



## Research

# New Technology, Same Principles: The Supreme Court and Tech

ASHLEY BAKER, THE COMMITTEE FOR JUSTICE | JANUARY 14, 2019

During the confirmation [hearings](#) for then-Judge Neil Gorsuch, Senator and former Judiciary Committee Chairman Orin Hatch asks a question about interpreting constitutional provisions in the digital age. How, he asks, can a two-century old document apply to technologies that were not even imagined by the Founders?

Gorsuch responds, “So, the technology changes, but the principles do not. And it cannot be the case that the United States Constitution is any less protective of the people’s liberties today than it was the day it was drafted.”

Will the Supreme Court — with the recent addition of Justices Gorsuch and Kavanaugh — adhere to the dictum “new technology, same principles?” Only time will tell, but a few recent cases may serve as good indicators. Still, the law governing emerging technologies is predominantly statutory, which means that despite decisions by the courts Congress will inevitably have many questions to address.

Between the current cases before the Supreme Court and sensible legislation from Congress, there is still hope that our institutions will succeed in protecting both innovation and the principles of our founders in this brave new high-tech world.

## PRIVACY

*What’s Left of the Fourth Amendment?*

In what was one of the most important technology cases in Supreme Court history, the justices ruled [5-4](#) last June that the historical cell phone location data used to convict Timothy Carpenter of armed robbery is subject to the protection of the Fourth Amendment. Acknowledging that Fourth Amendment doctrine must [evolve](#) to account for “seismic shifts in digital technology,” the high court said that the government was required to obtain a search warrant for the data.

The question before the justices in *Carpenter v. United States* was whether the third-party doctrine and the lower standards of the [Stored Communications Act](#) (SCA) allow law enforcement authorities to obtain such data from an individual’s cell phone provider without the finding of “probable cause” required for a search warrant. The third-party doctrine, first articulated by the Supreme Court in *United States v. Miller* (1976) and *Smith v. Maryland* (1979), holds that people have no reasonable expectation of privacy under the Fourth Amendment when they voluntarily convey information to a third party, such as a bank or a telephone service provider.

In a world where digital information can be transmitted without affirmative consent, the doctrine has created a gaping hole in the Fourth Amendment. Cell phones are so ubiquitous that, as Chief Justice Roberts wrote in *Riley v. California*

(2013), “nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12 percent admitting that they even use their phones in the shower.”

With *Carpenter*, the Supreme Court concluded that the *voluntary* conveyance assumption behind the third-party doctrine doesn’t hold up in light of the precise, retrospective nature of cell phone location data. As Roberts [explained](#) in the majority opinion, “a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up.”

As the Court said in the ruling: “Our decision today is a narrow one. We do not express a view on (scenarios) not before us.” Because the high court’s reasoning logically applies to a variety of current and future technologies, however, the ramifications of the *Carpenter* decision are likely to be anything but narrow.

One practical, short-term implication of the decision is that law enforcement, defense attorneys, and courts will begin to think differently about metadata. Because *Carpenter* was so vague, attorneys may apply the logic of *Carpenter* to a wide array of situations involving other technologies. *Carpenter* may well cause law enforcement to adjust their practices and seek a warrant when searching the digital data that is so pervasive in our lives today. That alone makes the ruling a major victory for privacy rights that will reign in the [tendency](#) of the government to use subpoena power to circumvent the higher standards of a search warrant.

### *Possible Paths to Digital Property Rights*

The Court’s opinion in *Carpenter* included four dissents — the most written in a single case since *Obergefell*, the 2015 same-sex marriage decision. One of those dissents came from Justice Neil Gorsuch. His dissent was more like a concurrence on other grounds, but it reads as if he was laying the [groundwork](#) for future changes to Fourth Amendment jurisprudence, which may ultimately be in his hands.

Justice Gorsuch’s dissent was partially based on the Court’s failure to confront the third-party doctrine head-on. Gorsuch’s dissent argues that rather than employ a Fourth Amendment analysis focusing on the reasonable expectation of privacy, the court should follow a property rights-based theory of the Fourth Amendment. Under that theory, *Carpenter* had a property interest in his cell phone data.

Although the Court is unlikely to completely discard the third-party doctrine anytime soon, it will likely slowly chip away at the doctrine, and Justice Gorsuch’s suggestion of a positive-law approach may be the best path forward. When the legislative branch acts to create specific property rights, as Justice Gorsuch noted, “that may supply a sounder basis for judicial decision-making than judicial guesswork about societal expectations.” And since the Supreme Court’s ruling in *Carpenter* did not include more invasive and increasingly prevalent technologies such as facial recognition software, stingray devices, DNA collection, and drone surveillance, it may be time to discuss another approach to vindicate the full protections of the Fourth Amendment.

Meanwhile, Congress should [act](#) to strengthen statutory requirements for searches enabled by new technologies. Now that the third-party doctrine is no longer the bright-line rule it once was, confusion is inevitable, and the branch closest to the people is best-equipped to weigh in on societal privacy expectations.

Whether or not Congress picks up its glacial pace of legislation, the Supreme Court and lower courts will continue to settle important technology issues. Policymakers need to be especially cognizant of how legal responses to innovation will impact technologies' application and implementation, as well as expose the need for congressional action.

## ANTITRUST

### *Will the Supreme Court Take a Bite Out of Apple?*

This term's big antitrust case is *Apple v. Pepper*, in which users of Apple's iPhone claim that the company is violating federal antitrust laws by requiring them to buy apps exclusively from Apple's App Store. The question before the Supreme Court is whether iPhone users have standing to bring this suit for damages. The answer hinges on the Court's application of its 1977 *Illinois Brick Co. v. Illinois* precedent, which holds that only the direct purchaser of a product or service may sue for antitrust damages.

Apple argues that it is merely acting as an agent or middleman for app developers, as evidenced by the fact that it sells the apps at the prices set by the developers. The only direct purchasers, Apple says, are the developers themselves, who pay the company a 30 percent commission for use of the App Store. The plaintiffs disagree, noting that iPhone users pay Apple directly and are thus direct purchasers.

If oral argument is any indication, the plaintiffs are likely to prevail. All four members of the Court's liberal bloc and at least a couple of the more conservative justices voiced skepticism of Apple's argument that the instant facts are analogous to *Illinois Brick*. In that case, contractors purchased bricks from the defendant company and used them in buildings the plaintiffs purchased, but the plaintiffs had no direct contact with the defendant. Unlike those plaintiffs, the plaintiffs here buy apps directly from Apple.

Some of the justices seemed to hint that the Court should overrule *Illinois Brick*. Justice Brett Kavanaugh noted that, at very least, it is not clear how *Illinois Brick* should apply to the facts here and suggested that the Court therefore look to the broad language of the governing Clayton Antitrust Act under which "any person injured" by an antitrust violation can sue. If that language is taken literally, iPhone users would have standing.

Only Chief Justice John Roberts seemed to lean toward Apple, noting that the plaintiffs' arguments had evolved from what they said in their complaint. Corey Andrews of Washington Legal Foundation explains that on the way "to the Supreme Court, the plaintiffs' theory of monopolization went from the claim that Apple monopolized the distribution market for apps by charging app developers a supracompetitive 30 percent commission to the claim that Apple's App Store is itself a monopoly because consumers can't buy an app from anywhere else."

Roberts also voiced concern about the possibility of duplicative recoveries in situations such as this if, say, both iPhone users and app developers sue for the same antitrust violation. Justice Gorsuch, however, pointed out that even in states that allow indirect purchasers to file antitrust suits under state law, duplicative recoveries have not been a problem: "Shouldn't we question *Illinois Brick* perhaps," Gorsuch asked, "given the fact that so many states have done so? They've repealed it."

### *Apple v. Pepper Is About Who Is Entitled to Sue*

If the plaintiffs do prevail on standing, the case will go back to the lower courts where the iPhone users will still need to demonstrate that Apple is in violation of antitrust laws. Similarly, any precedent set by the Court's decision later this year will be limited to standing and will not address the central question of whether the App Store violates antitrust law. In other words, *Apple v. Pepper* will decide who is allowed to sue.

The reach of any decision will also be limited by the practical fact that Apple has a unique business model regarding app sales. Since the plaintiffs were unable to point to other distributors with a similar business model, the justices may not worry, as some amici do, that a ruling against Apple would open the floodgates to similar e-commerce lawsuits.

That said, if the Court overturns *Illinois Brick*, giving indirect purchasers standing, the impact on antitrust law will not be limited to the tech industry. For the Court to overturn *Illinois Brick*, however, would be an extraordinary step, especially since the plaintiffs have not asked it to do so and the Court did not grant certiorari on the question of the precedent's viability. Moreover, Congress has [rejected](#) 17 bills over the past four decades to overrule *Illinois Brick* and repeal the direct purchaser rule. Nonetheless, given Congress's recent heightened interest in enforcing the antitrust laws against the tech giants, this case — especially a decision for Apple — could motivate Congress to consider legislation that negates or modifies the rule.

## FREE SPEECH

*Will a Free Speech Case “Break the Internet”?*

A relatively low-profile but important free speech case this term is [Manhattan Community Access Corporation v. Halleck](#), in which two content contributors are suing a public-access television channel, claiming it is violating their First Amendment rights by barring them from appearing on the channel for harassing an employee in 2012. The [question](#) before the Supreme Court is whether the private operator of this channel (known as MNN) is a “state actor” — that is, a person or entity acting on behalf of the government — and is therefore subject to the First Amendment, which normally applies only to the government.

The potentially broader issue before the high court is when private property can be a “[public forum](#)” — a place like a public street or park, where free speech is protected — and the owner of the property can be deemed a state actor and thus be subject to the First Amendment. This question is increasingly relevant as Congress and the legal community debate whether privately owned social media platforms such as Facebook and YouTube have any obligation to respect the requirements of the First Amendment.

If the justices conclude that Manhattan's designation of a private company to operate a public-access channel turns the company into a state actor, could the precedent apply to online media providers as well? That's an unlikely outcome, but the case will undoubtedly impact the larger ongoing debate over content moderation.

While acknowledging that on its face this case has little to do with online platforms, a [brief](#) filed by the Internet Association urges the Court to issue an “exceedingly narrow” ruling because of concerns “that any decision that deems MNN a state actor will be misinterpreted in ways that are highly damaging to the Internet.”

Another [amicus brief](#) warns the justices that “Internet service providers and platforms are directly affected by the uncertainty” generated by this case, because “these companies have developed business models that rely on providing open platforms” and some have even “sought to partner with municipalities to provide communities

with access to the Internet.” Therefore, it is important to clarify the line between state and private actors.

The concerns of Internet companies may have been alleviated somewhat at [oral argument](#), when the plaintiffs’ attorney emphasized that the Court was not asked to consider the broader public-forum question. Furthermore, plaintiffs explain, “only a government can create a public forum,” so Internet platforms can’t be analogized to government-mandated public-access channels.

At least two of the Court’s liberal justices, Ruther Bader Ginsburg and Sonia Sotomayor, appeared sympathetic to the plaintiffs’ argument that Manhattan’s designation of MNN to run the channel and its operational requirements that limit MNN’s discretion render the company little more than an agent of the government. Justice Brett Kavanaugh, on the other hand, was skeptical of that argument. He noted that MNN was a private company “not operating on government property” and was thus very much like public utilities, which have been [held](#) to not be state actors.

### *Kavanaugh and Congress Could Matter Most*

For the past three decades, a substantial portion of opinions in important free speech cases were authored by Justice Anthony Kennedy, giving him substantial [influence](#) on First Amendment jurisprudence. Although he, like Justice Sandra Day O’Connor, was often a swing vote in these cases, [some](#) would argue that Justice Kennedy’s central legacy was his insistence on putting First Amendment cases first.

Following his departure from the Court last June, it remains to be seen which justice will fill his shoes in prioritizing free speech cases. Although Chief Justice Roberts recently declared himself the First Amendment’s “most aggressive defender,” Justice Kavanaugh’s confirmation to the Court is likely to be more consequential, as he is replacing the swing vote. And if lower court judicial records are any indication, Kavanaugh is [likely](#) to weigh in on free speech cases, and may even place an emphasis on online speech. The role of the D.C. Circuit combined with the increasing number of tech-related cases over the past several years has given him ample exposure to the issue.

There is no shortage of [evidence](#) supporting this prediction. In an opinion dissenting from the denial of rehearing en banc in *United States Telecom Association v. FCC* (2016), Kavanaugh wrote that the government may not “regulate the editorial decisions of Facebook and Google” or “impose forced-carriage or equal-access obligations on YouTube and Twitter.” In *Cablevision Systems Corp. v. FCC* (2010), Kavanaugh also wrote separately to discuss the First Amendment problems raised by carrier restrictions, noting that “[t]he First Amendment endures, and it applies to modern means of communication as it did to the publishers, pamphleteers, and newspapers of the founding era.”

Although the high court’s decision in *Manhattan Community Access Corporation v. Halleck* is [likely](#) to be a narrow one, policymakers should pay extra attention to Justice Kavanaugh for potential discussion of Internet platforms.

As for Congress, while this case won't directly impact social media platforms, conversation surrounding it is certain to spill over into the debate over [Section 230](#), the law that protects online speech by providing limited immunity from third-party speech liability. Lawmakers are upset about social media companies' content moderation practices, and — rightly or wrongly — want to do something about it. That Section 230 immunity is politically [vulnerable](#) was demonstrated when Congress passed [SESTA-FOSTA](#) last year, ending immunity for content related to sex trafficking.

Since the Court won't grant a more directly relevant case in the immediate future, it may be that Congress decides the fate of their limited immunity provision that inadvertently created the Internet as we know it. It is therefore important for policymakers to consider carefully each aspect of this issue rather viewing it through the lens of politics alone.

## CONCLUSION

In the areas of the law most important to the future of America's tech industry — privacy, antitrust, and free speech — both Congress and the Supreme Court can contribute to the continued vibrancy of America's tech industry and the economic growth it spurs.

The Supreme Court holds tremendous power, but as these three cases demonstrate, it both moves incrementally and is constrained by the law. Sometimes the Supreme Court is the wrong forum for updating American law to reflect technological advancement, making the need for congressional action greater. Protecting the Internet could require wise legislation on current issues.