

Give Gorsuch a 21st Century Litmus Test

By Mark Grabowski[†]

Introduction.....	1
I. Big Shoes to Fill	3
II. Gorsuch’s Mixed Record	6
III. Tech Litmus Test	8

Introduction

The United States Senate began confirmation hearings on March 20 to vet Neil Gorsuch, who was nominated to succeed the late Supreme Court Justice Antonin Scalia. Lawmakers are expected to apply litmus tests, probing him on issues such as abortion. They should also delve into his views on technology. As *Wired*’s political reporter Issie Lapowsky noted, “[w]hile liberals [focus] on such contentious issues as women’s reproductive rights and environmental protections, Gorsuch will also face cases that demand a solid command of the complex issues digital technology raises, from copyright and privacy to intellectual property rights and data storage.”¹ Although Gorsuch has a decade of experience serving as a judge on the U.S. Court of Appeals for the Tenth Circuit, he lacks an extensive record on tech-related cases and his decisions have been mixed, which should raise concerns about how he might decide such cases as a Supreme Court Justice. For example, Gorsuch is widely regarded as a strong supporter of free speech, including online speech, but he has not been as reliable an advocate for digital privacy. His support of network neutrality is far from certain. If confirmed, Gorsuch will likely rule on cases involving all of these issues and more. “The Supreme Court already has a list of digital civil liberties issues to consider in the near future, and that list is likely to grow,” predicted Kate Tummarello of the Electronic Frontier Foundation, a digital rights advocacy group. “If confirmed . . . Gorsuch . . . will be in a position to make crucial decisions affecting our basic rights to privacy, free expression, and innovation.”²

[†] Mark Grabowski is a lawyer and associate professor of communications at Adelphi University in Long Island, where he teaches Internet law. He also is a nationally syndicated columnist for the Washington Examiner. Grabowski won the 2015 James Madison Prize for Outstanding Research in First Amendment Studies. For more information, visit markgrabowski.com.

1. Issie Lapowsky, *Trump’s SCOTUS Pick Needs to Get Tech—These Cases Show Why*, WIRE (Jan. 31, 2017, 9:32 PM), <http://www.wired.com/2017/01/trumps-scotus-pick-needs-get-tech-cases-show>.

2. Kate Tummarello, *Digital Rights Issues on the Horizon at the Supreme Court*, ELEC. FRONTIER FOUND. (Feb. 6, 2017), <http://www.eff.org/deeplinks/2017/02/digital-rights-issues-horizon-supreme-court>.

Indeed, he may be the deciding vote on important tech cases. During Scalia's term, for example, the Supreme Court ruled 5-4 that the Child Online Protection Act violated the Free Speech clause of the First Amendment.³ "As we have seen with critical 5-4 decisions applying constitutional doctrine to changes in technology over the years . . . each and every Justice on the bench matters" – wrote Lisa Hayes, general counsel for the Center for Democracy & Technology, an internet rights group – "[w]e must take the time to thoroughly vet Judge Gorsuch and ensure we preserve an independent judiciary."⁴

As it is, the High Court has "difficulty in handling the intersection of the [Constitution] with technology"⁵ and is often mocked for being "[h]opelessly behind the times . . . out of touch . . . techno-fogeys."⁶ For example, many of the Justices do not even use email.⁷ "The Justices are not necessarily the most technologically sophisticated people," Justice Elena Kagan admitted.⁸ Without a tech savvy new Justice who appreciates how the average American uses computers, smart phones and social media, the Court risks taking a step backwards. That is because the new Justice's predecessor had been the Court's "standard-bearer" when it came to technology law.⁹ Despite his typically conservative views on social issues, Scalia was "shockingly forward-looking" on technology issues.¹⁰ In fact, he was considered a "hero"¹¹ by tech and legal experts, who cite his "pro-technology" decisions on cases providing First Amendment rights for video games, privacy protections for smart phones, and regulations for network neutrality.¹² Given that the Court will increasingly be called upon to make important judgments that relate to technology, experts say Scalia's successor should demonstrate a genuine desire to keep up with the latest developments and provide guidance on how the Constitution should apply to the

3. Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656 (2004).

4. Lisa A. Hayes, *Justice Neil Gorsuch?*, CTR. FOR DEMOCRACY & TECH. (Jan. 31, 2017), <http://cdt.org/blog/justice-neil-gorsuch/>.

5. *Leading Cases*, 144 HARV. L. REV. 179, 184 (2010), http://cdn.harvardlawreview.org/wp-content/uploads/pdfs/vol_12401city_ontario_v_quon.pdf.

6. Paul Fletcher, *On Point: Don't Know Much 'Bout Technology . . .*, DETROIT LEGAL NEWS (Jun. 13, 2014), <http://www.legalnews.com/detroit/1390728>.

7. Will Oremus, *Elena Kagan Admits Supreme Court Justices Haven't Quite Figured Out Email Yet*, SLATE (Aug. 2, 2013, 3:33 PM), http://www.slate.com/blogs/future_tense/2013/08/20/elena_kagan_supreme_court_justices_haven_t_gotten_to_email_use_paper_memos.html.

8. *Id.*

9. Jack Smith IV, *Say What You Want About Justice Antonin Scalia, He Was Great for Technology*, MIC (Feb. 14, 2016), <http://mic.com/articles/135263/say-what-you-want-about-justice-antonin-scalia-he-was-great-for-technology>.

10. Katharine Trendacosta, *Antonin Scalia, the Supreme Court's Unlikely Defender of Technology*, GIZMODO (Feb. 14, 2016, 1:00 PM), <http://gizmodo.com/antonin-scalia-the-supreme-court-s-unlikely-defender-o-1759075490>.

11. Robinson Meyer, *Antonin Scalia Totally Gets Net Neutrality*, ATLANTIC (May 16, 2014), <http://www.theatlantic.com/technology/archive/2014/05/net-neutralities-little-known-hero-antonin-scalia/361315/>.

12. Ian Lopez, *A 'Pro-Technology' Justice Scalia's Relationship with Tech*, LEGALTECH NEWS (Feb. 23, 2016), <http://www.legaltechnews.com/id=1202750446375/A-ProTechnology-Justice-Scalias-Relationship-with-Tech>.

legal issues they raise—just as the late Justice did. Although President Donald Trump said he wants a Justice who is ““very much in the mold of Justice Scalia””¹³ and many court observers have dubbed Gorsuch “Scalia 2.0,”¹⁴ that may not be the case when it comes to technology law. An analysis of Scalia’s and Gorsuch’s decisions related to the First Amendment, Fourth Amendment and network neutrality indicate that the two jurists may be more different than similar. This should raise questions at the confirmation hearing by Democrat and Republican lawmakers alike.

I. Big Shoes to Fill

Scalia’s death leaves the Supreme Court with big shoes to fill when it comes to tech jurisprudence. He was widely regarded as a strong defender of technology. Even his biggest critics concede that he was progressive when it came to technology. “Scalia’s opinions were backwards in almost every possible arena,” observed Katharine Trendacosta, a staff writer at tech blog Gizmodo. “For all the harm he did sitting on the Court for nearly thirty years, Scalia was surprisingly adept at understanding technology.”¹⁵ Likewise, Jack Smith IV, who covers technology and inequality for millennial news site Mic, wrote: “Say what you want about Justice Antonin Scalia, he was great for technology.”¹⁶ Lisa Larrimore Oullette, a professor of technology law at Stanford Law School, called him “a pro-technology Justice.”¹⁷ Michael Bennett, a lawyer and associate research professor at Arizona State University’s School for the Future of Innovation in Society, labeled Scalia a “minor philosopher of technology.”¹⁸ Matthew Rozsa of Daily Dot, a blog covering Internet culture, added: “when it comes to Internet freedom, he may have been one of the great legal minds of our time.”¹⁹

In particular, video game enthusiasts owe a debt of gratitude to Scalia. He wrote the “historic majority opinion” in *Brown v. Entertainment Merchants*

13. Jonathan H. Adler, *How Scalia-esque Will Donald Trump’s Supreme Court Nominee Be?*, WASH. POST: THE VOLOKH CONSPIRACY (Jan. 26, 2016), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/how-scalia-esque-will-donald-trumps-supreme-court-nominee-be/?utm_term=.78347d2cd777 (quoting Donald Trump).

14. Richard Primus, *Trump Picks Scalia 2.0*, POLITICO MAG. (Jan. 31, 2017), <http://www.politico.com/magazine/story/2017/01/trump-gorsuch-supreme-court-scalia-20-214718>.

15. Trendacosta, *supra* note 10.

16. Smith IV, *supra* note 9.

17. Lopez, *supra* note 12.

18. Michael G. Bennett, *Justice Scalia: Minor Philosopher of Technology*, MEDIUM (Apr. 7, 2016), <http://medium.com/imaginary-papers/justice-scalia-minor-philosopher-of-technology-72bbe664d5a>.

19. Matthew Rozsa, *Supreme Court Justice Antonin Scalia’s Evolution on Internet Freedom*, DAILY DOT (Feb. 14, 2016, 10:16 AM), <http://www.dailydot.com/via/supreme-court-justice-scalia-legacy-internet-freedom/>.

Association, which gave video games First Amendment protection.²⁰ The Supreme Court’s ruling stopped California from regulating video games as products like cigarettes and alcohol instead of as a medium for expression like music, books, and movies.²¹ The Entertainment Software Association praised the decision: “It was a momentous day for our industry and those who love the entertainment we create and we are indebted to Justice Scalia for so eloquently defending the rights of creators and consumer everywhere.”²²

Scalia also left an indelible mark on digital privacy laws.²³ He made several key rulings, including requiring law enforcement to get a warrant before accessing the iPhone of a person they arrested,²⁴ before using thermal imaging devices to search a home for marijuana,²⁵ or before tracking a suspect using GPS.²⁶ Scalia’s precedents continue to shape tech law and policy in other ways. For example, digital privacy advocates are now using the GPS precedent to challenge the constitutionality of Stingray-style devices.²⁷ Smith, a tech journalist, said Scalia’s strong support of digital privacy rights has altered the way police conduct investigations: “[S]omewhere out there, there are police officers trying to use the most sophisticated technology of our time to peer into our lives in ways we never thought possible. And because of Antonin Scalia, someone is saying, ‘You’re going to need a warrant for that.’”²⁸

Additionally, Scalia was “net neutrality’s unlikely hero,” according to Robinson Meyer, tech editor for *The Atlantic*.²⁹ He went against the Court’s majority in a 2005 case, *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, arguing that Internet service was a telecommunications service, which made it subject to stricter government regulation.³⁰ A decade later, the Federal Communications Commission reclassified Internet service as a telecommunication service in order to impose network neutrality—the principle that internet service providers should treat all data on the internet equally, not discriminating or charging differentially by user, content, or website.³¹ “It is

20. Owen S. Good, *ESA Lauds the Late Antonin Scalia, Justice Who Enshrined Video Games as Protected Expression*, POLYGON (Feb. 14, 2016, 8:54 AM), <http://www.polygon.com/2016/2/14/10988692/esa-lauds-the-late-antonin-scalia-justice-who-enshrined-video-games>

21. *Brown v. Entm’t Merch. Ass’n*, 564 U.S. 786 (2011).

22. Good, *supra* note 20.

23. Lawrence Rosenthal, *The Court After Scalia: Fourth Amendment Jurisprudence at a Crossroads*, SCOTUSBLOG (Sept. 9, 2016, 5:31 PM), <http://www.scotusblog.com/2016/09/the-court-after-scalia-fourth-amendment-jurisprudence-at-a-crossroads>.

24. *Riley v. California*, 134 S. Ct. 2473, 2485 (2014).

25. *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

26. *United States v. Jones*, 565 U.S. 400, 400 (2012).

27. Jennifer Lynch & Adam Schwartz, *EFF to Court: Accessing Cell Phone Location Records Without a Warrant Violates the Constitution*, ELEC. FRONTIER FOUND. (Apr. 26, 2016), <http://www.eff.org/press/releases/eff-aclu-court-accessing-cell-phone-location-records-without-warrant-violates>.

28. Smith IV, *supra* note 9.

29. Meyer, *supra* note 11.

30. 545 U.S. 967, 1006 (2005).

31. *In re Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015).

Give Gorsuch a 21st Century Litmus Test

certainly true that Justice Scalia's dissent was pivotal to the FCC's theories in the Open Internet Order," said Peter Karanjia, co-chair of the appellate practice for law firm Davis Wright Tremaine. "The FCC in the order took pains to cite Justice Scalia's opinion."³²

This is not to imply that Scalia was a computer whiz. During hearings, he sometimes asked embarrassing questions about technologies many Americans took for granted, such as cable television.³³ He admitted to being "clueless" when it came to social media.³⁴ And he staunchly opposed allowing cameras to broadcast Supreme Court hearings.³⁵ But Scalia made great strides in understanding the latest technology. For example, at age 74, he boasted that he owned an iPod and an iPad and did so much work on his gadgets that he could "hardly write in longhand anymore."³⁶ Scalia also said that when he had to "take materials home for work, he use[d] a thumb drive, or accesse[d] the Court computer system remotely."³⁷ He even "joked that he played" the popular fighting game *Mortal Kombat* as part of his research in preparing for oral arguments in *Brown*.³⁸

As a result, "he seemed to understand technology better than his peers," according to Trendacosta.³⁹ Likewise, Steve Vladeck, professor of law at University of Texas School of Law, said that "Justice Scalia was quick to grasp how particular technological innovations implicated constitutional protections in ways that might have taken his colleagues an additional step or two."⁴⁰ When reviewing Scalia's body of work in technology cases, his legacy is nonpareil, according to experts. "[I]f there was any force in the forward-march of modern

32. Jacob Fischler, *Scalia's Sharp Dissent Helped Shape Net Neutrality*, LAW360 (Feb. 17, 2016, 8:22 PM), <http://www.law360.com/articles/759979/scalia-s-sharp-dissent-helped-shape-net-neutrality>.

33. Transcript of Oral Argument at 35, *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461), http://www.supremecourt.gov/oral_arguments/argument_transcripts/2013/13-461_9715.pdf (indicating that Scalia did not understand that HBO was a cable network that was not available free over the airwaves).

34. Jordan Fabian, *Chairman to Justices: "Have Either of Y'all Ever Considered Tweeting or Twitting?"*, THE HILL: HILLICON VALLEY (May 21, 2010, 7:30 PM), <http://thehill.com/policy/technology/99209-chairman-to-justices-have-either-of-yall-ever-considering-tweeting-or-twitting-> (quoting Scalia's testimony at a House judiciary subcommittee hearing).

35. Maria Bartiromo, *Justice Scalia Says "Not a Chance" to Cameras*, TODAY (Oct. 11, 2005), <http://today.msnbc.msn.com/id/9649724/ns/today/t/justice-scalia-says-not-chance-cameras> (quoting Scalia on whether cameras will be allowed in the Supreme Court as saying, "Not a chance, because we don't want to become entertainment. I think there's something sick about making entertainment out of real people's legal problems.")

36. David Lat, *Justice Scalia at the Federalist Society Fête*, ABOVE THE LAW (Nov. 20, 2010, 7:36 PM), <http://abovethelaw.com/2010/11/justice-scalia-at-the-federalist-society-fete>.

37. *Id.*

38. Dean Takahashi, *Supreme Court Justices Appear to Favor Video Game Industry in Violence Case*, VENTURE BEAT (Nov. 2, 2010, 9:20 AM), <http://venturebeat.com/2010/11/02/supreme-court-justices-appear-to-favor-video-game-industry-in-violence-case>; see also *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 797 n.4 (2011) ("Reading Dante is unquestionably more cultured and intellectually edifying than playing *Mortal Kombat*.").

39. Trendacosta, *supra* note 10.

40. Lopez, *supra* note 12.

history that could consider Scalia a standard-bearer, it was technology . . . over and over again, he got it right,” Smith said.⁴¹ Stanford Law’s Oullette agreed: “[H]e deserves his reputation as a pro-technology Justice . . . He supported legal rules that allow new technologies to flourish.”⁴²

II. Gorsuch’s Mixed Record

Gorsuch has been dubbed “Scalia 2.0” by many court observers, including University of Michigan Law Professor Richard Primus, who wrote that Gorsuch is “not far from” being “Scalia reincarnated.”⁴³ While that characterization may be accurate broadly speaking, it is less clear the two judges are identical when it comes to specific areas, especially technology law. Like Scalia, Gorsuch has a strong record defending free speech, including online speech. He also has some quirky preferences reminiscent of Scalia’s opposition to cameras in the courtroom. For example, while moonlighting as an adjunct law professor, Gorsuch “forbade students in his legal ethics class from using computers—an unusual move within law schools, where laptops are ubiquitous,” according to legal blog Above The Law.⁴⁴ In contrast to Scalia, Gorsuch has been inconsistent in defending digital privacy rights. In addition, “Gorsuch, being the strict Constitutionalist that he is, may rule to strike down net neutrality regulations.”⁴⁵ Given these disparities, Gorsuch’s record on technology deserves a closer look by the Senate.

On issues related to free speech, “it is readily apparent that” Gorsuch has a “long and informed commitment to the First Amendment,” according to Ronald Collins, a First Amendment professor at University of Washington School of Law.⁴⁶ Gorsuch’s free speech advocacy includes defending the rights of online journalists. In a much-celebrated 2010 decision, Gorsuch joined Tenth Circuit in ruling that a college journalist had his constitutional rights violated when police searched his home and confiscated his computer after a professor complained of being libeled by the student’s online satirical newsletter. In his concurrence in *Mink v. Knox*, Gorsuch wrote that “the First Amendment precludes defamation actions aimed at parody, even parody causing injury to individuals who are not public figures or involved in a public controversy.”⁴⁷ The American Civil

41. Smith IV, *supra* note 9.

42. Lopez, *supra* note 12.

43. Primus, *supra* note 14.

44. Kathryn Rubino, *Judge Gorsuch and the Laptop Ban*, ABOVE THE LAW (Feb. 6, 2017, 7:00 PM), <http://abovethelaw.com/2017/02/judge-gorsuch-and-the-laptop-ban>.

45. Tara Seals, *SCOTUS Pick Neil Gorsuch Will Have Important Voice on Data Privacy*, INFOSEC. MAG. (Feb. 10, 2017), <http://www.infosecurity-magazine.com/news/scotus-pick-neil-gorsuch-data/>.

46. Ronald Collins, *Judge Neil Gorsuch—the Scholarly First Amendment Jurist*, FIRST AMEND. NEWS (Feb. 7, 2017), <http://mtpress.mtsu.edu/firstamendment/judge-neil-gorsuch-the-scholarly-first-amendment-jurist/>.

47. *Mink v. Knox*, 613 F.3d 995, 1012 (10th Cir. 2010) (Gorsuch, J., concurring).

Give Gorsuch a 21st Century Litmus Test

Liberties Union, Student Press Law Center and Foundation for Individual Rights in Education all lauded the court's decision.⁴⁸

On privacy matters, Gorsuch “has dealt with several Fourth Amendment cases that raised novel technology issues.”⁴⁹ Based on his record on such cases, he does not appear to share Scalia’s “legacy as a defender of privacy rights”⁵⁰ in technology. That said, as Orin S. Kerr, a George Washington University law professor who specializes in Fourth Amendment and technology issues observed, Gorsuch’s opinions suggest that he is “not a knee-jerk vote for the government.”⁵¹ Most recently, in August 2016, Gorsuch strengthened online privacy protections in *United States v. Ackerman*.⁵² That case—involving authorities searching emails for child pornography without a warrant—expanded the definition of what a search means, thereby expanding the types of situations that require a warrant to include instances where a person or organization is searching emails on behalf of the government.⁵³ In a 2013 case, involving police officers erroneously stopping someone because of a faulty license plate database, then discovering evidence of a crime, Gorsuch ruled that the police’s use of the flawed technology made the search sufficiently unlawful to block prosecutors from using the drugs as evidence.⁵⁴ In some cases, however, Gorsuch has sided with law enforcement. For example, in June 2016—despite Scalia’s and the Supreme Court’s 2012 ruling that police officers need warrants to monitor suspects’ movements by attaching GPS trackers to their cars—Gorsuch ruled that prosecutors could use GPS evidence without a warrant because the tracking occurred a year prior to the Supreme Court’s decision.⁵⁵ In another blow to digital privacy, in the 2007 case *United States v. Andrus*, Gorsuch ruled that a 91-year-old man giving authorities permission to search his son’s computer files was sufficient consent under the Fourth Amendment.⁵⁶ These inconsistent decisions indicate that Gorsuch could be a swing vote on digital privacy cases in the Supreme Court.

There is also doubt over whether Gorsuch will uphold network neutrality. Internet Service Providers have challenged the FCC’s policy in federal court and the case could eventually make its way to the Supreme Court by 2018 “by which

48. Azhar Majeed, *Prosecutor Coughs Up \$425,000 for Violating Student’s First Amendment Rights*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Dec. 13, 2011), <http://www.thefire.org/prosecutor-coughs-up-425000-for-violating-students-first-amendment-rights>.

49. Charlie Savage, *Was That Search Illegal? Sometimes, Neil Gorsuch Ruled It Was*, N.Y. TIMES (Feb. 2, 2017), <http://www.nytimes.com/2017/02/02/us/politics/neil-gorsuch-supreme-court-fourth-amendment.html>.

50. Tom Risen, *Garland Would Influence SCOTUS Encryption, Privacy Cases*, U.S. NEWS & WORLD REP. (March 16, 2016, 5:15 PM), <http://www.usnews.com/news/articles/2016-03-16/garland-would-influence-scotus-encryption-privacy-cases>.

51. Savage, *supra* note 49.

52. *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016).

53. *Id.* at 4; *see also* Tummarello, *supra* note 2.

54. *United States v. Esquivel-Rios*, 725 F.3d 1231 (10th Cir. 2013).

55. *United States v. Mitchell*, 653 F. App’x 651 (10th Cir. 2016).

56. *United States v. Andrus*, 483 F.3d 711 (10th Cir. 2007).

point Gorsuch, of the Tenth Circuit, may be confirmed.”⁵⁷ The FCC maintains that it has the authority to regulate the Internet based on the “*Chevron* doctrine,” named for a 1984 Supreme Court decision that expanded the regulatory power of the federal government, which Scalia “was often a defender of.”⁵⁸ On the other hand, a “recent concurring opinion Gorsuch wrote from the appellate bench suggests that he could target just the sort of agency authority the FCC asserted in its net neutrality order.”⁵⁹ In his August 2016 concurring opinion in *Gutierrez-Brizuela v. Lynch*, Gorsuch called *Chevron*, and a subsequent Supreme Court ruling that recognized the FCC’s authority to determine whether the Internet should be regulated as a telecommunications service, the “elephant in the room.”⁶⁰ Gorsuch said the principles enshrined by *Chevron* “permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design.”⁶¹ According to Case Western Reserve University Law Professor Jonathan Adler, the issue of whether courts should defer to administrative agencies such as the FCC when a statute is ambiguous is “the greatest area of difference between Gorsuch and Scalia.”⁶²

III. Tech Litmus Test

In addition to ruling on network neutrality, Gorsuch could make landmark rulings for technologies that have not even been imagined yet. Because Supreme Court Justices enjoy lifelong appointments, Gorsuch—who would be the youngest Justice on the current Supreme Court bench at 49 years old—could serve for three or four decades. Just within the next few years, several key issues involving technology are on the horizon. With Apple resisting the Federal Bureau of Investigation’s demand to help it hack a terrorist’s iPhone, Google’s data-mining techniques leading to invasion of privacy lawsuits, and cyberbullying testing the limits of free speech, *Ars Technica* tech policy reporter Joe Silver predicts that “the Supreme Court is likely to be confronted with many . . . challenging technology cases, and it will play a central role in shaping the 21st century cyberlaw debate.”⁶³

It is crucial that senators carefully vet Gorsuch to ensure he is the right jurist to decide such issues. Both his savvy and legal philosophy regarding technology

57. Kyle Daly, *GOP Lawmakers Leave Net Neutrality to FCC to Pressure Dems*, BLOOMBERG BNA (Feb. 13, 2017), <http://www.bna.com/gop-lawmakers-leave-n57982083721>.

58. Fischler, *supra* note 32.

59. Daly, *supra* note 58.

60. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016).

61. *Id.*

62. Jonathan H. Adler, *Gorsuch’s Judicial Philosophy is Like Scalia’s—With One Big Difference*, WASH. POST (Feb. 1, 2016), <http://wapo.st/2nD26WP>.

63. Joe Silver, *Supreme Court Struggles with E-Mail But Will Shape Technology’s Future*, ARS TECHNICA (May 6, 2014, 3:44 PM), <http://arstechnica.com/tech-policy/2014/05/supreme-court-struggles-with-e-mail-but-will-shape-technologys-future>.

Give Gorsuch a 21st Century Litmus Test

should be examined. “Future nominees to the bench should be quizzed on their knowledge of technology at confirmation hearings,” suggested Trevor Timm, Executive Director of the Freedom of the Press Foundation.⁶⁴ They do not need a million followers, or even a social media account. But, like Scalia, Court nominees should at least demonstrate a genuine desire to learn about technology and attempt to properly balance innovation and expression with privacy and safety. “A justice typically isn’t confirmed or denied based on these kinds of issues,” said Shaun Bockert, an intellectual property attorney at Blank Rome.⁶⁵ “There are hot button issues, and unfortunately whether software is copyrightable is not one of them.”⁶⁶ But, as *Wired*’s Lapowsky notes, “that doesn’t mean these cases won’t have far-reaching implications for the tech industry and users of tech alike—which is to say pretty much everyone.”⁶⁷ For everyone’s sake, the Senate must ensure Gorsuch is “very much in the mold of Justice Scalia” when it comes to technology.

64. Trevor Timm, *Technology Law Will Soon Be Reshaped By People Who Don’t Use Email*, GUARDIAN (May 3, 2014, 7:30 AM), <https://www.theguardian.com/commentisfree/2014/may/03/technology-law-us-supreme-court-internet-nsa>.

65. Lapowsky, *supra* note 1.

66. *Id.*

67. *Id.*