

Justice Scalia 2.0: Replacing “The Supreme Court’s Unlikely Defender of Technology”

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Although the late Supreme Court Justice Antonin Scalia’s rulings on social issues were considered “behind the times” by progressives,¹ one area where he was “shockingly forward-looking” was technology.² “Scalia had an ability to recognize when the Constitution continued to apply to new technology,” according to court observers.³ This was surprising given his legal philosophy and technological greenness. As a staunch originalist, Scalia believed cases should be decided solely on the original intent of the Founding Fathers. Some Court colleagues contended that 18th century laws should not be applied to 21st century technology.⁴ In addition, Scalia was a self-proclaimed Luddite. He admitted he was initially “clueless” about computers, social media, and even cable television.⁵ Eventually, Scalia “evolved” in both his use and views of technology.⁶ He emerged as an “unlikely defender of technology,” according to tech experts⁷, who cite his “pro-technology” decisions on cases involving video games, cloud-based services, and other new technologies.⁸ Steve Vladeck, professor of law at American University Washington College of Law, said that “Justice Scalia was quick to grasp how particular technological innovations implicated constitutional protections in ways that might have taken his colleagues an additional step or two.”⁹

Scalia’s passing leaves the nation’s highest court without a “standard-bearer” for addressing tech issues.¹⁰ While Scalia worked to understand emerging technologies in order to provide necessary updates to the nation’s 200-year-old laws, many of his colleagues have been reluctant to do the same. Consequently, the cantankerous judge often criticized his fellow justices for making narrowly-tailored rulings on tech-related cases that applied only to the parties involved instead of addressing the broader issues

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raised by such cases.¹¹ Doing so was a “disregard of duty,” Scalia wrote in *Ontario v. Quon* (2010).¹² President Donald Trump’s desire to appoint a successor “very much in the mold of Justice Scalia”¹³ may be prudent given that the Court will increasingly be called upon to make important judgments that relate to technology. To keep up with the rapidly changing times, Scalia’s successor, along with future Court appointees, should be vetted for their tech literacy, legal and tech experts agree.¹⁴ They do not need to be tech experts, but, like Scalia, Court nominees should at least demonstrate a genuine desire to keep up with technological developments and provide guidance on how the Constitution should apply to the legal issues they raise. Although the Senate confirmation hearings for the new justice are expected to be contentious, hopefully, conservatives and liberals can at least agree on that.

Scalia’s High Tech Evolution: From “Clueless” to “Great Legal Mind”

Scalia was often criticized by legal journalists and scholars alike for “looking backward,”¹⁵ particularly on social issues. *CNN* senior legal analyst Jeffrey Toobin opined that Scalia’s opposition toward homosexuality “appeared straight out of his sheltered, nineteen-forties boyhood.”¹⁶ Law professor David Rudenstine observed that Scalia “was horrified—indeed outraged—by the court’s ruling that a woman has a constitutional right to an abortion.”¹⁷ History professor Peniel E. Joseph wrote that Scalia’s hostility to affirmative action “exemplifies the crisis of institutional racism at the heart of American democracy.”¹⁸ These are just a few examples. Scalia was held in such contempt for rulings on social issues that some law faculty at Georgetown University, where Scalia studied as an undergraduate and frequently lectured at the law school,¹⁹ argued his death should not be mourned.

“I imagine many other faculty, students and staff, particularly people of color, women and sexual minorities, cringed at . . . the unmitigated praise with which [Georgetown’s official] press release described a jurist that many of us believe was a defender of privilege, oppression and bigotry, one whose intellectual positions were not brilliant but simplistic and formalistic,” professor Gary Peller wrote in a statement disseminated to the campus community.²⁰

Thus, it may seem a bit paradoxical that many of Scalia's critics simultaneously viewed the staunchly conservative senior citizen as a champion of progress when it came to, of all things, technology. "Scalia's opinions were backwards in almost every possible arena," observed Katharine Trendacosta, a staff writer at tech blog *Gizmodo*. "For all the harm he did sitting on the Court for nearly thirty years, Scalia was surprisingly adept at understanding technology."²¹ Likewise, Jack Smith IV, who covers technology and inequality for millennial news site Mic, wrote: "Say what you want about Justice Antonin Scalia, he was great for technology."²² Lisa Larrimore Oullette, a professor of technology law at Stanford Law School, called him "a pro-technology Justice."²³ Michael Bennett, a lawyer and associate research professor at Arizona State University's School for the Future of Innovation in Society, labeled Scalia a "minor philosopher of technology."²⁴ Matthew Rozsa of *Daily Dot*, a blog covering Internet culture, agreed: "when it comes to Internet freedom, he may have been one of the great legal minds of our time."²⁵ In particular, he was "net neutrality's unlikely hero," according to Robinson Meyer, tech editor for *The Atlantic*.²⁶ Tim Risen, a technology reporter for *U.S. News & World Report*, said Scalia has a "legacy as a defender of privacy rights" in technology.²⁷ Owen S. Good of Polygon, a website that covers video game news, noted that as a 79-year-old, Scalia "wrote the majority opinion in a landmark case for a new medium" which "enshrined video games as protected expression."²⁸

Such accolades were unexpected given that Scalia was "the Supreme Court's unlikely defender of technology."²⁹ Earlier in his Supreme Court term, both his technological greenness and legal philosophy initially led many to believe he would be as backwards on tech issues as he was on social issues. By his own admission, Scalia was positively baffled about some aspects of the digital world. For example, during a congressional subcommittee meeting in 2010, he said he did not know about the popular social networking service Twitter: "I don't even know what it is . . . But, you know, my wife calls me 'Mr. Clueless.'"³⁰ Similarly, in an interview with *New York Magazine* in 2013, he expressed confusion over Facebook: "I don't know why anyone would like to be 'friended' on the network. I mean, what kind of a narcissistic society is

it that people want to put out there, ‘This is my life, and this is what I did yesterday?’ I mean . . . good grief. Doesn’t that strike you as strange? I think it’s strange.”³¹ His disconnect often showed when the Court heard a tech-related case. When sexting was explained to Scalia during *Ontario v. Quon*, a 2010 case about whether a city had the right to search its employee’s pager, he did not seem to understand the concept.³² “Could [the employee] print these spicy little conversations and send them to his buddies?” he asked.³³ Social media blog *Mashable* ranked Scalia last in tech competence among justices following a 2014 hearing on Aereo, a startup that streamed television channels to computers. “The most embarrassing comments of the oral arguments came from Scalia,” *Mashable* reported. “At one point he indicated that he did not know that HBO is a paid premium cable channel, thinking instead that it is available for free over the airwaves.”³⁴ The remark was not just an irrelevant oops, but actually incredibly important given that Aereo was redistributing HBO’s shows without paying any fees. An analysis of the Supreme Court’s hearings on tech-related cases by Selina MacLaren, a legal fellow with the Reporters Committee for Freedom of the Press, concluded: “Over half the time when Justice Scalia asks a tech-related question at oral argument, it is a question that indicates confusion.”³⁵

Scalia was not just a Luddite, though. He was also old-fashioned when it came to jurisprudence. “Because originalism dominates his legacy,” explained Matthew S. Adams, a partner specializing in law and technology for law firm Fox Rothschild, “it may be hard to believe that Justice Scalia was actually very forward thinking with his jurisprudence when it came to technology.”³⁶ As an originalist, “he believed cases should be decided based solely on the original intent of the Founding Fathers.”³⁷ Unlike many jurists who contend the Constitution is “living” or “evolving,” Scalia believed the Constitution is “static . . . You can’t reinvent the wheel . . . Go back to the good, old dead Constitution.”³⁸ Scalia explained: “The only good Constitution is a dead Constitution. The problem with a living Constitution in a word is that somebody has to decide how it grows and when it is that new rights are—you know—come forth. And that’s an enormous responsibility in a democracy to place upon nine lawyers, or even 30 lawyers.”³⁹

However, some legal scholars cautioned that scrutinizing 21st century technological issues using an 18th century rationale was “extremely questionable.”⁴⁰ Richard Posner, a judge on the U.S. Court of Appeals for the Seventh Circuit, explained, “Eighteenth-century guys, however smart, could not foresee the culture, technology, etc., of the 21st century. Which means that the original Constitution, the Bill of Rights, and the post-Civil War amendments (including the 14th), do not speak to today.”⁴¹ Even fellow Supreme Court conservative jurist Samuel Alito, whose rulings typically aligned with Scalia’s, mocked his originalist approach on multiple occasions. During a 2010 hearing on whether banning the sale of violent video games to minors was unconstitutional, Alito remarked: “I think what Justice Scalia wants to know is what James Madison thought about video games. Did he enjoy them?”⁴² Alito argued that video games represent a “new medium that cannot possibly have been envisioned when the First Amendment was ratified” and that it was “entirely artificial” to analogize the Framers’ attitudes toward violent books for children to violent games. In a 2012 decision involving whether a warrant was required to use a GPS tracking device to monitor a suspected drug dealer, Alito again poked fun at Scalia’s obsession with what the Framers would have done with satellites and lasers. He stated, “It is almost impossible to think of late-18th century situations that are analogous to what took place in this case. (Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach’s owner?)”⁴³

But such criticisms of Scalia eventually lessened. While Scalia remained “stuck in the past” and “disconnected from the real world” on many issues,⁴⁴ he “evolved” when it came to technology and the virtual world.⁴⁵ He gradually upgraded both his personal use of and legal views of technology. At a Federalist Society dinner just six months after joking about being “clueless” about Twitter, he boasted that he owned an iPod and an iPad and did so much work on his gadgets that he “can hardly write in longhand anymore.”⁴⁶ He said his iPod was filled with classical and operatic tunes—music he put there himself. Scalia also said that “[w]hen he has to take materials home for work, he uses a thumb drive, or accesses the Court computer system remotely.” He

added: “I don’t have to schlep the [legal] briefs around. Oh, it’s a brave new world.”⁴⁷ Scalia’s embrace of new technologies did not stop there. He held a virtual colloquium for students at an online law school from his chambers at the Supreme Court. Despite being strongly opposed to allowing cameras in the Supreme Court,⁴⁸ Scalia lectured and answered students’ questions via video-conferencing, prompting *Legal Times*’ Supreme Court correspondent Tony Mauro to dub Scalia “Cyber-Professor Scalia.”⁴⁹ In one decision, Scalia even mentioned playing *Mortal Kombat*, a popular, violent video game.⁵⁰ But, he quipped, “Reading Dante is unquestionably more cultured and intellectually edifying.”⁵¹ By the time he passed away, Scalia had developed a “seemingly advanced understanding of technology” according to Ian Lopez of *Legaltech News*.⁵²

When Scalia was unfamiliar with a technology that was at issue in a Supreme Court case, he would conduct his own research to get a better understanding. For example, in preparation for *Bilski v. Kappos*, a 2010 case involving a software-related patent, Scalia consulted with a leading patent attorney, Robert Greene Sterne, who recalls:

“During a short meeting in his chambers prior to the oral argument, he asked for my opinion about the case. I told him that, while not involved in the case, it was my opinion that the U.S. needed a flexible and progressive legal test to determine patentable subject matter to offer possible patent protection of emerging areas of technology pushing the leading edge of innovation. Such protection would foster investment in these risky new technologies and such investment is critical to the U.S. innovation pipeline. He smiled and said, ‘good answer.’ During the oral argument, that very issue of emerging technology areas came up.”⁵³

Ultimately, Scalia’s homework paid off with a shrewd decision. He joined the Court in unanimously ruling that holding that the machine-or-transformation test should not be the sole test for determining the patent eligibility of the software.⁵⁴ Janice M. Mueller, a University of Pittsburgh law professor and patent expert, said the decision “reflected a welcome sensitivity to the settled expectations of” patent applicants.⁵⁵

As Scalia’s experience with technology changed, so did his legal philosophy about it. Daily Dot’s Rozsa noted:

“Although Scalia’s positions on Internet freedom ranged from supporting net neutrality to questioning whether a right to privacy exists throughout his career, the most important quality here is that they evolved. Despite being a staunch originalist . . . Scalia recognized that the technological advances brought about

by the Internet age meant that old legal traditions need to be re-evaluated in a new light.”⁵⁶

Scalia’s changing views on digital privacy illustrate this. He initially expressed skepticism over how much privacy Americans should reasonably expect in the Digital Age, stating in a 2009 speech at the Institute of American and Talmudic Law: “Every single datum about my life is private? That’s silly.”⁵⁷ In response to the statement, a Fordham University School of Law class searched for any public information they could find online about Scalia and compiled it into a dossier. The result was a fifteen-page document that included the justice’s home address, his home phone number, the movies he likes, his food preferences, his wife’s personal e-mail address, and photos of his grandchildren.⁵⁸ When presented with the class’s findings by its professor, Scalia seemed perturbed, but insisted he would “stand by” his remark on digital privacy.⁵⁹ Such a view aligns with originalism given that “the Founders were concerned about entry into the home, body, and papers because that is what agents at the time were capable of doing,” according to the Brennan Center for Justice. “They surely could not have foreseen technologies” such as smart phones and the World Wide Web.⁶⁰

Scalia’s Rulings: “Over and Over Again, He Got It Right”

Scalia’s rulings following the Fordham exposé, however, suggest he changed his mind on digital privacy. In a 2014 hearing involving whether police need a warrant before they can search cellphones found on people they arrest, Scalia said: “it seems absurd that they should be able to search that person’s iPhone.”⁶¹ He joined the majority in ruling in *Riley v. California* (2014) that a warrant is first required.⁶² Orin S. Kerr, a professor specializing in computer crime law at George Washington University Law School, called *Riley* “a bold opinion. It is the first computer-search case, and it says we are in a new digital age. You can’t apply the old rules anymore.”⁶³ Ann Bartow, a University of New Hampshire law professor specializing in technology and privacy, observed: “Scalia’s views of privacy apparently change[d] when his personal information [was] at stake.”⁶⁴

Vladeck agreed that “Scalia’s brand of originalism was not static” when it came to ever-evolving technology.⁶⁵ He explained:

“I do think technological advances put some pressure on how he read particular provisions of the Constitution, especially, for example, the Fourth Amendment. Thus, his particular understanding of the kind of privacy the Founders meant to enshrine leads to very different results in cases implicating searches of the home and/or physical intrusions than other surveillance that, in today’s day and age, might be regarded as far more pervasive and intrusive.”⁶⁶

Specifically, “Justice Scalia’s opinions in *Kyllo* and *Jones* marked particularly significant adaptations of the Founder’s concerns to modern privacy cases” according to Edward R. McNicholas, a partner at the law firm Sidley Austin.⁶⁷

In both cases, Scalia argued that as technology expanded what humans could do, the Constitution had to expand and account for those superhuman abilities. In *Kyllo v. United States* (2001), law enforcement sought to use thermal imaging devices to heat-map a home so they could find marijuana growers, but Scalia’s decisive vote helped put a stop to that. Scalia wrote in the 5-to-4 decision:

“While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no ‘significant’ compromise of the homeowner’s privacy has occurred, we must take the long view.”⁶⁸

In another case, *Jones v. United States* (2012)—“a modern landmark in police surveillance”⁶⁹—Scalia and the Court unanimously ruled that police should not be able to utilize a GPS tracker for long-term surveillance without a warrant.⁷⁰

Like digital privacy advocates, video game enthusiasts also owe a debt of gratitude to Scalia. He wrote the “historic majority opinion” in *Brown v. Entertainment Merchants Association* (2011), which gave video games First Amendment protection.⁷¹ The Supreme Court’s ruling stopped California from regulating video games as products like cigarettes and alcohol instead of as a medium for expression like music, books, and movies. The Entertainment Software Association praised the decision: “It was a momentous day for our industry and those who love the entertainment we create and we are indebted to Justice Scalia for so eloquently defending the rights of creators and consumer everywhere.”⁷²

Scalia was not afraid to go against popular opinion when it came to tech cases. Gizmodo's Trendacosta noted:

“Where Scalia shines with technology is in a pair of cases: *American Broadcasting Companies, Inc. v. Aereo, Inc.* and *National Cable & Telecommunications Association v. Brand X Internet Services*. In each, he seemed to understand technology better than his peers.”⁷³

In 2014, when the major broadcast networks got the Supreme Court to decisively shut down Aereo, a service that let users watch cable television on their smartphone or tablet and save shows for later, Scalia was one of the few justices who stood against the decision.⁷⁴ Smith said Scalia “refus[ed] to accept the rudimentary argument that Aereo was just like any other cable company” and was engaging in copyright infringement.⁷⁵ Instead, Scalia said the cloud-based technology was akin to the VCR, which the Supreme Court narrowly ruled in favor of 30 years earlier when Hollywood studios sued its manufacturer Sony for enabling copyright infringement. *TechDirt*, a blog covering tech law, sided with Scalia, calling the majority’s ruling “unfortunate and terribly problematic.”⁷⁶ *CNET*, a technology news site, agreed the decision was a blow to “technological evolution.”⁷⁷

Nine years earlier, in *National Cable & Telecommunications Association v. Brand X Internet Services* (2005), Scalia also went against the Court’s majority. He fought for network neutrality in the *National Cable & Telecommunications* (NCTA) case. He mocked the NCTA’s argument that broadband Internet service is inseparable from internet content as akin to a pizzeria saying it did not offer pizza delivery but rather offered to bake the pizza and then bring it to a customer. In doing so, Scalia essentially “made [the Federal Communications Commission’s (FCC)] case” for later implementing net neutrality—the principle that internet service providers and governments should treat all data on the internet equally, not discriminating or charging differentially by user, content or website.⁷⁸ “It is certainly true that Justice Scalia’s dissent was pivotal to the FCC’s theories in the Open Internet Order,” said Peter Karanjia, co-chair of the appellate practice for law firm Davis Wright Tremaine. “The FCC in the order took pains to cite Justice Scalia’s opinion.”⁷⁹ Liberal political magazine *The*

Atlantic observed: “Scalia totally [got] net neutrality We should’ve taken his advice.”⁸⁰

Scalia’s precedents continue to shape tech law and policy in other ways. For example, digital privacy advocates are now using the *Jones* precedent to challenge the constitutionality of Stingray-style devices.⁸¹ Smith, a tech journalist, said Scalia’s strong support of digital privacy rights has altered the way police conduct investigations: “[S]omewhere out there, there are police officers trying to use the most sophisticated technology of our time to peer into our lives in ways we never thought possible. And because of Antonin Scalia, someone is saying, ‘You’re going to need a warrant for that.’”⁸² When reviewing Scalia’s body of work in technology cases, his legacy is nonpareil, according to experts. “[I]f there was any force in the forward-march of modern history that could consider Scalia a standard-bearer, it was technology . . . over and over again, he got it right,” Smith said.⁸³ Stanford Law’s Oullette agreed: “[H]e deserves his reputation as a pro-technology Justice He supported legal rules that allow new technologies to flourish.”⁸⁴

Duplicating “The Mold of Justice Scalia”

Scalia’s death arguably leaves the bench with a void of leadership when it comes to tackling technology issues. While Scalia worked in earnest to understand emerging technologies in order to provide necessary updates to the nation’s 200-year-old laws, many of his fellow jurists seem reluctant to do the same. In 2013, for example, Justice Elena Kagan revealed that many of her colleagues do not even use email. “The justices are not necessarily the most technologically sophisticated people,” she said in a Brown University speech.⁸⁵ Their naivety often shows in hearings. For example, at a 2014 hearing on software patents, Justice Anthony Kennedy suggested code to implement an idea could be done by “any computer group of people sitting around a coffee shop” over a weekend.⁸⁶ In another 2014 hearing over whether police should be able to search smartphones without warrants, Chief Justice John Roberts alarmed privacy advocates when he doubted that anyone other than drug dealers carries more than one cellphone.⁸⁷ These are just a couple of many examples. It is no wonder the Court is

often criticized for being out of touch with ordinary people.⁸⁸ Unlike the justices, most Americans live in a connected society: In the United States, sixty-two percent of people get their news from social media,⁸⁹ eighty-seven percent of people use the internet,⁹⁰ and ninety-two percent of the population owns cell phones.⁹¹ But, as the Electronic Frontier Foundation's Parker Higgins said, "The justices live an unusual and sheltered life: they have no concerns about job security."⁹² While technological advances have forced workers in many industries to retool or retire, the justices cannot be required to change because they enjoy lifelong appointments.⁹³ Tech journalist Nick Summers said the justices not only lack an understanding of the digital world, but are downright "hostile to technology."⁹⁴

Perhaps that explains why the Court has declined to hear many important technology-related cases, such as a challenge to the National Security Agency's electronic snooping in 2014.⁹⁵ And when they do hear such cases, justices "revert to a Model T worldview," according to the Brennan Center for Justice, and make a "classic Supreme Court move" by issuing "narrow, highly fact-specific rulings that provide little broad guidance."⁹⁶ Kennedy declared in *Ontario v. Quon* that the Court lacks "the knowledge and experience" to make "[a] broad holding" on constitutional issues involving technology.⁹⁷ But such jurisprudence, Scalia countered in his opinion, is a "disregard of duty" because it leaves lower courts without any guidance on how America's antiquated laws on issues such as privacy apply to smart phones, computers, and other devices.⁹⁸ For instance, in 2010, the Supreme Court had the opportunity to provide a much-needed update on privacy law, an issue it last made a major ruling on in 1987.⁹⁹ As the U.S. Court of Appeals for the Ninth Circuit noted, *Ontario* represented a "new frontier for Fourth Amendment jurisprudence that has been little explored."¹⁰⁰ Although the Supreme Court's ruling would only directly affect government workplaces, it was expected that it would have an impact on the private workplace as well.¹⁰¹ The Court, however, declined to address the broader issues on digital privacy involved in the case and instead made a narrow ruling that applied only to the parties involved.

In his majority opinion, Kennedy acknowledged that *Ontario* “touches issues of far-reaching significance,” but added that the Court would address none of them. “The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear At present, it is uncertain how workplace norms, and the law’s treatment of them, will evolve,” he explained.¹⁰² A *Harvard Law Review* article noted the “perplexing irony” of Kennedy’s musings about the difficulty of crafting privacy standards for new technology, especially given that the case turned on text messages sent on “two-way pager devices that were issued to employees a decade ago and that would likely be deemed antiquated by today’s teenagers and young professionals,” who largely tend to use cell phones or texting.¹⁰³ Although Scalia concurred with the ruling, he said his fellow justices’ refusal to address Fourth Amendment issues was “indefensible.”¹⁰⁴ He wrote, “Applying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case, we have no choice. The-times-they-are-a-changin’ is a feeble excuse for disregard of duty.”¹⁰⁵ A month after the Court handed the decision down, the U.S. Court of Appeals for the Eleventh Circuit criticized the ruling for “a marked lack of clarity.”¹⁰⁶ In the 2012 *Jones* case involving whether police needed a warrant to use a GPS tracker, the Court again declined to address the broader issues involved and instead issued a vague, narrowly-tailored ruling. *Slate*’s legal correspondent Dahlia Lithwick bemoaned:

“[I]f a coherent legal rule has emerged from all this mess, I can’t for the life of me identify it. In issuing the narrowest possible decision about the most consequential technological dilemma, the court has told us only that what the police did in this one instance was an unconstitutional search. Good luck deciding what it means about your smartphone.”¹⁰⁷

Tech journalists have expressed concern that the law may lag further behind technology in coming years due to the Court’s aversion to technology. “Appointed for life, cloistered and hidebound, obsessed with tradition . . . the nine justices make up the branch of government least changed by the last 200 years,” Summers observed.¹⁰⁸ *ITworld* reporter Ryan Faas wrote, “This brings us to the fundamental question: is the Supreme Court equipped with the understanding to truly comprehend the technical

issues involved in technology?”¹⁰⁹ Scalia worried about this, too. He once lamented that the Court ultimately would determine whether widespread gathering of telecommunications data violates the Fourth Amendment. “The institution that will decide that is the institution least qualified to decide it,” he told reporters at a National Press Club event in 2014.¹¹⁰ Trevor Timm, Executive Director of the Freedom of the Press Foundation, said, “This lack of basic understanding [of technology] is alarming, because the Supreme Court is really the only branch of power poised to confront one of the great challenges of our time: catching up our laws to the pace of innovation.”¹¹¹ True, Congress also has the authority to update U.S. technology policy, but it has been unable to pass even the most uncontroversial proposals, let alone comprehensive reforms. For example, in 2012, the House of Representatives blocked a proposed federal law that would have prevented employers from demanding job applicants’ Facebook and other social media passwords.¹¹² In 2016, the Senate failed to agree on the proposed Email Privacy Act, which would have required law enforcement to get a warrant before accessing Americans’ emails and other electronic communication.¹¹³ Timm decried:

“[T]he legislative branch can’t even get its act together long enough to pass an update our primary email privacy law, which was written in 1986—before the World Wide Web had been invented. So the future of our privacy, of our technology—these problems land at the feet of a handful of tech-unsavvy judges.”¹¹⁴

With Apple resisting the Federal Bureau of Investigation’s demand to help it hack a terrorist’s iPhone, telecommunication giants challenging the FCC’s new rules on network neutrality, and cyberbullying testing the limits of free speech in schools, *Ars Technica* tech policy reporter Joe Silver predicts that “the Supreme Court is likely to be confronted with many . . . challenging technology cases, and it will play a central role in shaping the 21st century cyberlaw debate.”¹¹⁵ The implications are particularly profound for U.S. communications law, according to Northeastern University cyber law professor Dale Herbeck, because, with the advent of the Digital Age, speech and expression have become intertwined with technology.¹¹⁶

It is crucial for our most important decision-makers, Supreme Court justices, to have at least a rudimentary understanding of technologies most Americans cannot imagine living without. Technology touches virtually every aspect of Americans' lives and often is affected by laws. "The Supreme Court's tech-deficit could have a profoundly negative impact on its ability to properly decide technology cases," warned Silver.¹¹⁷ If the Court cannot grasp how business inventions have changed since the Industrial Revolution, or how communication methods have evolved since Alexander Graham Bell, then they might make decisions that misapply the law due to a misunderstanding of the facts about technology. The Court may also be unwilling to hear certain technology-related cases, since they have discretionary review and may not grasp the importance of the issues involved. Even if law clerks or litigants clearly explain the relevant technology, there remains the problem of whether justices can appreciate how people use it. "When given technical information . . . judges often misunderstand the technological implications at stake," wrote Alex Lipton, an attorney who is a law clerk at the U.S. Court of Appeals.¹¹⁸ Higgins agreed:

"What can't really be explained in a brief . . . is a community's relationship with a technology. You can get at parts of it, citing authorities like surveys and expert witnesses, but a real feeling for what people expect from their software and devices is something that has to be observed. If the nine justices on the Supreme Court can't bring that knowledge to the arguments, the public suffers greatly. . . . It is essential that the Court understands how people use technology, especially in areas where they're trying to elaborate a standard of what expectations are 'reasonable.'"¹¹⁹

Scalia seemed to grasp that. Like many Americans, he stored much of his life—from music to work documents—on his Apple devices. His expectations for privacy evolved as technology evolved. And when his tech preferences differed from societal norms, as they did with social media networks, he recognized that. Many other justices, by contrast, seem unable to relate to the average American when it comes to tech concerns. Alito, for example, conceded: "[J]udges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person."¹²⁰

To help modernize the Court, Scalia's successor, along with "[f]uture nominees to the bench, should be quizzed on their knowledge of technology at confirmation

hearings,” suggested Timm, of the Freedom of the Press Foundation.¹²¹ They do not need a million followers, or even a Twitter account. But, like Scalia, Court nominees should at least demonstrate a genuine desire to learn about technology and keep up with major developments. “[I]t will be advantageous for the development of technology and Internet law if the Supreme Court nominee . . . has first-hand experience with technology and the Internet—the more, the better,” said Eric Goldman, a professor and co-director of Santa Clara University School of Law’s High Tech Law Institute.¹²² Trump said that he would nominate a Supreme Court justice “probably within two weeks” of his inauguration on January 20, 2016.¹²³ Senate confirmation hearings for Scalia’s successor are expected to be contentious.¹²⁴ The Republican president said he wants to appoint a successor “very much in the mold of Justice Scalia,”¹²⁵ but liberal advocacy groups said they are “preparing for a big fight.”¹²⁶ Hopefully, Republicans and Democrats can at least agree on the need for someone like Scalia when it comes to technology.

Notes

¹ Advocate.com Editors, “Phobie Awards: The 13 Worst People of the Year,” *The Advocate*, December 13, 2013, <http://www.advocate.com/media-gallery/detail/956641/843611>.

² Katharine Trendacosta, “Antonin Scalia, The Supreme Court’s Unlikely Defender Of Technology,” *Gizmodo*, February 14, 2016, <http://gizmodo.com/antonin-scalia-the-supreme-court-s-unlikely-defender-o-1759075490>.

³ *Ibid.*

⁴ Dahlia Lithwick, “Scalia And Alito Brawl Entertainingly Over Technology And Privacy,” *Slate Magazine*, January 23, 2012, <http://slate.me/2iwaqoo>.

⁵ Nancy Scola, “Justices Scalia, Breyer Asked Whether They ‘Twit’,” *TechPresident*, May 21, 2010, <http://techpresident.com/blog-entry/justices-scalia-breyer-asked-whether-they-twit>.

⁶ Matthew Rozsa, “Supreme Court Justice Antonin Scalia’s Evolution On Internet freedom,” *The Daily Dot*, February 14, 2016, <http://www.dailydot.com/via/supreme-court-justice-scalia-legacy-internet-freedom/>.

⁷ Trendacosta, “Antonin Scalia.”

⁸ Ian Lopez, “A ‘Pro-Technology’ Justice Scalia’s Relationship With Tech,” *Legaltech News*, February 23, 2016, <http://www.legaltechnews.com/id=1202750446375/A-ProTechnology-Justice-Scalias-Relationship-with-Tech>.

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