caller places a call.

The *Carpenter* majority opinion is narrow in not entirely overruling *Miller* and *Smith*; however, Chief Justice Roberts was not a minimalist, nor does he show judicial restraint in the way in which he characterizes CSLI evidence. The *Carpenter* opinion produced by the intermediate appellate court pointed out several interesting facts concerning the evidence used to convict Carpenter of a string of robberies. One of the robbers confessed and provided Carpenter's cell phone number.⁴⁶⁸ At trial, seven accomplices identified Carpenter as the mastermind behind many of the robberies because he organized them, provided weapons for use in the robberies, and often served as a lookout by waiting outside a robbery site in a stolen vehicle.⁴⁶⁹ Expert testimony from an FBI agent showed that the CSLI placed the suspect within a half-mile to a two-mile range in the Detroit urban area.⁴⁷⁰ Thus, at trial the CSLI data seemed to serve as corroboration of witness testimony in that the CSLI showed that Carpenter was located within a particular urban area, but the CSLI data did not more precisely pinpoint Carpenter's location as outside the scene of any of the robberies.⁴⁷¹ The intermediate appellate decision emphasizes that the GPS used in *Jones* located the suspect

468. United States v. Carpenter, 819 F.3d 880, 884 (6th Cir. 2016), *rev'd*, 138 S. Ct. 2206 (2018).

469. *Id.* at 884–85.

470. *Id.* at 885.

471. *See id.*

within fifty feet, whereas CSLI located Carpenter only within one-half to two miles.⁴⁷²

Chief Justice Roberts took some liberties in describing the *Carpenter* facts. The CSLI located Carpenter within a particular neighborhood, but Carpenter’s location was not as accurate as implied by the majority opinion. After providing a plain English explanation of the ubiquitous use of cell phones and an explanation of the generation of cell-site location information, Chief Justice Roberts summed up this background information by stating: “[M]odern cell phones generate increasingly vast amounts of increasingly precise CSLI.”⁴⁷³ The majority opinion compared CSLI and the GPS monitoring done in *Jones* and drew a comparison between the two types of monitoring: “Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled.”⁴⁷⁴ The majority opinion characterizes CSLI as providing GPS-like location information: “[W]hen the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone’s user.”⁴⁷⁵ The majority opinion weaves in a view of the facts provided by CSLI that overstates today’s technological capability. “Only the few without cell phones could escape this tireless and absolute surveillance.”⁴⁷⁶ Perhaps law enforcement will have this surveillance capacity in the future, but the opinion is far from minimalist and seemingly takes a top-down approach to communication technology. “[T]he accuracy of CSLI is rapidly approaching GPS-level precision,” such that “wireless carriers already have the capability to pinpoint a phone’s location within 50 meters.”⁴⁷⁷

Chief Justice Roberts recognizes the continuing validity of *Miller* and *Smith* while declining to broaden the third-party doctrine to include the “novel circumstances” of advancing technology and social practices resulting in an individual carrying a cell phone wherever the individual goes.⁴⁷⁸ “Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user’s claim to Fourth Amendment protection.”⁴⁷⁹ The wording of the majority opinion assumes that the third-party doctrine never covered digital information. Thus, a close read of the wording of the majority opinion shows that the Court sticks strictly to the precedent of *Miller* and *Smith* by not overruling the two cases, but instead limiting the reach of *Miller* and *Smith*. Chief

472. *Id.* at 889.

473. *Carpenter*, 138 S. Ct. at 2212.

474. *Id.* at 2216.

475. *Id.* at 2218.

476. *Id.*

477. *Id.* at 2219.

478. *Id.* at 2216–17.

479. *Id.* at 2217.

Justice Roberts draws a line between *Miller* and *Smith*, on one hand, and *Carpenter*, on the other hand, by noting the difference in the type of information collected and the voluntariness with which the individual turned over the information to third parties. CSLI provides “a detailed chronicle of a person’s physical presence compiled every day, every moment, over several years” and “in no meaningful sense does the user voluntarily ‘assume the risk’ of turning over a comprehensive dossier of his physical movements.”⁴⁸⁰

The Chief Justice may have been more willing to compromise to include a line of reasoning than he would have had there been more than five Justices in the majority. As this Article has covered, the need, both strategically and psychology, to court voters into a five-vote majority coalition can often influence the scope of a Justice’s decision. The final *Carpenter* decision, like that in most other important cases, was certainly a collaborative effort of the Justices. Although Chief Justice Roberts may have wanted to follow a particular policy preference, the wording of the majority opinion had to take into account a desire to garner as many Justices as possible joining in the majority opinion. In other words, this happens to be one of the cases where the author of a majority opinion was somewhat constrained by what the author anticipates to be the reaction of the other Justices.

The majority author’s line of reasoning is strategic in trying to reflect or approach what the author anticipates as the policy preferences of the other Justices. In all probability, there was negotiation, or even a struggle, among the Justices as to the wording of the majority opinion and the final vote and alignment of the various Justices may or may not have been consistent with their initial votes cast in the case. The Court did not announce *Carpenter* until almost the end of a Court term; the time pressure to get the last few cases decided may have outweighed the majority author’s amenability to revise the language of the opinion to win more votes for the majority opinion. In the future, personal papers of one or more Justices deciding the case may provide light as to the give and take among the Justices until the Court announced the decision.

Dissenting opinions typically highlight flaws in the reasoning of the majority opinion; however, concurring opinions can weaken the majority opinion by specifically referencing ways in which the concurring author believes the majority opinion to be inadequate. Certain concurring opinions become more noteworthy than the majority opinion. Prime examples of often

480. *Id.* at 2220 (quoting *Smith v. Maryland*, 442 U.S. 735, 745 (1979)).

quoted concurring opinions concerning privacy include Justice Harlan's concurring opinion in *Katz* and Justice Sotomayor's concurring opinion in *Jones*.⁴⁸¹ Justice Alito's concurrence in *Jones* affected *Carpenter* by providing a rationale for the majority opinion in *Carpenter*.⁴⁸² Both concurring and dissenting opinions are more likely in the more important cases before the Court. The timing of the announcement of the final decision in a case may be a factor in a Justice deciding to write a concurring opinion. Although a concurring opinion is generally shorter than a majority opinion, the concurring author still must factor in the time necessary to write a concurring opinion and may be loath to spend the time should the final decision happen near the final days of the Court term.

As in *Carpenter*, the reader views the majority opinion as persuasive until one reads the concurring and dissenting opinions, which represent different possible ways to decide the case and back up the result advocated for with different paths of reasoning. For example, Justice Kennedy's dissent provides a more realistic view of the CSLI capability of pinpointing a suspect's location: "[I]n urban areas cell-site records often would reveal the location of a cell phone user within an area covering between around a dozen and several hundred city blocks. . . . By contrast, a Global Positioning System (GPS) can reveal an individual's location within around 15 feet."⁴⁸³ With so many conflicting opinions presented by the Justices, one might conclude that the Justices were a little constrained by adhering to one overriding principle in deciding the case. *Carpenter*, like many of the cases before the Court, was a complicated and difficult case. One complication is that technology is the core around which the facts center, and technology is not the Court's strong suit. Another complication is the inability of the Court to reach a consensus on the best theory to decide a case concerning privacy and technology. Justice Scalia's majority decision in *Jones*, which Justice Scalia based on an ancient property law concept, is one indication that cases concerning privacy and technology might long present obstacles to easily reaching decisions. *Carpenter* does cut back on the vitality of the third-party doctrine, but the case shows an extreme lack of consensus on the principles that the Justices agree to use in deciding future cases.

481. See generally, e.g., Margin McKown, *Fifty Years of Katz: A Look Back—and Forward—at the Influence of Justice Harlan's Concurring Opinion on the Reasonable Expectation of Privacy*, 85 GEO. WASH. L. REV. ARGUENDO 140 (2017); Matt Ford, *Pleading for the Fourth*, ATLANTIC (Nov. 12, 2015), <https://www.theatlantic.com/politics/archive/2015/11/justice-sotomayor-fourth-amendment/414948/> [<https://perma.cc/7BHP-K3VZ>].

482. *Carpenter*, 138 S. Ct. at 2215.

483. *Id.* at 2225 (Kennedy, J., dissenting).

V. CONCLUSION

Research has revealed a multitude of factors that go into judicial decision-making. Out of this multitude, the two influences that scholars and researchers tend to focus on the most are a Justice's ideology, political or legal, and the precedential record in the area of dispute. This focus appears to be warranted, as research has repeatedly demonstrated the predictive power of these factors.⁴⁸⁴ *Carpenter*, however, provides a nice window into the judicial decision-making process because it allows us to see how the Justices side, and what other factors might be influencing their decision-making, when ideology and precedent are more diffuse and thus less determinative. The narrowness of the opinion highlights the influence of coalitional dynamics. Justice Robert's siding with the traditionally liberal core in departing from the third-party doctrine suggests perhaps that his desire to establish a personal reputation as a consensus builder may trump his fidelity to precedent in this context. Justice Gorsuch may have also been influenced by how he felt his colleagues or the public would perceive his actions when he decided to dissent from the majority opinion rather than concur, given that he essentially agreed in the decision but disagreed on the reasoning used to get there.

In all likelihood, the membership on the Court will remain stable for the foreseeable future unless a Justice passes on. For this reason, *Carpenter* may be the last privacy and technology case the Court decides for a while; the Court has yet to grant a petition for writ of certiorari in another privacy and technology case, and the Justices may not be willing to soon confront a case similar to *Carpenter* that results in the Court issuing a splintered decision. As a result, it may be well into the future before we get another such window into decision-making at the level of the Supreme Court that is not dominated by ideology or precedent.

484. See *supra* notes 5, 13, 37–72, 157–75 and accompanying text.

