

# CONCURRING OPINIONS

## Supreme Court Protects Your Right to Make Negligent Facebook Posts

By Ilya Shapiro

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True to form, in *Elonis v. United States* the Supreme Court [continued its unparalleled defense of free speech](#) – this time in the social-media context. Also true to form, however, Chief Justice John Roberts put together a near-unanimous majority by shying away from hard questions and thus leaving little guidance to lower courts.

The case involved a statute that made it a federal crime to transmit in interstate commerce – the Internet counts – “any communication containing any threat . . . to injure the person of another.” Based on a bizarre series of Facebook posts styled largely on the lurid lyrical stylings of Eminem, Anthony Elonis was convicted under that law of threatening his wife, the police, an FBI agent, and a kindergarten class. Yet prosecutors didn’t prove that Elonis intended to threaten anyone or even understood his words as being threatening. All they showed was that the individuals in question felt threatened by the posts. The Supreme Court correctly ruled that that’s not enough, that negligently throwing around violent rap lyrics shouldn’t get someone thrown in prison. As Roberts noted, the general rule is that a “guilty mind” – what lawyers call *mens rea* – is a necessary element of any crime.

But alas that’s as far as Roberts went: since the statute in question doesn’t specify the requisite state of mind, mere negligence isn’t enough. He did not say – the Court did not rule at all – whether an amended statute criminalizing negligent speech would pass First Amendment muster. (This issue was the focus of [Cato’s amicus brief](#).) Indeed, as Justice Alito points out in partial dissent, the majority opinion doesn’t even say whether “reckless” Facebook posts come under the statute’s purview (or whether that reading would in turn satisfy the First Amendment).

In short, I’m glad that amateur poet “Tone Dougie” (Elonis’s nom de rap) won’t be practicing his art in the hoosegow, but the Supreme Court’s minimalism has guaranteed this type of case – and maybe even this defendant – an encore. Particularly as social media and other new means of expression evolve, the justices need to do more than narrowly slice speech-chilling criminal laws.

*Ilya Shapiro is a Senior Fellow in Constitutional Studies and Editor-in-Chief of the Cato Supreme Court Review.*