

Implied Consent: A Review Of Judicial Process and Constitutional Law

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## Abstract

The legislature of the State of Wisconsin passed a law containing a clause defining what has been called “implied consent”. Implied consent, in this case, is the idea that if you drive on Wisconsin’s roads, it is implied that you give consent to being tested for intoxication via breath, blood, or urine analysis. All 50 states have some version of this law, but it was a man in Wisconsin who decided to challenge its constitutionality in *Mitchell v. Wisconsin*, which was argued before the Supreme Court on April 23, 2019. This paper will discuss the history of the Fourth Amendment and the constitutionality of the Wisconsin law, and by extension the corresponding laws in the other 49 states. Discussion will be in regard to the legality of the idea of implied consent, whether it is an unconstitutional condition on driving, and whether it rationally violates the 4<sup>th</sup> amendment directly as an unreasonable search and seizure. This will incorporate some of the arguments heard by the Supreme Court as well as develop new ones. The decision issued by the Court on June 27, 2019 will be discussed. Following this will be a dissection of how the Court reached this decision, focusing namely on the role of amicus briefs and the Gorsuch/Kavanaugh split. Implications of this decision will also be discussed, focusing mainly on the constitutional significance and the potential impacts of Ruth Bader Ginsburg’s death and Amy Coney Barrett’s appointment upon the topics of implied consent specifically and the Fourth Amendment in general.

Keywords: Constitutional law, Implied consent, Unconstitutional conditions, Fourth Amendment, Judicial process, Judicial politics

### Implied Consent: A Constitutional Review

Implied consent laws would appear to make a lot of sense to those who are firm believers in law and order above all else. However, civil libertarians see it as a shocking breach of constitutional protections. There are deep constitutional questions contained within this law and the challenges posed against it. Namely, does a law allowing a blood draw from an unconscious driver violate the Fourth Amendment's warrant requirement? Based on rational analysis and a review of relevant case law, the Supreme Court should have held that it does and should therefore have exercised judicial review to strike it down. However, the Court, in a four-justice plurality opinion, upheld the Wisconsin law and, therefore, the idea of implied consent.

### History of the Fourth Amendment

The founding of our nation and the writing of our constitution were heavily influenced by the trials undergone by the colonies during the years leading up to the American Revolution. The framers of the Constitution, especially the Anti-Federalists, knew provisions protecting the people from governmental tyranny were necessary. Several of the provisions and amendments were tailored to specific grievances, and the Fourth Amendment is no exception (Justia, 2019). The Fourth Amendment was written in response to the framers' recent memories of tyranny such as "writs of assistance", general search warrants whereby agents of the Crown could search and seize as they pleased.

The Fourth Amendment reads, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" (*U.S. Constitution*, 1789). The two clauses contained within it effectively balance the government's

legitimate interest in prosecuting crime with the rights of citizens to be free of unreasonable government intrusion into their privacy. While its mandate may seem relatively clear, the Supreme Court has altered its scope over time, as it has most clauses of the Constitution and Bill of Rights. Its understanding and interpretation have largely been expanded over the years, with some important caveats.

One of the earliest Supreme Court decisions of importance in regard to the Fourth Amendment was *Olmstead v. United States*, written by Justice Taft in 1928, wherein the Court decided that the warrant requirement only applied to physical searches and seizures, effectively limiting protections against unreasonable searches when it came to electronic surveillance (Taft, *Olmstead v. United States*, 1928). This interpretation continued for approximately 40 years, until it was overruled when the court abandoned *stare decisis* in *Katz v. United States*. In the decision in *Katz*, written by Justice Stewart, the court expanded the Fourth Amendment and privacy protections to include all searches and seizures so far as the person being searched had a reasonable “expectation of privacy” (Stewart, *Katz v. United States*, 1967).

Another important product of the Fourth Amendment relevant to the case and constitutional question at hand is the exclusionary rule. The exclusionary rule was first developed and implemented in 1914 in *Weeks v. United States*, wherein Justice Day wrote for the Supreme Court that products of illegal searches could not be used in trials (Day, *Weeks v. United States*, 1914). However, the Fourth Amendment protections and this rule were only applicable to federal criminal cases at the time of its inception. Writing for the majority opinion in *Wolf v. Colorado*, Justice Frankfurter changed this in part by incorporating the Fourth Amendment protections to the states, but not the exclusionary rule that enforced it (Frankfurter, *Wolf v. Colorado*, 1949). It was not until 1961 with Justice Clark’s majority opinion in *Mapp v. Ohio* that the Supreme Court applied the

Fourth Amendment as a whole to the states, including the exclusionary rule (*Clark, Mapp v. Ohio*, 1961). However, it is important to note that the Court has never held that the protections of the Fourth Amendment are all-encompassing or without exception.

### ***Mitchell v. Wisconsin***

The State of Wisconsin has a law concerning “implied consent”. It reads, in relevant part, Any person who is on duty time with respect to a commercial motor vehicle or drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in s. 346.61, is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances...” (Tests for intoxication; administrative suspension and court-ordered revocation). In May of 2013, Gerald P. Mitchell was arrested for driving under the influence of alcohol. At some point during the arrest and subsequent transportation to the police station, Mitchell became lethargic and the officers decided to take him to the hospital instead. He was read the mandated form detailing the implied consent law but was unable to give consent due to intoxicated incapacitation, eventually falling unconscious. The officers then ordered a blood draw despite not having a warrant (Oyez, 2019). His blood alcohol concentration was found to be far over the legal limit and as such he was subsequently charged with driving while intoxicated and having a prohibited blood alcohol concentration.

During the trial, Mitchell moved to exclude the results of the blood test on the grounds that his blood was taken without a warrant and that there were no circumstances providing an exception to the warrant requirement of the Fourth Amendment. The motion was denied, however, on the grounds that the state did not need a warrant due to its statute concerning “implied consent”. Mitchell appealed to the Supreme Court of Wisconsin, which upheld the search and the resulting

conviction, but had no clear majority opinion as to why the search was constitutional and valid. Mitchell then appealed to the Supreme Court of the United States, which granted certiorari and heard oral arguments on April 23<sup>rd</sup> of 2019.

### **Implied Consent**

Andrew Hinkel, the attorney representing Mr. Mitchell, stressed the importance of the notion of implied consent and his belief that it was inherently wrong. Case law appears to support his assertions. Writing for the majority of the Court, Justice Stewart in *Schneckloth v. Bustamonte* held that the “capacity for a conscious choice is the bare minimum for voluntary consent” (Stewart, *Schneckloth v. Bustamonte*, 1973). Though the state legislature wrote into law the implied consent statute, there was no specific consent given by the populace.

As was again referenced from *Schneckloth*, the Court has held that consent should be analyzed under the totality of the circumstances (Stewart, *Schneckloth v. Bustamonte*, 1973). As aforementioned, the individual citizens, Mr. Mitchell in this instance, did not give consent. Instead, the state legislature did. Within the questioning of the Justices were posited several alternative measures the state could have taken, each of which much more closely resembled actual consent. These include requiring signing an agreement to the same effect as the law, which would arguably look much more like consent than the Wisconsin law and similar laws in the other 49 states. The argument put forth by the state is that implied consent is required for proper law enforcement and constitutes a form of legal and valid consent. They attempted to claim that it could be considered a “special application” of consent, an argument that the court almost immediately rejected (Oyez, 2019). The argument put forth by Mr. Mitchell’s attorney is that implied consent isn’t really consent at all.

### **Exigency**

One of the main arguments brought before the court by both sides was that of exigency, or exigent circumstances. These are special situations or conditions that exempt an agent of law enforcement from meeting the warrant requirement. Such exemptions have been deemed permissible by the Supreme Court over the years. The State of Wisconsin argued that the state statute was created to address a circumstance of exigency, thereby circumventing the need for a warrant. Mitchell and his attorney, however, stressed their belief that the blood test would not be hindered by first meeting the warrant requirement.

There exists a case law that tends to support the state's argument that exigent circumstances circumvent the warrant requirement of the Fourth Amendment. In the majority opinion of *Maryland v. King*, written by Justice Kennedy, the Court held that a Maryland law enabling DNA collection during arrest procedures for the purposes of identification and cross-referencing with other cases did not violate the protections of the Fourth Amendment (Kennedy, *Maryland v. King*, 2013). The Court decided in the state's favor because the DNA swab did not constitute the invasiveness of a search requiring a warrant, and that the invasiveness it did have was outweighed by a legitimate state interest.

Despite this, the law and case at hand do not provide for an exigent circumstance, as held in *McNeely* in the plurality opinion written by Justice Sotomayor (Sotomayor, *Missouri v. McNeely*, 2013). The facts behind *Missouri v. McNeely* are not dissimilar with those in the Wisconsin case, being as both of the accused parties were accused of driving while intoxicated and the agents of the state in each case desired to retrieve a blood sample as evidence of this. However, in *McNeely*, the accused was not unconscious, and rather consciously protested against the attempts to withdraw his blood. As a result, no blood draw occurred, and he was instead charged with refusing to comply, in violation of another state statute forbidding the same. The Court, in a decision written by Justice

Sotomayor, held in *McNeely* that the Fourth Amendment prevents the taking of a warrantless blood sample and that the natural metabolism of alcohol does not justify a categorical exigency exception to the warrant requirement. It is important to note that the Court also held that the states interest in evidence collection is outweighed by the individual's protection against warrantless searches and seizures under the Fourth Amendment.

*Birchfield* will be discussed in relevant part in detail later on, but it is worth mentioning here that the decision of the majority in the case held that the privacy concerns associated with blood alcohol tests greatly outweigh any and all claims of exigency on the state's part (Alito, *Birchfield v. North Dakota*, 2016). Therefore, even if the natural metabolism of alcohol were to be considered an exigent circumstance, an idea which the Court has not held, it would not be enough to overcome the privacy concerns of the individual. The same is not true of breath alcohol tests, which can and should be considered as a constitutional alternative to compulsory blood tests, if the practice of implied consent is not done away with entirely.

### **Unconstitutional Conditions**

One of the major points brought forth by Mitchell's attorney was that the state had placed an unconstitutional condition on driving by passing the implied consent statute. It has long been considered that driving is a privilege, not a right. It is legal and arguably rational for the government to place conditions on driving in order to provide for the general welfare. However, there are limits to what restrictions and conditions may be placed. Mr. Hinkel argued this point, citing relevant case law to back up this idea.

In *Birchfield*, the Court established the limits of what conditions could reasonably be placed (Alito, *Birchfield v. North Dakota*, 2016). In the decision, the court stated that the privacy concerns associated with breath tests are outweighed by the state's interest in evidence collection

because the intrusion of a breath test is minimally invasive. This allows for a warrantless breath alcohol test to constitutionally take place. The court was sure, however, to declare that the opposite was true for blood alcohol tests. The Court held that as blood alcohol tests require a piercing of the skin and collection and storage of vital data, they are significantly more invasive than their breath equivalents. The Court simultaneously held that criminalizing a refusal to a breath test is permissible and constitutional, but the same does not apply to blood alcohol tests for the aforementioned reasons. However, and as noted by Mr. Hinkel, the Wisconsin law goes even further. It does not simply criminalize a refusal to submit to a test, it actually attempts to take that choice away and successfully does so in the case of an unconscious person such as Mr. Mitchell (Oyez, 2019).

### **Unreasonable Search and Seizure**

There are also additional Fourth Amendment protections violations in addition to those of the warrant requirement. The actions of the agents of the state involved call into question whether or not these types of searches and seizures are reasonable in the first place. It has already been established that the Supreme Court has held that warrantless compulsory blood alcohol tests are unconstitutional. However, it could also be argued that a blood alcohol test of an unconscious person who has no way to consent or retract consent, even with a warrant, is an unreasonable search and seizure.

In the words of Justice Sonia Sotomayor, referencing the decision in *Birchfield*, “the intrusion into a body is something else” (Oyez, 2019). Within the oral arguments of *Mitchell v. Wisconsin*, the less-invasive alternatives to blood alcohol tests were enumerated briefly. The other two most common types of alcohol tests, breath and urine, are less invasive by far and typically

equally as effective as their blood testing counterpart. An argument could be made for changing the legal measure of alcohol concentration away from blood entirely.

In *Rochin v. California*, Rochin ingested the drugs in his possession as a way to dispose of the evidence (Frankfurter, *Rochin v. California*, 1952). The arresting law enforcement officers attempted to force him to throw up themselves and then, after several unsuccessful attempts, took him to a hospital to have his stomach pumped. The drugs were recovered in this manner and Rochin was convicted based on this evidence. The Court, through a majority opinion written by Justice Frankfurter, reversed his conviction on the grounds of Fifth and Fourteenth Amendment violations, but the Fourth Amendment could and should have been thrown in as well. The decision of the Court was against “conduct that shocks the senses”. While a blood draw is undeniably less harsh and intrusive than a stomach pump, the forcible blood draw of an unconscious person calls into question whether it too is an example of such unreasonable conduct.

### **Decision**

At face value and disregarding entirely its negative externalities, the Wisconsin law might appear to be a rational way to prevent and prosecute the unarguably dangerous act of driving while intoxicated. However, this “implied consent” statute has several unconstitutional flaws. The idea that consent can be implied is inherently flawed, as no consent is ever actually given. If the search and subsequent seizure are not consensual, then a warrant is required under the Fourth Amendment. This holds true unless there are exigent circumstances. Exigent circumstances, as held by the Court on multiple occasions, do not encompass the natural metabolic processes of the human body. Based on the aforementioned relevant previous Supreme Court decisions and rational arguments, the Court should, theoretically, have exercised judicial review to strike down the

Wisconsin law and all laws similar to it in the other 50 states, effectively ending “implied consent” nation-wide.

However, this was not the case. In a surprising split decision, a four-justice plurality of the Court, comprised of Chief Justice Roberts and Justices Alito, Breyer, and Kavanaugh, held that the exigent circumstances doctrine generally permits the taking of blood for a blood alcohol content test without a warrant (*Mitchell v. Wisconsin*, n.d.). Within the opinion of the Court, Justice Alito stated that a blood draw is, in fact, a search within the meaning of the Fourth Amendment, but that the exigent circumstances present when a driver is unconscious generally permit a warrantless blood draw (Alito, *Mitchell v. Wisconsin*, 2019). Alito further wrote that “highway safety is a vital public interest”, that BAC limits “make a big difference”, and that enforcement of BAC limits necessitate tests “accurate enough to stand up in court”.

He continued by stating that the criteria for exigency are met when BAC is dissipating as long as there is some other factor that creates a “pressing health, safety, or law enforcement need”, and sent the case to remand to afford Mr. Mitchell the opportunity to prove that his situation was unusual and that it fell outside the generally applicable circumstances of exigency. Noticeably, the Court largely one question raised in the oral arguments untouched; whether “implied-consent” laws really constitute consent to be searched. Rather, Justice Alito noted that while the Supreme Court has generally looked favorably upon the general concept of implied-consent laws within a larger regulatory scheme against drunk driving, it has done so based on the specific constitutional issues at bar in each case.

Justice Clarence Thomas concurred with the judgement of the plurality, but criticized it for being more ambiguous than it could or should have been (Alito, *Mitchell v. Wisconsin*, 2019) . Justice Thomas stressed his belief that the rule being established was murky and would cause more

confusion than it solves, likely in an effort not to overturn previous case law that might be contradicted by a harder ruling. Justice Thomas stated his belief that every instance of drunk driving risks “imminent destruction of evidence” and advocated for a per se rule that blanketly made blood draws of reasonably suspected drunk drivers exigent circumstances immune from the protections of the warrant requirement.

Unlike the plurality, Justice Sotomayor did address the question of consent in her dissenting opinion, which was joined by Justices Ginsburg and Kagan (Alito, *Mitchell v. Wisconsin*, 2019). Justice Sotomayor stated her disagreement with the plurality’s position that its ruling was “necessary to spare law enforcement from a choice between attending to emergency situations and securing evidence used to enforce state drunk-driving laws”. She recognized the government’s compelling interest in proscribing drunk driving and preventing the accidents caused as a result, but argued that if there is ample time, a warrant must be obtained unless the search is consented to. She also addressed her belief that this was not an exigent circumstances case, and that the Supreme Court granted certiorari in order to evaluate Wisconsin’s statute, which it did not do. Justice Sotomayor finished by stating her belief that the Wisconsin law does not create or constitute real, informed consent and therefore a warrant should generally be required.

Justice Gorsuch, in an interesting turn of events, broke from every other conservative currently sitting on the Supreme Court bench and dissented from the plurality alone (Alito, *Mitchell v. Wisconsin*, 2019). In his dissent, Justice Gorsuch addressed only the question of consent and admonished the plurality for not deciding what he believed to be the actual question before it. Justice Gorsuch further stated that the exigent circumstances doctrine was improperly applied, that this particular area of constitutional law is exceedingly complex and was not properly discussed within this case, and that the case ought to have been dismissed as improvidently

granted, and that a future case presenting an actual example of exigent circumstances would have been the proper time for a decision on the topic of the exigent circumstances doctrine's effects on the Fourth Amendment with regard to unconscious and reasonably suspect drunk drivers.

The judgement of the Wisconsin Supreme Court was vacated and the case was remanded for further consideration, but the Court sided with the state of Wisconsin in finding that the blood draw of an unconscious person is generally constitutional without a warrant due to exigencies, unless the situation is particular in that it falls outside the scope of exigent circumstances, in which case a warrant becomes necessary. The question becomes, how was this decision reached? Case law appeared to point marginally in the opposite direction, so is it possible that outside influences or internal political maneuvers shifted the balance and tipped the scales towards the decision that ended up being reached by the plurality?

### **Impact of Interest Groups in *Mitchell v. Wisconsin***

Interest groups have often used the judicial branch as a way to advance their individual agendas and policy goals. Historically, the judicial branch in general and the Supreme Court in particular have been very receptive to goals such as the expansion of civil rights and equality (Carp, Manning, Holmes, and Stidham 2020, 240-242). Civil rights groups such as the NAACP and ACLU have taken advantage of this and been at the root of several landmark Supreme Court cases. The issue of implied-consent and the warrant requirement of the Fourth Amendment seem to pale in comparison, but interest groups were also heavily invested here, with fifteen different organizations filing an amicus curiae, or friend of the court, brief (Barnes 2019). Amicus curiae are the easiest way for an organization that is not a party to a case to still participate (Carp, Manning, Holmes, and Stidham 2020, 244). Amici curiae are filed in order for a nonparty to advance its message before the Court in order to supplement one of the sides of the argument.

Presumably, each of the organizations that filed an amicus curiae brief believed that they had a stake in, or would otherwise be affected by, the decision of the Supreme Court in this case. For some, such as the California DUI Lawyers Association, the DUI Defense Lawyers Association, and the National College for DUI Defense, Incorporated, their members' jobs could have been affected (Barnes 2019). For others, such as the DKT Liberty Project, the Cato Institute, Restore the Fourth, Incorporated, and the national organization and Wisconsin chapter of the ACLU it was a more principled issue of advocating for liberty and against the reduction of Fourth Amendment Protections. For Mothers Against Drunk Driving, the League of Wisconsin Municipalities, the National Conference of State Legislatures, and the several state governments that submitted an amicus curiae brief, it was the constitutionality and enforceability of the various related state statutes and advocating against tolerance of drunk driving and making it more difficult to get away with.

The American Civil Liberties Union filed an amicus curiae brief in favor of the petitioner, Mr. Mitchell (ACLU, *Mitchell v. Washington*, 2019). First, they argued that a blood test should presumptively require a warrant. Then, they addressed multiple facets of the consent question. Consent requires a conscious choice, and an unconscious person cannot make any such choice. They also claimed that state-imposed consent is not consent at all, and that states have better, more constitutional means to deter and prosecute drunk driving without imposing consent upon unconscious motorists. The plurality of the Court did not adhere to the ACLU's lines of argument, but the dissent of Justice Sotomayor did. It could not be said for certain whether this or any particular amicus curiae brief was responsible for or even influential in Justices Sotomayor, Ginsburg, and Kagan's decisions to dissent, but the similarities of the language in Justice

Sotomayor's dissent and the ACLU's brief cannot be ignored. Both spoke against the idea of implied consent heavily.

The Rutherford Institute and the Cato Institute also filed briefs in favor of the petitioner (Rutherford and Cato, *Mitchell v. Washington*, 2019). The Rutherford Institute provides free legal representation to those who have had their civil rights violated and the Cato Institute is a public policy research foundation. Their argument centered around one particular exception to the warrant requirement that was not brought up in either the oral arguments or the opinions of any of the justices. The "pervasively regulated business" exception provides that when an individual engages in activity that is commonly heavily regulated and where they have a lessened reasonable expectation of privacy, a warrant may not generally be required. The reason they bring up this exception is due to the Wisconsin Supreme Court's interpretation of it. It is likely that these firms wished for the Supreme Court to state that the Wisconsin Supreme Court got it wrong, but this objective was not achieved, as the Court decided the case based on an exigency exception rather than the pervasively regulated business exception.

Mothers Against Drunk Driving, or MADD, is one of the most well-known advocacy groups against driving under the influence, so it is no surprise that they filed an amicus curiae brief in favor of the state of Wisconsin (MADD, *Mitchell v. Washington*, 2019). MADD's brief contained rather unique arguments, including one stating that Mitchell's state of unconsciousness actually diminishes his privacy interest rather than improving it. More typical arguments were also advanced, including ones that made it into the opinion of the Court. MADD also argued that states have a compelling interest to protect the public from drunk drivers and there is no possible less invasive alternative, though this was disputed by Justice Sotomayor. MADD's legal team also

stated that applying the warrant requirement would not provide any benefits that are not outweighed by the benefits of allowing warrantless blood draws on suspected drunk drivers.

Eighteen states filed a joint amicus curiae brief in favor of the state of Wisconsin (States, *Mitchell v. Washington*, 2019). Their arguments centered on their belief that requiring consent is a constitutional condition on driving and that the governmental interest in warrantless blood searches outweighs the driver's right to privacy and Fourth Amendment protections. It was stated that there is an "overwhelming interest" in preventing the "carnage" caused by impaired driving, which should, in their joint opinion, remove the need for a warrant in order to take a blood draw. The plurality of the Court did not address the constitutional conditions question, but the similar language weighing the State's compelling interest against Mitchell's privacy rights and Fourth Amendment protections did find their way into the opinion of the Court.

These and other amici curiae were filed before the Supreme Court to provide information and additional arguments for the Court's consideration. Some of these arguments found their way into the plurality opinion or a dissenting opinion, meaning that these interest groups may have been successful in pushing their agenda onto the Court and advancing their policy goals through it.

### **The Kavanaugh-Gorsuch Split**

One of the most interesting results of this case is Justice Neil Gorsuch's lone dissent. He was the only conservative on the Court to vote in favor of the petitioner. Even more interesting is that the only other Justice who was appointed by President Trump at the time, Justice Brett Kavanaugh, joined in the plurality opinion of the Court. In fact, Gorsuch and Kavanaugh have found themselves on opposite ends of Supreme Court decisions more than any other pair of new justices chosen by the same president in decades (Barnes 2019-2020). This apparent split between Trump's two appointees could shine light on the interesting judicial politics of the Court.

As Chief Justice Rehnquist once stated, “so also may the personal antagonism developed between strong-willed appointees of the same President [frustrate that President’s expectations]” (O’Brien 2020, 93-94). In his dissent, Justice Gorsuch appeared to attack the plurality’s reasoning, stating very briefly and succinctly, in a single paragraph, that they failed to even address the issue at hand. Though of course in the proper tone and etiquette of a Supreme Court Justice, Justice Gorsuch berated them for their procession on “self-direction” (Alito, *Mitchell v. Washington*, 2019). This strong opposition to the plurality could be evidence of a deeper ideological distinction between Justice Gorsuch and the rest of his conservative peers. Legal scholarship is split. Some believe him to be just as conservative as his peers, as was seen in his first year (Chemerinsky 2017). Others, however, believe that Justice Gorsuch, along with Chief Justice John Roberts, is responsible for driving a wedge into the direction some conservatives desire to move the country in (Alder 2020). President Trump went as far as to criticize his own first Supreme Court pick when Justice Gorsuch voted in favor of Dreamer protections and against LGBT discrimination.

Adding to the intrigue of Justices Kavanaugh and Gorsuch’s apparent rift is the fact that their origins and histories are remarkably similar. Both Justices attended the same high school at the same time, attended Ivy League universities and law schools, and then clerked for the same Justice at the same time (Liptak 2019). It was logical then to assume that their jurisprudence on the Court would be as similar as their lives before their respective appointments. However, the Fourth Amendment is not their only point of disagreement. They have also disagreed on the death penalty, Planned Parenthood, and other rights of the criminally accused. Justice Gorsuch is a textualist and originalist who is often dissatisfied or even annoyed with pragmatism. Justice Kavanaugh is quite the opposite, willing to listen to what the more practical approach when the law is uncertain.

Several legal scholars agree that while both Justices are true conservatives, they are so in different ways.

Something that unites them, by contrast, is in the way that they have both betrayed the President that appointed them. “Betrayed by justice” is a phrase coined by David O’Brien referring to the phenomenon when a President’s own Supreme Court picks go against their wishes (O’Brien 2020, 93). When a President nominates someone to the Supreme Court, they expect loyalty. Yet, as O’Brien puts it, “justices frequently disappoint their presidential benefactors” (O’Brien 2020, 93). Both Justices Kavanaugh and Gorsuch failed to oppose a subpoena against Trump early 2020, which earned them anger and a sense of betrayal from President Trump (Sullum 2020). Contrary to initial impression, betrayals of justice should be seen as examples of principle, as it showcases the idea (and hopefully the reality) that Justices are above politics and vote based on the law and the Constitution, not based on their Presidential benefactors wishes.

Justices Kavanaugh and Gorsuch are not the “wonder twins” that it first appeared they might be (Barnes 2019-2020). Their split is a perfect showcase of how, once confirmed, Justices are not beholden to any political figure and are loyal only to the law and Constitution, or at least their interpretations of the same. This is especially true in light of how both Justices Kavanaugh and Gorsuch have betrayed President Trump on at least one occasion so far. This could also foreshadow the future takes of Trump’s newest Supreme Court pick; Justice Amy Coney Barrett.

### **Future of the Fourth Amendment after RBG**

On September 18<sup>th</sup>, 2020, the legendary feminist, Supreme Court Justice, and equal rights icon, Ruth Bader Ginsburg, passed away in her home (Totenberg 2020). Her death represented a tragedy for many, as her revolutionary life was and will forever remain to be an inspiration to many. As with the passing of any Supreme Court Justice, the focus of the media and of politicians

almost immediately turned to how she would be replaced, and who would replace her. Ultimately, Amy Coney Barrett was nominated to the high Court and was confirmed by the senate to take the seat of the “notorious RBG”.

Vital to both of the parties to *Mitchell v. Wisconsin* as well as all those who filed an amicus curiae brief or may ever bring future litigation up in court revolving around similar issues is how Justice Ginsburg’s death and Justice Barrett’s appointment to the Supreme Court will impact future Fourth Amendment jurisprudence. Barrett’s confirmation signifies a 6-3 conservative majority on the Court, marking a strong difference from recent years where a moderate Chief Justice Roberts was often the deciding vote.

Justice Ruth Bader Ginsburg joined Justice Sotomayor’s dissent in *Mitchell v. Wisconsin*, a vote that is representative of her tenure on the Court. She was known for being very liberal, but she was typically very pro Fourth Amendment and pro warrants across the board. In fact, even conservatives were impressed by one of her decisions with regard to the Fourth Amendment. Justice Ginsburg was and is famous for her dissents, and her lone dissent in *Kentucky v. King* is no exception (Purple 2020). In her scathing attack on the majority, she said that the Court’s opinion was a dishonor to the Fourth Amendment and that the decision destroyed the security of the home.

Like her late mentor Antonin Scalia, Justice Barrett identifies herself as an originalist. In her short time as a judge on the Seventh Circuit Court of Appeals, she has voted against Sixth Amendment rights for the criminally accused and Eighth Amendment protections for the incarcerated (Eisen and Nahra 2020). By contrast, she has voted in favor of privacy rights and gun rights in typical conservative fashion.

It should come as no surprise that Justice Barrett’s appointment will undoubtedly shift the Court in a conservative direction. The Court will likely vote more conservative than it has in

several decades. It may also vote more libertarian than it recently has, as Justice Gorsuch and Chief Justice John Roberts are known to vote with their liberal peers sometimes when an issue has a libertarian answer they agree with. However, the future direction of the Court on the Fourth Amendment is less clear. Justice Ginsburg appears to have been more in favor of rights for the criminally accused than Justice Amy Coney Barrett, meaning that the change from RBG to ACB may have negative impacts on those rights in the future.

### **Conclusion**

Despite seemingly strong case law in favor of Fourth Amendment protections, *Mitchell v Wisconsin* was a 5-4 decision against Mitchell. Several interesting facets of the judicial processes of America were showcased, including amicus curiae briefs and judicial politics. Though it cannot be definitively said one way or another without interviewing the justices themselves, it would appear as though these briefs from interested third parties may have had an impact on both sides of the Court. Judicial politics were also shown when Justice Gorsuch betrayed his fellow conservatives and dissented alone.

### **Implications**

Most of the Fourth Amendment is “settled law”, meaning that past precedents should hold through time. However, technological advancements are always progressing, meaning that there is no way to tell how they will impact the Fourth Amendment protections of the Constitution. What can be discerned, however, is that the new composition of the Court is positioned to be more conservative than has been seen in nearly a century, and that this may be a new age for jurisprudence on a variety of topics. With recent advocacy for completely changing the dynamics of the Court, from adding justices to splitting the Supreme Court into multiple, more specialized Supreme Courts, it is certainly an interesting time to live and watch the progress of the Court.

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