



7-24-2015

Keeping Pace: The U.S. Supreme Court and Evolving Technology

Brian Thomas

Ursinus College, brthomas@ursinus.edu

Follow this and additional works at: http://digitalcommons.ursinus.edu/pol_sum

Recommended Citation

Thomas, Brian, "Keeping Pace: The U.S. Supreme Court and Evolving Technology" (2015). *Politics Summer Fellows*. Paper 2.
http://digitalcommons.ursinus.edu/pol_sum/2

This Paper is brought to you for free and open access by the Student Research at Digital Commons @ Ursinus College. It has been accepted for inclusion in Politics Summer Fellows by an authorized administrator of Digital Commons @ Ursinus College. For more information, please contact aprock@ursinus.edu.

KEEPING PACE: THE U.S. SUPREME COURT AND EVOLVING TECHNOLOGY

Brian Thomas, Summer Fellows 2015

Abstract

Contemporary mainstream discussions of the Supreme Court are often qualified with the warning that the nine justices are out of touch with everyday American life, especially when it comes to the newest and most popular technologies. For instance, during oral argument for *City of Ontario v. Quon*, a 2010 case that dealt with sexting on government-issued devices, Chief Justice John Roberts famously asked what the difference was “between email and a pager,” and Justice Antonin Scalia wondered if the “spicy little conversations” held via text message could be printed and distributed. While these comments have garnered a great deal of attention on the internet, the Court has just as often addressed difficult constitutional questions regarding technology in a nuanced and informed manner. For this paper, I have selected six recent cases that deal with technology. Three of these cases concern technology and free speech, while the other three involve technology and the right to privacy. By reading oral argument and seeing how the justices discuss technology, I have attempted to define in each case how familiar the Court was with the specific innovation that was in question. Then, through this lens, I have analyzed the rulings to show where the Court’s technological nuance resulted in well-reasoned rulings and where better understanding of the technology would have been helpful.

The contemporary Supreme Court is notorious in popular discourse for its apparent naiveté surrounding modern technology. A 2014 *New York* magazine piece, pointedly titled “8 Times the Supreme Court was Baffled by Technology,” sardonically claimed that “in recent years, the Supreme Court has increasingly found itself tackling issues of technology, and each time, someone reveals bewilderment at those goldarn contraptions kids are obsessing over” (Raymond 2014). Perhaps the harshest insult came from a Reuters piece that, drawing on the deluge of mockery, declared the justices to be “black-robed techno-fogeys” (Hurley 2014). This kind of criticism became more common as the technologically literate millennial generation matured and began influencing modern society. As the use of personal technology has increased, so too has criticism that the ostensibly Luddite Court is behind the times.

Most of this criticism stems from studies of oral argument, where justices are speaking off the cuff. For instance, in *City of Ontario v. Quon* (2010), which dealt with sexting on government-issued devices, Justice Antonin Scalia asked, perhaps a bit too eagerly, whether the “spicy conversations” could be printed and distributed (Transcript of Oral Argument 2010a, 49). This comment, along with most of the quotations catalogued on the popular criticism outlets, certainly portrays the Court as out of touch to the point of hopelessness. After all, how could the justices rule on the constitutionality of sexting when they are so unclear about what text messaging really is?

Despite the recent string of pieces commenting on the Court’s apparent lack of technological know-how, the Court has dealt with technology questions since its inception. From railroad innovations in the 19th century to internet speech in the late 1990s, the Court has always necessarily had to confront changing technology. In the landmark case *Olmstead v. United States* (1928), where the Court ruled that the government was within its power in wiretapping private

phone conversations of suspected criminals, Justice Louis Brandeis filed a prescient and famous dissent advocating a more technologically literate method for answering constitutional questions arising from technology. “The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping,” he wrote, and “ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home” (*Olmstead v. United States* 1928, 474). Brandeis, always ahead of his time, was correct; the Court reversed *Olmstead* in *Katz v. United States* (1967). While *Katz* remains a vitally important case in Fourth Amendment jurisprudence, Brandeis’s concerns still hold true. The Court continues to seem wary of confronting new technology head on.

This paper explores the Court’s recent cases involving technology in a manner that further elucidates its politics and how it interacts with technology. In doing so, I analyze six cases. Three of the six cases that I’ve selected address questions of free speech and three concern search and seizure. *United States v. Playboy* (2000) deals with censorship of pornographic television programs. *Brown v. Entertainment Merchants Association* (2011), addresses a ban on selling violent or sexual video games to minors. *Elonis v. United States* (2015) concerns whether threatening lyrics posted on a Facebook page were illegal. *Kyllo v. United States* (2001) examines the use of thermal imaging devices by police. *United States v. Jones* (2012) concerns the use of GPS devices by the police. *Riley v. California* (2014) answers the question of whether police need a warrant to search an arrested person’s cell phone. I first analyze transcripts of oral arguments in order to discover how familiar the Court was with the technology in question. Then, after establishing its familiarity, I read the decisions through this lens to determine whether the justices’ understanding of technology influenced how they ruled.

Because all of these cases deal extensively with technology, they necessarily required the Court to gain at least a cursory insight into how society interacts with technology. The Justices did better in some cases than in others, sometimes ignoring the technology almost completely in their decisions after expressing utter confusion during oral argument. This pattern was not invariable, however. While the Court eagerly sought to apply past Fourth Amendment doctrine to modern technology when confronted with privacy concerns, it was less eager to do so when addressing free speech, often disregarding the role that technology had in that speech and relying instead on a clear disposition toward absolute freedom of speech. I address why this pattern is problematic or noteworthy in each case, concluding that the justices strategically accommodate technology when doing so fits their pre-existing beliefs.

United States v. Playboy Entertainment Group Inc. (2000):

A Full Ban on Sexual Material to Prevent Signal Bleed

Background:

Playboy Entertainment Group Inc. challenged a portion of the Telecommunications Act of 1996 that required cable operators to totally block or “scramble” the content of channels that were “primarily dedicated to sexually-oriented programming” during hours children were likely to encounter them. Scrambling, a process used by cable operators in daily operations to prevent customers from being able to access channels they were not paying for, is defined in the Court’s opinion as “[rearranging] the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner” (*U.S. v. Playboy Entertainment Group Inc.* 2000, 25).

Theoretically, since people can expect not to have access to channels they are not subscribing to due to scrambling, they would assume that they would not have access to explicit content against their will. However, due to the phenomenon of signal bleed, wherein the blocked content still shows up on the unsubscribed television, some households could randomly see or hear content they were not paying for, including the sexually explicit content produced by *Playboy*. In order to combat bleed, the government required that sexually oriented channels could only broadcast their content from 10 p.m. until 6 a.m., hours when children were least likely to be exposed to the content through bleed. In a 5–4 decision authored by Justice Kennedy, the Court ruled that the ban was content based and therefore violated the First Amendment rights of *Playboy*.

Oral Argument:

During oral argument, the justices collectively demonstrated a level of technological understanding that likely surprised critics of the Court’s handling of technology. While the Court has decided many cases involving broadcast regulations, this case was particularly dependent on technological nuances such as scrambling and signal bleed. For the most part, the justices showed an admirable understanding of not only cable TV but also the technological issues being debated.

Justice Scalia showed a familiarity with cable television in his comments and questions, both in how it is consumed and how it is distributed. He postulated that “a cable channel advertising itself as” one that “[transmits] indecent programming” will get more viewers than one that merely advertises “sexually explicit programming,” and he argued that the Court should “consider the application of this statute to other channels that...qualify as, quote, sexually explicit channels that are not obscene” (Transcript of Oral Argument 1999, 2). Later, he joked

that it is a consumer “cost consideration” that “you get the cheapest channel and then you hope to get the sports on the bleed, you know?” (Transcript of Oral Argument 1999, 11). Finally, toward the end of oral argument, Scalia described what he calls the “repairman problem,” saying, “Unlike the world where I grew up, I think many, many thousands of children come home after school and there’s no one there and parents don’t want to say I’ll call up the program and do something because that means they lose an afternoon at work while...while they’re home while somebody comes out to the house, if they’ve understood it, and then he didn’t show up on time” (Transcript of Oral Argument 1999, 19). He then quipped that “we’ve all lived through having to stay home all day because the repairman didn’t come and he still doesn’t come” (Transcript of Oral Argument 1999, 19). Scalia’s colloquial tone and description of common problems associated with television demonstrate a clear familiarity with cable television.

Justice Souter also showed a familiarity with television and the content that is commonly portrayed on it. Arguing that offensive material can be found on many unscrambled channels, he said, “Well, you see an awful lot of strong language on...on WGN or whatever the best channels are,” conceding that “[he’s] very often shocked at what I see on television” (Transcript of Oral Argument 1999, 7). He continued, saying that “much of the language in *Pacifica* you can hear on television any night of the week on any channel” (Transcript of Oral Argument 1999, 8). While not as folksy as Justice Scalia, Justice Souter still seemed comfortable with the technology of the case, and while not apparently an avid consumer of television, he at least knew what was available to contemporary audiences on a regular basis.

Justice Stevens spoke little in the oral argument, showing some confusion as to the technology involved and asking the appellee if he would “prosecute each one of these movies one by one” in order to “protect the little children” (Transcript of Oral Argument 1999, 4). Later

on, he asked for clarification on the basic idea of signal bleeding, saying, “Do the findings describe the aural content, the sound content, as opposed to what you see because of the bleed?” (Transcript of Oral Argument 1999,7). He “missed that part” (Transcript of Oral Argument 1999, 7). Of course, these questions are valuable, but the confusion that they imply is problematic because signal bleed is the core reason for the content scrambling mandating in the law. An understanding of the content that is transmitted through signal bleed is necessary in order to rule whether the ban is content based or not.

Final Opinions:

The majority decision, authored by Justice Kennedy, affirmed the district court’s ruling that the mandatory ban on sexually explicit content was unconstitutional. In the decision, Kennedy shows an impressive, sophisticated understanding of cable television technology and how it is consumed by the majority of the population. He predicts that “digital technology may one day provide another solution, as it presents no bleed problem at all,” and he recognizes that “digital systems are projected to become the technology of choice, which would eliminate the signal bleed problem” (*U.S. v. Playboy* 2000, 3). Although digital systems were not widely used at the time, the Court ruled that there were less restrictive alternatives for the government to implement, and thus the censorship was unconstitutional. Kennedy also argues that since “this case involves speech alone,” the government’s “content based burdens must satisfy the same rigorous scrutiny as its content-based bans” (*U.S. v. Playboy* 2000, 9 and 8).

Kennedy’s opinion also addresses the issues that broadcast media present to the Court, saying, “Cable television, like broadcast media, presents unique problems, which inform our assessment of the interests at stake, and which may justify restrictions that would be unacceptable in other contexts” (*U.S. v. Playboy* 2000, 8–9). The opinion then goes on to

demonstrate a nuanced understanding of the differences between the types of technology that would separate *Playboy* from the many other cases involving regulation of broadcast media. Kennedy writes that “there is, moreover, a key difference between cable television and the broadcasting media, which is the point on which this case turns: Cable systems have the capacity to block unwanted channels on a household-by-household basis” (*U.S. v. Playboy* 2000, 10).

Addressing how technological advances interact with the constitution, Kennedy writes that “technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us” (*U.S. v. Playboy* 2000, 13). By explicitly recognizing the societal value and potential of technology, Kennedy is showing that the Court is familiar with the changing tastes and practices of consumers as well as the likelihood of technology providing a less restrictive option in speech cases.

Justice Breyer’s dissent also partially argues in favor of technology, from the angle that its many uses can help alleviate the burden placed on speech by the statute. He argues that thanks to the options afforded to cable providers due to technological variety, the “statute places a *burden* on adult channel speech by requiring the relevant cable operator either to use better scrambling technology, or, if that technology is too expensive, to broadcast only between 10 p.m. and 6 a.m.” (*U.S. v. Playboy* 2000, 4). He also argues that “adults may continue to watch adult channels, though less conveniently, by watching at night, recording programs with a VCR, or by subscribing to digital cable with better blocking systems” (*U.S. v. Playboy* 2000, 12). Thanks to VCRs and advancements in cable television, Breyer argues that the government, having satisfied its burden of proof, is able to restrict speech through scrambling and time blocking, since it is still possible for the speech to be consumed in a number of ways.

Analysis:

In this case, the Court shows a realistic and thorough understanding of how technology is used throughout society. From Justice Scalia's quick jokes about television and repairmen to Justices Kennedy's and Breyer's technologically informed opinions, the Court seems much more aware of television-related technology. That being said, there still is some legal awkwardness in the ruling. This is perhaps best expressed by one of Justice Kennedy's comments during oral argument where he asked, "Can you tell me what is the standard for how widespread the bleed must be?" (Transcript of Oral Argument 1999, 4). He then said that "if this happened in 1 community to 10 homes, would it justify the statute?" (Transcript of Oral Argument 1999, 4). He eventually relents, claiming that "it's fairly much of an academic point based on your figures, but I just wanted to know what the...standard was to the extent of the evil" (Transcript of Oral Argument 1999, 5).

While "academic," Kennedy's comment does touch on an important point for understanding this ruling, and one that provides the basis for Breyer's dissent. Determining what constitutes a necessary action and legitimate interest on the part of the state is increasingly difficult as technology improves. Since television brings speech into someone's private property, it is especially important to make these determinations. Speech that enters the house against the will of the homeowners can be regulated, and the burden should not be on consumers to opt out of things they may not know that they are liable to see at any given moment. The Court does not lightly allow for the government to restrict free speech, but the content that was being regulated surely passes the *Miller* test and qualifies as obscenity, as Justice Scalia points out in his brief dissent. People who do not willfully subscribe to content expect not to see that content. It is

necessary, not superfluously academic, to define the specific reaches of speech before determining what can be regulated.

Justice Kennedy's opinion also relies on the Court's vigorous support of broad First Amendment protections. It does not do so, however, in a way that disregards the technological medium of the speech as irrelevant. The opinion in fact celebrates the effect that technology can have on speech and it does so correctly. A beautiful aspect of technological advancement is that it often democratizes and equalizes access to expression, carving out room in public discourse for unpopular ideas to inhabit. It allows for counter-current ideas to be shared free of censorship or governmental oversight. Kennedy is right to show restraint with regard to regulation of technological change. That being said, Justice Breyer's dissent reaches the right conclusion, and it does so with a much more reasoned and technologically aware approach.

Breyer, who thinks that the government has in fact met its burden of proof to show a significant interest, claims that technology actually can justify the ban on speech since it allows consenting consumers to either record the content for later viewing or purchase a digital subscription that allows access at all times. Technology would in fact let both consumers and opponents of indecent speech win, all while protecting unwilling children from seeing pornographic material. This integration of technology into legal debate is necessary and well founded. While at its core the Telecommunications Act was a content-based regulation, it was far from an outright ban. With a holistic look at the technology at play in the case, such as the one offered by Breyer, one can see that it is in fact reasonable and places the burden rightly on the adults who wish to consume the content rather than on people who do not.

Brown v. Entertainment Merchants Association (2011):**Virtual Violence, Free Speech, and Minors****Background:**

In October 2005, California's state legislature passed AB 1179. Sponsored by state senator Leland Yee, the bill was designed to prevent minors from accessing violent video games by "[requiring] violent video games to be labeled as specified" and instituting a \$1,000 per violation fine against individuals who made the games available to minors (California State Legislature 2005). On the basis of subsequently challenged scientific findings, the law declared that violent video games engendered antisocial behavior in minors and desensitized them to acts of violence, making them more likely to "exhibit violent antisocial or aggressive behavior" (California State Legislature 2005). Even though, as the law concedes, most players of violent video games do not go on to commit violent acts, the "psychological harm from prolonged exposure to violent video games," in tandem with the increased likelihood of violence, created a "compelling interest" for the state to prevent minors from playing violent video games (California State Legislature 2005).

To avoid ambiguity, the legislation carefully defines relevant technological terms. It defines "video games" as "any electronic amusement device that utilizes a computer, microprocessor, or similar electronic circuitry and its own monitor, or is designed to be used with a television set or a computer monitor, that interacts with the user of the device" (California State Legislature 2005). It defines "violent video games" as "a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being," and if virtual participation renders the game devoid of "serious literary, artistic, political, scientific value for minors" (California State Legislature 2005).

Resting on the basis of the Miller test established in *Miller v. California* (1973), which defined obscenity as content that appears to the “prurient interests” of a reasonable person, depicts sexual material in a “patently offensive way,” and lacks “serious literary, artistic, political, or scientific value.” The law was designed to apply only to those specific video games that met these three standards.

Oral Argument:

Throughout the oral argument, the justices repeatedly compared video games to other forms of entertainment, simplifying the technological advances inherent in video games. For instance, Justice Scalia, perhaps the strictest opponent of governmental censorship on the bench, continuously compared the games to violent literature, a comparison that would be repeated in his majority opinion. After conceding that “some of the Grimms’ fairy tales are quite grim,” Scalia jumped to the more pointed question of “Why are video games special?” (Transcript of Oral Argument 2010b, 4–5)

Following Scalia’s lead, Justices Kagan and Sotomayor both asked questions that compared video games to other forms of entertainment. Kagan asked, “Suppose a new study suggested that movies were just as violent. Then, presumably, California could regulate movies just as it could regulate video games” (Transcript of Oral Argument 2010b, 6). This question, while ostensibly logical, assumes that it is merely the level of violence prevalent in the content that would lead to regulation. This assumption is dubious because how people consume each type of media alters how the content affects them. While movies theoretically could be just as violent as video games, movies are consumed passively. When a person plays a video game, that person is actively participating in the content, and even though he or she is separated by the

screen, there is undoubtedly a different connection to the action when the player is controlling it. By not capturing this nuance, Kagan's question is problematic.

Sotomayor's comments are also telling. In discussing the experience of playing video games, she consistently referred to the video of violent gameplay that had previously been shown to the justices. Sotomayor said, "I'm not suggesting that I like this video, the one at issue that you provided the five-minute clip about. To me it's not entertainment, but that's not the point. To some, it may well be" (Transcript of Oral Argument 2010b, 7). By primarily referencing and arguing the merits of only the video that was shown and not the video games in question, Sotomayor misses the point. Just like movies, videos are consumed passively, while video games are manipulated by the player. Her use of the video as the sole point of reference for determining how video games are consumed is troublesome because it skips the nuance of player interaction with the technology that undoubtedly affects the speech in question.

Chief Justice Roberts asked about a "less restrictive alternative—a V-chip," which, he believed would allow parents to set impenetrable blocks on the content that their children can see in the video games (Transcript of Oral Argument 2010b, 25). V-Chip's, however, only work for television channels, and a quick internet search can explain how to override any parental controls on violent video games. Despite Roberts's confidence in his technological sophistication, the suggestion that a V-chip be implemented as a "less restrictive alternative" when it is not even applicable to the technology in question is erroneous because it reveals a thorough misunderstanding of how video games function and what they are capable of accomplishing.

As the attorney representing the Entertainment Merchants Association began his argument, Justice Kagan asked, "Do you think all video games are speech in the first instance? Because you could look at these games and say they're the modern-day equivalent of Monopoly

sets. They're games. They're things that people use to compete. You know, when you think about some of them—the first video game was Pong. It was playing tennis on your TV. How is that speech at all?” (Transcript of Oral Argument 2010b, 39). Kagan’s attempt at finding a pre-video game analogue, such as Monopoly, is a stretch. Even her mention of Pong, which might as well be considered caveman technology by modern video game standards, is insufficient. These analogues, which lead to her overly simplistic proclamation that “they’re games,” fail because they do not take into account the technological nuances of video games, which is necessary when defining them through the lens of the Miller test, as required by the law at hand.

Justice Scalia also demonstrated his ignorance of video games throughout the second half of the oral argument. In one exchange, where the attorney was attempting to explain how player interaction with the game, which is often called player “dialogue,” influences the narrative and gives the games artistic merit, Scalia asked, “The child is speaking to the game?” (Transcript of Oral Argument 2010b, 40–41). This remark relies on a misunderstanding not only of how video game technology functions but also of how it is consumed, both of which are vital to understanding the speech. Toward the end of oral argument, Justice Kagan brought up the “iconic” game *Mortal Kombat*, joking that “half of the clerks who work for us spent considerable amounts of time in their adolescence playing,” to which Scalia said, only slightly jokingly, “I don’t know what she’s talking about” (Transcript of Oral Argument 2010b, 58–59). Humor aside, however, there was a clear struggle from the bench to fully grasp the technology at hand.

Final Opinions:

Justice Scalia authored the Court’s majority opinion, in which Justices Ginsburg, Kennedy, Sotomayor, and Kagan joined. In this opinion, Scalia nearly echoes himself from oral argument, saying, “Certainly the *books* we give children to read—or read to them when they are

younger—contain no shortage of gore. Grimm’s Fairy Tales, for example, are grim indeed” (*Brown v. Entertainment Merchants Association* 2011, 8). This comparison is continued throughout the opinion, as Scalia goes on to show how “high-school reading lists are full of similar fare,” citing everything from Homer to *Lord of the Flies* (*Brown v. Entertainment Merchants Association* 2011, 8). Because of this long history of violence being accepted, Scalia argues that any censorship of it is unjust.

When facing the question of interactivity—arguably the facet of video game consumption that most sets them apart—Scalia argues that children have been influencing action in entertainment materials “since at least the publication of *The Adventures of You: Sugarcane Island* in 1969,” which allowed children to alter the course of the story by choosing the narrative arc from a set of options presented every few pages (*Brown v. Entertainment Merchants Association* 2011, 8). Due to this tradition of interactivity with violence, the fact that “Literature when it is successful draws the reader into the story,” as well as the lack of sufficient evidence to prove that violent video games posed an actual problem to society, the Court ruled that the law was content-based and therefore unconstitutional. In the decision, the Court refuses to make any distinctions between video games and previous technologies.

Justice Alito’s concurring opinion, which was joined by Chief Justice Roberts, displays a much more impressive and nuanced understanding of the technology behind video games. While Alito agrees that the ruling is correct on the basis that the law’s lack of clarity makes it unconstitutional, he disagrees with the reasoning behind it. He warns that “in considering the application of unchanging constitutional principles to new and rapidly evolving technology, this court should proceed with caution,” and he concedes that legislators “may be in a better position than we are to assess the implications of new technology” (*Brown v. Entertainment Merchants*

Association 2011, 2). This kind of caution regarding how the Court should handle technology is necessary but unfortunately unheeded by the majority.

Citing various *amici* briefs, Alito warns that some of the imminent developments in video game technology may allow users to “be able to experience physical sensations supposedly felt by a character on the screen” by wearing a “special vest,” as well as allowing “children to ‘actually feel the splatting blood from the blown-off head’ of a victim” (*Brown v. Entertainment Merchants Association* 2011, 12–13). With this thoroughly researched plea for better research and understanding, Alito, who tellingly quipped that Scalia “wants to know is what James Madison thought about video games,” demonstrates a thorough understanding of the technology and an eagerness to fit it correctly into pre-existing First Amendment doctrine (Transcript of Oral Argument 2010b, 17).

Of the two dissenting opinions, only one seemed familiar with and equipped to discuss the relevant technology. Justice Thomas’s opinion relied heavily on historical precedent, arguing that “although much has changed in this country since the Revolution, the notion that parents have authority over their children and that the law can support that authority persists today,” basing his entire defense on the idea that speech to minors has historically been allowed to be filtered through the parents (*Brown v. Entertainment Merchants Association* 2011, 17). Justice Breyer’s separate dissent invoked many of the same sentiments as Alito’s concurrence. He argues that “video games are excellent teaching tools” and that they “can cause more harm in this respect than can typically passive media, such as books or films or television programs” (*Brown v. Entertainment Merchants Association* 2011, 12). His approach rejected Alito’s deference to legislative bodies, however, including a massive bibliography of scientific support for his contention that video games can be harmful as support for the Court acting immediately.

Analysis:

In dealing with video games, the Court appears well out of its comfort zone. As evidenced in oral argument, even the most sympathetic justices struggled to find the correct terminology to describe the video games. Often, their sole point of reference appeared to be the video of gameplay that they were shown prior to the oral argument. In their questioning, the judges also often asked questions that were based on insufficient comparisons to literature and other forms of art and entertainment. Perhaps the closest any of them came to demonstrating firsthand knowledge of video games is Justice Kagan's remark about her clerks playing *Mortal Kombat*.

Of course, the justices do not need to be avid users of every piece of technology discussed in each case. Still, a basic understanding of how video games are consumed in society is, I would argue, necessary to defining them and placing them in the tradition of free expression. Without a firm grasp on the interactions between video games and society, the Court was forced to rely on a blind adherence to absolute free expression instead of building a nuanced, understanding argument. If they fully understood the technology, they would have had a different conception of how vile these games are. Because these games are so reprehensible, the Court should have upheld the ban on their sale to minors.

It surely appears that Scalia was ignorant as to the range and depth of violence portrayed in video games. It also appears that he did not attempt to remedy this ignorance during oral argument or between when the case was argued and when he wrote the Court's majority opinion. As noted, he mimics himself in the opinion, joking about the Grimm's fairy tales and citing an unlikely slippery slope of censorship. A large portion of Scalia's argument centers on the idea that video games fit seamlessly into the larger body of expression without any defining or

distinguishing features. He takes this idea as self-apparent, without any need for sophisticated definition of the technology at hand. Video games are unique, though, for precisely the reasons that Breyer's dissent and the government cited. They are highly interactive and force players to partake in any number of activities before they are able to advance. Most speech has the producer and the consumer occupying distinct roles; video games force the player not only to consume the content, but control it and produce it. This technological feat cannot reasonably be likened to literature and fit into past doctrine. The Court should have created a new test that accounts for the facets that make video games unique speech.

Scalia's opinion not only refuses to look at video games in their own category but also actively rejects Justice Alito's attempt to do so. Scalia's opinion attacks Alito's depiction of the most despicable portrayals of violence in video games as simply meant to "disgust" the reader, and then claims that "disgust is not a valid basis for restricting free expression" (*Brown v. Entertainment Merchants Association* 2011, 11). While in the abstract Scalia is correct that subjective disgust should not justify censorship, relying on such abstractions prevents the Court from honestly and holistically addressing the technology in a productive way. Scalia then claims that Alito's descriptions of "ethnic cleansing" and racially motivated violence "ironically... [highlight] the precise danger proposed by the California Act," which Scalia claims is "that the *ideas* expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription" (*Brown v. Entertainment Merchants Association* 2011, 11).

The "objective effects" that Scalia seeks proof of cannot possibly be recognized without an understanding of the emotions and thoughts inspired by playing video games. As with all nascent technology, the science is still developing with regard to violent video games. Because

of their heightened popularity, video game developers are creating more cutting-edge, immersive games faster than social scientists can possibly keep up with. Before long-term effects on children can conceivably be measured, new advancements are on the market that can have different or more drastic effects on children. The long-term effects detected in today's study apply only to the outdated, irrelevant technology from yesterday. This relative disadvantage makes a sophisticated understanding of the technology all the more necessary in this case because without such an understanding the justices are forced to rely solely on ideological leanings regarding censorship. The majority opinion relied on the Court's adherence to an absolute stance on the First Amendment, forsaking any kind of attempt to understand the experience being disputed. If the justices were truly aware of how such vile content was being consumed by children, they likely would have ruled otherwise.

Justice Alito's concurrence, while agreeing that the California law is unconstitutional, takes a much more different approach with regard to technology. As previously shown, he pleads with the Court to take technological nuance into account, which, according to him, would have given plenty of room to strike down the law. Although his requests fall on deaf ears, they are well founded and necessary. He is not merely relying on a desperate attempt to inspire "disgust" in his audience; he is pushing for a more active and investigative judicial role responding to technological advances. This is not only proper but necessary. While he does ultimately agree that the ban is unconstitutional, his opinion advocates for a much needed re-thinking of how the Court should approach technology. The technology and how it interacts with society needs to be better understood for the Court to apply past doctrine to it.

Alito's diagnosis of impending developments in the video game industry is also pertinent and fills a gaping hole left in the majority's reasoning. As he says, "If the technological

characteristics of the sophisticated games that are likely to be available in the near future are combined with the characteristics of the most violent games already marketed, the result will be games that allow troubled teens to experience in an extraordinarily personal and vivid way what it would be like to carry out unspeakable acts of violence” (*Brown v. Entertainment Merchants Association* 2011, 15). This prescient warning shows that judicial adaptability to newly developed technologies is necessary but completely absent from the majority’s ruling.

The Court here missed an important opportunity to fit technology that is consumed by nearly every American child into existing First Amendment doctrine. Of course, content-based censorship is antithetical to free speech in the abstract. But a law that only prevents the most vulnerable and malleable young minds from accessing heinous content is not only reasonable, but is necessary in a society that can access such content so easily through technology. The Court certainly could have written a new test for video games, or even new virtual reality technology that could have given clear guidelines for legislatures to help regulate new technology while still respecting the constitution. This would have been a much better course of action, and likely would have occurred had the justices better understood how video game technology is used in contemporary society.

Elonis v. United States (2015):

Threatening Speech on Social Media

Background:

In May 2010, the wife of avid Facebook user and amateur rapper Anthony Elonis left him, taking their children. Throughout the separation process, Elonis began to listen to more visceral and violent rap music, with lyrics that often contained hyperbolic threats toward women who had scorned the artist. Elonis changed the name on his Facebook profile to the “rap-style

nom de plume” of “Tone Dougie,” and he began using this persona to post original lyrics akin to that of the violent music he was listening to (*Elonis v. United States* 2015, 2). He often attached disclaimers to the posts, claiming that they were purely therapeutic and protected under the First Amendment.

Despite how he qualified his posts, *Elonis* was eventually charged with five separate offenses: threatening park patrons or employees, threatening his wife, threatening a police officer, threatening a kindergarten class, and threatening an FBI agent. His posts included a picture of him holding a fake knife to a co-worker’s throat under the caption “I wish,” a description of him shooting up a kindergarten class, and a detailed outline of his estranged wife’s house. There was also an instance where he threatened to shoot his wife after she received a restraining order against him. *Elonis* mentioned the document in the post, and there is evidence that he made sure that his wife saw the lyrics.

In a 7–2 decision, Chief Justice John Roberts wrote that causing a reasonable person to feel threatened was not enough to sustain a conviction; *Elonis*’s mindset had to be considered. The Court declined to address any broad First Amendment issues, and it did not advocate for or design a better test to determine a true threat. By contrast, Justice Alito, who concurred only in part, and Justice Thomas, who dissented, both argued that the Court could have reasonably decided on First Amendment grounds.

Oral Argument:

Throughout oral argument, the nine justices demonstrated a mix of understanding and bewilderment regarding Facebook. Much of the discussion revolved around a negligence standard, which would require the jury in the case to determine whether the individual making the threats actually meant to follow through on them. Although individual internet subcultures

communicate in unique ways and the context provided by the internet is key to determining intent, the discussion revolved around abstract hypotheticals aimed at hashing out the nuances of intent.

For instance, Justice Ginsburg asked pointedly how it “would be proved what is in his head” when “he knew that she or a reasonable person would be put in fear?” (Transcript of Oral Argument 2014b, 19) Justice Scalia also stated that “when you have a disaffected divorced husband who wants to place his former wife in fear, he doesn’t call her up, but a friend who knows about his malicious intent calls up the former wife and says, you know, your former husband has threatened to kill you” (Transcript of Oral Argument 2014b, 20). This prompted him to ask “why wouldn’t that meet all of the – all of the requirements...knowing that this would cause fear in her” because “the only thing missing is it is not his intent to cause fear in her?” (Transcript of Oral Argument 2014b, 20)

While important, these kinds of questions fail to take the technology into account. As a means of communication, Facebook is much more nuanced than it appears to a non-user. Posts can be hidden, people can be “tagged” in posts that ensure that they will see them, and users can establish forums and closed instant message chains that only invited people can access or view. When formulating questions regarding intent and state of mind, the mode of communication is important, and many times in the argument it was not taken into account.

The most technologically sensitive questions came from Chief Justice Roberts. In the beginning, he appeared to accept the argument that the speech posted on the internet is therapeutic, saying “Yes, of course, it shows that he was going to do something dangerous” but “it’s a good thing he had this outlet of the internet so he didn’t have to do it” (Transcript of Oral Argument 2014b, 5). His understanding of the complex contextual issues in the internet became

progressively clearer, as he argued that the reasonable person requirement also needs that reasonable person to be “familiar with the context” (Transcript of Oral Argument 2014b, 10). He then asserted, “So you don’t take what is on the Internet in the abstract and say, this person wants to do something horrible...you are familiar with the fact that this was a couple of teenagers in a chat room playing a game” (Transcript of Oral Argument 2014b, 10). Again, after determining that one needs to be familiar with the “subculture” to determine context, Roberts told the counsel for the government, “So if a teenager has a lot of friends on his Facebook page then you are going to evaluate it by a different standard; you know, friends all over different age groups and everything else, that’s a different standard than if he has only a few friends who have access to the statements” (Transcript of Oral Argument 2014b, 33). These comments demonstrate not only a careful attention to the context of the speech but also a firm understanding of how contemporary discourse occurs over the internet.

Justice Alito also demonstrated a more nuanced understanding of internet interaction in his questions and comments. After quoting directly the post where Elonis threatens to attack an elementary school, he observed, “And then there’s some individual who likes this. He puts a thumb up to this—to this comment” (Transcript of Oral Argument 2014b, 22–23). This is in reference to the popular practice of “liking” a post on Facebook, where friends of the original poster click on a thumbs-up icon to express appreciation, solidarity, or sometimes ironic displeasure with the content of the post. While quaint, Alito’s statement shows that he knows at least the basic tenets of cyber-interaction as it occurs on Facebook.

Both Roberts’s and Alito’s knowledge of internet communication seem extensive. While more nuanced and grounded than their colleagues’ hypotheticals, the attempts by Roberts and Alito to establish legitimate context nevertheless fall short. In order to determine a true threat

transmitted via the internet, one needs a much fuller understanding of how people interact on the internet along with an awareness of the many opportunities provided by the internet to instill fear in targeted people.

Final Opinions:

The majority opinion, authored by Chief Justice Roberts and joined by Justices Breyer, Scalia, Ginsburg, Sotomayor, Kennedy, and Kagan, overturned *Elonis*'s conviction. Carefully written to avoid any sweeping precedents on First Amendment rights as they pertain to the internet, the majority opinion stated that "the question is whether the statute also requires that the defendant be aware of the threatening nature of the communication, and—if not—whether the First Amendment requires such a showing" (*Elonis v. United States* 2015, 1). It concluded that "in sum, neither *Elonis* nor the Government has identified any indication of a particular mental state requirement in the text" of the statute (*Elonis v. United States* 2015, 9). It also argued that even though "*Elonis* stated that the finding of recklessness would not be sufficient...neither *Elonis* nor the Government has briefed or argued that point," making it unnecessary to "consider any First Amendment issues" (*Elonis v. United States* 2015, 16).

The opinion centers mostly on how the jury in the original trial was instructed to judge only whether a reasonable person would have interpreted *Elonis*'s posts as threats, not the mental state of *Elonis* at the time that the content was posted. As the opinion states, "in this case, 'calculated purveyance' of a threat would require that *Elonis* know the threatening nature of his communication," and "federal criminal liability generally does not turn solely on the results of an act without considering the defendants mental state" (*Elonis v. United States* 2015, 15). Because a better, clearer standard was not put forth, it is hard to see whether this case will have any immediate impact on true-threat jurisprudence or on internet speech at all.

Justice Alito, who concurred in part and dissented in part, wrote a much more technologically adept opinion that argued against the Court's inaction regarding the First Amendment ramifications of the case. Regarding context, *Elonis* frequently argued both on social media and in the original trial that he was simply emulating the famous rapper Eminem, who often produced aggressive, violent music about killing his own estranged wife. Alito, however, differentiated the effect that an audience has on context from the effect that Facebook friends have, noting that "statements on social media that are pointedly directed at their victims...are much more likely to be taken seriously" (*Elonis v. United States* 2015, 6). To hold otherwise, he claimed, "would grant a license to anyone who is clever enough to dress up a real threat in the guise of rap lyrics, a parody, or something similar" (*Elonis v. United States* 2015, 6). Alito also grounds his argument in the reality that Facebook is all but ubiquitous, since "threats of violence and intimidation are among the most favored weapons of domestic abusers, and the rise of social media has only made those tactics more commonplace" (*Elonis v. United States* 2015, 7).

Analysis:

While the Court's restraint here is admirable, its ruling is disastrously narrow. On a micro level, it overturned *Elonis*'s conviction, causing unknowable harm to an already fraught woman. On a macro level, as Justice Thomas writes in his dissent, it "throws everyone from appellate judges to everyday Facebook users into a state of uncertainty" as to what they can and cannot say (*Elonis v. United States* 2015, 2). It also opens the door for domestic abusers masquerading as cyber-pranksters to direct vile and violent threats toward their victims. By neglecting to rule on the First Amendment issues of recklessness and context, the Court failed to apply First Amendment and true-threat doctrine to the age of internet communication. As more and more

political and personal speech occurs on the internet, the Court will eventually have to help define what can and cannot be said. It missed an opportunity to do just that in this case.

Advocates of internet speech often worry that their cause will be hindered by any regulation of speech, no matter how dire the circumstances. Accordingly, a subjective intent requirement, which would force the government to prove not only that a reasonable person would feel threatened by the content but also that the speaker actually intended to do harm, assuages their worries. An *amicus* brief filed by the ACLU, the Center for Democracy and Technology, and several like-minded groups argued that because “a significant amount of speech on political, social, and other issues occurs online, and is often abbreviated, idiosyncratic, decontextualized, and ambiguous,” the actual intent of the speaker needs to be taken into account (Brief of ALCU and CDT 2014, 6). “As more and more speech moves onto the Internet,” the brief argues, “the constitutional protections afforded to online speech will increasingly determine the actual scope of First Amendment freedoms enjoyed by our society” (Brief of ACLU and CDT 2014, 6–7).

At their core, these sentiments express legitimate concerns. The internet is unique among past technological advancements in the sense that it provides all people a theoretically equal footing to express their views. It helps to democratize political discourse, and it can be effectively utilized as an organizing mechanism to hold elected officials accountable. As another *amicus* brief from The Domestic Violence Legal Empowerment and Appeals Project points out, political speech and threats are very different. A subjective intent requirement on political speech would effectively protect it, but since “a true threat inflicts injury on its intended audience,” the intent should be irrelevant (Brief of The Domestic Violence Legal Empowerment and Appeals Project 2014, 10). Both briefs are correct in arguing that more and more speech is occurring on

the internet, and this trend shows no sign of abating. The Court egregiously failed to make any distinctions among types of internet speech in this case, something that will have to be addressed eventually.

As speech and violence move onto the internet, nefarious attempts to manipulate constitutional rights into cover for criminal speech will inevitably follow. *Elonis* provides an example. Accompanying many of his posts were links to Wikipedia entries for First Amendment laws, claims that the judges hearing his cases did not know proper true-threat jurisprudence, and assertions that his posts were art and therefore protected speech. This grandstanding surely was not done to debate politics and legal philosophy with his fellow Facebook users. It was meant to send a very clear message to his victim that she was unsafe and the law could not protect her. The Court did not help clarify any of the jurisprudential questions surrounding artistic denotations of threatening or violent speech on the internet. To an outsider, though, it may be incorrectly thought that *Elonis*'s claims of constitutional protection were correct, and this confusion could prove detrimental to victims of domestic abuse.

Elonis's designation of his threats as art also needs to be addressed. In his dissent, Alito echoed a comment he made during oral argument, saying that "a fig leaf of artistic expression cannot convert such hurtful, valueless threats into protected speech" (*Elonis v. United States* 2015, 7). This is absolutely correct. As the internet equalizes political discourse, it also gives every amateur artist a stage, blurring the traditional definition of artistic success and merit. Some internet users have used the platform to achieve great success that they may not have found through traditional methods. Others have been able to share artistic work with other artists and friends through social media, effectively self-publishing and bypassing the bureaucracy of the publishing industry. This does not mean that every self-published statement on the internet can

be called art and protected speech. A seemingly glaring loophole arises when, as Justice Alito points out, an abuser can claim his public threats are published literary works in order to gain impunity. In neglecting to establish a test for such speech as it occurs on the internet and Facebook, the Court is clearing the way for more internet users to become victimized.

If *Elonis* had written the exact same words on a letter, signed it with his pseudonym “Tone Dougie,” and nailed it to telephone poles around his ex-wife’s place of residence, the Court would likely have ruled that objective intent is sufficient. Even if they were hollow, his public threats had instilled fear in his victim that was irreversible. Modern technology, however, allows him to bypass material reality and achieve his goal through the internet. According to the *amicus* brief filed by The National Network to End Domestic Violence, a third of threats that victims of domestic abuse faced occurred on Facebook or other social media platforms (Brief of The National Network to End Domestic Violence 2014, 14–15). To the Court, Facebook may be understandably foreign. To more and more people, however, it is the communication medium of choice. The same issues of First Amendment jurisprudence that have always been present in society (fighting words, threats, obscenity) will inevitably need to be decided. An opinion as singular and safe as *Elonis* cannot be sufficient. The Court missed an important opportunity in this case to provide reasonable and necessary limitations on internet speech. Without such limitations, First Amendment doctrine is rendered ineffective for the digital age, leaving contemporary society in an unsustainable and ambiguous position.

Kyllo v. United States (2001):

Using Thermal Imaging Technology to Monitor Marijuana Growth

Background:

In the early 1990s, Danny Kyllo of Florence, Oregon, was suspected of growing marijuana illegally. This suspicion arose after his subpoenaed electricity bills showed authorities that he had been consuming electricity at rates far higher than his neighbors. Because the growth of marijuana indoors requires the use of “high-intensity lamps” that emit a massive amount of heat, FBI agents eventually used an Agema Thermovision 210 thermal imaging device to discover that portions of Kyllo’s home were emitting heat consistent with their suspicions. This evidence, combined with the large electricity bills and tips from informants, allowed police to obtain a warrant to search Kyllo’s residence. The search showed that Kyllo was indeed using artificial lights to grow a large number of marijuana plants, which led to his arrest.

Because thermal imaging technology detects heat waves, which are impossible to see with the naked eye, and it was this information that enabled the warrant, Kyllo argued that using it constituted a search and therefore violated his Fourth Amendment rights protecting against unwarranted search and seizure. This attempt failed and he ultimately plead guilty. Because the thermal imaging device used did not expose any intimate details of Kyllo’s life, such as conversations or movements within the house, the Ninth Circuit Court of Appeals ruled that it was not a search. In a 5–4 decision authored by Justice Scalia and joined by Justices Souter, Thomas, Ginsburg, and Breyer, the Supreme Court overturned this ruling and decided in Kyllo’s favor that the use of thermal imaging technology is in fact a search and requires a warrant. Justice Stevens dissented, along with Chief Justice Rehnquist and Justices O’Connor and Kennedy.

Oral Argument:

As oral argument progressed, nearly every justice demonstrated an understanding of the technology and an eagerness not only to learn more about it but also to fit it into past Fourth Amendment doctrine. Instead of bypassing the specific pieces of technology that were being disputed, the Court confronted it head on, making nuanced differentiations between specific types of rays and comparing it with other kinds of contemporary technology. This sparked a very productive line of questions.

Most of the justices displayed a high level of understanding of what thermal imaging devices are capable of doing and how they work. At the most basic level, Justice O'Connor quickly showed that she knew the technology at hand, saying that "the thermal imaging device cannot and did not show any people or activity within the walls of the structure, and the device cannot penetrate the walls or windows to reveal conversations or human activity" (Transcript of Oral Argument 2001, 5). Justice Souter also revealed an understanding of the technology, asking whether the images of moving beings in a video tape shown to the Court were "made solely from the infrared process" (Transcript of Oral Argument 2001, 6). Justice Ginsburg asked if "the thermal imaging [will] tell you that it's not women taking showers" (Transcript of Oral Argument 2001, 13). Seemingly naïve, this question actually serves to clarify how accurate the technology is compared with subpoenaed utility bills. The question also inherently recognizes the technology's capabilities and possible breeches of privacy. While basic, these questions and statements use accurate terminology and are asked with a clear goal in mind. They are not simply asking for basic information regarding the technology; they are defining its scope and potential.

The Justices also showed a propensity for fitting the technology in question into established Fourth Amendment doctrine. Many of their questions and comments served this

purpose, attempting not just to define the technology, but also to apply the principles in the Fourth Amendment to the technology. For instance, Chief Justice Rehnquist asked whether the Court should rule on what the technology does rather than on what it could potentially do. When the counsel for the appellee responded, “absolutely,” Rehnquist retorted, “I don’t think you’re correct in that. I think in a Fourth Amendment case we decide what was actually done, not what something is capable of” (Transcript of Oral Argument 2001, 7–8). Later on, Justice Breyer asked about the applicable precedents, asking “how fixed” they are, whether “enough cause to warrant a beeper” would be enough to warrant a thermal imaging device, and whether “it’s absolutely fixed that you either have probable cause to rummage through the bedroom or you can’t do anything” (Transcript of Oral Argument 2001, 10). This question in particular shows a wonderful flexibility and willingness to adapt the existing doctrine to technological advances. The nuances involved are much more complex than physical search and seizure, and Breyer’s questions show a judicial awareness of this.

Justice Stevens also wondered “to what extent [Kyllo’s] theory depends on the sophisticated nature of the equipment,” and he suggested that the government could rent the house next door and hold a long thermometer over the roof to achieve the same results (Transcript of Oral Argument 2001, 13–14). Justice Scalia similarly asked, “Why don’t your reasonable expectations of privacy include technology?” (Transcript of Oral Argument 2001, 14) He pointed out the fact that many people have binoculars and can therefore see into a home regardless of how isolated it is. He then said, “And so also you know that there are things such as thermal image, and so if you’re really concerned about that degree of privacy, I’m sure there are means of preventing the heat escape from the house, and therefore preventing the technology from being used.” (Transcript of Oral Argument 2001, 14). Then he definitively asked, “Why do

we have to assume that we live in a world without technology?” (Transcript of Oral Argument 2001, 14)

Overall, the justices showed an impressive command of thermal imaging technology and how it should fit into past Fourth Amendment doctrine. They seemed not only aware of what it was and what it could do but also eager to define its scope and potential. Their questions did not focus on abstract legal questions as they often did in the free speech cases; instead they focused on the reality of the technology and how it interacts with society. This kind of attention is necessary when defining a reasonable expectation of privacy, and the justices argued in great depth regarding the implications of technology.

Final Opinions:

In a 5–4 decision, Justice Scalia ruled that the government’s use of thermal imaging technology violated Danny Kyllo’s Fourth Amendment protections against an unwarranted search. In order to use the technology, the Court ruled, the police must obtain a warrant. Because “the present case involves officers on a public street engaged in more than naked-eye surveillance of a home,” Scalia’s opinion argued that it is therefore a violation of a space where privacy is reasonably expected (*Kyllo v. United States* 2001, 5). This holding recognizes that technology does indeed affect how the Fourth Amendment and past doctrine are interpreted, differentiating the “naked eye” from what technology is capable of. “It would be foolish to contend,” Scalia writes, “that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology” (*Kyllo v. United States* 2001, 6).

Scalia also recognizes that the technology used here was “relatively crude” and therefore could not convey intimate details of Kyllo’s life. The opinion says that “the rule we adopt must take account of more sophisticated systems that are already in use or in development” (*Kyllo v.*

United States 2001, 8). This important distinction helps to prevent accidental breeches of privacy. As Scalia notes, the Court would “have to develop a jurisprudence specifying which home activities are ‘intimate’ and which are not,” which would still not sufficiently allow a police officer to “be able to know *in advance* whether his through-the-wall surveillance picks up ‘intimate’ details” (*Kyllo v. United States* 2001, 11). Because the definition of “intimate details” is still nebulous, giving the police unlimited use of technology, regardless of how crude, could potentially violate someone’s privacy.

One of the most nuanced components of this decision is the idea proposed by Scalia that thermal imaging devices violate Fourth Amendment protections because they are “not in general public use” (*Kyllo v. United States* 2001, 6–7). Scalia writes that because “the Government uses a device that is not in general public use to explore details of the home that would previously have been unknowable without physical intrusion,” it is therefore searching the home (*Kyllo v. United States* 2001, 12). Much of the decision is grounded in this idea of general use, which demonstrates not only nuance but also a sharp knowledge of how society interacts with and consumes technology.

Justice John Paul Stevens wrote the dissent for the Court, which showed an equally remarkable understanding of technology while arriving at a much different conclusion. Stevens’s argument rests on the technological nuance that defines thermal imaging as something other than “through-the-wall” surveillance. Because the information gathered was infrared radiation and not “an x-ray scan, or other possible ‘through-the-wall’ techniques,” Stevens argues that it is not a violation of the physical property (*Kyllo v. United States* 2001, 3). Because anyone could observe the effects of excessive heat on the roof, such as rapid snow melting or rainwater evaporation, “such use of the sense would not convert into an unreasonable search if, instead, an

adjoining neighbor allowed an officer onto her property to verify her perceptions with a sensitive thermometer” (*Kyllo v. United States* 2001, 3). Because “heat waves, like aromas that are generated in a kitchen, or in a laboratory or opium den, enter the public domain if and when they leave a building,” Stevens argues that the detection of such radiation is not a violation of privacy, no matter how it was obtained (*Kyllo v. United States* 2001, 4).

Stevens’s dissent also accounts for how society typically interacts with technology, albeit in a much more focused sense than Scalia’s opinion. For instance, Stevens writes that “it does not seem to me that society will suffer from a rule requiring the rare homeowner who both intends to engage in uncommon activities that produce extraordinary amounts of heat, and wishes to conceal that production from outsiders, to make sure that the surrounding area is well insulated” (*Kyllo v. United States* 2001, 6). In another sardonic portion of the dissent, Stevens writes that under the majority’s view “an officer using an infrared camera to observe a man silently entering the side door of a house at night carrying a pizza might conclude that its interior is now occupied by someone who likes pizza, and by doing so the officer would be guilty of conducting an unconstitutional ‘search’ of the home” (*Kyllo v. United States* 2001, 9). Stevens’s points are not ignorant of technology, and in fact demonstrate careful reflection of how society interacts with technology. He simply arrives at the conclusion that it is not as dangerous as Scalia thinks.

Analysis:

Despite Stevens’s well-reasoned and technologically aware arguments, Scalia arrives at the right conclusion here. Stevens’s arguments rest on the classically false premise that if a person with nothing to hide has nothing to fear. His pizza example is innocuous almost to the point of absurdity. A person could also realistically be experiencing a medical condition that

causes incessant feelings of coldness or chills that requires a warmer than usual room. This could be anything from anorexia to depression that requires the use of sun light simulators to supplement vitamin D. Thermal imaging is not totally harmless and could potentially reveal very personal details of people's lives without their consent.

Scalia's opinion also effectively provides for future developments in technology. Of course, judicial restraint is important when dealing with technology. As Stevens warns when closing his opinion, it is wrong for the Court "to shackle [emerging issues of technology] with prematurely devised constitutional constraints" (*Kyllo v. United States* 2001, 12). That being said, careful decisions do not necessarily preclude technological advances; they simply take them into account so as not to produce either overly narrow or overly broad decisions. Instead of a ruling based solely on the specific limitations or potential complications of thermal imaging, Scalia was able to produce a test that could be applied to other technologies.

Another commendable aspect of this opinion is that it does not grasp at straws in a misguided attempt to justify curtailing technological advances. Stevens's opinion certainly does this when considering the idea of heat rays entering the public domain. Even though he is correct in a nitpicky sort of way, imperceptible rays in the atmosphere that reveal something about goings-on within the home still fall under the reasonable expectation of privacy. Ignorance or disbelief about the possibility of detection is a perfectly fine defense of activities that would emit such rays. Because the thermal imaging technology is not in the general public use, reasonable people would not expect them to be used to inspect their homes.

The general public use idea that Scalia's opinion established is the single most important component of the opinion. It is simultaneously flexible and unnecessarily confusing. The flexibility of the concept is wonderful because it helps protect privacy while also allowing law

enforcement some leeway. It does not completely block the application of technology to the investigative process; it just situates the technology successfully into Fourth Amendment protections. This is an ideal way for the Court to address technological advances. It does not blindly rely on ideology or abstract legal philosophy and it does not recklessly allow technology to operate in society free of necessary restraints.

The general use requirement does pose a problem, however, because it is not defined and cannot be easily determined or measured. As Orin S. Kerr writes, “At some point in the future, thermal imaging devices will likely come into widespread use. They are increasingly used as non-contact thermometers by hobbyists, electricians, and mechanics, and can be purchased online for \$40” (Kerr 2011, 234–235). As the technology comes more into common use, the requirement becomes increasingly difficult to define. For instance, someone calling an electrician or mechanic has a reasonable expectation that such professionals will use a thermal imaging device under the supervision of the homeowner. Someone purchasing these services will not be blindsided by the appearance and use of the equipment necessary to do the work that the homeowners are asking for. Just because the technology is becoming ever more popular in a professional capacity does not necessarily mean that the general public uses it regularly. As the level of use rises, however, the distinction between general public use and professional use will blur. Because this case lacks clear definitions for this requirement, the test it puts forth will eventually become harder and harder to use. As Kerr states, “To allow the governing rules to change as needed over time, courts would be forced either to expressly change the governing rules at regular intervals or else articulate the governing rule using a standard that keeps the result unclear to incorporate changed circumstances” (234). Because the first option is

impossible, the second one is likely; and it will inevitably lead to confusion as technology progresses.

Despite these shortcomings, *Kyllo* demonstrates the Court at a peak position of technological mastery. The justices showed a detailed understanding of the issues they faced, and they vigorously worked to fit the issues appropriately into the long tradition of Fourth Amendment jurisprudence. They applied past doctrine in nuanced ways and took the public's interaction with technology into account when they were deciding the case. *Kyllo* is not simply a defense of privacy. It is also a shining model of the Court accounting for technological change in its rulings, and it led to several other technologically oriented search and seizure cases being addressed in the same careful manner.

United States v. Jones (2012):

Warrantless GPS Monitoring of Suspected Criminals

Background:

In 2004, the FBI and local police suspected that Antoine Jones, a nightclub owner in Washington D.C., was selling drugs. For months, the task force assigned to the case utilized traditional investigative techniques such as visual surveillance of Jones's nightclub and monitoring of his phone calls by means of a pen register and wire-tapping. Based on the information gathered through these techniques, the police requested and were granted a warrant to install a GPS tracking device on the Jeep that Jones regularly drove, even though it was registered in his wife's name. The warrant specified that the device had to be installed within ten days and in the District of Columbia. Eleven days after the warrant was issued, police installed the device in Maryland and proceeded to track Jones's movement for 28 days, gathering over 2,000 pages of data.

Eventually, the government indicted Jones on multiple charges of conspiracy to distribute and possession with intent to distribute five kilograms of cocaine and fifty grams of cocaine base. Jones moved to suppress the data obtained through the GPS surveillance, arguing that it violated the warrant and therefore his Fourth Amendment protections against unwarranted searches. The District Court only partially granted the motion, suppressing the information gained after police had to re-apply the device in a public parking garage in Maryland midway through the investigation. After one hung jury, Jones was found guilty at trial and sentenced to life in prison. The GPS data that linked him to his co-conspirators' stash house was presented at trial. The United States Court of Appeals for the District of Columbia circuit reversed the conviction because the evidence from the GPS was obtained without a warrant and therefore in violation of the Fourth Amendment. The Supreme Court ruled 9–0 that the attachment of the GPS device was a warrantless search, but the justices split in their reasoning. The opinion of the Court, written by Justice Scalia and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor, argued that the installation of the device constituted a technical trespass because the government violated Jones's property. Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, filed a concurrence that reached the same conclusion but did so on the basis of privacy rights. Justice Sotomayor filed a concurring opinion that incorporated both approaches.

Oral Argument:

During oral argument the Justices echoed many of the same sentiments as they did in *Kyllo*, arguing for a more technologically aware application of Fourth Amendment doctrine and showing familiarity with how the technology in question affects societal behavior. While some of their comments predicted hyperbolic, Orwellian consequences of governmental surveillance,

most comments and questions reflected a deep understanding of the technological nuances and an eagerness to apply Fourth Amendment protections accordingly.

Chief Justice Roberts seemed to pay the highest level of attention to how this case's technology should fit into Fourth Amendment doctrine. The government based much of its argument on *United States v. Knotts*, a 1983 case that determined a tracking beeper surreptitiously placed in an oil can that was then given to a suspect can be used for surveillance purposes without a warrant. Responding to petitioner's argument that the principles were identical to Jones's case, Roberts asserted that *Knotts* was "much more like traditional surveillance" because "you're following the car, and the beeper just helps you follow it...from a slightly greater distance" (Transcript of Oral Argument, 3–4). "The technology is very different," he continued, "and you get a lot more information from the GPS surveillance than you do from following a beeper" (Transcript of Oral Argument, 4). Roberts called the technique a "good example of the change in technology" because it is "a lot of work to follow the car" as opposed to "[sitting] back at the station" and "[pushing] a button whenever they want to find out where the car is" (Transcript of Oral Argument, 4). While this might be an oversimplification of the police-work involved in GPS surveillance, it still shows a strong willingness not to simply apply past doctrine to new technology when it might not fit.

Justice Alito also displayed considerable amount of technological savvy, mirroring Roberts in his attempts to place the new technology accurately into past doctrine. Alito's point of reference, however, was the reasonable expectation of privacy requirement put forth in *Katz v. United States* (1967). Alito claimed that in the "pre-computer, pre-internet age, much of the privacy...that people enjoyed was not the result of legal protections or constitutional protections; it was the result simply of the difficulty of travelling around and gathering up

information” (Transcript of Oral Argument, 10–11). He warned against deciding the case on the grounds of technical trespass—which Scalia ultimately did—saying, “I don’t have much doubt that in the near future, it will be possible...for law enforcement to monitor people’s movements on public streets without committing a technical trespass” (Transcript of Oral Argument, 11). Citing the rise of social media use that allows people to share their location at all times with friends, Alito conceded that he “[does not] know what society expects,” but that “technology is changing people’s expectation of privacy” (Transcript of Oral Argument, 44). These prescient statements show not only an awareness of how technology changes society’s perceptions of privacy but also a laudable attempt to adjust the Court’s understanding of the Fourth Amendment to accommodate these changes.

Other justices pursued this line of thinking as well. Justice Breyer noted that “the difference between the monitoring and what happened in the past is memories are fallible; computers aren’t” (Transcript of Oral Argument, 13). Justice Sotomayor, anticipating her celebrated concurring opinion, vigorously attempted to define Fourth Amendment doctrine according to the GPS technology. She questioned the government on its proposed theory, saying that under its logic “you could monitor and track every person through their cell phone, because today the smartphones emit signals that the police can pick up and use to follow someone anywhere they go” (Transcript of Oral Argument, 18). Referring to technological advances likely to occur in the near future, Sotomayor noted that because “there are now satellites that can look down and can hone in on your home on a block in a neighborhood...I don’t see that far in the future when those cameras are going to be able to show you the entire world and let you track somebody on the camera from place to place” (Transcript of Oral Argument, 39). This kind of

awareness and familiarity with technology is important, and it surely—and properly—influenced how the Court ruled.

Final Opinions:

Justice Scalia's Opinion for the Court finds that the installation of the GPS device constituted a technical trespass and therefore violated not only the specific warrant that was issued but also the Fourth Amendment protection against unwarranted search and seizure. From the beginning of the opinion, Scalia makes it very clear that it is the alteration of property, not the capability to violate privacy that triggers a search. Scalia writes that "it is important to be clear about what occurred in this case: The government physically occupied private property for the purpose of obtaining information." Scalia thus had "no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted" (*United States v. Jones* 2012, 4). Scalia also refuses to concede that the majority was, as Alito's concurrence contends, applying outdated laws to modern circumstances. Instead of applying wholesale the *Katz* test of a reasonable expectation of privacy, Scalia advocates leaving the *Katz* test to "situations involving merely the transmission of electronic signals without trespass" (*United States v. Jones* 2012, 11). In the view of Scalia and the majority, because in-person surveillance is constitutionally permissible and analogous to GPS tracking, the Court need not decide on the privacy issues brought up during this case. "It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy," writes Scalia, "but the present case does not require us to answer that question" (*United States v. Jones* 2012, 11).

Justice Alito's concurring opinion takes a very different approach while still concluding that the GPS monitoring constituted a search. Alito writes that "this case requires us to apply the

Fourth Amendment's prohibition of unreasonable searches and seizures to a 21st-century surveillance technique," before balking that, "ironically, the Court has chosen to decide this case based on 18th-century tort law" (*United States v. Jones* 2012, 1). According to Alito, the alteration of private property is minimal, involving only the placement of a "small light object that does not interfere in any way with the car's operation" (*United States v. Jones* 2012, 7). Fourth Amendment rights are truly threatened by the capabilities of the technology, not the alterations that it makes to property.

As his opinion concludes, Alito writes that society's interaction with technology will inevitably alter what a reasonable expectation of privacy is. As Alito writes, "new technology may provide increased convenience or security at the expense of privacy, and many people may find that tradeoff worthwhile" (*United States v. Jones* 2012, 10). The only way to gauge that expectation and public evaluation in a constitutional way is to apply the *Katz* test of whether reasonable person would expect privacy in a particular situation. Because "in the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical," the intention of the framers regarding privacy is less relevant than maintaining their general commitment to privacy (*United States v. Jones* 2012, 12).

Justice Sotomayor's solo concurrence is perhaps the most technologically aware of the opinions. Even though she signed Scalia's opinion endorsing a property-based approach, she also agreed with Alito's privacy-based argument. Sotomayor argues that the attributes specific to GPS monitoring need to be "[taken into] account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements," and she argues that the Court needs to "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” (*United States v. Jones* 2012, 4). Because “awareness that the Government may be watching chills associational and expressive freedoms” and “the Government’s unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse,” Sotomayor warns that a technologically aware application of the Fourth Amendment is necessary to maintain civil liberties (*United States v. Jones* 2012, 3). Finally, Sotomayor argues that “the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties” is “ill-suited to the digital age” because it is often necessary for technical service providers to maintain records of how people use their services. These conclusions are important and correct. Sotomayor’s lone eagerness to situate technology into existing Fourth Amendment doctrine is admirable and necessary.

Analysis:

Heralded as a landmark ruling defending privacy rights in the digital age, *Jones* quickly garnered a great deal of media attention. As attorney and legal writer Tom Goldstein points out, “Many pieces posted on newspapers’ websites right after the ruling was issued said that *Jones* required a warrant for GPS devices,” which is not completely accurate (“*Jones* Confounds the Press” 2012). The decision is actually much narrower than that, which is a consequence of Scalia’s technical trespass approach. The application of the GPS device was ruled a search because it was physically required to be attached to Jones’s car. The Court remained silent on whether the government could potentially track a suspect’s movements remotely without ever coming near the suspect’s car. Despite the press’s optimism, *Jones* was a much narrower case than initially thought. It was also not grounded in a deep understanding of the technology.

Of course, the justices are not homogenous in their technological aptitude. During oral argument, several of them displayed awareness of how society interacts with technology. The majority opinion in *Jones*, however, missed a great opportunity to effectively adapt Fourth Amendment doctrine to changing technology. It is absurd to think that all nine justices did not actually know that the true issue at hand was the government's ability to over reach egregiously in its investigations, using GPS technology to violate people's basic right to privacy. Chief Justice Roberts, for instance, made it seem very likely during oral argument that he understood the ramifications of GPS technology and was prepared to rule in a more technologically nuanced way. In the end, however, he signed on with Scalia's underwhelming opinion. As Stephen J. Schulhofer points out, "the protections of the old common-law trespass doctrine simply are not very much help" as technological advances allow the government to spy remotely (Schulhofer 2012, 139). Scalia's application of these outdated doctrines is bizarrely inappropriate and inadequate in a case regarding governmental surveillance using 21st-century technology. The Court should have confronted the technological question of privacy from GPS searches head on, as it will inevitably come up again.

Justice Alito's dissent-as-concurrence, while more aware and nuanced than Scalia's opinion, also falls short of addressing the potential for governmental violation of privacy. Alito's opinion clearly takes technology into account, evaluating the reasonable expectation of privacy rule through the lens of technological change. This point of view is admirable and much needed, but Alito still arrives at a conclusion not totally in line with both Fourth Amendment protections and technological advances. Despite his rhetoric warning that the Court must address technological change, Alito ultimately advocates deference to legislative bodies, allowing them to decide democratically what limitations should be placed on law enforcement and government

agencies. This approach is both overly safe and misguided. The Court is well within its constitutional authority to decide what violates Fourth Amendment protections, even if the decision proves unpopular with law enforcement or the general public. The protections of privacy are now more valuable and vulnerable than ever, and there is clearly a reasonable expectation of privacy inherent in public movement that the Court needs to protect.

Justice Alito's deference to legislatures is also misguided because they are in no position to actually place reasonable limits on law enforcement. Very few politicians can simultaneously prevent law enforcement from using certain investigative techniques and escape the toxic "soft-on-crime" label. While it is true that many people are unnerved by governmental surveillance, the image of a neighborhood or community police force monitoring the behavior of criminals does not appear threatening to the common citizen's privacy. It would therefore be challenging to gain support for a legislative ban on such activity. Faced with the powerful pro-police lobby and the assumption of most people that such surveillance will never affect them anyway, legislatures and the traditional democratic process are ill-equipped to narrow the scope of governmental surveillance, no matter how in accord with the Fourth Amendment such limitations may be.

Justice Sotomayor's solo concurrence is the most complete and nuanced of the three opinions. She correctly doubts "that people would accept without complaint the warrantless disclosure to the Government of a list of every website they had visited in the last week, or month, or year" (*United States v. Jones* 2012, 5). As evidenced by the NSA surveillance brought to light by Edward Snowden, people across the globe hope to retain their privacy rights during the modern age. Of course, the Snowden debacle concerned an Orwellian situation with an impenetrable government bureaucracy handling the data. This image sharply contrasts with the

view of local police departments keeping communities safe by monitoring the behavior of criminals. Still, people were rightly outraged that their reasonably expected privacy on their devices was violated. The Court's Fourth Amendment doctrine needs to adapt to what people expect in terms of privacy with regard to technology, and Sotomayor's opinion accurately captures that sentiment.

Justice Sotomayor's opinion also warns about the aggregation of data gathered from GPS surveillance. This is especially important because, while a single trip may not reveal much, observable patterns may reveal a great deal, such as medical conditions, political affiliations, and illicit affairs. The Court could have effectively stifled the government's ability to collect and keep such broad swaths of data in this case by requiring a warrant to collect it in the first place. It is especially important to stop at the source the kind of data collection that Sotomayor warns of, because, as attorney and law professor Erin Murphy argues, "it is a lot easier for the government to obscure the existence—much less the contents—of a government database than it is a physical prison." Murphy continues that "if the population at large is simply unaware of a measure, it is less capable of organizing politically to regulate it" (Murphy 2011, 251). A refusal to apply Fourth Amendment doctrine to GPS technology in an effective manner, as advocated by Sotomayor, could potentially have serious consequences on the democratic process that Justices Scalia and Alito both extol by prohibiting the populace from understanding the laws they are living under.

Justice Sotomayor, with her acceptance of both theories, was likely the swing vote in this decision. Despite her emphatic and technologically savvy concurrence, she still ultimately sided with Scalia's outdated application of common law. While admirable, her fervent concurrence could have been much more effective and groundbreaking had she sided with Alito's argument

for privacy rights. In tandem, the two opinions likely would have put the Court in a good position to respond carefully to the inevitable challenges regarding surveillance in the future.

Riley v. California (2014):

Warrantless Searching of Cell Phones Found on Arrested Persons

Background:

David Riley was stopped in California by a police officer for driving a vehicle with expired registration tags. During the course of the stop, the police learned that Riley's license had been suspended. Because of these two violations, the police impounded Riley's car after conducting a thorough inventory search. They also searched Riley's person, seizing his smartphone and accessing the data held within. In the search, they found information associating Riley with the violent "Bloods" street gang. They also found pictures of him next to a car associated with a shooting for which Riley was suspected. Riley was eventually charged with firing at an occupied vehicle, assault with a semiautomatic firearm, and attempted murder. He moved unsuccessfully to suppress all the data that the police had accessed from his smartphone.

This opinion was issued jointly with *United States v. Wurie* (2014), which involved similar circumstances. The case revolved around respondent Brima Wurie's flip-phone being searched and used to identify his home address after he was arrested on drug charges. Upon entering the home, police found large amounts of narcotics and charged Wurie with distributing crack cocaine and possessing with intent to distribute.

In a 9–0 decision delivered by Chief Justice Roberts, the Court ruled emphatically that police need to obtain a warrant before searching an arrested person's cell phone and its cellular data. Justice Alito filed a solo concurrence.

Oral Argument:

During oral argument, the justices demonstrated an incomparable mastery of the relevant technology. From the very beginning, the justices clearly not only understood the functions and capabilities of smart phones but also how ubiquitous they are in modern American society. In privacy cases, this understanding of society's interaction with technology is indispensable. Finally, they used appropriate jargon confidently and accurately, discussing not just the phone's technology but also the apps and accessories developed for use in tandem with the phone.

Chief Justice Roberts displayed perhaps the highest level of technological finesse. Referring to social media apps like Facebook and Twitter, he was the first justice to ask the important question, "Could you have a rule that the police are entitled to search those apps that, in fact, don't have an air of privacy around them?" (Transcript of Oral Argument 2014a, 10) This line of questioning shows an important understanding of how apps work and what they are used for. Smartphones without apps are little more than old-fashioned flip phones. The individual apps allow the users to customize their phones and store important information. Recognizing this early in oral argument, Roberts showed a clear understanding of how smartphones function in modern society.

Roberts also asked, "What if you have a device that doesn't have the broad information that a smartphone has, but only a very limited, like a Fitbit that tells you how many steps you've taken, and the defendant says, I've been in my house all afternoon, and they want to check and see if he's walked 4 miles?" (Transcript of Oral Argument 2014a, 17) This clever hypothetical ostensibly seems to be splitting hairs, but in fact it shows that Roberts knows what is at stake when smartphones are searched. He was careful not to suggest that smartphones and Fitbits are analogous; instead he demonstrated that he knows how much information is stored on

smartphones and was eagerly seeking to design a well-tailored opinion that takes technological nuances into account.

Finally, Roberts asked whether it is “significant...in this case that the information was not protected by a password” and whether that “[affects] the expectation of privacy” (Transcript of Oral Argument 2014a, 26). Many smartphones are rapidly enhancing their password protection levels. New iPhone models require the owner’s finger print before access to the phone is granted, and they can also be accessed through a four-digit passcode. This intense level of security necessarily affects the level of privacy that smartphone users expect. It is understood that they are the only ones capable of accessing the content that they choose to store on their phones, which undoubtedly influences their habits and practices. By asking his question, Roberts showed his familiarity with the modern usage habits of smartphone owners as well as the built-in privacy measures on these devices, something that must be taken into account when defining an expectation of privacy.

Justices Kagan and Sotomayor also appeared eager to apply the Fourth Amendment to smartphones in a responsible and informed manner. Kagan, bluntly challenged the respondent’s attorney, noting that “people carry their entire lives on cell phones” before rhetorically asking, “That’s the world we live in, isn’t it?” (Transcript of Oral Argument 2014a, 30). Soon after these remarks, Kagan said “[smartphones] have as much computing capacity as...laptops did five years ago...and everybody under a certain age, let’s say about 40, has everything on them” (Transcript of Oral Argument 2014a, 32). These comments, like those from Roberts, show a lucid understanding of smartphones and their applications to contemporary society. It is clear that Kagan was not viewing this case in the abstract but instead looking carefully at how the Fourth Amendment protections against search and seizure should apply to modern society.

Justice Sotomayor's comments further demonstrate that the Court was anything but confused about how smartphones operate. Pursuing a claim by respondent's attorney that searching a smartphone is no different from a search of a billfold containing photographs, Sotomayor retorted, "That is different because carrying a billfold of photographs is a billfold of photographs" (Transcript of Oral Argument 2014a, 28). She continued by noting that while billfolds can only practically contain "anywhere from one to five" photographs, "we're talking potentially thousands, because with digital cameras people take endless photos and it spans their entire life" (Transcript of Oral Argument 2014a, 28). These comments are direct and more surprising than they appear. Often when dealing with technology the Court will gladly embrace any analogy it can create, and Sotomayor's rejection of one showed that she was very familiar with the actual implications of the case.

Sotomayor also challenges the argument of the respondent's attorney by saying, "Your theory would apply to iPads, computers, anything that's, for example, sitting next to a person in a car, at their desk if they're arrested at their desk, anywhere if they are carrying it in their hand because you see a lot of people carrying their iPad or something comparable, a tablet of some sort" (Transcript of Oral Argument 2014a, 35). This level of familiarity with how society uses technology is invaluable. Finally, giving an answer to the question of how police could keep digital evidence safe without searching the phone, Sotomayor suggested that "if you've had enough time at the precinct to put it on airplane mode, the wipe hasn't happened" (Transcript of Oral Argument 2014a, 50). These comments show a recognition of how cellular networks and smartphones themselves operate and a strategic employment of this understanding by Sotomayor to further her argument.

Final Opinions:

Chief Justice Roberts's decision for the unanimous Court is clearly articulated and well crafted, with a wealth of technological nuance, research, and understanding. The 9–0 ruling states in uncharacteristically simple terms, “Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant” (*Riley v. California* 2014, 28). The argument leading up to that declaration shows Roberts confidently discussing just how much privacy is expected in contemporary society and how much is at stake.

Roberts begins the decision by charmingly saying that cell phones “are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy” (*Riley v. California* 2014, 9). He again addresses how pervasive cell phones are in contemporary society by saying, “It is the person who is not carrying a cell phone, with all that it contains, who is the exception” (*Riley v. California* 2014, 19). This awareness of how society commonly interacts is crucial to defining reasonable expectations of privacy, and Roberts's decision thoroughly addresses it, often citing statistics. For instance, he writes that “nearly three-quarters of smartphone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower” (*Riley v. California* 2014, 19).

Roberts's opinion also uses appropriate jargon to make his point, showing an understanding of how most people use the technology and what is contained on a smartphone. He notes that apps are the main source of privacy concerns for smartphone users, a vital point that shows an intimate knowledge of the technology. He notes that “there are apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling

addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps for every conceivable hobby or pastime; apps for improving your romantic life,” and that “the average smart phone user has installed 33 apps, which together can form a revealing montage of the user’s life” (*Riley v. California* 2014, 20). This understanding of the variety of apps on the market, as well as the implications of accessing them, is remarkable. Without this deep understanding of how common users operate their phones, the Court may have been tempted to accept a breach of privacy.

Roberts’s indisputable knowledge of smartphones in this decision also helps to knock down a tempting but reckless analogy put forth by the respondent, who argued that a smartphone is really no different from a container of information and records. Roberts writes with impressive technological care that “the analogy crumbles entirely when a cell phone is used to access data located elsewhere, at the tap of a screen” because “that is what cell phones, with increasing frequency, are designed to do by taking advantage of cloud computing” (*Riley v. California* 2014, 21). Roberts goes on to explain cloud computing, which is how smartphones store data on a server rather than on the actual device itself. This kind of technological depth shows the insufficiency of most of the analogies put forth. It takes the actual technology into account and rules based on how the technology would best fit into Fourth Amendment doctrine.

Justice Alito concurred. As in his dissent in *United States v. Jones* (2012), Alito calls for more judicial restraint and deference to legislative bodies regarding new technologies. Because modern technologies are allowing people to make more personal information public, Alito argues that “it would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts using the blunt instrument of the Fourth Amendment” (*Riley v.*

California 2014, 6). According to Alito, it should be state legislatures, not the Court, that decide the limitations of technological privacy.

Analysis:

As Marc Rotenberg, president of the electronic privacy center, and attorney Alan Butler rightly proclaimed on SCOTUSBlog the day after the decision was announced, “The Court’s unanimous decision in the cellphone privacy cases brought the Fourth Amendment into the digital age” (SCOTUSBlog, June 26, 2014). While it is true that the Court did not completely ban searches of cell phones, and therefore leave it open to searches with a warrant, it is still a landmark case for privacy rights advocates. This opinion is a truly remarkable application of the Fourth Amendment to technological advances, and it ought to be the key precedent for how the Court addresses similar issues in the future.

This case’s attention to detail regarding technology is clearly admirable, and it will likely result in swift action in the lower courts to expand the same protections to other technologies such as computers and tablets. This course could not have come sooner. While new technology is seemingly everywhere, there is no device more common than smartphones. No other technology is simultaneously public and private. It is also a rapidly evolving piece of technology, with multiple companies competing to discover new breakthroughs. The Court’s willingness to accept this reality and carefully apply the Fourth Amendment to the digital age is the best course of action.

The politics of this case are fascinating, especially considering how bluntly it limits police activity. As law professor Adam Gershowitz writes, “Although the Court frequently claims to favor bright-line rules in the criminal procedure area so as to give police adequate guidance, the Court’s decisions and standards are rarely as simple and blunt as this week’s

decision in *Riley*” (“Surprising unanimity, even more surprising clarity,” June, 26, 2014). Unlike *Jones*, where the decision’s limitations on law enforcement were vague at best, *Riley* is clearly defined. In cases that deal this closely with how police officers are able to operate, the Court tends to split. The unanimity of this decision attests to the necessity of addressing technology head on. With a holistic and accurate account of how smartphones are used in modern society, it is nearly impossible to argue that accessing them does not violate the privacy of the user. Even Justices Scalia and Thomas, who claim to be the most devout strict constructionists on the Court, were persuaded. As Chief Justice Roberts says, “The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought” (*Riley v. California* 2014, 28). The intent to preserve the privacy of the citizenry undoubtedly applies to smartphone technology.

One interesting component of this decision’s text is that it actually provides law enforcement officials with suggestions for how to handle smartphones so that they can respect the Fourth Amendment while still preserving evidence. The justices here are clearly not throwing open the doors for true criminals to hide or destroy digital evidence. They simply require a warrant, which can be obtained quickly via email. The decision makes it clear that “remote wiping can be fully prevented by disconnecting a phone from the network,” which can be done by turning the phone off or placing it in an “enclosure that isolates the phone from radio waves” (*Riley v. California* 2014, 14). The Court offers very reasonable alternatives for law enforcement officials to take while still protecting the Fourth Amendment. These suggestions show the true depth of understanding that the Court has of the technology.

Riley is also important because it proves that the *Katz* test of a reasonable expectation of privacy is a sustainable standard. It is adaptable to modern innovations while also being realistic

enough to give law enforcement room to operate within the constitution. As the majority decision states, most people in modern society use cell phones to store a trove of highly personal data. There is undoubtedly a reasonable expectation of privacy, especially as newer models increase the capacity for secrecy. This decision is a testament to the *Katz* test, and it will hopefully be drawn upon in the future as more cases involving technology and privacy are brought to the Court.

How the Court will handle future violations of privacy obviously remain to be seen, but *Riley* offers substantial reason for hope. With this powerful and thorough precedent, it is hard to imagine the Court suddenly shifting its stance. This case will be cited more and more as people continue to consolidate their personal information onto single devices or apps. Every new piece of communication technology used by criminals will potentially contain evidence of a crime. *Riley's* precedent allows for that evidence to be obtained while also reducing the risk that the police will violate someone's privacy.

Conclusion:

The contemporary Supreme Court's record on technology-based cases is clearly varied. Its refusal to take a nuanced look at vulgar video games when ruling on a law blocking minors from purchasing them in *Brown v. Entertainment Merchants Association* (2011) is a far cry from its superbly crafted and sophisticated ruling in *Riley v. California* (2014). In fact, all three of the speech-related cases discussed here were resolved in ways that were not only technologically ignorant but also reckless and inaccurate. The Court's willingness to acknowledge, accommodate, and apply Fourth Amendment doctrine to technology is certainly admirable, but this mindset also needs to be applied to First Amendment cases. Although they may not have been ruled in a different way, the First Amendment cases would have certainly benefited from a

clearer judicial understanding of the technology involved. The definitions of the context of the speech, which is vital, would have been clearer and allowed the Court to make much clearer precedents and decisions.

As technology becomes more ubiquitous, it also makes information sharing more instantaneous. Political discourse is occurring more and more online and in ways that have no clear analogue in the past. A 140-character tweet cannot be reasonably compared to an anti-war pamphlet. Also, more and more political speech is occurring alongside personal and promotional speech on the internet. For instance, someone's Facebook profile may contain a status update with just a phrase that implies a stance on a political subject next to a re-posted photograph commenting on the latest pop culture scandal. This blurring of lines is unique to the internet, especially social-networking sites. Other pieces of technology, including video games and television, are so advanced that content creators can produce things unimaginable with the technology of just ten years ago, such as hyper-realistic violence and graphic sexual material. Legislatures will necessarily be confronted with instances of hate speech, threats, and obscenity from the internet, and the Court will eventually have to define a clear standard for what can be censored. This should happen sooner rather than later, and the Court needs to be *Riley*-esque in how it incorporates technology into its thinking.

Many modern technology companies and communities do a fine job of self-policing. For instance, the video game, music, and movie industries all place detailed warnings on their content voluntarily so that consumers are able to know when material may be offensive before they consume it. Internet subcultures, of which there are many, often develop their own ethical codes. While some take an anarchic, "anything goes" approach, others make sure to provide content warnings on potentially offensive material and permanently eject members who do not

follow the rules of speech. This kind of self-policing is not enough, however. Technology may outpace the law, but that does not mean that the law cannot react. While legislatures may be well positioned to place limitations on speech, they pose a greater threat in the sense that their attempts may be overzealous and threatening to minority opinions. *Brown* involved a law that blocked children's access to violent video games, but it is not unreasonable to imagine a highly conservative legislature banning certain video games outright. While the regulation in the *Brown* case was reasonable, an outright, content-based ban would be a true threat to the First Amendment. The Court needs to react continuously to technology and modify past doctrines so that they properly apply to modern conditions.

It is reasonable to expect the Court to take technology into account when deciding civil liberties cases. The justices have proven through the three Fourth Amendment cases discussed here that they are capable of such behavior. The question then naturally arises as to why the Court differs so greatly in its approach to technologically oriented cases. The answer is likely found in the politics of the Court. Both the liberal and conservative wings of the Court display a strain of libertarianism. They both are wary of judicial activism and governmental overreach into the daily lives of ordinary citizens. The First Amendment decisions discussed here relied heavily on an absolutist approach to free speech, treading carefully and conscious of how a ban, no matter how reasonable, would be perceived. It is hard to imagine that had the justices chosen to incorporate a holistic understanding of how the technology functions and interacts with society that they could have ruled in the same way. The context of the speech, which is created and influenced by the technology that enables it, always affects whether it is granted First Amendment protections. The justices' strategic denial of this truth is telling.

The Fourth Amendment cases, however, are a harder sell. Any limitations on law enforcement are hard to justify in a society concerned with law and order. While the Court does not have to worry about elections or an upset constituency, the justices still undoubtedly worry about their images and try to avoid circumventing elected legislative bodies. Still, the libertarianism present in the First Amendment cases manifested itself in these Fourth Amendment cases as well. The Court was clearly concerned with how it could protect privacy as technology rapidly advances. In order to justify a ruling that ostensibly limited law enforcement activity, the Court needed to utilize a deep insight into technology. Its decisions correctly incorporate technology and carefully take into account what people expect from their devices and surroundings; but the Court is not necessarily doing this because it is the justices' default course of action, and they seek to bring the law up to date with modern times. From Scalia's qualification in *Kyllo* that the thermal-imaging device could be banned only until it came into greater public use, to the Court's unanimous decision in *Riley* that cell phones cannot be searched because of their vast storage capabilities and ubiquity in society, the Court used a very pro-technology lens to advance its libertarian ideology.

This is not to say that the Court's Fourth Amendment cases were entirely politically motivated. The Court has a storied history of protecting privacy in a reasonable and nuanced manner. It is also not to say that these cases are detrimental to civil liberties or society at large. They all provide highly valuable protections for privacy that are much needed and commendable. The justices, however, cannot incorporate technology into their thinking when it suits their ideological predisposition. A reasonable incorporation of how society interacts with technology may necessitate certain limitations on civil liberties, specifically speech. Limitations like the kind that should have been applied in *Elonis v. United States* (2015) are not unprecedented. First

Amendment jurisprudence is complex and nuanced, with many reasonable limitations on speech being widely accepted because they are necessary in a free society. A refusal to account for technology simply delays the issue until the Court will inevitably have to deal with it again.

The Court cannot simply choose when technology is important and when it is not, depending on the justices' ideology. Technology is always important. Societal standards change, often in correlation with technological advancement. The third-party doctrine, for instance, was once reasonable but no longer can be expected to be sufficient. In order to gain access into modern society and all of the opportunities that it entails, people necessarily need to partake in internet and cell-phone-based activity, which requires them to disclose personal information to a third-party, private entity. Justice Sotomayor warned of this doctrine's insufficiency in the modern age in her dissent in *United States v. Jones* (2012). Technology as luxury is becoming increasingly rare; it is a necessity in order to succeed and to be an active member of modern society. The Court needs to recognize this, understand it, and take it into account when deciding all cases involving technology. While *Riley* is certainly a shining moment for this type of judicial behavior, the approach needs to occur regardless of what specific liberty is being disputed or threatened. The future is impossible to predict, but the Court will continue to be confronted with technology. The justices need to take it into account in all cases when applying past doctrine to the technological age.

References

- Brown v. Entertainment Merchants Assn.* 2011. 564 U.S. ___
- Brief *Amici Curiae*. 2014a. The American Civil Liberties Union, The Abrams Institute for Freedom of Expression, The Cato Institute, The Center for Democracy & Technology, and The National Coalition Against Censorship in support of Petitioner in *Elonis v. United States*.
- Brief *Amici Curiae*. 2014b. The Domestic Violence Legal Empowerment and Appeals Project and Professor Margaret Drew in Support of Respondent in *Elonis v. United States*.
- Brief *Amici Curiae*. 2014c. The National Network to End Domestic Violence, Et Al. in Support of Respondent in *Elonis v. United States*.
- California State Legislature. 2005. AB–1179 Violent video games: sales to minors.
- Elonis v. United States*. 2015. 575 U.S. ___.
- Gershowitz, Adam. 2014. “Symposium: Surprising Unanimity, Even More Surprising Clarity.” *SCOTUSBlog*. June 26.
- Goldstein, Tom. 2012a. “Reactions to *United States v. Jones*: The Government Fared Much Better than Everyone Realizes.” *SCOTUSBlog*. January 23.
- Goldstein, Tom. 2012b. “*Jones* Confounds the Press.” *SCOTUSBlog*. January 25.
- Hurley, Lawrence. 2014. “In U.S., When High-Tech Meets High Court, High Jinks Ensur.” *Reuters*. May 9.
- Katz v. United States*. 1967. 389 U.S. 347.
- Kerr, Orin S. 2011. “The Fourth Amendment and New Technologies: Constitutional Myths and The Case for Caution.” *The Fourth Amendment: Searches and Seizures, Its Constitutional History and the Contemporary Debate*. Ed. Cynthia Lee. New York: Prometheus Books. 230–237.

Kyllo v. United States. 2001. 533 U.S. 27.

Miller v. California. 1973. 413 U.S. 15.

Murphy, Erin. “Paradigms of Restraint.” *The Fourth Amendment: Searches and Seizures, Its Constitutional History and the Contemporary Debate*. Ed. Cynthia Lee. New York: Prometheus Books. 242–251.

Olmstead v. United States. 1928. 277 U.S. at 474.

Ontario v. Quon. 2010. 560 U.S. 746.

Raymond, Adam K. 2014. “8 Times the Supreme Court was Bewildered by Technology.” *New York Magazine*. April 23.

Riley v. California. 2014. 573 U.S. __

Rotenberg, Marc and Alan Butler. 2014. “Symposium: In *Riley v. California*, a Unanimous Supreme Court Sets Out Fourth Amendment for Digital Age.” *SCOTUSBlog*. June 26.

Schulhofer, Stephen J. 2012. *More Essential than Ever: The Fourth Amendment in the Twenty First Century*. New York: Oxford University Press.

Transcript of Oral Argument. 1999. *United States v. Playboy Entertainment Group, Inc.* November 30.

Transcript of Oral Argument. 2001. *Kyllo v. United States*. February 20.

Transcript of Oral Argument. 2010a. *City of Ontario v. Quon*. April 19.

Transcript of Oral Argument. 2010b. *Brown v. Entertainment Merchants Assn.* November 2.

Transcript of Oral Argument. 2011. *United States v. Jones*. November 8.

Transcript of Oral Argument. 2014a. *Riley v. California*. April 29.

Transcript of Oral Argument. 2014b. *Elonis v. United States*. December 1.

United States v. Jones. 2012. 565 U.S. __.

United States v. Playboy Entertainment Group, Inc. 2000. 529 U.S. 803.

