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Moving Beyond Cameras in the Courtroom: Technology, the Media, and the Supreme Court

Mary-Rose Papandrea*

I. INTRODUCTION

News media, legal blogs, and law reviews routinely cite a panoply of reasons why the Supreme Court will not permit the televising or videotaping of oral arguments: the Justices' desire for anonymity,¹ the risk that creative editing of sound bites will mislead the public,² the risk that the Justices' questions and comments will be taken out of context,³ the need to separate the judicial process from the political branches of government,⁴ a lack of confidence in the public's ability to understand the proceedings,⁵ and the concern that both the lawyers and the Justices will grandstand for the cameras.⁶ More cynical commentators believe that the Justices are reluctant to be recorded on camera because of their view that their branch is exceptional.⁷ Others suggest that the Justices "are simply not used to being second-guessed."⁸

* Associate Professor, Boston College Law School. Thank you to Derek Bambauer, Elizabeth Ludwin King, Joseph Liu, Emily Meazell, Rebecca Morrow, Ronald Wright, Fred Yen, the Wake Forest Law School faculty, and all the participants at the BYU Law Review Symposium: The Press, the Public, and the U.S. Supreme Court, for their helpful comments and feedback on the contents of this Article. I am also grateful to Noah Hampson, Eric Lee, Jeff Locke, Ellen Melville, and Andy Soliman for their research assistance.

1. Ariane de Vogue, *What Do the Supreme Court Justices Think of Cameras in Court?*, ABC NEWS LEGAL BLOG (Dec. 1, 2011, 9:00 AM), <http://abcnews.go.com/blogs/politics/2011/12/what-do-the-supreme-court-justices-think-of-cameras-in-court>.

2. Adam Liptak, *Supreme Court TV? Nice Idea, but Still Not Likely*, N.Y. TIMES, Nov. 29, 2011, at A18, available at <http://www.nytimes.com/2011/11/29/us/supreme-court-tv-still-not-likely-sidebar.html>.

3. Mark Memmott, *Americans Want the Supreme Court to Open Up; Here's Why It Won't*, NPR (Mar. 24, 2012, 6:00 AM), <http://www.npr.org/blogs/thetwo-way/2012/03/24/149235724/americans-want-the-supreme-court-to-open-up-heres-why-it-wont>.

4. Tony Mauro, *Let the Cameras Roll: Cameras in the Court and the Myth of Supreme Court Exceptionalism*, 1 REYNOLDS CTS. & MEDIA L.J. 259, 270 (2011).

5. Liptak, *supra* note 2.

6. De Vogue, *supra* note 1.

7. Mauro, *supra* note 4, at 259, 270–71 (arguing that the Court views itself as "a unique institution that can and should resist the demands of the information age").

8. Adam Cohen, *Why Won't the Supreme Court Allow TV Cameras?*, TIME (Nov. 21, 2011), <http://ideas.time.com/2011/11/21/why-won-the-supreme-court-allow-tv-cameras>.

Another common explanation is that the Supreme Court has resisted modern communications technology because the Justices do not understand new technology⁹ and are indeed “hostile to [it].”¹⁰ As the *Wall Street Journal* Law Blog put it, “Maybe the justices are against cameras in the court because when they think of cameras, they think of those huge cameras on tripods with the cloth to cover the photographers and the supernova flash-bulbs.”¹¹ Indeed, Judge Posner recently wrote that “the current justices have—though this is not new—a low comfort level with science and technology, and with complex commercial transactions, at a time when technology (including “financial engineering”) is playing an increasingly large role in culture and society.”¹²

The goal of this Article is to examine the theory that the Court’s reluctance to embrace not just cameras but modern communications technology more generally is based on the Justices’ own lack of understanding of and hostility to this technology. To accomplish this goal, the Article considers the Justices’ use of technology in their personal and professional lives as well as their understanding of communications technology in oral argument and written opinions. First, the Article examines the Court’s changing use of technology to communicate with the press and public in the twentieth and twenty-first centuries as well as the various comments Justices have made in their public remarks regarding their personal understanding and use of technology. The Court has plainly been slow to embrace new

9. See Monica Bay, *Cameras and Social Media in the Courts*, L. TECH. NEWS (May 19, 2011), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=120249447655> 3 (summarizing comments from Manny Medrano, a litigator and legal analyst, who suggested that having a “media savvy judge, who is not terrified of media” was one of three conditions required for court proceedings to be televised properly); Carrie Dann, *On ATMs, Tweets, and ‘Twitting,’* NBCNEWS.COM (May 21, 2010, 6:11 PM), http://firstread.nbcnews.com/_news/2010/05/21/4439641-on-atms-tweets-and-twitting (reporting that some of the Justices’ recent statements have done little to rebut the stereotype that they are “awed and confused by technology”).

10. Nick Summers, *Supreme Court Turns Technophile*, DAILY BEAST (June 28, 2011, 12:38 AM), <http://www.thedailybeast.com/articles/2011/06/28/supreme-court-video-game-decision-is-rare-tech-savvy-ruling.html>.

11. Ashby Jones, *Our Tech-Savvy Supreme Court*, WALL ST. J.L. BLOG (Apr. 19, 2010, 5:56 PM), <http://blogs.wsj.com/law/2010/04/19/our-tech-savvy-supreme-court>.

12. Richard A. Posner, *The Court of Celebrity*, NEW REPUBLIC, May 26, 2011, at 26; see also Monica Harrington, *The Supreme Court Doesn’t Understand Globalization*, FAST COMPANY (Jan. 21, 2010), <http://www.fastcompany.com/blog/monica-harrington/social-innovation-perspectives/supreme-court-doesnt-understand-globalization> (“The Supreme Court is made up of justices who demonstrate no understanding of how profoundly the world has changed due to changes in business, technology and communications.”).

communications technology, and the Justices' personal use of technology is consistent with those in their respective peer groups. Second, the Article examines the Court's understanding of communications technology as reflected in its oral arguments and written decisions in the last two decades.¹³ This section concludes that the Court's resistance to cameras in the courtroom and other technological advances in public communications does not stem from ignorance of technology. By and large, the Court's opinions actually indicate a remarkable understanding of technology. Instead, these opinions reveal that the Court is often cautious in the face of technological developments not because the Justices do not understand those developments but rather because they are not confident that they can predict the future of technology and the development of social norms that will surround its use. Furthermore, the Court is generally hesitant to revisit its prior decisions and pre-existing doctrinal framework and often chooses to issue more narrow decisions to avoid the difficult jurisprudential questions new technology can present.

The third and final section of this Article concludes that the Court's reluctance to embrace modern communications technology has less to do with its lack of understanding of that technology and more to do with its concerns about the modern media culture. While the Court's resistance to cameras in the courtroom may diminish with time, it does not appear that we will see cameras at the Court anytime soon. In the meantime, rather than focusing solely on convincing the Court to permit cameras to record its proceedings, advocates for increased public access to the Court's work should devote at least part of their energy to thinking beyond cameras to other ways in which the Court could evolve to accommodate the expectations of the public in a changing media environment.

II. TECHNOLOGY AT THE COURT

In order to understand the Court's reluctance to use modern communications technology, it is helpful to take a look at the history of its public communications as well as the Justices' personal use and understanding of communications technology. This Part demonstrates that throughout its history, the Court has been slow to embrace new

13. I will focus on cases involving communications technology. Depending on how one defines technology, it would be possible to examine the effects of technology in virtually every doctrinal area on the Court's docket. For example, for a discussion of the Court's treatment of technological developments at issue in its Commerce Clause cases, see Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476 (2011).

technology. The Justices' personal use and understanding of technology differs from Justice to Justice, but generally speaking it is consistent with the use of technology by others in their peer group.

A. Communications with the Press and the Public

The last several years have seen an explosive use of communications technology in America's courtrooms.¹⁴ Many state courts around the country, including state supreme courts, permit cameras in their courtrooms.¹⁵ Indeed, in the state courts the issue is no longer whether cameras should be permitted, but what other things should be done to adapt to modern-day journalist and technological realities. For example, a pilot project in a state court in Quincy, Massachusetts, has installed live-streaming cameras in the courtrooms and provided free WiFi access to anyone who comes to the courthouse to make it easier for citizen journalists to cover a case.¹⁶ Several state courts around the country have created official Twitter pages to alert the interested public when new opinions or other material is posted.¹⁷ Other progressive courts have changed their rules to expand the definition of news media to include anyone who regularly disseminates information of public interest and permits them to make use of "pool cameras" and to transmit from the courtroom using cellphones, laptops, and other electronic devices.¹⁸

14. Foreign courts have also been less hesitant to embrace cameras. Liptak, *supra* note 2 (noting that the Supreme Court of Canada and the Supreme Court of the United Kingdom allow cameras).

15. *Cameras in the Court: A State-by-State Guide*, RADIO TELEVISION DIGITAL NEWS ASS'N, (Nov. 15, 2012, 10:08 AM), http://rtdna.org/article/cameras_in_the_court_a_state_by_state_guide_updated.

16. Justin Ellis, *Reality TV: OpenCourt Has Begun Its Livestream of the Judicial System*, NIEMAN JOURNALISM LAB (May 3, 2011, 1:00 PM), <http://www.niemanlab.org/2011/05/reality-tv-opencourt-has-begun-its-livestream-of-the-judicial-system>.

17. *See Florida Supreme Court Begins Using Twitter*, FLA. BAR NEWS (May 1, 2010), <http://bit.ly/fla-sup-ct-on-twitter>; John P. Martin, *Pa. Supreme Court to Go on Twitter*, PHILLY.COM (Oct. 19, 2011), <http://bit.ly/pa-sup-ct-on-twitter>.

18. *Watch Live Video from Quincy District Court*, PATRIOT LEDGER, <http://www.patriotledger.com/homepage/breaking/x1146472520/Live-streaming-video-goes-live-May-2-at-Quincy-District-Court> (last updated Jan 8, 2013); *see also* Press Release, Supreme Judicial Court Public Information Office, News Media Registration Under SJC Rule 1:19 Now Available Online (Aug. 13, 2012), <http://www.mass.gov/courts/sjc/docs/rule-119-press-release.pdf> (announcing new rules for Massachusetts state courts permitting anyone who regularly disseminates matters of public interest to the public to register as a member of the news media and make use of the pool camera or electronic devices in the courtroom with the permission of the presiding judge). The Supreme Court of the United Kingdom also recently began to allow tweeting from the courtroom. *See Tweeting Allowed in Supreme Court*, GUARDIAN (Feb. 3, 2011, 3:42 PM),

Federal courts have been a bit slower to evolve their communications practices, but the district and appellate courts have begun to make steady progress. In 1972, the Judicial Conference amended the Code of Conduct for federal judges to add a prohibition against “broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto.”¹⁹ In 1990, the Judicial Conference recommended and ultimately implemented a three-year pilot program in two appellate and six district courts to evaluate the use of cameras in civil proceedings.²⁰ This pilot program led the Judicial Conference to conclude that cameras had intimidating effects on some jurors and witnesses and declined to expand the use of cameras in civil proceedings.²¹ Distinguishing between appellate and trial proceedings, the Judicial Conference permitted the appellate courts in 1996 to decide for themselves whether to permit cameras but prohibited cameras at the district court level.²² Justices Sonia Sotomayor,²³ Samuel Alito,²⁴ and Stephen Breyer²⁵ have all supported cameras in the courts when they were judges on the circuit level.

Currently, the Judicial Conference is reconsidering whether cameras should be permitted at the district court level and has sponsored a new pilot program to examine the use of cameras in fourteen federal district courts.²⁶ Starting in July 2011, cameras have been permitted in civil cases heard before the participating courts as long as the parties consent.²⁷ These recordings are made publicly available on uscourts.gov

<http://www.guardian.co.uk/law/2011/feb/03/tweeting-allowed-in-supreme-court>.

19. *History of Cameras in the Federal Courts*, U.S. COURTS, <http://www.uscourts.gov/Multimedia/Cameras/history.aspx> (last visited Jan. 26, 2013).

20. *Id.*

21. *Id.*

22. *Id.*

23. Tony Mauro, *Cameras in Court May Get Boost*, FIRST AMENDMENT CENTER (July 16, 2009), <http://archive.firstamendmentcenter.org/analysis.aspx?id=21838> (noting that in her confirmation hearings Justice Sotomayor acknowledged that she supported cameras in the courtroom, and that her former court, the Second Circuit, had cameras in its courtroom).

24. Tony Mauro, *Alito Well-Versed in First Amendment*, FIRST AMENDMENT CENTER (Jan. 17, 2006), <http://archive.firstamendmentcenter.org/analysis.aspx?id=16316> (quoting Justice Alito’s statements in his confirmation hearings that he had voted in favor of allowing cameras in the courtroom when he had served as a judge on the Third Circuit).

25. Matt Sundquist, *Cameras and the Supreme Court*, SCOTUSBLOG (Apr. 29, 2010, 8:17 AM), <http://www.scotusblog.com/2010/04/cameras-and-the-supreme-court> (noting how Justice Breyer permitted cameras into the First Circuit when he served as a judge on that court).

26. *Id.*

27. Robert Ambrogi, *Federal Court in Boston to Announce New Rules on Cameras and Coverage Today*, MEDIA L. (Oct. 6, 2011, 8:16 AM), <http://medialaw.legaline.com/2011/10/federal->

and other local participating websites to be determined in the court's discretion.²⁸ In addition, the district court in Massachusetts has established a "virtual press box" that gives holders of media identification credentials increased access to the electronic filing system.²⁹ This new program will also permit members of the media to sign up for alerts on any new filings made in cases they choose to follow.³⁰

The highest federal court in the land has been much more reluctant to embrace modern information technology to communicate quickly and easily with the press and public. Indeed, when Chief Justice Roberts was asked recently about when the Court would permit cameras in the courtroom, he reminded his audience that "one of the architectural motifs on the base of our lamp posts throughout [the Supreme Court] is a turtle. . . . And that's to indicate that we move slowly but surely and on a stable basis."³¹

At the outset, it is important to note that the current Justices apparently do not share a single, unified view regarding the wisdom of allowing cameras in the courtroom. Although retired Justice David Souter famously told Congress that cameras in the Supreme Court would roll "over my dead body,"³² some of the other Justices have publicly stated that they would be in favor of permitting cameras. For example, Justice Kagan has said, "I think it's a good idea . . . If everybody could see this it would make them feel so good about this branch of government and how it operates."³³ That said, other Justices such as Justice Kennedy, Justice Thomas, and Justice Scalia have publicly opposed cameras, and Justice Alito, who voted in favor of cameras while serving as a judge on a lower federal court, is also reluctant to embrace cameras at the Supreme Court.³⁴

court-in-boston-to-announce-new.html.

28. *History of Cameras in the Federal Courts*, *supra* note 19.

29. Ambrogi, *supra* note 27.

30. *Id.*

31. De Vogue, *supra* note 1.

32. *On Cameras in Supreme Court, Souter Says 'Over My Dead Body,'* N.Y. TIMES, Mar. 30, 1996, at A24, available at <http://www.nytimes.com/1996/03/30/us/on-cameras-in-supreme-court-souter-says-over-my-dead-body.html>.

33. Robin Hagan, *Justice Kagan Talks Cameras in the Supreme Court, Collegiality*, FINDLAW (Aug. 5, 2011, 9:05 AM), http://blogs.findlaw.com/supreme_court/2011/08/justice-kagan-talks-cameras-in-the-supreme-court-collegiality.html.

34. *Justice Alito: Few Would Watch High Court Arguments on TV*, FIRST AMENDMENT CENTER (Oct. 22, 2007), <http://www.firstamendmentcenter.org/justice-alito-few-would-watch-high->

1. *Recordings and transcripts of oral argument and opinion announcements; orders and opinions*

It is common knowledge that the Court has never permitted still or video cameras in the courtroom, either for oral argument or opinion announcements, regardless of the public interest in the legal issues at stake.³⁵ Although for decades there has been a push for cameras in the courtroom, the Court has repeatedly rejected these attempts.³⁶ The only step it has made in the direction of permitting cameras is a baby step at best; the Court permits a closed-circuit transmission of the proceedings to an overflow room in the courthouse.³⁷ Justice Breyer has indicated that overflow transmission to other courthouses might also be a possibility, but that idea has not become a reality yet.³⁸

The Court has traditionally been slow to update its communications with the public to take advantage of advances in technology. For example, the Court took a long time after the technology was available to release transcripts and audio recordings of its proceedings; indeed, even today the Court does not make transcripts and audio recordings accessible as quickly as it could. The Court first made audio recordings of oral arguments available for archival purposes only in 1955, decades after the technology was available.³⁹ Even then the Court, which deposited the tapes with the National Archives, did not make recordings available until after the Term concluded.⁴⁰ After CBS broadcasted a portion of the oral argument in the Pentagon Papers case in 1971, the

court-arguments-on-tv; Debra Cassens Weiss, *Alito Warns of 'Observer Effect' if Courtroom Cameras Are Allowed*, ABA J. (Oct. 1, 2010, 7:51 AM), http://www.abajournal.com/news/article/alito_warns_of_observer_effect_if_courtroom_cameras_are_allowed.

35. In 1988, the Court permitted advocates for cameras in the courtroom to stage a demonstration of how cameras would work in the Supreme Court chamber. This experiment received little publicity; more importantly, it seemed to have little effect on the Court. Mauro, *supra* note 4, at 264–65.

36. Justice Souter famously said to Congress in 1996 that “the day you see a camera come into our courtroom, it’s going to roll over my dead body.” *On Cameras in Supreme Court, Souter Says, ‘Over My Dead Body,’ supra* note 32. Justice Souter’s comments echoed those of Chief Justice Burger a decade earlier. Howard Rosenberg, *Burger’s Day in Moyers’ Court*, L.A. TIMES, July 9, 1986, at J9 (quoting Justice Burger making an over-my-dead-body comment in an earlier CBS interview).

37. *See* Liptak, *supra* note 2.

38. *Id.*

39. Roy M. Mersky & Kumar Percy, *The Supreme Court Enters the Internet Age*, 63 TEX. B.J. 569, 569 (2000), available at <http://www.llrx.com/features/supremect.htm>.

40. *Id.*

Court stopped sending tapes to the National Archives for fifteen years.⁴¹ When the Court began releasing recordings again in 1986, it required those who wanted to listen to them to receive permission from the Court, which would be granted only if the applicant promised to use them solely for educational and noncommercial purposes.⁴² Only after Peter Irons and Stephanie Guitton violated this agreement by publishing a selection of edited oral argument audiotapes and transcripts in *May It Please the Court* did the Court permit the National Archives to sell the recordings.⁴³

The Court waited until 2000, when it heard *Bush v. Gore*,⁴⁴ to release these audio recordings to the press and the public on the same day they were made.⁴⁵ The release of audio recordings initially rested in the Court's sole discretion, which it exercised sparingly.⁴⁶ During the 2009–2010 term, the Court denied all seven media requests for same-day release.⁴⁷ In 2010, the Court revised its policy to permit the release of the audio recordings for all oral arguments, but it does not release the audio recordings on the same day.⁴⁸ Instead, it releases a week's worth of arguments every Friday.⁴⁹ Given that the Court never hears oral argument on Fridays, this new policy means that the Court does not routinely release audio recordings on the same day they were made.⁵⁰ In March 2012, the Court agreed to release the audio of the oral arguments in the Affordable Health Care Act case on the same day,⁵¹ but the general Friday release policy remains in effect.

Making use of the audio recordings can be challenging, especially for those not as familiar with the Court's docket or with the Justices. It can be difficult for interested members of the public to find the audio they are looking for because the recordings are listed by case name only,

41. *Id.*

42. *Id.*

43. *Id.* at 569–70.

44. 531 U.S. 98 (2000).

45. Bruce G. Peabody, "Supreme Court TV": Televising the Least Accountable Branch?, 33 J. LEGIS. 144, 148–49 (2007).

46. Mauro, *supra* note 4, at 266.

47. *Id.* at 267.

48. *Id.*

49. *Id.*

50. *Id.*

51. Tony Mauro, *Supreme Court to Expedite Release of Audio for Health Care Arguments*, BLOG LEGALTIMES (Mar. 16, 2012, 4:30 PM), <http://legaltimes.typepad.com/blt/2012/03/supreme-court-turns-down-video-for-health-care-arguments.html>.

without annotation.⁵² Furthermore, listening to the audio can be difficult for someone not familiar with the voices of the individual Justices unless one follows along with a copy of the transcript to determine who is speaking.⁵³

The Court has also been slow to release oral argument transcripts, and until recently they were difficult to use. In 1996, Linda Greenhouse complained that it took two weeks for the Court to release the transcripts, even though the technology existed for the Court to release them on the same day.⁵⁴ It was also not until 2004 that the transcripts indicated which Justice asked which question; instead, the transcript simply read, "QUESTION."⁵⁵ The Court did not begin releasing same-day transcripts of oral arguments until 2006.⁵⁶

The Court was slow to make its opinions electronically accessible to the public. Opinions and other court orders were first made electronically accessible in 1992 through the subscription-only HERMES Bulletin Board System.⁵⁷ Three years later, the Court established its own bulletin board system to make available to the general public slip opinions and other items.⁵⁸ In 2000, the Court established its own website.⁵⁹ This website gives the public and press alike access to the Court's opinions, argument schedule, briefs, oral argument recordings, and transcripts. The Court posts opinions and orders in PDF form on the website until they come out in the print volume of U.S. Reports. In 2010, the Court updated its website to provide "enhanced search capabilities."⁶⁰ The PDFs use optical character recognition that permits the text of the opinions to be easily searched, copied, and pasted. Critics have noted that one way the Court could improve its website is by converting the opinions and orders into HTML when available, with page numbers.⁶¹ In addition, the

52. Lisa T. McElroy, *Cameras at the Supreme Court: A Rhetorical Analysis*, 2012 BYU L. REV. 1837.

53. *Id.*

54. Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537, 1559 (1996).

55. Mauro, *supra* note 4, at 267.

56. *Id.*

57. Mersky & Percy, *supra* note 39.

58. *Id.*

59. *Id.*

60. Press Release, U.S. Supreme Court (Mar. 18, 2010), http://www.supremecourt.gov/publicinfo/press/viewpressreleases.aspx?FileName=pr_03-18-10.html.

61. Bradley J. Hillis, *The U.S. Supreme Court Web Site: A Judicial Review*, JURIST LEGAL INTELLIGENCE (Aug. 29, 2000), <http://jurist.law.pitt.edu/courttech5.htm>.

Court's website does not make available audio recordings of the opinion announcements. Instead, such recordings are available at www.oyez.org.

When the healthcare decision was announced in June, the millions of people trying to get access to the Court's opinion on the official website overwhelmed the server's capacity. As a result of this crushing demand, the Court was effectively unable to publish its decision on its website for about half an hour after the decision was announced in open court.⁶² This meant that everyone not in the courtroom was waiting for reports from the press to find out what had happened, and the inaccurate reporting from some media outlets confused a lot of people, including President Obama.⁶³

Although the Court's website is an encouraging step in the right direction, the Court has not embraced the full range of communications technology that it could to communicate with the public. For example, the Court does not use Twitter, Facebook, or any other social media platform that would permit interested followers to receive notification when new material is posted. The Justices have largely deflected calls for the Court to embrace social media, but it appears that their opposition is to individual Justices using social media to communicate with the public, rather than the Court as an institution making use of social media to improve its communications. For example, Justice Sotomayor has said that people would find it "very unsatisfying" to interact with judges on social media because they cannot debate with the public in the same way that politicians engage with their constituents.⁶⁴ Justice Breyer has likewise stated that he believes it would be inappropriate for the Justices to have followers on Twitter or friends on Facebook.⁶⁵

While it would indeed be inappropriate for the Justices to provide tutorials on legal issues or discuss their votes in unreleased decisions, it still would be possible for the Court as an institution to use social media to communicate with the public about what is happening at the Court.

62. Tom Goldstein, *We're Getting Wildly Differing Assessments*, SCOTUSBLOG (Jul. 7, 2012, 10:04 PM), <http://www.scotusblog.com/2012/07/were-getting-wildly-differing-assessments>.

63. *Id.* ("At the White House, there is more to the story than the spin that the President believed the Administration had lost the case only for a very short period of time. In fact, for at least a few minutes he thought the opposite and for more than five minutes, he had substantially worse information than many Americans.").

64. Kathy Matheson, *Sotomayor Visits Penn for Law School Dedication*, PHILLY.COM (Apr. 6, 2012, 6:13 AM), <http://bit.ly/sotomayor-visits-penn-for-law-school-dedication>.

65. Stephanie Francis Ward, *Justice Breyer's on Twitter and Facebook, but Don't Count on Him Friending You*, ABA J. (Apr. 14, 2011, 1:46 PM), http://www.abajournal.com/news/article/breyer_on_facebook_but_dont_count_on_him_friending_you.

Indeed, the Justices are aware that their work is increasingly dissected on websites, blogs, and social media platforms. Nonofficial sources, like SCOTUSblog,⁶⁶ have proven to be indispensable guides to the Court's work. SCOTUSblog provides real-time summaries of oral arguments and opinion announcements as well as a host of additional information about pending cases and petitions for certiorari. The Justices appear to welcome the attention their work has received. Justice Kennedy testified to Congress that it is good for social media to cover the Court's work.⁶⁷

Although for most of the twentieth century the Justices avoided appearing in the broadcast media,⁶⁸ in the last few decades the Justices have increasingly been willing to sit down for televised interviews and to permit audio and visual recording when they are giving speeches or lectures, particularly when they have a book to promote or a particular message they want to get out.⁶⁹ In addition, in 2009 retired Associate Justice Sandra Day O'Connor launched the website "iCivics" to educate young people about their government.⁷⁰ The website offers a broad range of educational video games and activities for middle- and high-school students.⁷¹ The Justices' increasing use of modern media to get out their own messages indicates that they are very much aware of the important role the media plays in our society.

66. SCOTUSBLOG, <http://www.scotusblog.com> (last visited Jan 26, 2013). The importance of SCOTUSBLOG cannot be overstated. Website publisher Tom Goldstein has reported that usage data indicates that staff members of the Court access the website and that the site received 5.3 million page views the day the Court released its Affordable Health Care Act decision. Mallary Jean Tenore, *Why It's So Hard for SCOTUSBlog to Get Supreme Court Press Credentials*, POYNTER.ORG (Jul. 11, 2012, 1:10 PM), <http://www.poynter.org/latest-news/top-stories/180581/why-its-so-hard-for-scotusblog-to-get-credentialed>.

67. Ward, *supra* note 65.

68. In 1958, Justice Douglas became the first Justice to sit for a televised interview. RICHARD DAVIS, *JUSTICES AND JOURNALISTS: THE U.S. SUPREME COURT AND THE MEDIA* 150 (2011). Justice Scalia has had the most dramatic change of heart regarding cameras. For many years, he was known for his vehement opposition to audio or visual recording of his public appearances—even going as far as confiscating reporters' tape recorders. *Id.* at 172.

69. *Id.* at xiv–xv, 151 (“The justices appear to have shed their camera shyness.”). While a full account and summary of the Justices' televised appearances and general relationship with the press is beyond the scope of this Article, interested readers should consult Davis's book for details. In addition, in this symposium issue, RonNell Anderson Jones provides additional details about the reluctance of some Justices to engage with the media. See RonNell Anderson Jones, *U.S. Supreme Court Justices and Press Access*, *BYU Law Review Symposium: The Press, the Public, and the U.S. Supreme Court*.

70. *What Is iCivics?*, ICIVICS, <http://www.icivics.org/About> (last visited Jan. 26, 2013).

71. *We've Got Games!*, ICIVICS, <http://www.icivics.org/games> (last visited Jan. 26, 2013).

2. *Press access*

The Supreme Court has not made it easy for the press to cover the Court. Its policies regarding the release of opinions, the use of technology in the courtroom, and press credentialing all have room for improvement.

The Court releases opinions when they are completed with little attention to the difficulties that a crush of high-profile opinions will cause for the press. Until 1965, the Court released opinions only on Mondays.⁷² This practice inevitably meant that at the end of each Term there would be a crush of decisions coming down at once, and reporters and editors dealing with limited time and space had to make difficult decisions about which ones to cover.⁷³ Justice Frankfurter repeatedly urged his colleagues to abandon the Monday-only rule in order to help the press coverage of the Court and prevent “public indigestion, with consequent misinformation and mischievous reaction to decisions.”⁷⁴ Although this change was helpful, reporters still had to deal with the crush of opinions that would come out at the end of each term. In 1996, Linda Greenhouse wrote about her frustration with the Court’s practice of releasing its opinions in clusters, especially in June, rather than spreading them out over two or three days.⁷⁵ When she offered this suggestion to then-Chief Justice Rehnquist, he unhelpfully suggested that she spread out her reporting over two or three days.⁷⁶ In Greenhouse’s opinion, the Court did not intentionally make itself “mysterious and remote” but rather the Court was “quite blithely oblivious to the needs of those who convey its work to the outside world.”⁷⁷

In recent years, the Clerk of the Court, William Suter, has tried to avoid the release of particularly newsworthy decisions on the same day as oral argument so that reporters will not face the impossible choice of reading and reporting the newsworthy case or listening to oral argument.⁷⁸ Despite these efforts, reporters still continue to face this

72. DAVIS, *supra* note 68, at 143.

73. *Id.*

74. *Id.*

75. Greenhouse, *supra* note 54, at 1558.

76. *Id.* at 1558–59.

77. *Id.* at 1559.

78. Brigham Young University Law Review Symposium, The Press, the Public, and the U.S. Supreme Court, Journalist Panel (Jan. 26, 2012), www.law2.byu.edu/videos_index/LawReviewSymposium%20-%20Journalist%20Panel.wmv (statement of Lyle Denniston).

Hobbesian choice any day when opinions are announced on the day of oral argument.⁷⁹ Although even reporters recognize it is not realistic to expect the Court to space out its opinions to make things “easier” for the press corps, some have suggested that the Court could make coverage easier by giving the press some advance notice when opinions are coming so that they can review the briefs and brush up on the issues involved, or give reporters in “lock up” access to copies of the Court’s opinions at 9:30 (half an hour before they are announced in open court) so that they have a little extra time to read and digest the opinions before reporting on them.⁸⁰

Reporters at the Supreme Court are not allowed to use cell phones or any other electronic devices from the courtroom where decisions are announced. This ban means that reporters must take notes on the proceedings by long-hand, and they are unable to transmit information from the courtroom to their editors—or the public—without leaving the courtroom. In order to facilitate the rapid transmission of the Court’s decisions to the public, some reporters choose to listen to the opinion announcements in the Court’s Public Information Office, where live audio from the Court can be heard.⁸¹ Linda Greenhouse has described the press room as “about the size of a subway car,” and when reporters are awaiting the release of an opinion in a high-profile case—as they were for *Bush v. Gore* in 2000—that room can become “like the most crowded rush hour subway car ever.”⁸² In high-profile cases, additional reporters are often stationed on the courthouse steps waiting to do a stand-up interview once they hear word of the decision from their colleagues inside the Court or obtain a copy of the opinion from a runner.⁸³ The moment the decision is announced in the courtroom, the staff in the Public Information Office opens a huge white box and hands

79. *Id.*

80. *Id.* At the symposium, Lyle Denniston and Dahlia Lithwick appeared to endorse a lock-up idea; Dahlia Lithwick also suggested an advance-notice policy; and Tony Mauro expressed concern that advance notice might disrupt the markets.

81. *How the Court Works: News Media*, SUP. CT. HIST. SOC’Y, <http://www.supremecourthistory.org/how-the-court-works/how-the-court-work/news-media> (last visited Jan. 26, 2013).

82. Linda Greenhouse, *Thinking about the Supreme Court After Bush v. Gore*, 35 IND. L. REV. 435, 435 (2002). Greenhouse also complained that the Court personnel refused to provide reporters with any indication about when the opinion might be released, leading them all to remain captive in the press room for hours while they fielded anxious calls from their editors and fought off starvation until a few reporters took up a collection for pizza. *Id.*

83. Goldstein, *supra* note 62.

out copies of the slip opinions. The reporters then scramble to get to their computers to read and report the decisions via telephone or over the Internet to their editors, or they rush to the Court plaza to do a “stand up” report.⁸⁴ After the Court began posting its opinions on its website, it stopped e-mailing copies of the opinions to reporters because it assumed that reporters could get copies of the opinions online.⁸⁵ As noted above, however, the release of the healthcare decision demonstrated that the website is not infallible.

Another stumbling block in the Court’s public communications is its outdated press credentialing system. The Court adheres to a rather antiquated method of press credentialing prevalent in the nation’s Capital. The Court credentialing process is derivative; it requires applicants to already possess active congressional press credentials (or White House credentials, which are also derivative of congressional credentials). Only twenty-six journalists have permanent Court credentials, and the rest must use temporary day passes.⁸⁶

Obtaining congressional press credentials can be difficult—if not impossible—for many publications. There are two different procedures to obtain press accreditation in Congress, and the one required depends on the type of publication. For daily publications, the Senate Rules Committee works with the Senate Press Gallery staff to oversee the credentialing process for the Standing Committee of Correspondents, which issues the three types of congressional press passes for daily publications: a one-day pass, a temporary pass, and a permanent pass.⁸⁷ An applicant must be a “full-time, paid correspondent” employed by a news organization “whose principal business is the daily dissemination of original news and opinion of interest to a broad segment of the public, and which has published continuously for 18 months.”⁸⁸ For magazines,

84. *Id.*; *How the Court Works*, *supra* note 81; Nick Judd, *The Fast-Paced Frenzy of a Low-Tech Supreme Court*, ABC NEWS (June 28, 2012), <http://abcnews.go.com/Politics/OTUS/fast-paced-frenzy-low-tech-supreme-court/story?id=16664707>; Sarah Kliff, *How Will You Know If Obamacare Still Stands Tomorrow? Probably from Lyle*, WONKBLOG (June 27, 2012, 11:14 AM), <http://bit.ly/how-you-will-know-if-obamacare-still-stands>.

85. Goldstein, *supra* note 62.

86. Tenore, *supra* note 66.

87. *Rules Governing the Press Gallery*, U.S. SENATE DAILY PRESS GALLERY, <http://www.senate.gov/galleries/daily/rules2.htm> (last visited Jan. 26, 2013).

88. *Id.* The rules also deem eligible full-time, paid employees of news organizations with “General Publications periodicals mailing privileges under U.S. postal service rules.” *Id.* Periodical publications can receive mailing privileges if they intend to distribute indefinitely and on a regular basis information of a general or specific nature. *See* U.S. POSTAL SERV., HANDBOOK DM-204 (2002), <http://about.usps.com/handbooks/dm204.pdf>.

newsletters, nondaily newspapers, and online publications, accreditation is handled through the Periodical Press Gallery, which is currently controlled by the House (it rotates between each body periodically). New applicants can be deterred due to the lengthy application process, which can take up to a year.⁸⁹ The Press Gallery undergoes a screening that adheres to five rules and six regulations, which mandate that applicants be employed by a periodical that is published for profit and is supported chiefly by advertising or by subscription.⁹⁰ Nonprofit organizations are permitted to apply for credentials provided that they “operate independently of any government, industry, or institution” and do not engage “directly or indirectly” in any lobbying.⁹¹ Some blogs and Internet-only news outlets like *Talking Points Memo*, the *Huffington Post*, and the *Daily Caller* have been able to satisfy these standards and have received credentials.⁹² Other online-only publications may rely less on subscriptions or broad-based advertising for their revenue and can have trouble receiving credentials from Congress.⁹³

With a changing multimedia environment, as well as changing funding models for print and online resources, Congress has come under fire for what seems to be a byzantine and arcane accreditation process. Senator Kerry held a hearing on this issue in 2009, but reform efforts have stalled. At this hearing, Senator Kerry noted that the Standing Committee of Correspondent’s role in credentialing dates back to 1877 and warned that Congress should “be careful about how we change” the system of accreditation to treat online reporters fairly.⁹⁴

The current credentialing system also does not account for the changing structure of news outlets. The best example of the current problems with the credentialing system is the inability of SCOTUSblog to obtain press credentials. For ten years, this website—begun by Tom Goldstein and Amy Howe as an effort to drive business to their law firm—has served as the go-to source for information about the Court.⁹⁵

89. *New Applicant Instructions*, U.S. HOUSE REPRESENTATIVES PERIODICAL PRESS GALLERY, <http://periodical.house.gov/app-new.shtml> (last visited Jan. 26, 2013).

90. *Rules and Regulations*, U.S. HOUSE REPRESENTATIVES PERIODICAL PRESS GALLERY, <http://periodical.house.gov/rules.shtml> (last visited Jan. 26, 2013).

91. *Id.*

92. Tenore, *supra* note 66.

93. *Id.*

94. Josh Stearns, *The Debate Over Press Credentials*, STORIFY, <http://storify.com/jcstearns/the-debate-over-press-credentials> (last visited Jan. 26, 2013).

95. Staci D. Kramer, *SCOTUSblog: After a Decade, an Overnight Sensation*, PAIDCONTENT (Jun. 29, 2012, 7:03 PM), <http://paidcontent.org/2012/06/29/scotusblog-after-a-decade-an-overnight->

Last spring, on the day CNN and FOX famously bungled the reporting of the Court's anxiously awaited health care decision,⁹⁶ over a million readers benefited from SCOTUSblog's careful and reliable reporting and legal analysis.⁹⁷ The website, now sponsored by Bloomberg Law, has four full-time staffers, ten additional active contributors, and over 100 experts who contribute at least one piece during the Court's Term.⁹⁸

Ironically, despite the crucial role SCOTUSblog plays in informing the public, it cannot obtain a press pass for its reporters to enter the courtroom to hear oral argument and the announcement of decisions. Although its reporter Lyle Dennison has a press pass, this is only because he also works for WBUR in Boston and is able to obtain a press pass as a result of that affiliation.⁹⁹ Senate Press Gallery Director Joe Keenan has said that the problem for SCOTUSblog is the requirement that the applicant not be involved in any lobbying or paid advocacy or promotion work before Congress or any federal government department.¹⁰⁰ Keenan reported that in June 2010 his office concluded that the website was not completely separate from the law firm where Goldstein and a number of other authors for the website practiced.¹⁰¹ Goldstein contests this explanation, however. He recently stated that he was told the website should not bother applying for press credentials because it was not supported by advertising or subscriptions.¹⁰²

Although it seems clear that SCOTUSblog should receive permanent press credentials, it will not necessarily be easy for Congress to determine, in our rapidly changing media environment, who or what constitutes "the press."¹⁰³ It is enough for purposes of this Article to

sensation.

96. Paul Farhi, *Early Reports on Health-Care Decision from CNN, Fox Overturned One Mandate: Accuracy*, WASH. POST (June 28, 2012), <http://wapo.st/WaUOaO>.

97. See Rebecca Rosen, *Internet Gone Wild! SCOTUSblog Explodes with Health-Care Enthusiasm*, ATLANTIC (Jun. 28, 2012, 11:34 AM), <http://bit.ly/internet-gone-wild-SCOTUSblog>.

98. Dan Diamond, *Regardless of ObamaCare Decision, SCOTUSblog Has Already Won*, FORBES (Jun. 24, 2012, 2:43 PM), <http://www.forbes.com/sites/dandiamond/2012/06/24/regardless-of-obamacare-decision-scotusblog-has-already-won>.

99. Tenore, *supra* note 66.

100. *Id.*

101. *Id.*

102. *Id.*

103. For a more extensive discussion of the difficulties of defining what constitutes "the press," see Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 564-84 (2007) (discussing the various approaches that statutes, courts, and commentators have taken in defining who can invoke the reporter's privilege); see also David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 436-46 (2002) (discussing the various approaches taken

note, however, that something is clearly wrong with a credentialing system that excludes one of the best sources of information about the Supreme Court.

B. Justices' Personal Use of New Technology

The Justices are not as technologically ignorant as many have depicted. Although their formal communications with each other remain quaintly old-fashioned, increasingly the Justices are using modern technology in both their professional and personal lives. None of the Justices appears to be a technophile, but they do seem to be just about as familiar with technology as anyone their ages might be.

At the Court, the Justices still retain traditional methods of communicating with each other. The Justices do not use e-mail to circulate draft opinions or to indicate their “joins,” suggestions for revision, or plans to write separately; instead, they rely on their chamber aides to carry hard copies of whatever the Justices wish to communicate with other chambers.¹⁰⁴ This respect for tradition and ritual permeates much of what occurs at the Court.¹⁰⁵

The Court was rather slow in getting Internet access and remains very concerned about cybersecurity. When the Court decided to provide access to the Internet in 2002, it went so far as to install an additional computer at each desk for this purpose.¹⁰⁶ To this day the Court maintains two terminals at each desk with a switch that allows users to alternate between the systems.¹⁰⁷ The Court also maintains two separate e-mail systems; one operates only internally within the Court, and the other that operates externally.¹⁰⁸ This cumbersome approach effectively

to defining “the press”).

104. See Debra Cassens Weiss, *Justices Don't Communicate by Email, Kagan Says*, ABA J. (Oct. 17, 2011), http://www.abajournal.com/news/article/justices_dont_communicate_by_email_kagan_says (reporting Justice Kagan's remarks that while the Supreme Court clerks use e-mail to talk to each other, the Justices “ignore 25 years of technology” and “prefer to communicate via hand-delivered memos”); see also WILLIAM H. REHNQUIST, *THE SUPREME COURT* 231 (2001) (mentioning the use of aides to carry communications to other chambers).

105. See McElroy, *supra* note 52, at [[19–23]] (describing in detail the various traditions and rituals at the Court).

106. E-mail from Linda Stout, Secretary of Justice Souter, to Mary-Rose Papandrea, Assoc. Professor, Bos. Coll. Law Sch. (Nov. 12, 2012) (on file with author). From my own experience as a law clerk in 1997, I remember the internal-only e-mail system.

107. *Id.*

108. E-mail from Linda Stout, Secretary of Justice Souter, to Mary-Rose Papandrea, Assoc. Professor, Bos. Coll. Law Sch. (Nov. 21, 2012) (on file with author).

walls off the Court's internal e-mail system from the outside world and protects the Court's documents from hackers.

Although the Justices hew strongly to traditions and rituals of the Court, the way they do their work has been evolving with the times. To be sure, some Justices are slower to evolve than others. Justice Souter, who retired in 2009, famously refused to use a computer, much less the Internet or social media. Although he has said that he now owns a Kindle and has used an iPad, he does not appear very comfortable with the devices. Indeed, at a recent Harvard reunion, he entertained his former classmates with a story about how he tried to use an iPad.¹⁰⁹ He said it was "terrific," "until he found he couldn't turn it off, and had to place it in a bathroom with the door closed."¹¹⁰ Chief Justice Roberts, who at fifty-eight years old is over two decades younger than Justice Souter, says he knows how to use a computer but prefers to write his opinions out by long hand. He explains that he was "just a couple years too late" to learn how to use a computer to write because the "technological revolution was slightly behind [him]" when he was in college and law school.¹¹¹ But age does not always determine technological proficiency. Justice Stevens, who retired from the Court in 2007 at the age of ninety, was reportedly at least as computer-savvy as his clerks and was using a computer as far back as the early 1990s.¹¹²

When it comes to reading briefs, conducting legal research, and writing opinions, many of the Justices are increasingly embracing new technology. Justice Scalia said he uses his computer so much that he can

109. Elaine McArdle, *Justices Breyer and Souter Reminisce on Law School and High Court Experience*, HARV. L. SCH. (Nov. 4, 2011), <http://law.harvard.edu/news/spotlight/alumni-pursuits/breyer-and-souter-reminisce.html>.

110. *Id.*

111. *Supreme Court Project*: Interview by Susan Swain with John Roberts, Chief Justice, U.S. Supreme Court, in Wash., D.C. (C-SPAN television broadcast Oct. 9, 2009), available at <http://www.c-spanarchives.org/clip/678298> (a transcript of this interview may be found at <http://supremecourt.c-span.org/assets/pdf/JRoberts.pdf>); *Contra Supreme Court Project*: Interview by Susan Swain with Sonia Sotomayor, Assoc. Justice, U.S. Supreme Court, in Wash., D.C. (C-SPAN television broadcast Oct. 9, 2009), available at <http://www.c-spanarchives.org/program/BreyerT> (Justice Sotomayor saying that she uses a computer to draft her opinions) (a transcript of this interview may be found at <http://supremecourt.c-span.org/assets/pdf/SSotomayor.pdf>).

112. Timothy B. Lee, *Farewell, Stevens: The Supreme Court Loses Its Cryptographer*, ARS TECHNICA (June 28, 2010, 1:45 PM), <http://arstechnica.com/tech-policy/2010/06/the-supreme-court-loses-its-cryptographer/2>; Tony Mauro, *You Can Thank (or Curse) Stevens for Internet Freedom*, USA TODAY (Apr. 20, 2010, 4:42 PM), http://www.usatoday.com/news/opinion/forum/2010-04-21-column21_ST1_N.htm.

“hardly write in longhand anymore.”¹¹³ Justices Scalia and Kagan confessed to using an iPad and Kindle, respectively, to read legal briefs.¹¹⁴ As Justice Kagan has explained, there can be upwards of fifty briefs for a single case. “So there is a lot of reading,” she said. “And you know that’s a big part of the job and if a Kindle or an iPad can make it easier, that’s terrific.”¹¹⁵ Scalia has also indicated that “[w]hen he has to take materials home for work, he uses a thumb drive, or accesses the Court computer system remotely.”¹¹⁶ Scalia has said, “I don’t have to schlep the briefs around. Oh, it’s a brave new world.”¹¹⁷

Scholarly attention is recently focusing on the Court’s use of the Internet to conduct legal research,¹¹⁸ although it is often unclear whether it is the Justices themselves doing this research or whether it is the law clerks or other court personnel. Over a decade ago, Fred Schauer and Virginia Wise’s research revealed that the Court’s access to Lexis and Westlaw correlated with the Court’s increased citation to “nonlegal” authorities, like magazines and newspapers.¹¹⁹ Now that online research extends far beyond legal databases, Justices are frequently finding—and citing—a broad range of authorities on the web, from highly prestigious and reputable journals and newspapers, “to blog posts, sporting magazines, interest group websites, and (in lower courts) even to Wikipedia.”¹²⁰ Scholars have noted that the Court’s reliance on “Google” searches is potentially disconcerting because it may amount to fact-finding outside of the official record of a case, without input from the parties or challenge from expert opinion.¹²¹

Although it appears that most of the Justices now regularly use a computer to do their work and conduct research online—and some

113. David Lat, *Justice Scalia at the Federalist Society Fête*, ABOVETHELAW.COM (Nov. 20, 2010), <http://abovethelaw.com/2010/11/justice-scalia-at-the-federalist-society-fete>.

114. Jan Crawford, *Kagan’s Kindle v. Scalia’s iPad*, CBS NEWS (Dec. 13, 2010, 10:28 AM), http://www.cbsnews.com/8301-504564_162-20025455-504564.html.

115. *Id.*

116. Lat, *supra* note 113.

117. Robert Barnes, *Scalia on Cameras, Retirement and the ‘Brave New World,’* WASH. POST (Nov. 19, 2010, 11:49 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/19/AR2010111903067.html>.

118. See Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012).

119. Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 497 (2000).

120. Larsen, *supra* note 118, at 1300.

121. *Id.* at 1301–05.

Justices even use modern devices like iPads, iPods, and smart phones¹²²—the Justices’ personal use and understanding of modern communications technology is hardly cutting edge. For example, Justice Scalia—who appears to be one of the more technologically savvy of the bunch¹²³—does not appear to be familiar with Twitter. When asked at a Senate Judiciary Committee meeting about whether he has ever considering tweeting, Scalia responded, “I don’t even know what it is. I’ve heard it talked about.”¹²⁴ He added that his wife’s pet name for him is “Mr. Clueless.”¹²⁵ Justice Breyer’s public statements indicate that he is more familiar with Twitter, revealing that he learned about the role of Twitter in the Iranian uprisings from his son—on the other hand, he has referred to tweets as “twitters.”¹²⁶ Chief Justice Roberts has stated that he is not entirely sure what Twitter is.¹²⁷

The Justices’ apparently unfamiliarity with Twitter seems to reflect their lack of experience with social networking more generally. In June 2011, Chief Justice Roberts said that he does not believe any members of the Court have a Facebook page,¹²⁸ but Justice Breyer told a congressional committee just two months earlier that he uses Facebook to communicate with his family.¹²⁹ Although Chief Justice Roberts does not use Facebook himself, he appears to be very aware of its potential dangers: he instructs incoming clerks to refrain from posting updates about work on their social media accounts lest they inadvertently reveal confidential information about the Court.¹³⁰ Justice Breyer has revealed that he watched the movie *The Social Network* and “couldn’t even

122. In 2007, Justice Thomas indicated that a number of the Justices used Blackberries. *Fin. Servs. & Gen. Gov’t Appropriations for 2008: Hearings Before the Subcomm. on Fin. Servs. & Gen. Gov’t Appropriations: of the H. Comm. on Appropriations*, 110th Cong. 19 (2007) (statement of Clarence Thomas, Assoc. Justice, U.S. Supreme Court).

123. Crawford, *supra* note 114 (reporting Justice Scalia’s comments that he uses an iPad to read legal briefs and loads classical music onto his iPod).

124. Dann, *supra* note 9.

125. *Id.*

126. *Id.* (quoting Justice Breyer as saying that his son introduced him to Twitter during the Iranian election protests, and he read “Twitters” from Iranians for two hours).

127. Emil Protalinski, *US Supreme Court: We’re Not on Facebook, What’s Twitter?*, ZDNET (June 28, 2011, 6:06 AM), <http://www.zdnet.com/blog/facebook/us-supreme-court-were-not-on-facebook-whats-twitter/1756> (quoting Chief Justice Roberts as saying he does not believe anyone at the Court tweets, “whatever that is”).

128. *Id.*

129. Ward, *supra* note 65. During his congressional appearance, Justice Breyer referred to the world’s most popular social networking site as “the Facebook.” *Id.*

130. Protalinski, *supra* note 127.

understand [it],”¹³¹ although it is not clear what exactly he could not understand.

What we can glean about the Justices’ use of technology indicates that it is consistent with what we might expect from people their age. The current active Justices’ ages range from fifty-two (Justice Kagan) to seventy-nine (Justice Ginsburg). Justices Sotomayor (fifty-eight), Alito (sixty-two), and Thomas (sixty-four), as well as Chief Justice Roberts (fifty-seven), are on the younger end of the spectrum; Justices Scalia, Kennedy, and Breyer are in their mid-70s.¹³² The Pew Research Center reports that as of April 2012, 53% of American adults ages sixty-five and older use the Internet or e-mail. Among adults ages fifty to sixty-four, 77% use the Internet. “As of February 2012, one-third (34%) of internet users ages 65 and older use social networking sites such as Facebook, and 18% do so on a typical day.”¹³³ Only 14% of adults ages fifty to sixty-four own a tablet computer and only 16% own an e-reader.¹³⁴ A significant number of older adults use Facebook, MySpace, or LinkedIn—51% of adults between the ages of fifty to sixty-four and 33% of those over sixty-five years old¹³⁵—but much smaller percentages of older adults use Twitter. A recent Pew survey reports that only 9% of adults between the ages of fifty to sixty-four and 4% of adults over sixty-five use Twitter.¹³⁶

Indeed, the Justices may be more familiar with technology than many older adults because their law clerks help educate them. Justices Thomas and Kennedy have publicly noted that the clerks bring their technological knowledge to the Court and push for better technology with which to do their jobs.¹³⁷ This is not encouraging, however, to those

131. Nitasha Tiku, *Justice Breyer Confounded by Watching The Social Network*, DAILY INTELLIGENCER (Nov. 17, 2010, 3:50 PM), http://nymag.com/daily/intel/2010/11/justice_breyer_thoroughly_conf.html.

132. *Biographies of Current Justices of the Supreme Court*, U.S. SUP. CT., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Jan. 26, 2013).

133. KATHRYN ZICKUHR & MARY MADDEN, PEW INTERNET & AM. LIFE PROJECT, OLDER ADULTS AND INTERNET USE, at 2 (June 6, 2012), http://www.pewinternet.org/~media/Files/Reports/2012/PIP_Older_adults_and_internet_use.pdf.

134. *Id.* at 7.

135. KATHRYN ZICKUHR & MARY MADDEN, PEW INTERNET & AM. LIFE PROJECT, 65% OF ONLINE ADULTS USE SOCIAL NETWORKING SITES, at 4 (Aug. 26, 2011), <http://pewinternet.org/~media/Files/Reports/2011/PIP-SNS-Update-2011.pdf>.

136. AARON SMITH & JOANNA BRENNER, PEW INTERNET & AM. LIFE PROJECT, TWITTER USE 2012, at 3 (May 31, 2012), http://pewinternet.org/~media/Files/Reports/2012/PIP_Twitter_Use_2012.pdf.

137. Mersky & Percy, *supra* note 39, at 569.

commentators who have argued that members of the Supreme Court need to be more than minimally familiar with the modern communications technology that plays such an important role in our society.¹³⁸ In addition, perhaps more important than a detailed understanding of the relevant technology is an understanding of the social norms relating to that technology.¹³⁹

III. THE COURT'S RECORD IN CASES INVOLVING COMMUNICATIONS TECHNOLOGY

One way of examining the Court's reluctance to embrace new communications technology is by what the Court has said about technology during oral arguments and in its decisions. If the Court does not understand technology, or exhibits some sort of reluctance to engage with technology, that might help us understand why as an institution it is so reluctant to embrace technology to communicate with the public. My cursory review of cases involving new technology—primarily First and Fourth Amendment cases, as well as copyright cases—reveals that by the time the Court issues an opinion, it demonstrates an admirable understanding of the technology at issue. At the same time, in the Fourth Amendment context, the Court tends to be very cautious in cases involving new technology and frequently issues narrow decisions. In First Amendment cases, the Court as a whole has become increasingly hostile to arguments in favor of new medium-specific First Amendment standards and shows little deference to legislative findings in the face of developing technologies. The Court's First Amendment decisions can

138. See Mark Grabowski, *Are Technical Difficulties at the Court Causing a "Disregard of Duty"?*, 3 J.L., TECH. & INTERNET 1, 3 (2011) (arguing that it is "crucial for our most important decision-makers, Supreme Court Justices, to have at least a rudimentary understanding of technologies most Americans cannot imagine living without"); Arthur Bright, *A Plea for a Tech-Savvy Justice*, CITIZEN MEDIA L. PROJECT (Apr. 21, 2010), <http://www.citmedialaw.org/blog/2010/plea-tech-savvy-justice>; Brett Trout, *The United States Supreme Court v. Technology*, BLAWGIT (Apr. 20, 2010), <http://blawgit.com/2010/04/20/the-united-states-supreme-court-v-technology> (arguing that it is "imperative that courts fully inform themselves" not only about the technologies at issue in the case but also about technology as a whole). Richard Baum has suggested that term limits for Supreme Court Justices might help alleviate this problem. Richard Baum, *The Founding Fathers v. The Supreme Court*, REUTERS (May 19, 2010), <http://blogs.reuters.com/gregg-easterbrook/2010/05/19/the-founding-fathers-v-the-supreme-court> ("Term limits further would prevent the Supreme Court from being a geriatric institution whose members are out of touch with the country's culture and concerns.").

139. Grabowski, *supra* note 138, at 10 (quoting Rebecca Tushnet as arguing that it is perhaps even more important for the Court to understand "how different social groups experience the world").

also be characterized as cautious, however, in that they reflect a reluctance to change and a steadfast commitment to protecting speech in the face of uncertainty.

A. Cases the Court Doesn't Decide

Before considering how the Court treats technology in its decisions, it is worth pausing for a moment to consider the cases involving new technology that the Court does *not* decide. The Court often engages in the “avoidance” method when it comes to new technology. Often when the Court finally decides an issue involving new technology, it is only after decades have passed.¹⁴⁰ For example, the Court waited almost six decades after the invention of the telephone to address the Fourth Amendment implications of wiretaps¹⁴¹—and ultimately ended up reversing its decision almost forty years later.¹⁴² Less dramatically, the Court did not address the use of pen registers until 1979 even though they had been in use since the 1960s.¹⁴³

Currently the Court has failed to provide guidance on a number of importance legal issues involving new technology, despite disagreement in the lower courts. Although we cannot know for certain why the Court has decided to deny cert in a number of areas involving new technology, it does appear that the Court prefers to wait to take on these issues until it feels the lower courts have had ample opportunity to consider the cases and the technology has evolved sufficiently. These delays can be maddening as circuit splits develop, and the issues cry out for resolution. For example, the Court has declined to address whether the First

140. See, e.g., Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 869 (2004) (pointing out that the Court did not address the constitutionality of pen registers until 1979 even though they had been in widespread use by the 1960s, and noting how long it took the Court to address wiretapping in the first place). To be sure, there are instances when the Court did not hesitate to decide issues involving new technology before the technology—and the social norms surrounding them—had fully developed. The Court’s decisions in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), are two examples. A comprehensive review of the Court’s certiorari decisions is beyond the scope of this Article, but it might be that the Court feels more pressure to resolve cases involving new technology when lower-court rulings threaten business interests and less pressure when cases involve individual rights. *But see* Ronald Wright, *The Abruptness of Acton*, 36 CRIM. L. BULL. 401, 401–07 (2000) (noting that the Court decided cases addressing the constitutionality of student drug testing before the practice was widespread and before lower courts had much opportunity to address the issue).

141. *Olmstead v. United States*, 277 U.S. 438 (1928).

142. *Katz v. United States*, 389 U.S. 347 (1967).

143. *Smith v. Maryland*, 442 U.S. 735 (1979); *see also* Kerr, *supra* note 140.

Amendment limits the ability of schools to punish students for their online expression.¹⁴⁴ Although a circuit split has emerged on this issue, the Court is no doubt concerned that it remains too soon to weigh in on an issue where the technology is changing so rapidly. The Court has also failed to take on any cases involving personal jurisdiction based on Internet contacts¹⁴⁵—even though the issue has been brewing since the mid-1990s.

Although I have not undertaken a systematic review of the Court's cert denials to determine how many other times and in which contexts the Court has declined the opportunity to review cases involving new technology, it is plain from the few cases that the Court has resolved involving technology and new media that the Court has not been aggressive in this area. This uncertainty may be unsettling to litigants (and anyone else who attempts to structure their conduct in light of the relevant legal rules). In some cases, the Court's caution may be justified, at least up to a point. For example, it may have been wise for the Court to hold off on resolving a case involving personal jurisdiction based on Internet contacts given how much the technology has changed in the many years since the first courts decided Internet jurisdiction cases in the mid-1990s.¹⁴⁶

Indeed, the Court may be reluctant to take on cases involving new technology out of fear that any opinion it may issue will be outdated within a few years. As Professor Stuart Benjamin has noted, "Rapidly changing facts weaken the force of stare decisis by undermining the stability of precedents. Appellate opinions are only as robust as the facts on which they are based. When those facts evaporate, the opinion on which they rest is weakened as well."¹⁴⁷

Indeed, as Benjamin has demonstrated, the facts can change so quickly that the record developed at the trial level is stale by the time the

144. Bill Mears, *High Court Rejects Appeals on Public Prayers, Student Speech*, CNN (Jan. 17, 2012), http://articles.cnn.com/2012-01-17/us/scotus-appeals_1_appeals-court-student-speech-high-court.

145. *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1228 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1101 (2012); *Kauffman Racing Equip., L.L.C. v. Roberts*, 930 N.E.2d 784 (Ohio 2010), *cert. denied*, 131 S. Ct. 3089 (2011).

146. *E.g.*, *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) (setting forth a highly influential—but now outmoded—test for personal jurisdiction based on Internet contacts).

147. Stuart Minor Benjamin, *Stepping Into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 272 (1999).

case reaches the Supreme Court.¹⁴⁸ For example, in *Reno v. ACLU*,¹⁴⁹ which struck down attempts to regulate indecency on the Internet, the district court had made a factual finding that age verification was not possible on the Internet, but by the time the case made its way to the Court, such services had proliferated.¹⁵⁰ In addition, the government in *Reno* attempted to rely on the Court's prior ruling in *FCC v. Pacifica Foundation*¹⁵¹ to support the Internet indecency regulations, arguing that the Internet invaded the home in the same way broadcast television did. The Court rejected that argument, relying on the district court's holding that Internet communications do not appear on an individual's computer "unbidden."¹⁵² By the time the Court had decided the opinion, however, the technology had changed and "push" technology had been developed that requires no action from the user to receive information.¹⁵³ Similarly, in *Ashcroft v. ACLU*, in which the Court considered, among other things, the effectiveness of filtering technology, the Court noted that "the factual record does not reflect current technological reality—a serious flaw in any case involving the Internet."¹⁵⁴

Scholars have lively debates about what the Court should do in the face of constantly changing technology. One possibility would be simply not to take any cases that involve new technology, at least until things have settled down and no substantial change is going to take place. This avoidance approach can be frustrating for litigants, and in cases involving arguments that a statute is unconstitutional, it can have the effect of yielding too much power to the legislative branches.¹⁵⁵ In addition, it is difficult to declare with any degree of certainty that a certain type of technology will not change or develop in any meaningful way in the future, or, perhaps more importantly, that the common use and societal attitudes toward any particular technology will not continue to change or develop.¹⁵⁶

148. *Id.* at 290–96 (discussing the changes in technology between the trial court decision and the issuance of the Court's opinion).

149. 521 U.S. 844 (1997).

150. Benjamin, *supra* note 147, at 291–92.

151. 438 U.S. 726 (1978).

152. Benjamin, *supra* note 147, at 293.

153. *Id.*

154. 542 U.S. 656, 671 (2004).

155. Benjamin, *supra* note 147, at 309.

156. *See, e.g., City of Ontario v. Quon*, 130 S. Ct. 2619, 2629–30 (2010) (stating that it is important to proceed cautiously in cases involving new technology given not only the potential for changes in the technology but also the social norms relating to that technology).

As much as we might want resolution of new legal issues, early intervention from the Court might result in decisions based on imperfect understanding of the communications environment. Waiting for the technology to develop, for cultural understandings regarding that technology to take root, and for the lower courts to weigh in with their views is prudent.¹⁵⁷ Furthermore, as Lyrissa Lidsky points out in her essay for this Symposium, new media might be better off without the Court's intervention.¹⁵⁸ In addition, in all areas of the law the Court wants to be sure that when it grants a petition for certiorari, the case is a good "vehicle" for deciding the issues that have divided the lower courts. Most importantly for the purposes of this Article, regardless of whether the Court's avoidance approach is justifiable, there can be no doubt that the Court is very cautious about taking cases that involve new technology.

B. Oral Argument

Journalists and bloggers have often poked fun at the Justices for their questions during oral arguments in cases regarding technology. Because oral argument is largely unscripted, it is not surprising that the public has a chance to get a glimpse of the Justices' true feelings for and understanding of technology.

The Justices were somewhat recently ridiculed about the questions they asked during oral argument in *City of Ontario v. Quon*,¹⁵⁹ which addressed whether a police department violated its employee's privacy rights when it examined personal text messages sent from a device owned by the department.¹⁶⁰ In the case, Sergeant Jeff Quon and three other plaintiffs, including his wife and mistress, were employed with the Ontario police department and sued the Chief of Police for reading sexually explicit messages that were sent via pagers provided by the department.

During oral argument, the Justices asked a number of questions that

157. See Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1752 (1995) ("[The Court] should do everything it can to stand back from deciding these conflicts until the nature of these conflicts is well mapped, well constructed, well understood.").

158. See Lyrissa Lidsky, *Not a Free Press Court*, 2012 BYU L. REV. 1819.

159. See, e.g., Toby Harnden, *US Supreme Court Needs Technology Tuition*, TELEGRAPH (Apr. 22, 2010, 12:45 AM), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/7617031/US-Supreme-Court-needs-technology-tuition.html>.

160. Ashby Jones, *Our Tech-Savvy Supreme Court*, WALL ST. J.L. BLOG (Apr. 19, 2010, 5:56 PM), <http://blogs.wsj.com/law/2010/04/19/our-tech-savvy-supreme-court>.

appeared to reveal their struggle to understand the technology at issue. For example, Chief Justice John Roberts asked what the difference was “between a pager and e-mail.”¹⁶¹ In his defense, his question may have been directed at determining whether a workplace policy that protected the privacy of an employee’s e-mails would also encompass a right of privacy for messages sent on pagers.¹⁶²

Other questions the Justices asked are less easily explained. Chief Justice Roberts asked what would happen if a text message was sent to an officer at the same time he was sending one to someone else: “[D]oes the one kind of trump the other, or do they get a busy signal?”¹⁶³ In addition, Roberts stated that he would not have known about the role of a service provider routing the messages from the sender to the recipient: “I wouldn’t think that [some company was going to have to process the message]. I thought, you know, you push a button; it goes straight to the other thing.”¹⁶⁴ Justice Scalia—perhaps simply attempting to get a laugh—echoed the Chief’s comment and remarked, “You mean it doesn’t go right to the other thing?”¹⁶⁵ Shortly thereafter Justice Scalia made another comment that may have been a joke—or may indicate his unfamiliarity with pagers: “Could Quon print these . . . spicy conversations out and circulate them among his buddies?”¹⁶⁶

Notably, the Justices were not the only ones who seemed to struggle to understand the technology at issue in *Quon*. Dieter Dammeier, the lawyer for police officer Quon, stumbled when he was asked whether the officers had any ability to delete the messages permanently after they had been sent so that the police department would not be able to retrieve them later from the wireless carrier. At first, when Justice Alito asked him whether an officer can delete messages so that they cannot be

161. Transcript of Oral Argument at 29, *Quon*, 130 S. Ct. 2619 (No. 08–1332), http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1332.pdf.

162. That said, Chief Justice Roberts has made other comments at oral argument that reveal his discomfort with new technology. Although this Article does not address the Court’s understanding of technology in patent cases, it is worth noting that in one patent case, Chief Justice Roberts asked, “If you punched in in [sic] your search station, you know, give me all the bakers in Washington, would that be patentable?” Transcript of Oral Argument at 36, *Bilski v. Kappos*, 130 S. Ct. 3218 (2010) (No. 08–964), http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-964.pdf. It is unclear whether he intended to say “search engine” instead of “search station.” Because Chief Justice Roberts does not use his computer for word processing, it is entirely possible that he regards his computer as a “search station.”

163. Transcript of Oral Argument, *supra* note 161, at 44.

164. *Id.* at 49.

165. *Id.*

166. *Id.*

recovered, the lawyer responded, “Sure. Yes. . . . They can delete them. Just like if they received a letter, they could be put in the shredder.”¹⁶⁷ When Justice Alito asked him a few moments later whether he was sure about whether officers could delete the messages permanently, Dammeier admitted, “Honestly, I’m not—that’s not in the record, and the—how that pager works as far as deleting, I couldn’t be certain that it would be deleted forever.”¹⁶⁸

The Justices have asked memorable questions in various other cases that reveal their lack of experience with technology. For example, in a recent violent video game case, Justice Kennedy asked the California Attorney General why V-chips would not be sufficient to give parents the ability to control what violent video games their children play.¹⁶⁹ The lawyer correctly responded that “the V-chip is limited to television.”¹⁷⁰ Justice Kennedy was also ridiculed when he indicated in the *Citizens United* oral argument that Kindle readers received their content from satellites (rather than wireless cellular networks).¹⁷¹ In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, Justice Souter admitted that he did not use an iPod, but he nevertheless revealed he was well aware how that device could be put to legitimate—and illegitimate—uses:

I may not understand what people are doing out there, but it’s certainly not clear to me. I know perfectly well I could go out and buy a CD and put it on my iPod, but I also know perfectly well that if I can get the music on the iPod without buying the CD, that’s what I’m going to do. And I think it’s reasonable to suppose that everyone else would guess that.¹⁷²

It is clear that at least some of the Justices carefully read the advocates’ briefs and lower court opinions when they are trying to understand the communications medium under consideration. In the

167. *Id.* at 51.

168. *Id.* at 53.

169. Transcript of Oral Argument at 25, *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011) (No. 08–1448), http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1448.pdf.

170. *Id.*

171. Transcript of Oral Argument at 28, *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010) (No. 08–205), http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205.pdf.

172. Transcript of Oral Argument at 14, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (No. 04–480), http://www.supremecourt.gov/oral_arguments/argument_transcripts/04-480.pdf.

recent violent video games case, Justice Kagan asked the Attorney General for California, who was arguing that the state's restrictions on the sale of certain violent video games to minors was constitutional, what other violent video games would be covered under the statute because the only game explicitly mentioned in the California brief was "Postal 2."¹⁷³ In that same case, Chief Justice Roberts noted in the oral argument that some violent video games involve "people actively hitting schoolgirls over the head with a shovel so they'll beg with mercy, being merciless and decapitating them, shooting people in the leg so they fall down—I'm reading from the district court description—pour gasoline over them, set them on fire, and urinate on them."¹⁷⁴

The public's expectations for the Justices' understanding of new technology are so low that when any of them demonstrates that they "get it," the media covering the Court goes crazy. Perhaps the best example of this came in the violent video game case, where Justice Kagan got a laugh out of a crowd and significant media attention¹⁷⁵ when she asked the California Attorney General whether the statute at issue would cover *Mortal Kombat*, adding that it is "an iconic game, which I'm sure half of the clerks who work for us spent considerable amounts of time in their adolescence playing."¹⁷⁶ Shockingly, the lawyer responded that he was not very familiar with that particular game.¹⁷⁷ Oral argument attendees and the press also enjoyed Justice Scalia's resistance to California's arguments, where he was quick to respond to the argument that the statute covered only "deviant" video games—"As opposed to what? A normal violent video game?" he asked.¹⁷⁸ In addition, Justice Scalia contended at oral argument that California was making the same argument—that depictions of violence are somehow worse than ever before and therefore entitled to less First Amendment protection—that comes up whenever there is new technology.¹⁷⁹

In perhaps the most entertaining oral argument in recent memory, the

173. Transcript of Oral Argument, *supra* note 169, at 12.

174. *Id.* at 33.

175. See Joan Biskupic, *Kagan Offers Practicality to Arguments, Settles in as New Justice*, USA TODAY (Nov. 16, 2010, 6:25 PM), <http://usat.ly/Wn1NOg>; Nina Totenberg, *The Robe Seems to Suit New Justice Kagan*, NPR (Dec. 27, 2010, 12:01 AM), <http://www.npr.org/2010/12/27/132109642/the-robe-seems-to-suit-new-justice-kagan>.

176. Transcript of Oral Argument, *supra* note 169, at 58–59.

177. *Id.* at 59.

178. *Id.* at 4.

179. *Id.* at 7–8.

Court considered whether the FCC's ban on fleeting expletives in broadcast media was constitutional despite dramatic changes in communications technology since the Court's *Pacifica* decision in 1973. Justice Kennedy asked Solicitor General Don Verilli whether he was arguing that it is still important to have a small segment of the media that is not "vulgar," even though most people do not know which channels are cable and which are broadcast.¹⁸⁰ Justice Kennedy also noted that the V-Chip was not sufficient to protect children from indecency, stating "And, of course, you ask your 15-year-old, or your 10-year-old, how to turn off the chip. They're the only ones that know how to do it."¹⁸¹ Justice Ginsburg provided a reality check about minors' exposure to vulgarity: "I think that children—that children are not going to be shocked by [expletives] the way they might have been a generation ago" because they are hearing them on the street, from their big brothers.¹⁸² They are "in common parlance today."¹⁸³ Even Justice Alito was aware of how broadcast television had changed: "Well, broadcast TV is . . . living on borrowed time. It's not going to be long before it goes the way of vinyl records and eight-track tapes."¹⁸⁴

The Justices have frequently expressed their concerns about the capabilities of new technology in cases involving Fourth Amendment challenges. The oral argument in *United States v. Jones* illustrated these concerns most dramatically (and the various published opinions in the case, discussed below, reflected their unease). There, in a case challenging the constitutionality of GPS monitoring of a criminal suspect where George Orwell's *1984* was mentioned at least six times, the far-reaching potential for intrusive monitoring gradually dawned on the Justices. Early in the argument, the Justices seemed horrified to hear the lawyer for the United States concede that under his theory of the case, the government could install GPS devices on the Justices' vehicles to track their movements.¹⁸⁵ After the government lawyer explained what

180. Transcript of Oral Argument at 18, *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) (No. 10–1293), http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1293.pdf ("Just because it's an important symbol for our society that we aspire to a culture that's not vulgar in—in a very small segment?").

181. *Id.* at 19.

182. *Id.* at 23.

183. *Id.*

184. *Id.* at 32.

185. Transcript of Oral Argument at 9–10, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10–1259), http://www.supremecourt.gov/oral_arguments/argument_transcripts/101259.pdf.

information a GPS collects, Justice Ginsburg expressed concern about the ability to determine whether someone was speeding with a click of the mouse.¹⁸⁶ Justice Breyer pressured the government to address his concerns about “what would a democratic society look like” if the government were tracking its citizens every hour of the day.¹⁸⁷ When the government’s lawyer responded that the Court should put off for another day consideration of “the so-called 1984 scenarios” like the one Justice Breyer offered, Justice Sotomayor interrupted him to note that the potential for such monitoring was already there.¹⁸⁸ She explained that the cost of GPS units is relatively low, and that many cars today already come with GPS installed.¹⁸⁹

The Justices also asked the defendant’s lawyer some difficult questions about how to articulate his standard in light of the current and future state of technology. For example, Justices Ginsburg and Kagan asked the lawyer to distinguish GPS units from surveillance cameras, against which his client would have no Fourth Amendment defense.¹⁹⁰ With some hesitation, Justice Kagan noted that in London, “I’m told—maybe this is wrong, but I’m told” the police can piece together pictures from surveillance cameras and track someone’s movements.¹⁹¹ (Justice Kennedy pursued a similar line of questioning but instead referred to the traffic cameras mounted at intersections through this country.¹⁹²)

Unmoved by the respondent’s frequent urging that the Court decide the case on narrow trespass grounds, Justice Kagan asked him how the Court should deal with GPS surveillance that does not involve a physical trespass but instead relies on the GPS system installed in the car.¹⁹³ Similarly, Justice Sotomayor pressed the lawyer to provide a legal rule that would address not just the case before the court but also the near-future capabilities of surveillance technology.¹⁹⁴ This time she noted the ability of satellites to “hone in on your home on a block in a neighborhood” and how it is not far off into the future when these

186. *Id.* at 22–23.

187. *Id.* at 24.

188. *Id.* at 25.

189. *Id.* at 25–26.

190. *Id.* at 36.

191. *Id.*

192. *Id.* at 47.

193. *Id.* at 46.

194. *Id.* at 39–40.

satellites will be capable of tracking people's movements.¹⁹⁵ Even Justice Alito took part in the what-about-the-future game with a specific reference to communications technology. He asked the respondent about the reasonable expectation of privacy ten years from now when "90 percent of the population will be using social networking sites, and they will have on average 500 friends, and they will have allowed their friends to monitor their location 24 hours a day, 365 days a year, through the use of their cell phones."¹⁹⁶

As they did in *Jones*, the Justices commonly use oral argument as a time to learn more about the relevant technology from the advocates as well as to explore the ramifications any ruling they might issue will have. For example, in *Kyllo v. United States*, a Fourth Amendment cases involving thermal imaging of a house, the Justices asked several questions about how thermal imaging works, what information it can collect, and how that information differs from the information available from utility records or from that which might be available without the use of technology.¹⁹⁷ These types of questions indicate that lawyers appearing before the Court play an important role in educating the Justices about technology.

C. Cases the Court Has Decided

The Court has struggled to determine how to deal with the novel issues new technology raises. In case after case involving new technology, the Court has tended to proceed cautiously.¹⁹⁸ In Fourth Amendment, copyright, and telecommunications cases, the Court tends to make narrow decisions, expressing concerns about their inability to predict how technology—and its corresponding markets—will evolve and the need to defer to the political branches. In many of its First Amendment cases outside of the telecommunications context, the

195. *Id.* at 39.

196. *Id.* at 44.

197. Transcript of Oral Argument at 8, 10, 16–17, 23–24, 28–29, 30, 32–33, 52–53, *Kyllo v. United States*, 533 U.S. 27 (2001) (No. 99-8508), http://www.supremecourt.gov/oral_arguments/argument_transcripts/99-8508.pdf.

198. See *City of Ontario v. Quon*, 130 S. Ct. 2619, 2629 (2010) (“[T]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.”); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 778 (1996) (Souter, J., concurring) (arguing that given the fast-changing nature of telecommunications, the judiciary might be well-advised to heed the proposition: “First, do no harm” (quoting the Hippocratic oath)).

Court's caution takes a different form; the Court generally (with some notable exceptions) resists calls to revisit its foundational jurisprudential principles in the face of new technology, and in the face of technological uncertainty, favors speech and eschews deference to the political branches.

The important thing to note about the Court's decisions, however, is that while they reveal some doctrinal confusion about how to deal with new technology, they tend to reveal a solid understanding of the technology at issue. Of course, the depth of this understanding can vary within a single case, where the majority, for example, seems to have a solid grip on the technology whereas a concurring or dissenting Justice might not. But overall, the Court's decisions involving new technology tend to indicate that the Court is perfectly capable of learning about technology when it needs to do so.

1. Fourth Amendment

Much ink has been spilled about what to make of the Court's patchwork of decisions involving the Fourth Amendment and new technology. Most scholars agree that the Court's Fourth Amendment jurisprudence is a mess, although they disagree about whether changing technology is the cause of this mess.

Fourth Amendment questions involving new technology pose classic problems of constitutional interpretation. Some scholars have argued that the Fourth Amendment simply does not apply to searches carried out with the use of technology because the Fourth Amendment cannot be interpreted to "evolve" the same way technology can without departing dramatically from the intent of the founders.¹⁹⁹ Justice Black famously took this approach in his dissent in *Katz*, where he refused to go along with this majority's more expansive interpretation of the Fourth Amendment, arguing that it is not "the proper role of this Court to rewrite the Amendment in order 'to bring it into harmony with the times.'"²⁰⁰

Orin Kerr recently argued the Court's "messy" Fourth Amendment jurisprudence can be explained best through a theory of "equilibrium adjustment."²⁰¹ He argues that the Court has created its incoherent body

199. David E. Steinberg, *Sense-Enhanced Searches and the Irrelevance of the Fourth Amendment*, 16 WM. & MARY BILL RTS. J. 465 (2007).

200. *Katz v. United States*, 389 U.S. 347, 364 (1967) (Black, J., dissenting).

201. Kerr, *supra* note 13.

of Fourth Amendment decisions by reacting to changes in technology or social practice that effect the privacy “status quo.” In other words, if changes make it easier for the government to obtain evidence (thereby cutting into individual’s privacy), it issues decisions restricting that practice or the use of that evidence. But if changes make it harder, it reaches decisions that tend to restore the government’s power to obtain evidence and prosecute crimes—at the expense of privacy. Whatever the explanation, it is plain that technological changes have placed pressure on the Court’s Fourth Amendment jurisprudence and contributed to its current state of incoherence.

Perhaps the most famous Fourth Amendment case involving new technology is *Katz v. United States*,²⁰² in which the Court reversed its prior holding in *Olmstead v. United States*²⁰³ and held that the Fourth Amendment protected against government wiretapping.²⁰⁴ Notably, *Olmstead* itself was decided fifty years after the invention of the telephone; the technology was almost one-hundred years old by the time of the *Katz* decision. The Court was able to reach its ultimate conclusion only by jettisoning its traditional approach to the Fourth Amendment, which required a physical trespass or seizure. The majority took pains to note the importance of extending the Fourth Amendment to cover this new technology: “[T]o read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.”²⁰⁵ Justice Harlan’s famous concurrence offered the “reasonable expectation of privacy” framework that has since become so important to the Court’s Fourth Amendment jurisprudence.²⁰⁶ The Court has cited *Katz*’s reversal of *Olmstead* as an object lesson justifying a cautious approach to cases involving new technology.²⁰⁷

202. *Katz*, 389 U.S. 347.

203. *Olmstead v. United States*, 277 U.S. 438 (1928).

204. *Katz*, 389 U.S. at 359.

205. *Id.* at 352.

206. *Id.* at 361 (Harlan, J., concurring) (setting forth a “twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable’”).

207. *See, e.g., City of Ontario v. Quon*, 130 S. Ct. 2619, 2629–30 (2010) (citing *Olmstead* and *Katz* to support the proposition that “[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear”). Ironically, *Katz* itself may rely on a now-outdated understanding of the importance of the technology at issue in that case. These days, few people use public telephones; instead, the use of mobile phones is widespread. *See* Benj Edwards, *10 Victims of Recent Tech*, PCMAG.COM (Feb. 24, 2011), http://www.pcmag.com/slideshow/story/2610_35/the-10-victims-of-recent-tech/1.

The Court has been most aggressive with its Fourth Amendment analysis in cases involving new technology that permits government agents to discover information within the interior of the home. The best example of this tendency is *Kyllo v. United States*, in which the Court held that the use of thermal imaging constituted a search.²⁰⁸ Writing for the Court, Justice Scalia stated that “[w]here the Government uses a device that is not in general public use, to explore details of the home that previously would have been unknowable without physical intrusion, the surveillance is a search and is presumptively unconstitutional without a warrant.”²⁰⁹

Scalia signaled the limited nature of the decision by repeatedly emphasizing that the technology at issue in the case was “not in general use.”²¹⁰ This obvious hedging revealed the Court’s concern that over time the public’s understanding regarding the reasonable expectation of privacy could change along with the technology. Indeed, the Court has curbed the protections of the Fourth Amendment based on questionable assumptions regarding what technology is in general use or what the social norms surrounding the technology are. For example, the Court held in *California v. Ciraolo* that the Fourth Amendment does not protect a backyard from warrantless surveillance from an airplane,²¹¹ even though it is hard to imagine that most people have any sort of expectation that their backyards would be subject to an aerial—and warrantless—search at any time.

In his *Kyllo* dissent, Justice Stevens criticized the Court for making the case more difficult than it had to be. Stevens contended that “[t]here is no need for the Court to craft a new rule to decide this case.”²¹² Instead, he argued, the case could be resolved simply by distinguishing between surveillance inside the home and surveillance outside the home.²¹³ Stevens criticized the majority for not focusing more narrowly on the technology at issue in the case and attempting to “craft an all-encompassing rule for the future,” arguing that the Court should let the legislature grapple with these issues rather than “shackle them with prematurely devised constitutional constraints.”²¹⁴

208. *Kyllo v. United States*, 533 U.S. 27 (2001).

209. *Id.* at 40.

210. *Id.*

211. *California v. Ciraolo*, 476 U.S. 207 (1986).

212. *Kyllo*, 533 U.S. at 41–42 (Stevens, J., dissenting).

213. *Id.* at 42.

214. *Id.* at 51.

Generally speaking, the Court has followed Justice Stevens's admonition to be cautious in Fourth Amendment cases involving new technology. One of the most recent examples of this cautious approach is *City of Ontario v. Quon*, which addressed the Fourth Amendment implications of government surveillance of electronic equipment used by its employees.²¹⁵ The Court stated that it "must proceed with care" because "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."²¹⁶ The Court was concerned that the expectation of privacy that employees reasonably had in their use of electronic devices was still evolving; in addition, the Court claimed that a narrow holding was appropriate because a broad holding "might have implications for future cases that cannot be predicted."²¹⁷ Critics attacked the Court for taking such a cautious approach to the technology at issue in the case, arguing that the social norms relating to pagers—which have been around for decades—as well as text messaging are already sufficiently developed for the Court to resolve whether the Fourth Amendment offers any protection for such communications sent or received on government-issued devices.²¹⁸ Furthermore, critics have pointed out that the Court's narrow ruling failed to provide any meaningful guidance to employers, employees, the police, and lower courts.²¹⁹ Justice Scalia's concurrence in *Quon* branded the Court's narrow approach to the Fourth Amendment implications of electronic surveillance as "indefensible" because "[t]he-times-they-are-a-changin' is a feeble excuse for disregard of duty."²²⁰

In *United States v. Jones*, the GPS case, the Court likewise issued a frustratingly narrow opinion that left open many more questions than it answered.²²¹ Rather than decide the case based on whether the GPS surveillance offended the defendant's reasonable expectation of privacy, Justice Scalia's majority opinion was based on the pre-*Katz* basis for Fourth Amendment violations that depended on some trespass on the

215. *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).

216. *Id.* at 2629.

217. *Id.* at 2630.

218. *I. Fourth Amendment—Reasonable Expectation of Privacy*, 124 HARV. L. REV. 179, 185 (2010).

219. See, e.g., George M. Dery III, *Legal Limbo: The Supreme Court's Discomfort with Technology in City of Ontario v. Quon Caused It to Confuse the Definition of a Fourth Amendment Search*, 22 GEO. MASON U. C.R. L.J. 61, 82 (2011).

220. *Quon*, 130 S. Ct. at 2635 (Scalia, J., concurring).

221. *United States v. Jones*, 132 S. Ct. 945 (2012).

defendant's property.²²² Scalia contended that *Katz*'s reasonable expectation of privacy test supplemented rather than added to the traditional property-based approach.²²³ Justice Alito's concurring opinion took issue with Scalia's focus on finding a late eighteenth-century analog to GPS tracking, offering the following humorous footnote: "The Court suggests that something like this might have occurred in 1791, but this would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience."²²⁴ Justice Scalia's focus on the trespass on property rights left open many important questions that seemed to concern the Court in oral argument, including the constitutionality of obtaining data from a factory-installed GPS device or from cellphones.

Justice Sotomayor's concurrence in *Jones* expressed particular concern about how the Court would approach such future cases, especially given the Court's prior holdings that the Fourth Amendment does not protect information given to third parties. She suggested that in the future the Court might find it "necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties" because in the digital age, "people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."²²⁵ Even Justice Alito wrote a separate opinion expressing concern about the implications for future cases.²²⁶

Scholars have debated whether the Court should proceed cautiously in the face of new technology. Orrin Kerr, for example, has argued that Congress is in a better position than the courts to generate "rules of criminal procedure when technology is changing rapidly" because "Congress can legislate comprehensively, updating rules when technology changes."²²⁷ Kerr contends that whereas Congress can also enact clearer rules, solicit expert input, act when technology is still current, and act without a case and controversy requirement, judges are

222. *Id.* at 949–53.

223. *Id.* at 950.

224. *Id.* at 958 n.3 (Alito, J., concurring).

225. *Id.* at 957 (Sotomayor, J., concurring).

226. *Id.* at 962 (Alito, J., concurring) (expressing concern that the Court's decision "will present particularly vexing problems in cases involving surveillance that is carried out by making electronic, as opposed to physical, contact with the item to be tracked").

227. Orin S. Kerr, *Congress, the Courts, and New Technologies: A Response to Professor Solove*, 74 *FORDHAM L. REV.* 779, 782–83 (2005); see also Kerr, *supra* note 140, at 802.

more likely to misunderstand technological issues because they cannot solicit outside input and will therefore not know if they have misunderstood an issue until after the opinion has been released and becomes binding law.²²⁸

Daniel Solove has publicly disagreed with Kerr, arguing that there is no reason to believe that Congress is in a better position than the courts to handle technological issues and criticizing Kerr's approach as requiring unwarranted deference to legislative bodies.²²⁹ Solove points out that Congress's statutes often contain gaps and are out of date, and that Congress often fails to act in important areas.²³⁰ Solove argues that "there is no reason . . . to assume that the average legislator can better understand technology than the average judge" and that judges are able to understand technologies well enough to deliver thoughtful opinions.²³¹ He contends that "[e]xpert testimony or an amicus brief can adequately explain technology to judges."²³²

It is not the goal of this Article to resolve whether Solove or Kerr has the better argument. Instead, it is simply worth noting that in Fourth Amendment cases, the Court has generally taken Kerr's cautious approach to technology. The Court's Fourth Amendment decisions illustrate that the difficulties the Court has resolving issues relating to new technology appear to have as much—if not more—to do with uncertainty about how to apply the Fourth Amendment to new technology than with the Court's inability to understand the relevant technology. That said, the Court as a whole is exceedingly modest about its ability to predict the capabilities of new technology, frequently noting the limitations of its holdings, and deciding cases as narrowly as possible.

2. *Copyright cases*

The Court's copyright cases involving new technology demonstrate that however hazy the Court's understanding of technology was at oral argument, by the time the opinions came out, the Justices had a very solid understanding of the technology at issue and were careful to

228. Kerr, *supra* note 227, at 783.

229. Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr's Misguided Call for Judicial Deference*, 74 *FORDHAM L. REV.* 747, 760–61 (2005).

230. *Id.* at 763–64.

231. *Id.* at 771–72.

232. *Id.* at 772.

provide ample breathing space for the technology to grow and develop in the future.

Among the Court's copyright decisions, its opinions in *Sony Corp. of America v. Universal City Studios, Inc.*²³³ and *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*²³⁴ are the two that showcased the Court's commendable understanding of changing technologies. In *Sony*, the copyright holders sued the manufacturer of videocassette recorders, claiming that the manufacturer was contributorily liable for the infringement that occurred when the owners taped copyrighted programs. The Court held that the principal use of the VCR was "time-shifting," i.e., taping a program for later viewing at a more convenient time, which the Court concluded was a fair, noninfringing use.²³⁵ Justice Stevens' opinion for the Court established a commercially significant safe-harbor for new technologies that facilitate private, noncommercial copying.²³⁶

Notably, it was the well-known Luddite Justice Souter who wrote the majority opinion in *Grokster*, and by all accounts he had a firm grip on the technology at issue.²³⁷ He competently described how peer-to-peer networks function as well as the advantages of peer-to-peer networks over other kinds of networks. Justice Souter mindfully attempted to strike the right balance between innovation and copyright protection,²³⁸ and several years later, it appears he succeeded. Although some have criticized the Court for failing to provide a clear standard or test to define inappropriate inducement,²³⁹ it is clear that the Court's ruling has not

233. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

234. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

235. *Sony Corp.*, 464 U.S. at 454–56.

236. Pamela Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*, 74 *FORDHAM L. REV.* 1831, 1850 (2006).

237. See Kermit Roosevelt, *Justice Cincinnatus*, *SLATE* (May 1, 2009, 7:00 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2009/05/justice_cincinnatus.html (noting that Souter's opinion in *Grokster* "won high praise from both the legal and high-tech communities").

238. *Grokster*, 545 U.S. at 937 ("We are, of course, mindful of the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential.").

239. See Lital Helman, *Pull Too Hard and the Rope May Break: On the Secondary Liability of Technology Providers for Copyright Infringement*, 19 *TEX. INTELL. PROP. L.J.* 111, 129 (2010) (arguing that *Grokster* failed to clarify existing law and is open to various interpretations itself); Kent Schoen, *Metro-Goldwyn-Mayer v. Grokster: Unpredictability in Digital Copyright Law*, 5 *NW. J. TECH. & INTELL. PROP.* 156, 156–57 (2006) (criticizing the *Grokster* decision for targeting only clearly advertised infringing intent, thus arming technological innovators with knowledge of how to avoid liability in the future); John Borland, *Supreme Court Rules Against File Swapping*, *CNET NEWS* (June 27, 2005), <http://news.cnet.com/Supreme-Court-rules-against-file-swapping/2100->

stifled technological innovation—the pervasiveness of iPods, Kindles, and other electronic devices and products that allow consumers to buy and share copyrighted works are proof of this. Indeed, Justice Souter seemed comfortable enough with the technology to insert some humor into his decision, writing that peer-to-peer technology “has given . . . users the opportunity to download the briefs in this very case, though their popularity has not been quantified.”²⁴⁰ In another zinger, Justice Souter writes, “Users seeking Top 40 songs, for example, or the latest release by Modest Mouse, are certain to be far more numerous than those seeking a free Decameron, and Grokster and Streamcast translated that demand into dollars.”²⁴¹

Although the Court’s copyright decisions indicate that the Justices have a good grasp on the relevant technology, the Court has revealed—as it has tended to do in Fourth Amendment cases—a hesitancy to say any more than necessary to resolve the case before it. In *Sony*,²⁴² for example, the Court stated that it was reluctant to expand the protections of copyright law without clear guidance from Congress because “[s]ound policy, as well as history,” demonstrate that “Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.”²⁴³

Indeed, in his concurring opinion in the *Grokster* case, Justice Breyer wholeheartedly signed on to Professor Kerr’s view that the legislature is better situated than the Court to deal with the varied permutations of competing interests implicated by new technology.²⁴⁴ He explained, “Judges have no specialized technical ability to answer questions about present or future technological feasibility or commercial viability where technology professionals, engineers, and venture capitalists themselves may radically disagree.”²⁴⁵

Perhaps most importantly, in copyright cases the Justices are wary of how the market will change and develop in response to technological

1030_3-5764135.html.

240. *Grokster*, 545 U.S. at 923.

241. *Id.* at 926. Modest Mouse is an indie rock band that was very popular when the case was decided in 2005, and *The Decameron* is a fourteenth-century Italian work containing tales of wit, practical jokes, and life lessons.

242. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

243. *Id.* at 431.

244. *Grokster*, 545 U.S. at 965 (Breyer, J., concurring).

245. *Id.* at 958.

developments. In *Grokster*, for example, the Court took care to explain that “[w]e are, of course, mindful of the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential.”²⁴⁶

3. *First Amendment cases*

The Court’s approach to changing technology in First Amendment cases reveals its struggle to determine whether it needs to revisit its doctrinal approach to the constitutional issues presented in light of the pressures new technology places on that doctrine.

On a few occasions, the Court has dodged some of the more complicated questions new technology presents by construing the facts narrowly or deciding the case on other grounds. For example, in *Snyder v. Phelps*, the Court declined to include in their analysis the Westboro Baptist Church’s online denunciations of the Snyders, explaining that the Snyders failed to preserve that issue in their cert petition.²⁴⁷ In support of its decision to exclude this material, the Court cited *Quon*,²⁴⁸ clearly indicating that the Court was looking for an excuse to avoid addressing the tricky questions online expression raises. In *Morse v. Frederick*, the Court avoided the question of what authority schools have over the speech of their students occurring off school grounds—an issue that frequently arises with online expression—by concluding that the student was participating in a school-sanctioned event during school hours.²⁴⁹ In *FCC v. Fox*, the Court ducked the question of whether changes in technology warranted reconsideration of the constitutionality of the FCC’s broadcast indecency regulations by holding that the application of the regulations in that case violated the networks’ due process rights.²⁵⁰

The Supreme Court has a mixed record when it comes to questions of whether new media is entitled to the same First Amendment protections as the old. Historically, the Court has been more receptive to

246. *Id.* at 937 (majority opinion).

247. *Snyder v. Phelps*, 131 S. Ct. 1207, 1214 n.1 (2011).

248. *Id.* (citing *City of Ontario v. Quon*, 130 S. Ct. at 2629–31). The portion of the *Quon* opinion the Court cites has nothing to do with how to construe certiorari petitions but rather discusses how the Court must “proceed with care” before addressing “the implications of new technology before its role in society has become clear.” *See also id.* at 1225 n.15 (Alito, J., dissenting) (taking issue with the Court’s decision to avoid consideration of the “epic”).

249. *Morse v. Frederick*, 551 U.S. 393, 400–01 (2007).

250. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2320 (2012) (noting that it was unnecessary to consider the constitutionality of the indecency policy).

arguments that new technology should be treated differently. For example, the Supreme Court originally held that the First Amendment does not protect motion pictures.²⁵¹ (The Court later overruled that decision.²⁵²) Furthermore, the Court has adopted a less robust, medium-specific First Amendment standard applied to broadcast radio and television, evident in both *Red Lion Broadcasting Co. v. FCC*²⁵³ and *FCC v. Pacifica Foundation*.²⁵⁴

Furthermore, in some of its telecommunications cases, the Court has often expressed reluctance to interfere with the findings and predictive judgments on which Congress has based its legislation. For example, in *Turner Broadcasting System, Inc. v. FCC*, the Court majority stated that “[i]n reviewing the constitutionality of a statute, ‘courts must accord substantial deference to the predictive judgments of Congress.’”²⁵⁵ In other telecommunications cases, the Court has said that it is appropriate to defer to the FCC’s judgment in cases involving subject matter that is “technical, complex, and dynamic.”²⁵⁶

Indeed, the Court’s concerns about technological change have led it to proceed cautiously in the telecommunications context. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, for example, the Court struggled to determine how to approach cable regulation. The plurality—Justice Breyer joined by Justices Stevens, O’Connor, and Souter—held that it was “unwise and unnecessary [to] definitively pick one analogy or one specific set of words now,” due to its awareness “of the changes taking place in the law, the technology, and the industrial structure related to telecommunications.”²⁵⁷ Justice Souter’s separate concurring opinion in that case echoed the same concerns, noting that in

251. *Mut. Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 243 (1915) (characterizing as “wrong or strained” the argument that the free speech and press provisions of the First Amendment applied to motion pictures).

252. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

253. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

254. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

255. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994)).

256. *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1002–03 (2005); *see also Nat’l Cable & Telecomm. Ass’n v. Gulf Power Co.*, 534 U.S. 327 (2002); *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 102 (1973) (“[T]he broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence.”).

257. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 742 (1996); *see also id.* at 749 (“[W]e are wary of the notion that a partial analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area.”).

cases involving changing technology, “we should be shy about saying the final word today about what will be accepted as reasonable tomorrow.”²⁵⁸ He proclaimed that in the face of such change, “[the] judicial obligation to shoulder [their judicial responsibilities] can itself be captured by a much older rule, familiar to every doctor of medicine: ‘First, do no harm.’”²⁵⁹ Justice Kennedy (joined by Justice Ginsburg), however, took issue with the plurality’s deference to Congress in cases involving emerging technologies.²⁶⁰ He argued that it is not clear that the Court minimizes harm when it chooses to uphold rather than strike down legislation: “If the plurality is concerned about technology’s direction, it ought to begin by allowing speech, not suppressing it.”²⁶¹ Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, also took the plurality to task for avoiding the appropriate First Amendment standard for cable operators.²⁶²

The Court has more recently resisted the government’s arguments for less-stringent, medium-specific First Amendment protection for new media and has refused to defer to legislative judgment in the face of technological uncertainty. From “dial-a-porn”²⁶³ and cable television²⁶⁴ to the Internet,²⁶⁵ “crush” videos,²⁶⁶ and violent video games,²⁶⁷ the Court has insisted on applying the full robust protections of the First Amendment. In striking down statute after statute, the Court also has shown increasing reluctance to defer to legislative judgment even in the face of technological uncertainty. The majority position on the Court appears to be that when there is any uncertainty about the future of the technology, the balance tips in favor of speech. The Court has not shown the same reluctance it has demonstrated in its Fourth Amendment cases to issue broad rulings, but its First Amendment decisions are nevertheless aptly described as cautious. The Court, as a whole, is not willing to revisit its foundational jurisprudential principles in the face of new technology.

258. *Id.* at 777 (Souter, J., concurring).

259. *Id.* at 778.

260. *Id.* at 787 (Kennedy, J., concurring in part and dissenting in part).

261. *Id.*

262. *Id.* at 812–15 (Thomas, J., concurring in part and dissenting in part).

263. *Sable Comm’ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

264. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

265. *Reno v. ACLU*, 521 U.S. 844 (1997).

266. *U.S. v. Stevens*, 130 S. Ct. 1577 (2010).

267. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733–42 (2011) (applying traditional First Amendment principles).

It does not appear that any lack of understanding of technology has led to the approach the Court has taken to First Amendment cases involving new technology. The Court's first case involving speech on the Internet—*Reno v. ACLU*—was decided fifteen years ago, when the technology was in its infancy, and a panicky Congress had passed legislation to protect children from pornography online. In order to educate the Justices about this technology, the Court library ran training sessions, and the law clerks helped teach their bosses. The government urged the Court to treat the Internet the same way it had treated broadcast television and radio in *Pacifica*, but it was Justice Stevens, writing for the Court, who refused to permit special rules to hamper public discourse online. Indeed, one of Justice Stevens's law clerks from that term told Tony Mauro that her Justice "was just as computer-savvy as we were."²⁶⁸ Justice Stevens's opinion, as well as Justice O'Connor's separate opinion, conveyed a thorough understanding of the Internet as it existed at that time.²⁶⁹

Justice Stevens and Justice Souter again demonstrated a strong understanding of how the Internet works in their respective dissenting opinions in *United States v. American Library Association*, which upheld a federal law that conditioned library funds on the use of Internet filters.²⁷⁰ Relying heavily on the findings of the district court, Justice Stevens emphasized the many problems with Internet filters and the availability of less restrictive alternatives.²⁷¹ Stevens took issue with the plurality's conclusion that it would not be significantly burdensome to require users to request access to a particular website or the disabling of the filters, noting that in most cases a patron would not even know what is being hidden from him.²⁷² Justice Souter's dissent echoed many of Justice Stevens's concerns but also took pains to criticize the plurality's claim that providing limited access to the Internet was equivalent to the decisions libraries have to make selecting the books and other materials to purchase.²⁷³ He noted that "[a]t every significant point . . . the Internet blocking here defies comparison to the process of acquisition";

268. Mauro, *supra* note 112.

269. See *Reno v. ACLU*, 521 U.S. 844, 849–53 (1997) (discussing the Internet); *id.* at 888–91 (O'Connor, J., concurring in part and dissenting in part) (discussing the differences between cyberspace and speech in "the physical world").

270. *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003).

271. *Id.* at 221–23 (Stevens, J., dissenting).

272. *Id.* at 224.

273. *Id.* at 235–36 (Souter, J., dissenting).

for example, a library does not have to be concerned about limited funds or space when providing Internet access.²⁷⁴

The Court's recent decision in *Brown v. Entertainment Merchants Association* is illustrative of the efforts the Court makes to understand new technology.²⁷⁵ Experts believe that the Court did a lot of research about videogame technology.²⁷⁶ The Justices' law clerks most likely also played a role in citing games like Kill Screen and GameTrailers.com.²⁷⁷ Indeed, Chief Justice Roberts has publicly confirmed that the Justices often do rely on their law clerks to help them understand new technology: "That's one of the great things again with the law clerks. They come in and they know how all of this stuff works and what it means. And they are a resource for kind of educating those of us who are a little bit behind the curve."²⁷⁸

At the same time, a close review of Justice Alito's concurring opinion in *Brown* reveals that his understanding of violent video games remained weak even after the opinion-writing process. For example, he expressed horror that video games would be offered in 3D sometime "in the near future,"²⁷⁹ even though some already do have 3D images and in many ways are indistinguishable from movies. He also noted that "[w]hile the action in older games was often directed with buttons or a joystick, players dictate the action in newer games by engaging in the same motions that they desire a character in the game to perform."²⁸⁰ Justice Alito may have been thinking about Wii—which at the current time does not offer the sort of violent video games covered under the California statute—and not about all of the video game consoles on the market that come with buttons and joysticks. Justice Alito's opinion also refers to games that reenact the Columbine and Virginia Tech shootings,²⁸¹ but these games are not mainstream games (they are generally made by nonprofessionals), and they do not contain the sort of realistic graphic images of concern to California.

274. *Id.* at 236.

275. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

276. Nick Summers, *Supreme Court Turns Technophile*, DAILY BEAST (June 28, 2011, 12:38 AM), <http://www.thedailybeast.com/articles/2011/06/28/supreme-court-video-game-decision-is-rare-tech-savvy-ruling.print.html>.

277. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2748.

278. *A Conversation with Chief Justice Roberts* (C-SPAN television broadcast June 25, 2011), available at <http://www.c-spanarchives.org/clip/1960788>.

279. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2748 (Alito, J., concurring).

280. *Id.* at 2749.

281. *Id.*

Perhaps more striking than its understanding of the technology at issue in *Brown* was the majority's refusal to defer to the California legislature's findings that violent video games are harmful for minors, even though video game technology continues to evolve and the effect of violent video games on children is currently unclear.²⁸² The Court's broadly sweeping opinion in this case did not reveal the same sense of cautious hedging routinely on display in the Court's Fourth Amendment cases.

* * *

Cases involving new technology do not present easy answers and often place pressure on the relevant pre-existing doctrinal framework; it is therefore not surprising that the Court would struggle to understand the technology in its efforts to understand how to rule.²⁸³ The Justices are pretty tech-savvy for baby boomers, and they seem to do their research before they rule. If anything, the gap that appears to exist between the Justices' understanding of technology at oral argument and in their written decisions may indicate simply that advocates need to do a better job of educating the Justices in the first instance so they do not need to do so much outside research and rely so heavily on their law clerks.

IV. DISGUST FOR THE MODERN MEDIA CULTURE

Although the Court is cautious when it comes to new communications technology, it does not appear that its lack of understanding about technology is the reason why it does not permit cameras in the courtroom. After all, at this point cameras hardly count as "new" technology.

As the introduction to this Article mentioned, there are probably many reasons why some of the individual Justices would prefer to limit their exposure in the public eye. But surely one of them is the desire to

282. *Id.* at 2733–42 (majority opinion) (holding that video games, including violent video games, are entitled to First Amendment protection). Of course, some members of the Court made the typical arguments for a more cautious approach. *See id.* at 2742 (Alito, J., concurring) (criticizing the Court for failing to take a more cautious approach to new technology); *see also id.* at 2770 (Breyer, J., dissenting) (arguing that the Court should defer to the legislature, particularly in cases involving technical matters).

283. As Chief Justice Roberts has quipped: "The impact of the new technology on substantive law is really quite significant." *A Conversation with Chief Justice Roberts*, *supra* note 278, at 40:25.

keep the Supreme Court unsullied by the modern media culture. This concern runs far deeper than mere vanity, although that may also play a role. Justice Ginsburg gave a speech in July 2012 in which she collected ten examples of amusing comments from oral arguments in the prior Term and concluded, “From the foregoing samples, you may better understand why the court does not plan to permit televising oral arguments any time soon.”²⁸⁴

Various members of the Court have expressed doubt that cameras in the courtroom would promote public understanding of how the Court functions. Indeed, when Justice Alito was asked about cameras in 2007, he said that he did not see why access to video was so important given that the Court already provides transcripts and audio recordings.²⁸⁵ Justice Scalia has said that few people would watch the oral arguments gavel-to-gavel and instead would see only a thirty-second sound bite that would give a distorted image of the proceedings.²⁸⁶ He has also argued that “there’s something sick about making entertainment out of real people’s legal problems.”²⁸⁷ Retired Justice Souter said that when he had been a judge in New Hampshire, camera coverage had affected his behavior on the bench because he had believed that some questions would be taken out of context on the evening news. The judiciary is not a political institution, he said, “nor is it part of the entertainment industry.”²⁸⁸ Justice Breyer remarked along the same lines, explaining that one reason why there is tension between the Court and the press is that the press “specializes in what is interesting” and seeks out cases offering a human interest angle, while the Court “has no interest in being interesting.”²⁸⁹

The Court has grappled with excessive media coverage in its own cases and confirmation hearings. In *Estes v. Texas*²⁹⁰ and *Sheppard v. Maxwell*,²⁹¹ for example, the sensationalistic coverage of notorious

284. Liptak, *supra* note 2.

285. Tony Mauro, *Alito Reflects on His Role on the High Court*, LEGAL TIMES (Aug. 9, 2007), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=900005488255>.

286. De Vogue, *supra* note 1.

287. Interview by Maria Bartiromo with Antonin Scalia, Assoc. Justice, U.S. Supreme Court (Oct. 11, 2005), available at <http://today.msnbc.msn.com/id/9649724/ns/today/t/justice-scalia-says-not-chance-cameras>.

288. *On Cameras in Supreme Court, Souter Says, ‘Over My Dead Body,’* *supra* note 32.

289. Stephen Breyer, *Communication Media and Its Relationship with Supreme Courts*, 42 ST. LOUIS U. L.J. 1083, 1085–86 (1998).

290. *Estes v. Texas*, 381 U.S. 532 (1965).

291. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

murder trials horrified the Court.²⁹² And the media coverage of the O.J. Simpson trial was also widely criticized.²⁹³ Justice Kennedy apparently quipped soon after the trial, “I’m delighted I’m less famous than Judge Ito.”²⁹⁴ The confirmation hearings of Judge Robert Bork and Clarence Thomas also offended the Justices and even led retired Justice Thurgood Marshall to withdraw his support of cameras in the courtroom.²⁹⁵

Disgust with modern media culture was evident during oral argument in the Court’s most recent case addressing the FCC broadcast indecency regulations. There, Justices Kennedy and Scalia discussed the “symbolic value” of having broadcast channels free of expletives and nudity, and the Chief Justice waxed fondly on the olden days when he said from 1927 to the mid-1970s there weren’t any nudity or expletives on television.²⁹⁶ Chief Justice Roberts argued that the proliferation of cable channels means that people have 800 other channels where they go can for nudity and expletives.²⁹⁷ Justice Alito expressed concern about what people would see on Fox if these guidelines were held unconstitutional.²⁹⁸ Justice Breyer noted that Fox was fined because two young women “used a fleeting expletive which seems to be naturally part of their vocabulary.”²⁹⁹ Justice Kennedy worried that striking down the fleeting expletives regulation would cause more celebrities and wanna-be celebrities to be free to use profanity, and broadcasters would come to expect it “as a matter of course.”³⁰⁰ (Phillips responded that you would see people using the language they normally use, which increasingly includes vulgarity.³⁰¹) Justice Scalia helpfully suggested that in addition to using “bleeping” technology and imposing a scienter requirement, a third option for broadcasters is that they “shouldn’t interview these people” likely to use profanity.³⁰² In the opinion the Court ultimately issued in the case, the Court made a subtle dig at the content at issue by

292. Mauro, *supra* note 4, at 262.

293. *Id.* at 263.

294. Tony Mauro, *The Camera-Shy Federal Courts*, 12 MEDIA STUD. J. 60, 63 (1998).

295. Mauro, *supra* note 4, at 266.

296. Transcript of Oral Argument, *supra* note 180, at 22.

297. *Id.* at 28.

298. *Id.* at 29.

299. *Id.* at 31.

300. *Id.* at 35.

301. *Id.*

302. *Id.* at 56.

referring to a presenter at the Billboard Music Awards who used a profanity as “a person named Nicole Ritchie.”³⁰³

Indeed, one of the real reasons the Court is hostile to cameras in the courtroom may be precisely because it *does* understand all too well that technology is powerful and unpredictable. Perhaps the Justices are protecting themselves and the institution from misunderstandings that would likely be created and cemented by video. It is not difficult to imagine a remark, taken out of context, used over and over again to impugn the court, argue for its weakening, or to foment fundamental change (e.g., for elected judges or judicial term limits). If all we have is written transcript, the visceral impact of the misperception is much harder to create and maintain. The Justices may feel that it is better to leave things as they are than run the risk of technology in the courtroom, which is hard to control and unpredictable. In short, technology would disrupt the Court’s control over its perception by the public, and the Justices do not want to lose that control.

Given what appears to be a Court concerned about how video will pervert public understanding of the Court’s functioning, we still may be a long way off from having cameras in the courtroom. This hardly suggests, however, that there are not other ways that the Court could use to improve its communications with the public. This is not to minimize the value of video, but it simply recognizes that there are other potentially valuable ways of improving the way the Court interacts with the public. Once we can focus on what alternative technologies would be valuable, then the Bar and the press should undertake an effort to educate the Court about these technologies, just as lawyers (ideally) do when they are arguing cases with new technology before the Court.

Short of permitting cameras in the courtroom, there are a number of other initiatives the Court could undertake that would not interfere with the Court’s ability to control its public image but would make it easier for reporters to cover the Court and for the general public to understand the Court’s work. One obvious solution would be to make the audio of the oral argument available immediately; better yet, the Court could offer live streaming audio. Given that the Court already releases audio recordings of its oral arguments, the only thing this suggestion would change, if implemented, is the timing of these releases. Although releasing audio the day of oral argument might increase the use of the Justices’ voices in media coverage of the cases under consideration, bare

303. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2314 (2012).

audio recordings—without accompanying video—are less valuable for television broadcasts and, as a result, much less likely to lead to turning the Court’s work into the sort of “entertainment” in the way that the Justices apparently fear.

In addition, the Court should release the audio recordings of the opinion announcements immediately (again, live-streaming would be preferable) and make them easily accessible on the Court’s own website. The Court could also improve the accessibility of its own website. At the moment, the website lists cases by Term, and by case-name only. It would be very helpful for the press and public alike if the website gave some indication regarding the type of case, the question presented, and the holding.

Advocates for increased public access to the Court’s work should urge the Court to harness the power of the social media. The first step is to educate the Court that using social media does not mean that the individual Justices need to start opening Facebook and Twitter accounts to communicate on a daily basis for the public. Instead, the Court itself could use various social media platforms to distribute the Court’s opinions and orders, oral argument transcripts, and oral argument audio.

The Court could also help improve press coverage in a number of ways. For example, the Court could reinstitute its policy of e-mailing the opinions to the press corps, particularly in high-profile cases, in case the Court’s website becomes inaccessible. Congress and the Court alike should also carefully consider how it could revise its press access policies to account for changes in the media environment. Although it seems unlikely that the Court will give the press advance notice of which opinions are coming down, the Court could continue to work on its efforts to spread out the announcement of high-profile cases and to refrain from announcing decisions on the same day as oral argument.

V. CONCLUSION

This Article took on the common argument that the Supreme Court does not embrace the full range of communication media available because it does not like, or does not understand, new technology. A review of the Justices’ personal use of technology, statements at oral argument, and treatment of technology in written opinions reveals that although the Justices are generally not technophiles, they are not hostile to new technology but perhaps a little concerned about its impact. The Court is generally cautious when it approaches issues involving new technology, and this cautious attitude is reflected in its approach to using

technology to communicate with the public. At the same time, it is clear that the Justices are perfectly able to understand and appreciate technology. This Article concludes that advocates for improved public communications from the Court should move beyond its rather myopic focus on cameras on the courtroom and consider educating the Court about other ways in which the Court could improve its communications with the press and public.

