CANDIDES AND CASSANDRAS: TECHNOLOGY AND FREE SPEECH ON THE ROBERTS COURT

ASHUTOSH BHAGWAT*

ABSTRACT

John Roberts assumed his position as Chief Justice of the United States just prior to the commencement of the October 2005 Term of the Supreme Court. That was seven years after Google was incorporated, one year before Facebook became available to the general public, and two years before Apple released the first iPhone. The twelve years of the Roberts Court have thus been a period of constant and radical technological innovation and change, particularly in the areas of mass communication and the media. It is therefore somewhat astonishing how few of the Roberts Court's free speech decisions touch upon new technology and technological change. Indeed, it can be argued that only two cases directly address new technology: Brown v. Entertainment Merchants Association *on video games, and* Packingham v. North Carolina *on social media. Packingham, it should be noted, is the only Roberts Court free speech case directly implicating the Internet. Even if one extends the definition of cases addressing technology (as I do), only four cases, at most, can be said to address technology and free speech.*

It seems inevitable that going forward, this is going to change. In particular, recent calls to regulate "fake news" and otherwise impose filtering obligations on search engines and social media companies will inevitably raise important and difficult First Amendment issues. Therefore, this is a good time to consider how the Roberts Court has to date reacted to technology and what that portends for the future. This paper examines the Roberts Court's free speech/technology jurisprudence (as well as touching upon a few earlier cases), with a view to doing just that. The pattern that emerges is a fundamental dichotomy: some Justices are inclined to be Candides, and others to be Cassandras. Candide is the main character of Voltaire's satire Candide, ou l'Optimisme, *famous for repeating his teacher, Professor Pangloss's mantra "all is for the best" in the "best of all*

* Martin Luther King, Jr. Professor of Law, University of California, Davis School of Law. B.A. 1986 Yale University. J.D. 1990, The University of Chicago. Contact: aabhagwat@ucdavis.edu. Thanks to the editors of the *Washington University Law Review* for organizing this symposium, and to my fellow participants for very helpful feedback. Thanks also to my colleagues Irene Joe and Lisa Pruitt for thoughtful comments. Finally, special thanks to Greg Magarian for writing the fantastic book that provided the impetus for this event.

possible worlds." Cassandra was the daughter of King Priam and Queen Hecuba of Troy in Greek mythology, condemned by the god Apollo to accurately prophesize disaster, but never to be believed. While not all justices fit firmly within one or the other camp, the Roberts Court is clearly divided relatively evenly between technology optimists and technology pessimists.

The paper begins by analyzing the key technology/free speech decisions of the Roberts Court, and classifying the current Justices as Candides or Cassandras based on their opinions or votes in those cases. In the remainder of the paper, I offer some thoughts on two obvious questions. First, why is the Court divided between Candides and Cassandras and what qualities explain the divergence (spoiler: it is not simply partisan or political preferences). And second, what does this division portend for the future. As we shall see, my views on the first issue are consistent with, and indeed closely tied to, Greg Magarian's analysis of Managed Speech on the Roberts Court. On the second question, I am modestly (but only modestly) optimistic that the Candides will prevail and that the Court will not respond with fear to new technology. I am, in other words, hopeful that the Court will fend off heavy handed efforts to assert state control over the Internet and social media, despite the obvious threats and concerns associated with that technology. I close by considering some possible regulatory scenarios and how the Court might respond to them.

INTRODUCTION

John Roberts assumed his position as Chief Justice of the United States just prior to the commencement of the October 2005 Term of the Supreme Court.[1] That was seven years after Google was incorporated,[2] one year before Facebook became available to the general public,[3] and two years before Apple released the first iPhone.[4] The twelve years of the Roberts Court have thus been a period of constant and radical technological innovation and change, particularly in the areas of mass communication and the media. It is therefore somewhat astonishing how few of the Roberts Court's free speech decisions touch upon new technology and technological change. Indeed, it can be argued that only two cases directly address new technology: *Brown v. Entertainment Merchants Association* on video

1. *Roberts Sworn in as Chief Justice* CNN (Sept. 29, 2005), http://www.cnn.com/2005/POLITICS/09/29/roberts.nomination/index.html.

2. GOOGLE, https://www.google.com/intl/en/about/our-story/ (last visited Mar. 2, 2018).

3. FACEBOOK, https://newsroom.fb.com/company-info/ (last visited Mar. 2, 2018).

4. APPLE, https://www.apple.com/newsroom/2007/01/09Apple-Reinvents-the-Phone-with-iPhone/ (last visited Mar. 2, 2018).

games,[5] and *Packingham v. North Carolina* on social media.[6] *Packingham*, it should be noted, is the *only* Roberts Court free speech case directly addressing issues specific to the Internet. Even if one expands the definition of cases addressing technology (as I do in this paper), only four cases, at most, can be said to address technology and free speech directly.

It seems inevitable that going forward, this is going to change. In particular, recent calls to regulate "fake news" and otherwise impose filtering obligations on search engine and social media companies will inevitably raise important and difficult First Amendment issues.[7] This is therefore a good time to consider how the Roberts Court has reacted to technology to date, and what that portends for the future. This paper examines the Roberts Court's free speech/technology jurisprudence with a view to doing just that. The pattern that emerges, though admittedly somewhat fuzzy, is a dichotomy: some Justices are inclined to be Candides, and others to be Cassandras. Candide is the main character of Voltaire's satire *Candide, ou l'Optimisme*, famous for repeating his teacher, Professor Pangloss's mantra "all is for the best" in the "best of all possible worlds."[8] Cassandra was the daughter of King Priam and Queen Hecuba of Troy in Greek mythology, condemned by the god Apollo to accurately prophesize disaster, but never to be believed.[9] While not all justices fit firmly within one or the other camp, the Roberts Court seems divided relatively evenly between technology optimists and technology pessimists.

Part I of this paper begins by summarizing and analyzing the Roberts Court's major free speech/technology cases (and tangentially touches on a few earlier decisions). In Part II, I consider how and why the Justices of the Roberts Court are divided between Candides and Cassandras, including what qualities might explain the divergence (spoiler: it is not only partisan or political leanings). And finally, in Part III I will offer some thoughts on what these divisions portend for the future.

5. 564 U.S. 786 (2011).

6. 137 S. Ct. 1730 (2017).

7. *See generally Online Platforms and Free Speech: Regulating Fake News*, 127 YALE L. J. (Oct. 9, 2017), https://www.yalelawjournal.org/collection/regulating-fake-news.

8. VOLTAIRE, CANDIDE, OU L'OPTIMISME 6 (1759). Technically, this paper should be titled "Panglosses and Cassandras" since Candide's optimism derives from his teacher, and is generally referred to as Panglossian Optimism (Candide himself is disillusioned by the end of Voltaire's novel). *See* Frederick Schauer, *Rights, Constitutions, and the Perils of Panglossianism*, 28 OXFORD J. OF LEGAL STUD. (forthcoming 2018), https://ssrn.com/abstract=3092336. However, my preference is alliteration over accuracy.

9. ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Cassandra-Greek-mythology (last updated Feb. 16, 2018).

I. TECHNOLOGY ENTERS THE TEMPLE

In this Part, I will discuss in some detail the four free speech cases decided by the Supreme Court during Chief Justice Roberts's tenure that touch upon technology. As I noted in the introduction, only two of these cases—*Packingham* and *Brown*—deal directly with new technology and its implications for free speech. However, because the other two decisions were at least influenced by or implicate changing technology, they are worth some consideration to reveal patterns. I discuss the cases in reverse chronological order both because the most recent decision in this series, *Packingham*, is the most enlightening, and because the impact of technology on free speech issues has obviously accelerated in recent years.

I also should begin with a definitional clarification and some caveats. In the course of analyzing the cases that follow, I am seeking to classify the participating Justices as technology optimists (Candides) or technology pessimists (Cassandras). Of course, with rare exceptions, most cases do not require Justices to explicitly express hopes or fears about technology (though both *Brown* and *Packingham* did require just that). Therefore, when clear statements about technology are lacking, I use as my proxy for optimism or pessimism attitudes towards regulation of technology, on the assumption that technology optimists generally think regulation unnecessary and harmful, while pessimists think regulation is needed to fend of the dangers posed by technology. Silicon Valley is, after all, full of libertarians. But this proxy is concededly imperfect, since other factors can also influence attitudes towards regulation. Another source of uncertainty is that not every Justice writes in every case. When a Justice does not write, but rather joins an opinion authored by another Justice (whether a majority opinion or otherwise), I attribute the author's attitudes to the joining Justice. Again, however, this is an imperfect proxy, because other factors (including simply a desire for consensus) might lead a Justice to join an opinion he or she does not fully agree with. In my analysis I do identify situation when I believe these sorts of dynamics might be involved, but there are always uncertainties in analyzing silence.

Despite these uncertainties and caveats, I do believe there is value in the exercise I am undertaking here. Attitudes towards technology matter, and are likely to matter even more going forward. And given the ages of the Justices (all of whom became adults in the pre-Internet era), substantial variation in how familiar and comfortable they are with technology is inevitable. It may seem odd that these sorts of subterranean attitudes will in all likelihood shape free speech law going forward—but that is hardly the only or even most obvious oddity in modern constitutional law. Regardless, these issues are worth investigation.

A. Packingham v. North Carolina (2017)

The most recent and most striking technology/free speech decision of the Roberts Court, which also not coincidentally engaged the Court for the first time with the most important modern technological development affecting free speech—the spread of social media—was the 2017 decision in *Packingham v. North Carolina*.[10] *Packingham* involved a challenge to a North Carolina statute that forbade any registered sex offender from accessing "a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages."[11] Packingham, a registered sex offender, posted a statement on Facebook (under a fictitious name) celebrating his success in having a traffic ticket against him dismissed.[12] He was caught, convicted of violating § 14-202.5, and given a suspended prison sentence.[13] On appeal, the North Carolina Court of Appeals invalidated the statute, but the North Carolina Supreme Court reversed on the remarkable grounds that denying Packingham access to websites such as Facebook did not violate his First Amendment rights because Packingham remained able to access sites such as the Paula Deen Network and local television station websites which serve the "same or similar" functions as Facebook.[14]

On certiorari, all eight Justices agreed that the North Carolina statute was unconstitutional.[15] However, there was sharp disagreement among them regarding both the scope of the statute and the reason that the law failed to pass constitutional muster. On the issue of scope, the uncertainty concerned whether the North Carolina statute's broad definition of the term "social networking" websites encompassed not only sites generally understood to be social media such as Facebook, LinkedIn and Twitter, but also sites such as Amazon.com, Washingtonpost.com, and Webmd.com, which permit visitors to communicate with each other and share information (often through review or comment sections).[16] The majority opinion authored by Justice Kennedy, and joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, assumed for the purposes of the decision that the statute did not reach sites such as Amazon.[17] Nonetheless, the majority concluded that the law was unconstitutional because it failed the narrow tailoring requirement

10. 137 S. Ct. 1730 (2017).
11. *Id.* at 1733 (quoting N.C. Gen. Stat. Ann. §§ 14-202.5(a), (e) (2015)).
12. *Id.* at 1734.
13. *Id.*
14. *Id.* at 1735 (quoting State v. Packingham, 777 S.E.2d 738, 747 (2015)).
15. The case was argued after Justice Scalia's death, but before Justice Gorsuch joined the Court.
16. *Packingham*, 137 S. Ct. at 1736–37.
17. *Id.*

of the Court's "intermediate scrutiny" test applicable to content-neutral restrictions on speech.[18] Emphasizing the importance of social media to modern communications, the majority concluded that the North Carolina law suppressed far more speech than necessary to achieve the State's concededly important goal of preventing sexual abuse of children.[19]

Justice Alito wrote a separate opinion concurring only the judgment, joined by Chief Justice Roberts and Justice Thomas. Central to Justice Alito's reasoning was his conclusion that the North Carolina law denied sex offenders access to "an enormous number of websites" including Amazon, Webmd, and many news websites.[20] Because such sites were extremely unlikely to be used to facilitate sexual abuse of a child, he too concluded the law failed narrow tailoring. Crucially, however, in the closing section of his opinion Justice Alito strongly suggested that he might well have voted to uphold a more narrowly written statute focused on true social media, because of the importance of the State's interest in protecting children.[21]

More than their differing readings of the challenged statute, however, what truly separates the Justices in the *Packingham* case is their vastly different attitudes towards the Internet and social media. Justice Kennedy's majority opinion begins his substantive discussion by noting the traditional importance of public forums such as streets and parks for public dialogue. He then says, in a memorable phrase, that "[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general . . . and social media in particular."[22] He goes on to discuss the manifold functions of the Internet, especially social media, in sharing information and views, and describes the advent of this new technology as a "revolution."[23] He concludes that because the *Packingham* "case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet . . . the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium."[24]

Justice Alito's attitude towards modern technology can only be described as the polar opposite of Justice Kennedy's. He begins his opinion by explicitly noting that he was writing separately because of the majority's "undisciplined dicta [and] musings that seem to equate the entirety of the

18. *Id.* at 1736.
19. *Id.* at 1737.
20. *Id.* at 1740–43 (Alito, J., concurring in the judgment).
21. *Id.* at 1743–44.
22. *Id.* at 1735 (quoting Reno v. American Civil Liberties Union, 521 U.S. 844, 868 (1997)).
23. *Id.* at 1736.
24. *Id.*

Internet with public streets and parks."[25] In his view, "there are important differences between cyberspace and the physical world" such as anonymity and invisibility that cut in favor of, not against, state regulatory authority, because of the risk that sex offenders and others can take advantage of these features.[26] Precisely because of the unique nature of cyberspace, Alito concludes, the Court should be "cautious in applying our free speech precedents to the [I]nternet."[27]

SCORECARD:
Candides: Kennedy, Ginsburg, Breyer, Sotomayor, Kagan
Cassandras: Alito, Roberts, Thomas

B. FCC v. Fox Television Stations (2012 and 2009)

The Court's two decisions in the long-lasting *FCC v. Fox Television Stations* litigation, one in 2009[28] and the other in 2012,[29] did not directly involve a new technology or form of media. To the contrary, they involved regulation of the oldest of the electronic mass media, broadcast television and radio. Moreover, neither decision directly addressed First Amendment issues. However, because the cases indirectly raised the question of how the evolution of the mass media in response to technological change should impact regulation of older media, and because the First Amendment hovered in the background of the litigation throughout, I treat the case as an honorary member of the free speech/technology club.

The broad issue in the *Fox Television Stations* cases was the legality of the Federal Communications Commission's new interpretation of its longstanding rule against indecent language on broadcast media to prohibit even a single utterance of an expletive in a nonliteral manner.[30] Earlier, the FCC had limited findings of liability to repeated or explicit uses of expletives but had not considered "fleeting expletives" used in a nonliteral way to be indecent. In 2004, in response to complaints directed at a comment made by Bono, the lead singer of U-2, during the Golden Globe Awards, that "this is really, really, fucking brilliant,"[31] the FCC reversed course. It held that even a single, obviously nonliteral use of the "F-Word" was inherently indecent (though bizarrely, the FCC also said that even Bono's use of the word had a "sexual connotation"). The *Fox* cases themselves arose not from the Bono incident, but from two other incidents

25. *Id.* at 1738 (Alito, J., concurring in the judgment).
26. *Id.* at 1743–44.
27. *Id.* at 1744.
28. FCC v. Fox Television Stations, 556 U.S. 502 (2009) [hereinafter *Fox I*].
29. FCC v. Fox Television Stations, 567 U.S. 239 (2012) [hereinafter *Fox II*].
30. *Fox I*, 556 U.S. at 508–09.
31. *Id.* at 509.

in which expletives were uttered on air, both of which occurred before the FCC had announced its new interpretation in 2004 (one involving Cher, and the other involving Paris Hilton and Nicole Richie) in response to which the FCC enforced its new policy, though without imposing financial sanctions.

The issue in the first *Fox* decision was whether the FCC's decision to reinterpret its indecency policy violated the Administrative Procedure Act. Justice Scalia's majority opinion, joined by Chief Justice Roberts and Justices Thomas and Alito in its entirety, and Justice Kennedy almost in its entirety, ruled that it did not.[32] The details are not important for our purposes, except to note the administrative law principle that emerged, or was confirmed, by the decision was that an agency's change in policy or legal interpretation does not impose any greater obligation of explanation on agencies than the original formulation of policy or law.[33] The Court then remanded the case to the Court of Appeals to consider the broadcasters' First Amendment challenge to the new policy.[34] Justices Stevens, Souter, Breyer, and Ginsburg dissented essentially on the grounds that the FCC had not adequately explained its change of course.[35]

For our purposes, however, the crucial opinion in the case was neither the majority opinion nor any of the dissents (nor, for that matter, Justice Kennedy's concurrence). It was rather Justice Thomas's concurring opinion.[36] In it, Justice Thomas pointed out that the original 1978 decision of the Supreme Court upholding the FCC's indecency policy, *FCC v. Pacifica Foundation*,[37] was based firmly on the premise (established in *Pacifica*'s predecessor decision *Red Lion Broadcasting v. FCC*[38]) that the broadcast media received far less First Amendment protection than other technologies.[39] He also noted that since *Pacifica*, the Court had consistently refused to extend that lower level of protection to other media such as telephone dial-in services, cable television, and the Internet, and so had consistently struck down attempts to ban indecent language on those platforms.[40] He argued, however, that the massive technological changes since 1978, notably the fact that most consumers today receive broadcast television via cable television or the Internet, made the lower standard applicable to broadcast indefensible.[41] The reasons were two-fold. First,

32. *Id.* at 517–18.
33. *Id.* at 514–15.
34. *Id.* at 529–30.
35. *Id.* at 552–62 (Breyer, J., dissenting).
36. *Id.* at 530–35 (Thomas, J., concurring).
37. 438 U.S. 726 (1978).
38. 395 U.S. 367 (1969).
39. *Fox I*, 556 U.S. at 530–35 (Thomas, J., concurring).
40. *Id.* at 532–33 (Thomas, J., concurring).
41. *Id.* at 532–34 (Thomas, J., concurring).

modern technology had fatally undermined the driving assumptions of *Red Lion* and *Pacifica* that the broadcast media was subject to scarcity and was "uniquely pervasive."[42] And second, from the viewers' perspective "broadcast" materials viewed via their cable service or internet streaming was indistinguishable from other content that received full First Amendment protection, making differential regulatory treatment difficult to defend.[43] Therefore, he urged the Court to reconsider *Red Lion* and *Pacifica*.[44]

On remand from *Fox I*, the Court of Appeals struck down the FCC's new indecency policy as unconstitutionally vague.[45] The Supreme Court once again granted review and this time affirmed, but on extremely narrow grounds. Justice Kennedy's majority opinion (joined by all the participating Justices[46] except Ginsburg) found that the FCC's finding of liability for the Fox broadcasts (and one additional one involving fleeting nudity), all of which aired before the FCC had announced its new policy in the Bono case, violated the Due Process vagueness doctrine for failure to give fair notice.[47] At the end his opinion, Justice Kennedy acknowledged both the attacks on *Pacifica* raised by litigants and the underlying First Amendment issue, but declined to address any of them.[48] Justice Ginsburg filed a brief opinion concurring in the judgment, arguing that *Pacifica* was wrong when decided but in any event required reconsideration in light of subsequent technological changes (citing Justice Thomas's opinion in *Fox I*).[49]

In the *Fox* decisions, most of the Justices were silent about the implications of technological change for regulatory policy towards broadcasting. Two Justices, however, took forthright positions indicating that in their view technology did matter, and cut in favor of increasing constitutional protections for broadcasting. That makes them Candides.

SCORECARD:

Candides: Ginsburg, Thomas

Cassandras: None

42. *Id.* at 533 (Thomas, J., concurring).
43. *Id.* at 534 (Thomas, J., concurring).
44. *Id.* at 532–35 (Thomas, J., concurring).
45. *Fox II*, 567 U.S. at 251–52.
46. Justice Sotomayor did not participate.
47. *Fox II*, 567 U.S. at 253–54.
48. *Id.* at 258.
49. *Id.* at 259 (Ginsburg, J., concurring in the judgment).

C. Brown v. Entertainment Merchants Assn. (2011)

As I noted earlier, *Brown v. Entertainment Merchants Ass'n*[50] and *Packingham* are the two Roberts Court cases that directly considered how to apply First Amendment doctrine to new technologies. This time, however, the new technology was not the Internet, it was video games. In 2005 California passed a statute banning the sale or rental of violent video games to minors (and requiring that such games be labeled "18").[51] In *Brown*, the Court, in an opinion authored by Justice Scalia and joined by Justices Kennedy, Ginsburg, Sotomayor and Kagan, struck down this statute.[52] It held that the California law was a content-based restriction on free speech subject to strict scrutiny,[53] which it could not possibly survive given that the actual evidence that violent video games harm minors is very limited.[54] On the first crucial question of whether video games were entitled to First Amendment protection, California conceded that they were but the majority nonetheless emphasized that the fact that such games constituted "entertainment" did not take them out of the First Amendment.[55] Moreover, later in the opinion, when California argued that the "interactive" nature of video games made them particularly harmful, the Court flatly rejected this view with a few succinct comments to the effect that all literature is interactive to some extent and so this made no difference.[56] Notably, the Court seemed utterly unmoved by California's (and the dissent's) arguments that the highly visual and immersive nature of video games made them different in kind from purely written or oral forms of communication. Most of the majority opinion considers (and rejects) the argument that violent speech directed at children should be considered "low-value" and so unprotected for First Amendment purposes, a doctrinal issue not relevant to this article.[57] But on the fundamental question of how the First Amendment applies to a new and potentially worrisome technology the majority was clear that it applies fully.

Three Justices disagreed with this approach.[58] In an opinion concurring in the judgment, Justice Alito, joined by Chief Justice Roberts, raised the

50. 564 U.S. 786 (2011).
51. *Id.* at 789.
52. *Id.* at 805.
53. *Id.* at 799.
54. *Id.* at 799–801.
55. *Id.* at 790.
56. *Id.* at 798.
57. *Id.* at 792–99.
58. Justice Thomas dissented from the Court's judgment, but on the novel ground that minors had *no* First Amendment rights to receive information independent of their parents. *Id.* at 821–39 (Thomas, J., dissenting). As Justice Thomas did not address the implications of novel technology, in this case he must be considered neutral.

"possibility that the experience of playing video games (and the effects on minors of playing violent video games) may be very different from anything that we have seen before."[59] He noted that playing video games, unlike reading or watching television or a movie, requires the player to physically participate in the action, especially in newer games that respond to physical motions by players rather than the use of joysticks.[60] He also noted that "[i]n some of these games, the violence is astounding."[61] And finally, he worried that the advent of newer technology such as virtual reality (though he did not use those words, this being 2011) raised the possibility that video games would become almost indistinguishable from real life.[62] For all of those reasons, he would have left open the possibility that video games should be subject to greater regulation than other forms of speech, though he concluded that this particular statute was unconstitutionally vague.[63]

Justice Breyer dissented, arguing that the California law should be upheld. In a long opinion, Breyer carefully examined the available empirical evidence regarding the impact of video games (including journal articles and studies not in the record), concluding that there was sufficient evidence for California to conclude that violent interactive entertainment did cause aggressive behavior in children.[64] Therefore, he would have concluded that the California statute survived even *strict* scrutiny.[65] Justice Breyer did not rely as explicitly as Justice Alito on the fact that video games were a novel technology to defend the California law, but there seems little doubt that concerns about new technology were a key factor in his vote. Consider the fact (pointed out by the majority) that the key empirical study relied upon by California suggested that the effects of playing violent video games on minors were about the same as that of watching Bugs Bunny or Road Runner cartoons, or of viewing pictures of guns.[66] But imagine a statute banning children from viewing Warner Brothers cartoons. Or imagine a law prohibiting pictures of guns in books directed at minors. Is it conceivable that Justice Breyer would have voted to uphold such laws, or even apply the watered-down version of strict scrutiny he used in *Brown*? The answer seems obvious, and makes Breyer a fellow Cassandra to Alito and Roberts in this case.

SCORECARD:

Candides: Scalia, Kennedy, Ginsburg, Sotomayor, Kagan

59. *Id.* at 816 (Alito, J., concurring in the judgment).
60. *Id.* at 817–18 (Alito, J., concurring in the judgment).
61. *Id.* at 818 (Alito, J., concurring in the judgment).
62. *Id.* at 819–20 (Alito, J., concurring in the judgment).
63. *Id.* at 820–21 (Alito, J., concurring in the judgment).
64. *Id.* at 849–55 (Breyer, J., dissenting).
65. *Id.* at 847 (Breyer, J., dissenting).
66. *Id.* at 800–01.

Cassandras: Alito, Roberts, Breyer
Neutral: Thomas

D. Sorrell v. IMS Health (2011)

The final case we examine, *Sorrell v. IMS Health*,[67] touches upon one of the most significant and controversial free speech issues likely to arise in the digital era: the problem of Big Data. Unusually, however, the case did not involve either mass media or the Internet as such; instead, it involved data mining as a means of strengthening advertising. But no less than *Packingham*, *Sorrell* directly poses the question of how First Amendment doctrine and law should respond to radically new forms of technology and "speech."

The issue in *Sorrell v. IMS Health* was the constitutionality of a Vermont statute that regulated the sale, disclosure, and use of pharmacy records containing information about the prescribing practices of individual doctors.[68] In practice, because of the language of the statute and various exceptions, the effect of the statute was to bar the sale of prescriber-identifying data to data miners such as IMS Health, who in turn analyzed the data on behalf of pharmaceutical manufacturers for use in the latter's efforts to market prescription drugs to individual doctors.[69]

The majority opinion by Justice Kennedy, joined by Chief Justice Roberts and Justices Scalia, Thomas, Alito and Sotomayor, begins by describing the Vermont law as enacting "content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information."[70] As such, the majority strongly suggests that the statute should be subject to "heightened judicial scrutiny" and cites cases applying strict scrutiny.[71] Crucially, in reaching this conclusion, the Court responded to an argument made by Vermont, that the sale, transfer, and use of prescriber-identifying information constituted conduct, not speech, and therefore should not receive any First Amendment protection—an argument, it should be noted, that the First Circuit had accepted in a related case.[72] The Court sharply disagreed, stating that "the creation and dissemination of information are speech within the meaning of the First Amendment"[73] because "[f]acts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to

67. 564 U.S. 552 (2011).
68. *Id.* at 558–59.
69. *Id.* at 562–63.
70. *Id.* at 563–64.
71. *Id.* at 565–66.
72. *Id.* at 570 (citing IMS Health v. Ayotte, 550 F.3d 42, 52–53 (1st Cir. 2008)).
73. *Id.* (citing Bartnicki v. Vopper, 532 U.S. 514, 527 (2001)).

conduct human affairs."[74] Ultimately, the Court did not resolve the question of whether the sale of data constitutes speech, though it did say that "[t]here is a strong argument that prescriber-identifying information is speech for First Amendment purposes."[75] Instead, the Court held that because Vermont's restrictions on marketing by pharmaceutical companies clearly triggered the commercial speech doctrine, and because the Vermont statute could not even survive the intermediate scrutiny applicable to commercial speech restrictions, the issue could be left for another day.[76] But the implication of the majority opinion—joined by six Justices, it should be noted—was crystal-clear: Data is speech,[77] and therefore, any attempt to regulate the sale, use, or transfer of Big Data necessarily triggers stringent First Amendment scrutiny.

The dissenting Justices in *Sorrell* (Breyer, Ginsburg, and Kagan) did not directly address the question of how to categorize sales of data under the First Amendment, arguing instead that because Vermont's statute operated within a heavily regulated industry (pharmaceuticals), and because the data at issue existed only as a byproduct of government regulation, the Vermont statute should be treated as a species of economic regulation rather than a regulation of speech.[78] Ultimately, however, it is clear that for the dissenters the fact that this particular statute itself regulated only information, as opposed to regulating conduct in a way that incidentally affects speech, made no difference.[79] As such, while the dissenters did not speak directly to the issue, the tone of Justice Breyer's opinion leaves little doubt that he would be inclined to treat the regulation of data as a form of economic regulation rather than as a law raising core First Amendment issues.

SCORECARD:

Candides: Kennedy, Roberts, Scalia, Thomas, Alito, Sotomayor

Cassandras: Breyer, Ginsburg, Kagan

II. CONFIDENCE AND CONCERNS

So what can we learn from all of this? Let us start with what we can glean about the attitudes of individual Justices towards technology. And in the course of doing so, we might indulge in a bit of speculation as to why the Justices lean the way they do. I should note that because my primary purpose here is to discern future implications, I consider below only the

74. *Id.*
75. *Id.*
76. *Id.* at 571–79.
77. *Cf.* Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57 (2014); Ashutosh Bhagwat, Sorrell v. IMS Health: *Details, Detailing and the Death of Privacy*, 36 VT. L. REV. 855 (2012).
78. *Sorrell*, 564 U.S. at 584–86 (Breyer, J., dissenting).
79. *Id.* at 601–02 (Breyer, J., dissenting).

Justices serving as of this writing (Spring 2018), with the exception of Justice Gorsuch who did not participate in any of the cases discussed in Part I, and therefore whom it is too early to assess—though the fact that Justice Gorsuch was still in his twenties at the beginning of the Internet era gives me some hope. I do not therefore further explore the perhaps-surprising fact that Justice Scalia emerges as something of a Candide in these cases, albeit he did not have the opportunity to voice his views in *Packingham*.

The one obvious and immediate conclusion that jumps out from the cases is that the Candide-in-Chief of the Roberts Court, the most consistent technology optimist, is Justice Kennedy. In three of the four cases discussed he came out clearly on the Candide side, and was the author of the most technology-embracing free speech opinion of the Roberts Court, the majority opinion in *Packingham*. And in the *Fox Television Stations* "fleeting expletives" litigation[80] Kennedy was merely silent, giving no reason to believe he necessarily opposed extending stronger constitutional protection to the broadcast media. Finally, Justice Kennedy's recent support for technology is consistent with his actions in pre-Roberts Court cases. Notably, during the Rehnquist Court Kennedy authored two opinions arguing that the strongest levels of constitutional protections should be accorded to cable television programming.[81] Justice Kennedy's optimism with regards to technology, moreover, is consistent with the fact that he is generally the most speech-protective Justice on the modern Court.[82] Given his strong support for free speech generally, it is perhaps unsurprising that Justice Kennedy's inclination to extend the strongest First Amendment protections to new technologies seems both consistent and neigh absolute.

The other Roberts Court Justice who is quite clearly a firm Candide is Justice Sotomayor. Like Justice Kennedy, Sotomayor was with the Candides in the three cases in which the Justices directly addressed technology, and like Kennedy she was merely silent in *Fox Television*. I place her second on this scale to Kennedy only because she did not author the strikingly idealistic language of the majority opinion in *Packingham*. But her voting record suggests that she too strongly supports free speech rights on all technology platforms, not just traditional media such as print.

Another Justice who emerges as a likely strong Candide is Justice Ginsburg. She joined the technology optimists in both of the key cases,

80. *See Fox II*, 567 U.S. at 250 (quoting *Fox Television Stations v. FCC*, 489 F.3d 444, 446 (2nd Cir. 2007).

81. United States v. Playboy Entm't Grp., 529 U.S. 803 (2000); Denver Area Telecomms. Consortium v. FCC, 518 U.S. 727, 780–812 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

82. For empirical support for this assertion, see Ashutosh Bhagwat & Matthew Struhar, *Justice Kennedy's Free Speech Jurisprudence: A Quantitative and Qualitative Analysis*, 44 MCGEORGE L. REV. 167 (2013).

Packingham and *Brown*, and in the second *Fox Television Stations* decision she went out of her way to advocate an approach that would have finally extended full First Amendment protection to the broadcast media after over forty years of minimal protection.[83] The only other Justice to express agreement with this view (in the first *Fox Television Stations* decision) was Justice Thomas. And it is noteworthy that Ginsburg was the only Justice to join both of Justice Kennedy's strong pro-cable television opinions in the pre-Roberts Court era (though to be fair, Justice Sotomayor was not on the Court when either case was decided). The only exception to this pattern of technology-optimism was of course Justice Ginsburg's vote in *Sorrell v. IMS Health*; but *Sorrell* is I think explicable on other grounds. As noted earlier, Justice Breyer's dissent analyzed the Vermont statute challenged in *Sorrell* as a species of economic regulation because it operated in a highly regulated industry, and involved information (that is to say "data") that existed only as a result of government regulation.[84] The three dissenters thus did not appear to see *Sorrell* as a case about technology or speech, or even Big Data in general. I therefore do not take Justice Ginsburg's vote in *Sorrell* as any sort of indication that when posed more directly with the question of whether data generally deserves First Amendment protections, she will necessarily become a Cassandra.

Finally, on the Candide side, Justice Kagan also emerges as a likely member of the optimists' club for basically the same reasons as Justice Ginsburg. She voted consistently with the Candides in every case except *Sorrell*, and her vote in *Sorrell* is probably explicable on the same grounds as that of Justice Ginsburg. My only hesitation in classifying Kagan, and why I think she may be a more cautious Candide than the others, is Justice Kagan's silence in the major technology cases combined with a broader sense that she (like Justice Breyer, as I will discuss) inclines towards greater caution in expanding constitutional rights, including notably First Amendment rights, [85] than the strong Candides. But these are only impressions, and for now we can assume that Justice Kagan is generally inclined to see technology in a positive light.

---

83. Justice Ginsburg focused her ire on the Court's 1978 decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), in which the Court upheld FCC regulations barring "indecency" in broadcast. *Fox II*, 567 U.S. at 259 (Ginsburg, J., concurring in the judgment). However, reduced protection for broadcast went well beyond indecency. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding Fairness Policy which imposed content-based restrictions on broadcasters).

84. *See supra* at n. 79 & accompanying text.

85. A good example is United States v. Alvarez, 567 U.S. 709 (2012), in which Justice Kennedy authored a strong plurality opinion, joined by Justices Ginsburg and Sotomayor (and Chief Justice Roberts), extending full First Amendment protection to even intentional falsehoods. Justice Kagan, however, joined Justice Breyer's concurrence extending only limited protection. *Id.* at 731–32 (Breyer, J., concurring in the judgment).

Turning now to the Cassandras, two Justices immediately emerge as strong technology pessimists: Chief Justice Roberts and Justice Alito. Both of them took firmly pessimistic approaches towards technology in the two key cases, *Packingham* and *Brown*, and there is nothing else in their actions suggesting that their views are in any way otherwise (unlike Justice Thomas, as we shall see). Both were silent regarding technology in the two *Fox Television Stations* decisions, and so the only countervailing evidence is their votes in *Sorrell* to strike down data restrictions. But it is my view that Justice Alito's and Chief Justice Roberts's votes in *Sorrell* are explicable for the obverse reasons to Justices Ginsburg's and Kagan's votes in that case. *Sorrell* might be thought of as a technology case (Justice Kennedy certainly seemed to see it as such), but it could just as easily be seen to be a case about business regulation, which Roberts and Alito are of course generally hostile to.[86] But when the business-regulation overlay is removed, both Justice Alito and Chief Justice Roberts seem thoroughly skeptical about the value of, versus the risks posed by, new technology.

It is worth noting that Justice Alito's doubts about the social utility of free speech using new technology parallels his general skepticism about free speech. Alito was, after all, the sole dissenter in two crucial non-technology Roberts Court cases extending the scope of First Amendment protections, *Snyder v. Phelps*[87] and *United States v. Stevens*.[88] And he has shown little inclination, at least outside of commercial or corporate contexts, to protect expressive liberties. But the same cannot be said of Chief Justice Roberts. He not only joined but in fact authored both *Snyder v. Phelps* and *Stevens*, and he also joined the most speech-protective opinion in another landmark non-technology case, *United States v. Alvarez*.[89] For the Chief Justice, then, the problem is not speech as such, it is the risks and threat posed by new technology.

Turning to Justice Thomas, it would appear that he is divided or perhaps uncertain. Thomas was a firm Cassandra in *Packingham*, but he displayed important Candide-like inclinations in *Fox Television Stations*. In *Brown* he

86. *See* Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1449–51 (2013) (finding Alito and Roberts to be the most business-friendly Justices on the Court during the period encapsulating the 1946 through 2011 Terms). It should be noted that the Court's decision in Citizens United v. FEC, 558 U.S. 310 (2010), striking down restrictions on corporate expenditures related to federal elections, also shares this characteristic of being in part a case about speech, but in part a case about regulation of corporations. And the votes in that case (Justice Kennedy excepted) may well be explicable as driven by the latter rather than the former considerations.

87. 562 U.S. 443, 459 (2011) (reversing Intentional Infliction of Emotional Distress verdict against protestors at a military funeral).

88. 559 U.S. 460, 460 (2010) (holding that speech that depicted animal cruelty enjoyed full First Amendment protection).

89. 567 U.S. 709, 713–30 (2012) (plurality opinion). This opinion was authored (naturally) by Justice Kennedy and also joined (also naturally) by Justices Ginsburg and Sotomayor.

was silent on the technology issue, and in *Playboy Entertainment Group*, one of the pre-Roberts era cable television decisions authored by Justice Kennedy, Justice Thomas provided the key, fifth vote for extending strong First Amendment protections to that technology (and to non-obscene, sexually explicit speech).[90] Finally, his vote in *Sorrell* might (but might not) reflect a view on the constitutional status of Big Data for the same reasons as discussed with respect to Alito and Roberts.[91] Further compounding the difficulty is the fact that Justice Thomas's preferred approach to constitutional interpretation—Originalism[92]—naturally has little to offer on the question of new technologies.[93] So with regards to Justice Thomas, we must satisfy ourselves with uncertainty.

Finally, we come to Justice Breyer. Even more than Justice Thomas, Justice Breyer comes off as an enigma. He was with the Candides in *Packingham*, but a firm Cassandra in *Brown*. He dissented in *Sorrell*, but again seemingly for reasons unrelated to technology. And he was silent on technology in *Fox Television Stations*. Looking to earlier cases, Justice Breyer wrote the main dissent (for four Justices) in *Playboy Entertainment Group*, the decision discussed above in which Justice Kennedy's majority opinion extended strong constitutional protections to cable television.[94] Ironically, then, despite being a native of San Francisco Justice Breyer appears to be uncertain about how to weigh the benefits and risks of new technology. Or perhaps more to the point, in these cases Justice Breyer's general friendliness towards regulation is seemingly at war with his general support for constitutional rights.

FINAL SCORECARD

Candides: Kennedy, Sotomayor, Ginsburg, Kagan

Cassandras: Roberts, Alito

Uncertain: Thomas, Breyer, (Gorsuch)

Turning to the question of why certain Justices are inclined to be Candides and others Cassandras, it is of course impossible to say for sure,

90. *See* United States v. Playboy Entm't Grp., 529 U.S. 803, 829–31 (2000) (Thomas, J., concurring).

91. In the Lee, Landes, and Posner study, Justice Thomas emerged as the fifth most pro-business Justice during the 1946–2011 period. *See* Epstein, Landes & Posner, *supra* note 87, at 1451.

92. Brown v. Entm't Merchs.' Ass'n, 564 U.S. 786, 822 (2011). (Thomas, J., dissenting) ("[w]hen interpreting a constitutional provision, 'the goal is to discern the most likely public understanding of [that] provision at the time it was adopted'") (quoting McDonald v. Chicago, 561 U.S. 742, 828 (2010) (Thomas, J., concurring in part and concurring in the judgment)).

93. *See* Adam Liptak, *Justices Debate Video Game Ban*, N.Y. TIMES, Nov. 2, 2010, https://perma.cc/5AKE-CQKZ (Liptak recounts a moment during oral arguments in *Brown v. Entertainment Merchant's Ass'n* when Justice Alito commented to California's lawyer: "What Justice Scalia wants to know is what James Madison thought about video games.").

94. *Playboy Entm't Grp.*, 529 U.S. at 835 (Breyer, J., dissenting).

and certainly I have no desire to engage in armchair psychoanalysis on the question. I do think, however, that a broad explanation does emerge, an explanation that is consistent with, and indeed closely tied to, Greg Magarian's analysis of *Managed Speech* on the Roberts Court.[95] The answer, in short, is attitudes towards order and turbulence. In this sense, the division on the Roberts Court mirrors the longstanding tension in American political thinking between Jeffersonians who embrace change and individual autonomy at the cost of occasional disorder,[96] and Hamiltonians who embrace order at the cost of occasional limits on liberty.[97]

For the Cassandras, the problem I suspect can be summarized in a nutshell: technology is always disruptive, but given the current pace of technological change, today that disruption often resembles chaos. Ten years ago, social media barely existed and had no consequential role in the organizing of society. Today, our President uses social media as his primary tool to build and shape his political support, and there are overwhelming indications that foreign agents aggressively used social media to try and manipulate American democracy in the 2016 elections.[98] More specifically, technology threatens to substantially magnify the kinds of risks and concerns that have always been advanced to restrict free speech, most notably the protection of children. It is surely no coincidence that protecting children was the justification for the regulations in both *Packingham* and *Brown*. And it is similarly unsurprising that for Cassandras, such elevated fears justify restrictions on new technologies that they may not have permitted to be imposed on traditional media such as print. Indeed, children were the issue in *Fox Television Stations* as well, and again the Court as a whole's reluctance to extend full constitutional protections to broadcasting may well have been a product of these sorts of fears. Moreover, as discussed in Part III below,[99] there is no reason to believe that the Cassandras' need to preserve order and traditional social structures and values will be limited to the protection of children. And if it is not, the technology skepticism of the Cassandras will persist.

---

95. *See* GREGORY P. MAGARIAN, MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT xv (2017) (arguing that the Roberts Court's free speech jurisprudence is characterized by a need "to reconcile substantial First Amendment protection for expressive freedom with aggressive preservation of social and political stability").

96. *See* Letter from Thomas Jefferson to James Madison (January 30, 1787) ("I hold it that a little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical."), *reprinted in* THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON, 1776–1826, Vol. I (1776–1790) 461 (James Morton Smith, ed., W.W. Norton 1995).

97. *See* Jason Frank and Isaac Kramnick, *What 'Hamilton' Forgets About Hamilton*, N.Y. TIMES, June 10, 2016, https://perma.cc/8NQG-MFDS.

98. *See, e.g.*, Scott Shane and Vindu Goel, *Fake Russian Facebook Accounts Bought $100,000 in Political Ads*, N.Y. TIMES, Sept. 6, 2017, https://perma.cc/EDH9-CCXL.

99. *See infra* Part III.

Candides are in some ways easier to understand than Cassandras. The language of Justice Kennedy's majority opinion in *Packingham* drips with the Utopianism of the early Internet era,[100] an attitude that remains an important element of tech culture today. How can universal access to cheap speech possibly be bad? The truth, however, is that cheap speech can in fact cause substantial harm.[101] Once that reality is accepted, the question then becomes whether the promise of such speech outweighs the risks it poses. Why Candides readily accept that it does is not a question I can answer fully, except to repeat my earlier suggestion that Candides almost certainly have a greater tolerance for disorder than Cassandras, which shifts the balance from their perspective.

III. WHAT COMES NEXT?

Turning now to the final question of what the existing Roberts Court technology cases portend for the future, I am modestly (but only modestly) optimistic that the Candides will generally prevail, and that the Court will not instinctively respond with fear to new technology. Put differently, I think it likely, but not certain, that a working majority of the Roberts Court will vote to fend off heavy-handed efforts to assert state control over new technology such as the Internet and social media. But I am only modestly optimistic because I fear that the obvious threats and concerns associated with that technology could easily drive a Court generally inclined towards order and hierarchy (as Magarian illustrates this Court is[102]) towards a more fearful and so restrictive attitude.

My optimism arises primarily from the fact that Candides appear to outnumber Cassandras on the Roberts Court. I found three, probably four strong Candides, and only two clear Cassandras. As such, for technology optimists to prevail in any particular case, they need to convince only one of the three divided or uncertain Justices: Thomas, Breyer and Gorsuch. For the Cassandras to win, however, they must convince all three. Adding to that the general receptivity of the Roberts Court to free speech claims, there are reasons to believe that aggressive new regulation of free expression via new technologies will not succeed.

One uncertainty concerns the Candides. At least until recently, the benefits of technology in terms of facilitating access to speech and speech platforms for almost everyone seemed obvious to all. And concerns about

100. *See* John Perry Barlow, *A Declaration of the Independence of Cyberspace*, HACHE (Feb. 8, 1996), https://www.eff.org/cyberspace-independence.

101. *See* Ashutosh Bhagwat, *When Speech Is Not "Speech,"* 78 OHIO ST. L. J. 839 (2017); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

102. *See supra* note 96.

the impact of technology seemed overstated—Cass Sunstein, who presciently predicted many of the concerns now emerging regarding political polarization and loss of even basic consensus regarding fact, was at the time he first expressed these ideas an outlier.[103] As such, the Candides' embrace of technology seemed natural. But as the threats posed by the Internet and social media to social order and stability become more widely understood and accepted, one wonders whether the Candides will retain their faith that unregulated technology usually makes the world a better place. If they do not, then that could cause a shifting of the balance on the Roberts Court against technology.

Another question that arises, but to date remains unclear, is whether the Cassandras of the Roberts Court will extend their technology skepticism to situations where the social interests invoked to justify regulation are serious, but not tied to protecting children. If the Cassandras have primarily been driven by concerns about children, then that too portends well for new technology. But there is no particular reason to believe that their concerns are so limited. How, for example, will those Justices evaluate efforts to protect personal privacy, given the enormously greater privacy harms enabled by the Internet in general and social media in particular?[104] Or what about the concerns recently so prominent in the press regarding "fake news" and the use of technology to influence/interfere with democratic politics?[105] Also consider the problem of children employing social media off-campus in ways that potentially interfere with the operations of schools—a topic of extensive lower court litigation that the Court has yet to take on.[106] All of these developments represent threats to traditional forms of order and hierarchy, both social and political, which suggests that technology pessimists will remain pessimists, and furthermore that some centrists and even some optimists might shift. But, of course, it is also true that concerns about the safety and wellbeing of children are uniquely powerful and persuasive, suggesting that in other spheres at least some hitherto pessimistic Justices might be more inclined to take free-speech claims seriously.

Perhaps the most important variable in determining how the constitutional law of free speech over the Internet develops in the coming

103. *See* CASS R. SUNSTEIN, REPUBLIC.COM 54–73, 80–84 (2001).

104. *See* Bhagwat, *supra* note 102, at 849.

105. *See supra* at note 7, note 125.

106. *See* Michael K. Park, *Restricting Anonymous "Yik Yak": The Constitutionality of Regulating Students' Off-Campus Online Speech in the Age of Social Media*, 52 WILLAMETTE L. REV. 405, 431–38 (2016) (discussing division among circuits regarding how to evaluate school-imposed restrictions on students' use of social media); William Calve, *The Amplified Need for Supreme Court Guidance on Student Speech Rights in the Digital Age*, 48 ST. MARY'S L. J. 377, 383–88 (2016) (same).

years concerns the nature of the regulatory initiatives that emerge from Congress, the Federal Communications Commission (FCC), and state legislatures. If past history is any guide, content-neutral structural regulations such as the Net Neutrality policy adopted by the Obama-era FCC[107] (and recently repealed by the Trump-era FCC[108]) are likely to fare well in courts and the Court, especially given the existence of precedent, authored notably by Justice Kennedy, upholding similar structural regulations of cable television.[109] I also would expect that narrowly focused legislation, aimed at serious problems generated by the reality of cheap speech and the Internet and without significant collateral consequences, also will likely fare well. A prominent example would be regulation prohibiting "revenge porn," a repulsive practice whereby former romantic partners (usually male) post on the Internet revealing pictures of their former partner, which were typically voluntarily shared during the relationship.[110] Such laws, assuming that they can be written clearly and narrowly (a big if perhaps), target a social practice with privacy ramifications which should be obvious to anyone, including any judge, but which do not otherwise seem to threaten the free flow of information. It should be noted that "revenge porn" is necessarily a creature of the Internet, since before cheap speech private persons would never have been able to obtain access to mass-distribution platforms for the purpose of pursuing their unpleasant, personal agendas. So in that sense, revenge porn legislation is a regulation of new technology; but it seems a thoroughly unproblematic one.

Harder is the problem of Big Data and personal privacy writ large. As discussed earlier, in the *Sorrell* case a majority of the Court strongly indicated that it would treat data as speech, and therefore subject regulations of data to stringent First Amendment scrutiny. It is also noteworthy that the two clearest Candides on the Court, Justice Kennedy (who wrote the opinion) and Justice Sotomayor (who joined it) can be assumed to be strongly committed to this position. On the other hand, the other two potential Candides, Justices Ginsburg and Kagan, were in dissent in *Sorrell*; and the two primary Cassandras, Chief Justice Roberts and Justice Alito, joined the majority opinion. *Sorrell* is thus a bit of a mess because of the many cross-currents in the case, including issues of data and technology, but also commercial speech and proper treatment of highly-regulated

107. *See* Protecting and Promoting the Open Internet, 30 FCC 5601 (2015).

108. Cecelia Kang, *F.C.C. Repeals Net Neutrality Rules*, N.Y. TIMES, Dec. 14, 2017, perma.cc/G9CJ-L2WQ.

109. *See* Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994); Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997).

110. *See* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 350–54 (2014); Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 661 (2016).

industries such as pharmaceuticals. And on the flip side, the governmental interests at stake in *Sorrell* were frankly trivial and suspect. The privacy at issue was the "right" of doctors to remain anonymous regarding what drugs they prescribe.[111] But why this is a serious privacy interest, given that doctors have always operated in a highly regulated environment, remains unclear. Moreover, the way the Vermont legislation was written, it only protected doctors' privacy vis-à-vis pharmaceutical companies, not other actors such as regulators or academics.[112] Presumably the interest the legislation advanced, therefore, was to shield doctors from marketing by pharmaceutical companies; but it is very difficult to understand why anyone should take this concern seriously given that doctors remain free at all times to simply refuse to meet marketers.[113] And if the state interest is to prevent pharmaceutical companies from convincing doctors to prescribe brand name rather than generic drugs, as was likely the case, the *Sorrell* majority quite rightly rejected this as paternalistic and illegitimate.[114]

The difficult question, then, is how the Court would react to a law that restricted data practices in the technology sector rather than a traditionally regulated industry, but that also had real and serious privacy justifications. Examples might include Germany's recent efforts to prevent Facebook from incorporating data obtained from use of other Facebook-owned apps such as WhatsApp or Instagram into Facebook profiles.[115] Or it might be a more direct challenge to data transfers, such as imposing onerous consent requirements before permitting any inter-company sales of personal data—a regulatory outcome that looks increasingly likely given recent revelations about Facebook's data practices and the misuse of Facebook profiles by Cambridge Analytica during the 2016 election.[116] Either way, the conflict is clear: such laws substantially burden the movement of data—i.e., under the *Sorrell* dictum they burden "speech"—but they also advance significant personal privacy interests. Based on my reading of *Sorrell*, I am fairly confident that the two main Candides on the Court—Kennedy and Sotomayor—will view such regulations at a minimum with a great deal of suspicion because of the onerous and technology-specific impact of such laws. I am less clear of the other Justices, however. The Cassandras and

111. *Sorrell*, 564 U.S. at 572–73.
112. *Id.*
113. *Id.* at 575.
114. *Id.* at 577–78.
115. Mehreen Khan, *German Cartel Office Warns Facebook Over Personal Data Collection* FINANCIAL TIMES (Dec. 19, 2017), https://www.ft.com/content/78580b45-bf92-388e-9ad1-72892001f7bc.
116. Matthew Rosenberg, Nicholas Confessore & Carole Cadwalladr, *How Trump Consultants Exploited the Facebook Data of Millions*, N.Y. TIMES, March 17, 2018, https://www.nytimes.com/2018/ 03/17/us/politics/cambridge-analytica-trump-campaign.html?action=click&contentCollection=U.S.&module=RelatedCoverage&region=Marginalia&pgtype=article.

Justice Thomas, it seems likely, will be torn between their concerns about the impact of technology on privacy and their general hostility to business regulation. And the others (Ginsburg, Breyer, Kagan) are simply inscrutable to me as they are likely to be sympathetic both to regulation and to free speech concerns. Aside from the obvious bromide that the narrower and better-tailored the law the more likely it is to survive, this remains an area of profound uncertainty.

Moving away from the commercial sphere, and direct regulation of tech or data, let us consider now the problem of school children's off-campus use of social media. As noted earlier, there is a substantial jurisprudence in the lower courts on this subject, but the Supreme Court has failed to address the issue despite substantial disagreements among the lower courts.[117] This again is a situation where there are strong, competing considerations. One factor, cutting in favor of speech protections, is that *Packingham* suggests the Candides on the Court, along with at least some centrists, will be suspicious of intrusions on social media because of its role as the new forum for social discourse. On the other hand, in the only Roberts Court case addressing student free speech rights—*Morse v. Frederick*[118]—the Court was notably unsympathetic to the free speech claim despite minimal evidence that the speech at issue, the infamous "BONG HiTS 4 JESUS" banner, actually disrupted school activities. But to complicate matters further, in *Brown v. Entertainment Merchants Association* the majority, which included all of the Court Candides, adopted a position strongly supportive of the off-campus free speech rights of minors,[119] and the social media cases in the lower courts typically involve off-campus speech. These disputes represent the perfect storm for the Roberts Court, placing the Court's general inclinations to maintain order and traditional hierarchies against its general support of both free speech and new technology. At a minimum, we can be confident that given the views expressed by Justice Thomas in *Morse*[120] and in *Brown*,[121] he will probably reject any First Amendment claim brought by minors. As for the others, my prediction, such as it is, is that the Candides will, with the support of Justice Breyer (given his vote in *Packingham*), prevail when such a case comes to the Court; but I confess that Justice Breyer's vote remains highly uncertain, especially given his equivocation in *Morse*,[122] suggesting that Justice Gorsuch may

117. See *supra* at note 107.
118. 551 U.S. 393 (2007).
119. 564 U.S. at 794–95.
120. 551 U.S. at 410–22 (Thomas, J., concurring).
121. *See supra* at note 5.
122. *Morse*, 551 U.S. at 425–33 (Breyer, J., concurring in the judgment in part and dissenting in part) (declining to address the merits of Frederick's First Amendment claim because of its difficulty, and arguing therefore to resolve the case on qualified immunity grounds).

well cast the deciding vote. And if the off-campus speech in the first case to reach the Court is particularly troublesome (threats of violence or the like), all bets are off.

Finally, we come to the hardest and most amorphous problem, the potential regulation of "fake news" or other deceptive uses of social media for political purposes. I am going to set aside the problem of foreign nation-states or their representatives manipulating social media because that would raise the largely unresolved and complex problem of whether foreign states or their nationals not present within the United States enjoy First Amendment rights to communicate to U.S. citizens. But the problem of "fake news" and manipulation of social media to move political sentiment is hardly limited to Vladimir Putin. To the contrary, given the seeming effectiveness of these techniques in the 2016 election, we can fairly expect more to come from all sorts of sources.

One fairly obvious starting point: If any state entity sought to directly regulate or ban "fake news" on social media, through for example, "take-down" requirements similar to those imposed by the Digital Millennium Copyright Act with regard to intellectual property,[123] I would expect all or almost all of the nine current Justices, whether Candides, Cassandras, or in-between, to vote to strike down such legislation. The Court has already held in a non-Internet case that even intentional falsehoods are entitled to some level of First Amendment protection, [124] and there is no reason to expect that principle not to be extended to the Internet. Furthermore, such a law would require a minimal statutory definition of political "falsehood," an obviously fraught subject. Given the enormous risk of self-serving political manipulation or bias posed by government regulation of social media falsehoods on political topics, I would expect all the Justices to balk. Which is precisely why such blunt regulatory initiatives are unlikely to be enacted by any legislature with a modicum of common sense.

A more likely scenario (and one apparently under active discussion) is to extend the kinds of disclosure requirements for political advertising currently applicable to traditional media to social media.[125] The Court, it should be noted, has upheld disclosure requirements for traditional media (with only Justice Thomas dissenting).[126] Would it do the same for social

123. *See generally* Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J. L. & TECH. 171 (2010).

124. United States v. Alvarez, 567 U.S. 709 (2012). Admittedly there were three dissenters in *Alvarez*, including Justices Thomas and Alito among the current members of the Court, but the six Justices agreeing that falsehoods are not *per se* unprotected remain on the Court, and even the dissenters are likely to be influenced, I think, by the concerns expressed in the text.

125. *See* Kenneth P. Vogel & Cecilia Kang, *Senators Demand Online Ad Disclosures as Tech Lobby Mobilizes*, N. Y. TIMES (Oct. 19, 2017), perma.cc/5QUP-JJAA.

126. Citizens United v. Federal Election Commission, 558 U.S. 310, 366–71 (2010).

media? On first cut, there would seem no barrier to doing so, since *Packingham* (and a previous case[127]) suggest that the same First Amendment standards apply to the Internet as to traditional media. The counter-argument is that "each medium of expression . . . may present its own problems,"[128] and that disclosure requirements impose special burdens on Internet firms (or so such firms claim[129]) not present in other contexts. Assuming these arguments have a basis in fact (a question beyond the scope of this paper or current public knowledge), one could imagine a technology Candide striking down such requirements on the grounds that the burden on speech outweighs any social benefit, or alternatively on the grounds that the law, whatever its purpose, will have the effect of suppressing substantial amounts of speech rather than merely adding to the total of public information as disclosure requirements are intended to do. A similar argument, though based on legitimate concerns of retaliation, did convince the Court in the pre-Internet era to strike down, on an as-applied basis, a facially valid disclosure requirement.[130] Given these countervailing arguments, each Justice's ultimate inclination will likely turn on his or her attitude towards new technology and the need to foster it, versus the need to rein it in or not give it special privileges—i.e., whether the Justice is a Candide or a Cassandra. And on those issues much uncertainty remains, especially regarding Justices Breyer and Gorsuch.[131]

A last, extremely difficult question, which I will raise but not attempt to answer fully here, is whether the Roberts Court as currently constituted would permit a state actor (most likely Congress or a federal regulatory entity) to impose structural restrictions, akin to net neutrality, on Internet content providers such as Facebook or (more likely) Google and other search engines. In other words, would the Court interpret the First Amendment to permit legislative or regulatory action that moves content-providers more towards a common carrier model, and away from the current model in which firms are presumed to maintain essentially unlimited control over the content available on their platforms. Faced with a similar question with respect to print newspapers, the Court rejected legislative interference,[132] but when earlier faced with restrictions on the broadcast media, it acquiesced.[133] As noted above, over the years the Court (including notably the Roberts Court in *Packingham*) has been inclined to treat the

127. Reno v. American Civil Liberties Union, 521 U.S. 844, 868–70 (1997).
128. *Id.* at 868 (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975)).
129. *See* Vogel & Kang, *supra* note 126.
130. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982).
131. As his vote in *Citizens United* indicates, Justice Thomas generally disfavors disclosure requirements, and it is hard to imagine shifting from that position in the Internet context.
132. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).
133. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

Internet as more akin to print media, entitled to full First Amendment protection, rather than to broadcast, the unloved stepchild of the First Amendment.[134] For that reason among others, one suspects that the Candides will disfavor even structural regulation. But it should be noted that in light of the almost complete market dominance of some Internet firms such as Facebook and Google, perhaps the broadcast analogy is somewhat apt (certainly European regulators appear to increasingly believe so[135]). Cassandras and technology wafflers on the Court may well be tempted by such reasoning, so long as any structural regulation is politically unbiased and content-neutral. On the other hand, reducing platform-owners' control over the content they display could easily increase the incidence of "fake news" and harmful speech such as revenge porn by disabling those firms from screening out such content. For that reason, on the whole, I doubt that the current Court would move in the direction of lessening First Amendment protections for Internet firms given the limited benefits of such a move and the increased disorder and risk it would undoubtedly entail; but the jury remains out.

CONCLUSION

This paper has explored the apparent attitudes of the current Justices of the Roberts Court towards technology and free speech, as reflected primarily in the positions those Justices (except for Justice Gorsuch) took in the four major Roberts Court free speech decisions which touch on technology. It then sought to apply the insights gained therein to several likely or possible regulatory initiatives which, if enacted over the next several years as seems quite possible, would surely draw constitutional fire. The results were admittedly tentative and contained a large margin of uncertainty. But the exercise was still, I would argue, productive. Most importantly, what this paper hopefully demonstrates is that any effort to study the Justices through a lens other than the usual partisan one is valuable, given the tendency in our partisan times to subsume all other distinctions and nuances into politics. And technology is surely not the only or even most important question that divides the Justices in ways that do not correlate perfectly, or even well, with political partisanship. What this article demonstrates, hopefully, is that identifying and studying such distinctions can be useful, instructive, and at the least diverting.

134. *Cf.* CINDERELLA (Walt Disney Productions 1950).

135. Jeff John Roberts, *Why Google, Facebook, and Amazon Should Worry About Europe* FORTUNE (July 20, 2017), perma.cc/6CQ2-ACXN.