

2017

Updating the Social Network: How Outdated and Unclear State Legislation Violates Sex Offenders' First Amendment Rights

Elizabeth Tolon
Fordham University School of Law

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), [First Amendment Commons](#), [Internet Law Commons](#), [Legislation Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Elizabeth Tolon, *Updating the Social Network: How Outdated and Unclear State Legislation Violates Sex Offenders' First Amendment Rights*, 85 Fordham L. Rev. 1827 (2017).

Available at: <https://ir.lawnet.fordham.edu/flr/vol85/iss4/11>

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

UPDATING THE SOCIAL NETWORK: HOW OUTDATED AND UNCLEAR STATE LEGISLATION VIOLATES SEX OFFENDERS' FIRST AMENDMENT RIGHTS

*Elizabeth Tolon**

Readily available on computers, phones, tablets, or television, social media has become a necessary platform of expression for many. But, for others, social media is an inaccessible tool whose very use has criminal repercussions.

To protect innocent children, many states have enacted legislation restricting sex offenders' access to social media. Unfortunately, this legislation is often outdated, overly restrictive, and unconstitutional under the First Amendment. North Carolina has recently attracted national attention, as its statute highlights the potential constitutional issues states face in drafting such legislation. To avoid the constitutional concerns that North Carolina faces, state legislators must draft statutes narrowly and provide ample alternative channels of communication for sex offenders.

*This Note first analyzes current state legislation restricting sex offenders' social media usage, focusing specifically on North Carolina's statute. It then discusses the U.S. Supreme Court case *Packingham v. North Carolina*, challenging the constitutionality of North Carolina's statute under the First Amendment. This Note explains how *Packingham* offers the Supreme Court an opportunity to clarify and instruct states on how to properly draft future legislation. Specifically, the Court must address what constitutes a narrowly tailored statute and what type of alternatives must be available for sex offenders whose social media access is restricted. This Note ultimately concludes that North Carolina's statute is not narrowly tailored and does not leave ample alternative channels of communication. To help avoid these issues in the future, this Note concludes by suggesting a model statute for constitutionally restricting sex offenders' social media use.*

* J.D. Candidate, 2018, Fordham University School of Law; Dual B.A., 2012, George Fox University. I would like to thank Professor Youngjae Lee for his guidance and scholarship. I would also like to thank Tom McInerney, Harlem Boo Radley, the Study Group, my sweet family, and the entire *Fordham Law Review* for their help in preparing this Note.

INTRODUCTION.....	1829
I: A BRIEF HISTORY OF SEX OFFENDER LEGISLATION	1831
A. <i>The Evolution of Sex Offender Legislation</i>	1831
B. <i>The Rise of the Internet in Society Today</i>	1834
1. The Internet: Can't Live Without It, Yet Some Do	1834
2. A Deviant Use: Sex Offenders and the Internet.....	1835
II: A DIVERGENCE OF OPINIONS: THE STATE LEGISLATIVE RESPONSE.....	1836
A. <i>Prohibitions on Internet Usage Under the First Amendment</i> .	1837
1. How Courts Evaluate Free Speech Challenges.....	1837
2. Is Anything Really Free?: The Constitution's Protection for Free Speech on the Internet	1839
a. <i>Free Speech and Its Limits for Felons</i>	1840
b. <i>Registered Sex Offenders and Free Speech: How the Law Does Not Clarify Sex Offenders' First Amendment Rights</i>	1841
B. <i>A National Look at Sex Offender Social Media Bans</i>	1842
C. <i>States That Got It Right: How New York, Texas, and Minnesota Crafted Constitutional Statutes</i>	1843
1. New York.....	1844
2. Texas.....	1844
3. Minnesota.....	1844
D. <i>States That Got It Wrong: How Indiana's, Louisiana's, and Nebraska's Statutes Failed to Pass Constitutional Muster...</i>	1845
1. Indiana	1845
2. Louisiana.....	1846
3. Nebraska	1847
E. <i>A Troubling Case: How North Carolina's Statute Creates Constitutional Concerns</i>	1847
III: <i>PACKINGHAM V. NORTH CAROLINA: AN OPPORTUNITY FOR THE U.S. SUPREME COURT TO CLARIFY FIRST AMENDMENT QUESTIONS</i>	1849
A. <i>The Personal Profile of State v. Packingham</i>	1850
B. <i>Not Narrow Enough: The North Carolina Court of Appeals Declares the Statute Unconstitutional</i>	1850
C. <i>The North Carolina Supreme Court Opinion Holds That the Statute Is Constitutional</i>	1851
D. <i>Who Got It Right?: The United State Supreme Court Steps in to Determine the Statute's Fate</i>	1853
1. Content Based v. Content Neutral.....	1853
2. Narrow Tailoring	1855
3. Ample Alternative Channels of Communication.....	1856
E. <i>A Comment on the Case: The Unbearable Burden of North Carolina's Statute</i>	1857

IV: WHAT NEXT?: THE PATH TO CONSTITUTIONAL LEGISLATION..... 1859APPENDIX..... 1860

INTRODUCTION

Social media is readily accessible at all times—on computers, tablets, phones, and even watches. Society depends on these websites to attend social gatherings, catch up with old friends, receive news updates, and express opinions. But imagine a world without social media. No invitations to gatherings, important or immediate news notifications, or personal online profiles. For some individuals, this is reality.

As a condition of release, many registered sex offenders are restricted from accessing social networking websites.¹ Courts, parole boards, parole officers, and state legislation impose this condition (along with other conditions, such as registry requirements, residency restrictions, and employment restrictions) to protect the public, and specifically children, from sex offenders.² The compelling public desire to keep children safe from potential abusers fuels these restrictions. The motivation behind social media bans is the desire to bar sex offenders from the virtual communities where children congregate. Consequently, many offenders are restricted from using much of the Internet, one of the leading mediums of expression.³

The Internet and social networking websites are crucial to individual expression.⁴ Social networking websites have revolutionized the way individuals communicate, share ideas, market their businesses, strategize, and protest.⁵ Because these mediums have become essential tools of expression, any statute restricting access risks a First Amendment challenge.⁶

For some registered sex offenders, these restrictions may seem appropriate; the offender's underlying crime might have involved a minor, inappropriate communication over the Internet, or both. For other offenders—those who had no contact with a minor or did not use the Internet in the facilitation of their crime—these conditions are harsh and overbroad. It is this latter group of offenders whose First Amendment rights may be in jeopardy: the restrictions are insufficiently tailored

1. *See infra* Part III.B–D.

2. Although discretionary conditions imposed on sex offenders by judges, parole boards, and parole officers provide an interesting discourse, this Note focuses on state legislation restricting sex offenders from accessing social networking sites. This Note does not address the current circuit split regarding various discretionary conditions exercised by nonlegislative bodies. For a more detailed analysis of this issue, see generally Krista L. Blaisdell, Note, *Protecting the Playgrounds of the Twenty-First Century: Analyzing Computer and Internet Restrictions for Internet Sex Offenders*, 43 VAL. U. L. REV. 1155 (2009) (discussing the varying approaches to postconviction release hearings for Internet sex offenders).

3. *See infra* Part I.B.1.

4. *See infra* notes 44–48 and accompanying text.

5. *See id.*

6. *See infra* Part II.A.1.

because they apply to those who pose no risk to children and fail to leave open adequate alternatives for these individuals to communicate.

Some states, like New York and Texas, have passed legislation that successfully balances public safety concerns with sex offenders' First Amendment rights.⁷ Other states, like Indiana and Nebraska, however, have enacted flawed laws, many of which were ultimately struck down for being overly restrictive.⁸ The wide spectrum of laws limiting sex offenders' access to social media demonstrates the confusion over how states can regulate sex offenders' speech without raising constitutional concerns.⁹ One state in particular, North Carolina, has recently garnered national attention¹⁰ for prohibiting all registered sex offenders, regardless of the sexual offense, from using a wide array of social networking websites.¹¹ A registered sex offender challenged the law after he was convicted for using Facebook.¹² The U.S. Supreme Court will hear his case in early 2017.¹³ The Court will address whether the statute, which restricts all registered sex offenders from accessing a wide array of social networking websites, is constitutional under the First Amendment.¹⁴ This case presents the Supreme Court with an opportunity to clarify how the First Amendment may impose limitations on state legislation restricting sex offenders' right to access social networking websites.

This Note examines the issues states face when drafting legislation prohibiting sex offenders from using social media. Part I discusses the evolution of sex offender legislation and how the advent of the Internet has affected this evolving body of law. Next, Part II examines current state legislation restricting sex offenders' access to social networking sites, focusing on North Carolina's statute. It also analyzes relevant First Amendment jurisprudence. Then, Part III discusses the issues presented in *State v. Packingham*,¹⁵ the Supreme Court case challenging the constitutionality of North Carolina's statute and offers suggestions as to how the Supreme Court can resolve these issues. Finally, Part IV proposes a model statute and commentary for states drafting similar legislation.

7. See N.Y. PENAL LAW § 65.10(4-b) (McKinney 2011); TEX. GOV'T CODE ANN. § 508.1861(a)–(b) (West 2015); see also *infra* notes 126–40 and accompanying text.

8. See *infra* Part II.D and accompanying text.

9. See *infra* Part II.C–D.

10. See Debra Cassens Weiss, *Supreme Court Will Consider Constitutionality of Law Banning Sex Offenders from Social Media*, A.B.A. J. (Oct. 31, 2016, 3:26 PM), http://www.abajournal.com/news/article/supreme_court_will_consider_constitutionality_of_law_banning_sex_offenders [<https://perma.cc/L5RN-H7GR>].

11. See N.C. GEN. STAT. § 14-202.5 (2009).

12. See *State v. Packingham*, 748 S.E.2d 146, 149 (N.C. Ct. App. 2013), *rev'd*, 777 S.E.2d 738 (N.C. 2015), *cert. granted*, 137 S. Ct. 368 (2016); see also *infra* Part III.

13. See *Packingham*, 137 S. Ct. 368.

14. See Brief for the Petitioner at i, *Packingham*, 137 S. Ct. 368 (No. 15-1194), 2016 WL 7321777, at *i.

15. 777 S.E.2d 738 (N.C. 2015), *cert. granted*, 137 S. Ct. 368 (2016).

I: A BRIEF HISTORY OF SEX OFFENDER LEGISLATION

Sex offender legislation has emerged as a prominent issue in recent years as public concern for child welfare has risen.¹⁶ Congress enacted the Sex Offender Registration and Notification Act (SORNA) as part of the Adam Walsh Child Protection and Safety Act of 2006 to keep children safe from sexual predators who may live in their neighborhood, city, or county.¹⁷ Under SORNA, every state must have a sex offender registry that adheres to the SORNA guidelines.¹⁸ Beyond these guidelines, states have wide autonomy to craft registry requirements and laws regulating registered offenders, including laws restricting access to social networking websites.¹⁹

To understand why state legislation may conflict with the First Amendment, it is important to understand how these statutes came into existence and from where they derive their authority. Part I.A. explores how federal legislation sets the minimum requirements that states must impose on sex offenders. It explores the state response to these requirements and how the rise of the Internet has impacted state legislation. Then, Part I.B. examines how states have responded to Internet crimes by restricting sex offenders' access to specific websites.

A. *The Evolution of Sex Offender Legislation*

SORNA mandates a nationwide sex offender registry with penalties for sex offenders who fail to register.²⁰ States that fail to comply with SORNA lose ten percent of their annual funds from the Edward Byrne Memorial Justice Assistance Grant Program (JAG).²¹ To avoid losing federal funding, states are required to overhaul their sex offender registry to meet SORNA's minimum requirements,²² including maintaining a minimum risk classification system for sex offenders,²³ which states have generally done.²⁴ SORNA also allows states to impose more stringent requirements, and this discretion has led to wide variations in sex offender legislation.²⁵

16. See John E.B. Meyers, *A Short History of Child Protection in America*, 42 FAM. L. Q. 449, 460–62 (2008).

17. See 42 U.S.C. § 16901 (2012). The Walsh Child Protection and Safety Act establishes community notifications, registry requirements, and state legislation requirements. See *id.*; see also Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future*, 64 DRAKE L. REV. 741, 749–50 (2016).

18. See 42 U.S.C. § 16912.

19. *Id.*; see also *infra* Part II.D.

20. See 42 U.S.C. § 16922.

21. See *id.* § 16925(a). For more information about the JAG Program, see NATHAN JAMES, CONG. RESEARCH SERV., RS22416, EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT (JAG) PROGRAM 2 (2013).

22. See 42 U.S.C. § 16925(a).

23. See *id.* §§ 16911–16912.

24. For a list of jurisdictions that have successfully implemented SORNA, see *SORNA Implementation Status*, SMART, <http://ojp.gov/smart/sorna-map.htm> (last visited Feb. 16, 2017) [<https://perma.cc/LM3K-7QAU>].

25. See 42 U.S.C. § 16912.

An interesting example of how states have varied in their implementation of SORNA's requirements is their treatment of the tiered system.

SORNA establishes three tiers of sex offender classifications in the federal system, which are based on the severity of the convicted offense and determine the type of restrictions offenders face upon release.²⁶ States are also required to establish a similar tiered system,²⁷ but they may determine how to integrate the offenses listed in SORNA, as each tier of offenses is subject to corollary registration requirements.²⁸ This is important for the purpose of this Note because states who have implemented constitutional social media restrictions have restricted access in correlation to the sex offenders' tier or risk level, as suggested by SORNA.²⁹ In contrast, states who have failed to implement constitutional restrictions on sex offenders' social media use have similarly failed to integrate risk level or tier status into determining whether a sex offender is granted social media access.³⁰ This results from the amount of variation states are permitted under SORNA.

Because SORNA mandates only the minimum registry requirements and permits states to implement harsher restrictions, there is considerable variation among how states implement these requirements. For example, New York classifies offenders based on crime of conviction combined with several other factors,³¹ while Pennsylvania classifies offenders based on crime of conviction alone.³² Thus, depending on the state, some sex offenders who have been convicted of the same underlying offense may have to comply with fewer restrictions than others. If a sex offender is classified as "high risk," he may be required to provide to the state his entire criminal history, as well as his DNA, driver's license and passport information, employment information, phone numbers, online Internet identifiers, physical description, professional licensing information, addresses of both personal residences and school residences (if applicable), social security number, and any vehicle information.³³ States are permitted to require even more information than this from sex offenders upon release.³⁴

26. *See id.* § 16917(a).

27. *See id.* §§ 16911–16912.

28. *See* Lori McPherson, *Practitioner's Guide to the Adam Walsh Act*, 20 UPDATE, nos. 9–10, 2007, at 1, 2, http://www.ndaa.org/pdf/update_vol_20_no_9_10_2007.pdf [<https://perma.cc/42DL-6X6H>].

29. *See infra* notes 126–40 and accompanying text.

30. *See infra* Part II.D.

31. For example, New York considers the offender's criminal history. It also determines risk level based on a court's assessment of whether the offender is likely to repeat the same or a similar offense and the danger the offender poses to the community. *See Risk Level & Designation Determination*, DIVISION CRIM. JUST. SERVICES, http://www.criminaljustice.ny.gov/nsor/risk_levels.htm (last visited Feb. 16, 2017) [<https://perma.cc/P4YY-Z68K>].

32. *See Megan's Law Website*, PA. ST. POLICE, <https://www.pameganslaw.state.pa.us/FAQ.aspx> (last visited Feb. 16, 2017) [<https://perma.cc/SML6-4YBG>].

33. *See* 42 U.S.C. § 16914 (2012).

34. *See id.* § 16912; *see also* WASH. REV. CODE § 9A.44.130(3) (2015) (providing that registered sex offenders must present signed written notice of plans to travel outside the

Understanding the tiered system and the resulting restrictive conditions placed upon sex offenders helps to provide context for demonstrating how further limitations, such as restricting Internet access, may go too far. For example, while some states have unsuccessfully attempted to ban sex offenders from using the Internet entirely,³⁵ many states have enacted legislation that restricts the use of certain websites, such as social networking websites.³⁶ In response, registered sex offenders brought actions challenging the statutes' constitutionality under the First Amendment,³⁷ Due Process Clause,³⁸ Ex Post Facto Clause,³⁹ and the Fourth Amendment.⁴⁰

These challenges highlight the possibility that states have gone too far in their restrictions and that, specifically, restricted Internet access is cause for extreme concern. To understand how statutes impact registered sex offenders by restricting their social media usage, this Note next examines the rise of the Internet and its prevailing use in society.

country at least twenty-one days prior to travel and must include their names, passport numbers, and destinations, as well as itinerary details including departure and return dates, means of travel, and reasons for travel).

35. *See* *United States v. Paul*, 274 F.3d 155, 169–70 (5th Cir. 2001) (upholding an Internet prohibition where the defendant had used Internet communication to encourage exploitation of children); *United States v. Crandon*, 173 F.3d 122, 127–28 (3d Cir. 1999) (upholding a postrelease ban on Internet use where the defendant had been convicted of receiving child pornography and had also engaged in sexual relations with an underage girl he had met via email).

36. *See* N.Y. PENAL LAW § 65.10(4-b) (McKinney 2011); TEX. GOV'T CODE ANN. § 508.1861(a)–(b) (West 2015).

37. *See infra* Part II.B.

38. *See* *State v. D.M.*, No. 110822401, 2013 WL 1845596, at *9 (Del. Fam. Ct. 2013) (holding that automatic and mandatory registration and notification provisions within the Delaware statute, as applied to juvenile offenders, were constitutional and did not violate the procedural due process guarantees of the Fourteenth Amendment or the state constitution). *But see* *Doe v. Jindal*, 853 F. Supp. 2d 596, 605 (M.D. La. 2012) (concluding that the Louisiana statute that restricted registered sex offenders from using or accessing social networking websites, chat rooms, and peer-to-peer networks was void for vagueness in failing to clarify which websites were prohibited).

39. *See* *Doe v. Shurtleff*, 628 F.3d 1217, 1220 (10th Cir. 2010) (holding that the statute requiring the offender to disclose his Internet identifiers imposed only a civil burden upon sex offenders). *But see* *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1125 (D. Neb. 2012) (finding that criminalizing sex offender registrants' use of social networking websites, and requiring disclosure of Internet identifiers, was intended to punish sex offenders, and therefore violated the Ex Post Facto Clause).

40. *See* *White v. Baker*, 696 F. Supp. 2d 1289, 1312 (N.D. Ga. 2010) (holding that a statute did not violate the Fourth Amendment by requiring former sex offenders to provide Internet email addresses, usernames, and passwords to law enforcement personnel, because the required disclosed information had already been reported to third parties and was publicly available on the Internet). *But see* *Doe v. Prosecutor*, 566 F. Supp. 2d 862, 882 (S.D. Ind. 2008) (holding that Indiana's statute that required offenders not currently on parole, probation or under court supervision to consent to installing hardware or software on personal computers at the offender's expense was unconstitutional).

B. *The Rise of the Internet in Society Today*

Readily available on computers, phones, tablets, or television, the Internet has become a necessary commodity for many.⁴¹ For others, the Internet is an inaccessible tool, the use of which may have criminal repercussions.⁴² This section discusses the importance of the Internet in society and describes the criminal penalties imposed on sex offenders for using it.

1. The Internet: Can't Live Without It, Yet Some Do

The Internet significantly increases the ability to find, manage, and share information.⁴³ Specifically, social networking websites were designed to encourage communication and interactions between friends, families, and colleagues.⁴⁴ Further, these sites allow many individuals to express their opinions and beliefs on a common platform while also gathering relevant news and information.⁴⁵ Americans use social networking sites for work, professional development, or to seek employment.⁴⁶ Sites like LinkedIn have become popular with college graduates and high-income earners.⁴⁷ Social networking websites have gained tremendous traction in the business world; a recent study found that 70 percent of business marketers acquired customers through Facebook.⁴⁸ Given the rise of the Internet and social media use in all facets of daily life, it is evident that it has become an important tool of expression, hence why restricting its usage can be damaging. Considering its value and usage in daily life, it is crucial to understand why social media restrictions are permissible in some cases but not others.

41. See Frank La Rue (Special Rapporteur on the Human Rights Council), *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶¶ 20–22, U.N. Doc. A/HRC/17/27 (May 16, 2011) (declaring Internet access an inherent right).

42. See *infra* Part II.B.1.

43. See Kristin Purcell & Lee Raine, *Americans Feel Better Informed Thanks to the Internet*, PEW RES. CTR. (Dec. 8, 2014), <http://www.pewInternet.org/2014/12/08/better-informed/> [<https://perma.cc/DHX4-X9HS>].

44. See Jonathon Hitz, *Removing Disfavored Faces from Facebook: The Freedom of Speech Implications of Banning Sex Offenders from Social Media*, 89 IND. L.J. 1327, 1332 (2014).

45. For example, more than half of the American public turned to these sites to learn about the 2016 American presidential election. See Shannon Greenwood et al., *Social Media Update 2016*, PEW RES. CTR. (Nov. 11, 2016), <http://www.pewInternet.org/2016/11/11/social-media-update-2016/#fn-17239-1> [<https://perma.cc/NKS7-TWUH>].

46. *Id.*

47. For example, half of adults who have college degrees use LinkedIn, compared with 27 percent of individuals who attended but have not graduated from college. *Id.*

48. See *id.*; see also *Businesses on Social Media—Statistics and Trends*, GO-GULF (Sept. 30, 2014), <http://www.go-gulf.ae/blog/businesses-social-media/> [<https://perma.cc/EMH5-5VP7>].

2. A Deviant Use: Sex Offenders and the Internet

Prohibiting sex offenders from using the Internet after they have served time for their crimes may strike some as an exaggerated response to the threats they pose, especially because the Internet has become such a crucial part of daily life. The Internet, however, also facilitates crimes.⁴⁹ Generally, criminals use the Internet to commit a wide variety of crimes, from commonplace acts of misconduct⁵⁰ to acts of terrorism.⁵¹ Sex offenders in particular use the Internet to commit crimes because it allows them to create anonymous identities and evade the attention of authorities.⁵²

The ease of communication through email, instant message sites, or live electronic programs allows sex offenders to meet up with unsuspecting internet users and to find people who have the same criminal proclivities.⁵³ For example, providers of child pornography are difficult to track because of their anonymity on the Internet, which contributes to the increasing exploitation of children.⁵⁴ Furthermore, child pornography had been virtually eliminated in the United States before the advent of the Internet.⁵⁵

49. See Iliia Kolochenko, *Cybercrime: The Price of Inequality*, FORBES (Dec. 19, 2016, 9:00 AM), <http://www.forbes.com/sites/forbestechcouncil/2016/12/19/cybercrime-the-price-of-inequality/print/> [<https://perma.cc/3FZ4-TDLF>].

50. See, e.g., James M. Sellers, Comment, *The Black Market and Intellectual Property: A Potential Sherman Act Section Two Antitrust Defense?*, 14 ALB. L.J. SCI. & TECH. 583, 587–88 (2004).

51. See, e.g., Seth R. Merl, Note, *Internet Communication Standards for the 21st Century: International Terrorism Must Force the U.S. to Adopt “Carnivore” and New Electronic Surveillance Standards*, 27 BROOK. J. INT’L L. 245, 248 (2001).

52. See generally Jay Krasovec, Comment, *Cyberspace: The Final Frontier, for Regulation?*, 31 AKRON L. REV. 101 (1997) (discussing methods that many utilize to remain anonymous on the Internet).

53. See *United States v. Paul*, 274 F.3d 155, 164 (5th Cir. 2001) (finding that the defendant interacted with other sexual offenders on the Internet prior to committing his crimes); see also Meiring de Villiers, *Free Radicals in Cyberspace: Complex Liability Issues in Information Warfare*, 4 NW. J. TECH. & INTELL. PROP. 13, 39 (2005) (noting that the degree of anonymity on the Internet “embolden[s] cybercriminals to commit crimes they would not otherwise consider”).

54. See Robyn Forman Pollack, Comment, *Creating the Standards of a Global Community: Regulating Pornography on the Internet—An International Concern*, 10 TEMP. INT’L & COMP. L.J. 467, 478–80 (1996) (discussing several cases in which sex offenders used the Internet to select their victims).

55. By the middle of the 1980s, trafficking of child pornography within the United States was almost completely eliminated through federal law, which prevented the creation, possession, or dissemination of child pornography. See *Child Pornography*, U.S. DEP’T JUST. (June 3, 2015), <https://www.justice.gov/criminal-ceos/child-pornography> [<https://perma.cc/RQ38-9B4W>]. There were a number of successful anti-child pornography campaigns waged by law enforcement, which rendered the production, purchase, and trade of child pornography both difficult and expensive. See *id.* Anonymous distribution and receipt was nearly impossible, and it was difficult for child pornography seeking or producing individuals to locate and interact with each other. See *id.* The rise of the Internet created an explosion within the child pornography market. See *id.* For the first time, online communication made possible anonymous meetings of people with sexual attractions to children. See Kurt Eichenwald, *A Shadowy Trade Migrates to the Web*, N.Y. TIMES (Dec. 19, 2005), <http://www.nytimes.com/2005/12/19/business/19kidswebhistory.html> [<https://perma.cc/H3BE-E52Q>]. Consequently, the Internet revived the market for child pornography and allowed for the collection and trading of such materials with, as one author

Because the Internet has provided a tool for some sex offenders to engage in criminal behavior, it is understandable that legislatures would have an interest in banning its use among convicted sex offenders.⁵⁶

II: A DIVERGENCE OF OPINIONS: THE STATE LEGISLATIVE RESPONSE

Many states have enacted broad legislation restricting sex offenders' access to social networking websites to protect children from online predators.⁵⁷ States differ in determining which specific category of sex offense may trigger a social media ban and which websites are prohibited.⁵⁸ Some states restrict sex offenders' access to social networking websites regardless of underlying offenses or whether the offense had any connection to the Internet.⁵⁹ Other states have tailored their statutes more narrowly and limit offenders' use of social media based upon their previous criminal conduct.⁶⁰ When individuals challenge these restrictions, courts are forced to balance public safety concerns with registered sex offenders' constitutional rights.⁶¹

First, Part II.A analyzes the First Amendment jurisprudence necessary to determine the constitutionality of current legislation. Next, Part II.B examines the spectrum of approaches states take in restricting sex offenders' access to social networking websites. Part II.C discusses state statutes that restrict only certain individuals and social networking websites, while Part II.D examines state statutes that broadly restrict social media access and, as such, have failed under the First Amendment. Part II concludes by focusing on how North Carolina's statute fits along this spectrum.

put it, "the vigor and obsession usually found among baseball card enthusiasts." *Id.* The Internet made production of child pornography easy and inexpensive and allowed individuals to create, access, and share child sexual abuse images with ease and anonymity. *See Child Pornography*, U.S. DEP'T JUST. (June 3, 2015), <https://www.justice.gov/criminal-ceos/child-pornography> [<https://perma.cc/RQ38-9B4W>]. Today, child pornography is readily available through almost every Internet outlet including websites, email, instant messaging, newsgroups, message boards, peer-to-peer networks, and social networking websites. *See id.*

56. Although beyond the scope of this Note, many social networking sites, such as Facebook and Instagram, have barred sex offenders from their websites. *See e.g., Statement of Rights and Responsibilities*, FACEBOOK, (Jan. 30, 2015), <https://www.facebook.com/terms> [<https://perma.cc/ACU7-HNNC>]. Facebook explicitly bans access by sex offenders in its terms of service, whereas Twitter, Snapchat, LinkedIn, Kik, and other websites permit sex offenders. *See id.*; *see also Twitter Terms of Service*, TWITTER, (Sept. 30, 2016) <https://twitter.com/tos?lang=en> [<https://perma.cc/M73A-XNDL>]; *User Agreement*, LINKEDIN, (Oct. 23, 2014), <https://www.linkedin.com/legal/user-agreement> [<https://perma.cc/U6EP-CAHT>]; *Snap Inc. Terms of Service*, SNAP, INC., <https://www.snap.com/en-US/terms/> (last visited Feb. 16, 2017) [<https://perma.cc/CK2T-5KKQ>]; *Terms of Service*, KIK, (May 11, 2016), <https://www.kik.com/terms/#changementsection> [<https://perma.cc/TW5R-XNLK>].

57. *See infra* Part II.B.

58. *See infra* Part II.B–D.

59. *See e.g.*, N.C. GEN. STAT. § 14-202.5 (2009).

60. *See* MINN. STAT. § 244.05(6)(c) (2016); N.Y. PENAL LAW § 65.10(4-b) (McKinney 2011); TEX. GOV'T CODE ANN. § 508.1861(a)–(b) (West 2015).

61. *See supra* notes 38–40 and accompanying text.

A. *Prohibitions on Internet Usage
Under the First Amendment*

The First Amendment governs the individual right of free speech and expression—one of the bedrock principles upon which this country was founded.⁶² Over time, the Supreme Court has crafted a framework to determine whether state action has infringed upon an individual's right to free speech and expression. This section reviews that framework to aid in determining the constitutionality of North Carolina's sex offender statute.

1. How Courts Evaluate Free Speech Challenges

Faced with a First Amendment challenge, courts often balance the government's interest against the burdened individual's rights.⁶³ The greater the burden imposed on individual rights, the stronger the government interest must be for a statute to be constitutional.⁶⁴ Courts must balance these interests when reviewing First Amendment challenges to statutes.⁶⁵

Courts review alleged First Amendment violations with differing levels of scrutiny.⁶⁶ Statutes regulating speech are either content-based regulations or content-neutral regulations of speech.⁶⁷ Content-based statutes regulate speech on the face of the statute and upon the speech expressed.⁶⁸ For example, a law that prohibits offensive speech is content based because it restricts speech based on the message or type of words conveyed.⁶⁹ If the Court finds a statute content based, strict scrutiny applies, which requires the statute to serve a compelling government interest and be narrowly tailored to achieve that interest.⁷⁰ Although the

62. See U.S. CONST. amend. I; *Schneider v. New Jersey*, 308 U.S. 146, 161 (1939) (stating that the freedom of speech and press are fundamental rights, and courts have the duty to balance these rights against regulation).

63. See *State v. Packingham*, 777 S.E.2d 738, 749 (N.C. 2015), *cert. granted*, 137 S. Ct. 368 (2016).

64. See *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989) (holding that concert restrictions in a public park were constitutional time, place, and manner restrictions because they adequately balanced individual rights with legitimate government interests); see also Eva Conner, *Why Don't You Take a Seat Away from That Computer?: Why Louisiana Revised Statute 14:91.5 Is Unconstitutional*, 73 LA. L. REV. 883, 903 (2013). For a good example of the Court balancing these interests, see *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

65. See *Ward*, 491 U.S. at 791.

66. See R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing*, 8 ELON L. REV. 291, 291–92 (2016).

67. See *id.* at 295.

68. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

69. See, e.g., *Cohen v. California*, 403 U.S. 15, 26 (1971); see also *R.A.V.*, 505 U.S. at 382.

70. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *Erznoznik v. Jacksonville*, 422 U.S. 205, 209 (1975) (stating that the government cannot selectively censor offensive speech under the First Amendment).

government interest may be incredibly strong, it is very difficult for statutes to pass strict scrutiny.⁷¹

In contrast, a statute is content neutral if it regulates speech or expression without reference to the message conveyed.⁷² For example, a law that regulates the volume level of a concert held in a public square is content neutral because it does not regulate the content of the music even if it affects how the music is expressed.⁷³ These content-neutral regulations are often sorted into two categories: (1) time, place, or manner restrictions and (2) expressive conduct restrictions.⁷⁴ Time, place, or manner restrictions restrict the how the speech is expressed but not the speech itself.⁷⁵ If the regulation is a time, place, or manner restriction, intermediate scrutiny applies, requiring the statute to (1) serve a significant governmental interest, (2) be narrowly tailored to serve that interest, and (3) leave open ample alternative channels for communicating the information.⁷⁶ The previous example of a restriction on a concert's volume level is an example of a time, place, and manner restriction.

Alternatively, content-neutral regulations that restrict expressive conduct and incidentally burden speech are also evaluated under intermediate scrutiny, though under a different standard.⁷⁷ If a court determines that a statute regulates conduct in a content-neutral manner, it will apply the four-factor test from *United States v. O'Brien*⁷⁸ to determine whether the statute is sufficiently justified.⁷⁹ In *O'Brien*, the Supreme Court found that when speech and nonspeech elements are combined in the same course of conduct, the regulation is permissible if

it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.⁸⁰

This standard differs from the time, place, manner restrictions because it targets expressive or symbolic conduct, (such as burning a draft to protest a war)⁸¹ that may not rise to the level of protected speech but still is afford

71. See *Reed*, 135 S. Ct. at 2226. *But see* *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (noting that the government has a very strong and compelling interest in protecting citizens during elections from coercion and confusion).

72. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

73. See generally *id.*

74. See *State v. Packingham*, 777 S.E.2d 738, 743 (N.C. 2015), *cert. granted*, 137 S. Ct. 368 (2016). This threshold determination is not always present, but the initial question of conduct versus speech continues to be a central feature of First Amendment doctrine. See *Texas v. Johnson*, 491 U.S. 397, 404 (1989); see also Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1988–90 (2016).

75. See *Ward*, 491 U.S. at 796.

76. See *id.* at 791.

77. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

78. 391 U.S. 367 (1968).

79. See *id.* at 377.

80. *Id.* at 376–77.

81. See generally *id.*

some First Amendment protection.⁸² In total, hurdling over the constitutional bar is easier for content-neutral restrictions than content-based restrictions, but the government must still articulate a legitimate government interest and show an adequate balance between its interest and the speech interests.⁸³

One of the more difficult issues courts face is what level of constitutional protection speech on the Internet is afforded. When the government regulates internet expression, individuals challenge the statutes for violating their constitutional rights.⁸⁴ The arguments challenging Internet bans have helped clarify what level, if any, of constitutional protection is afforded to speech over the Internet.

2. Is Anything Really Free?:

The Constitution's Protection for Free Speech on the Internet

As the Internet has become a leading platform for expression, courts grapple with whether access to the Internet should be considered a fundamental right or, at least, a medium of speech afforded constitutional protection. While the United Nations has declared Internet access an inherent right,⁸⁵ the Supreme Court has not yet recognized access to the Internet as an individual right but has acknowledged that speech conducted on the Internet implicates the First Amendment.⁸⁶ Although Internet speech is protected by the Constitution, it is unclear whether registered sex

82. *Id.* at 376 (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea. . . . This Court has held that when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”).

83. *See State v. Packingham*, 777 S.E.2d 738, 749 (N.C. 2015), *cert. granted*, 137 S. Ct. 368 (2016).

84. *See United States v. Miller*, 594 F.3d 172, 175 (3d Cir. 2010) (holding lifetime limitation on use of Internet, in light of less restrictive alternatives, a “greater restraint of liberty than is reasonably necessary”); *United States v. Heckman*, 592 F.3d 400, 409 (3d Cir. 2010) (stating that prohibiting access to any Internet service provider, bulletin board system, or other public or private computer network for the rest of a defendant’s life is too broad given “alternative, less restrictive, means of controlling Heckman’s post-release behavior,” including computer monitoring paid for by defendant).

85. *See La Rue*, *supra* note 41, ¶¶ 20–22.

86. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (“The Internet can hardly be considered a ‘scarce’ expressive commodity. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soap box. . . . [O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”); *see also Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (recognizing that the First Amendment protections extend to new forms of speech and expression, and noting “‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears” (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952))); *Ashcroft v. ACLU*, 535 U.S. 564, 566 (2002) (“The Internet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” (quoting 47 U.S.C. § 230(a)(3) (Supp. 1996))).

offenders enjoy the same amount of constitutional protection that average internet users do.

a. Free Speech and Its Limits for Felons

The Supreme Court has not explicitly defined the limits of registered sex offenders' First Amendment rights. However, the Supreme Court has addressed the First Amendment rights of prisoners in two cases: *Pell v. Procunier*⁸⁷ and *Beard v. Banks*.⁸⁸ These cases provide a brief overview of current jurisprudence regarding the First Amendment rights of incarcerated prisoners and their sliding spectrum of constitutional protection.⁸⁹ Although prisoners and sex offenders are not in identical situations, they share similar limitations of rights. This analysis of prisoners' rights provides context for registered sex offenders' First Amendment rights; if prisoners can have their speech rights curbed to ensure public safety, sex offenders may be subjected to speech limitations as well.

For example, in *Pell*, the Court held that the prison's policy to deny prisoners permission to interview with journalists did not violate the prisoners' First Amendment rights.⁹⁰ In contrast to a narrowly tailored analysis or an *O'Brien* analysis⁹¹ the Court found that "a prison inmate retains [only] those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."⁹² Individuals retain their constitutional rights while imprisoned, but certain rights may be restricted or denied for the safety of the prison environment.⁹³ The Court reasoned that the safety concerns of face-to-face interviews and the resulting potential discipline issues outweighed the prisoners' right to communicate with the journalists.⁹⁴ The Court found that prisoners had alternative channels of communication,⁹⁵ so the prisoners' freedom of speech was sufficiently protected and the First Amendment was not violated.⁹⁶

Similarly, in *Beard*, the Supreme Court reiterated *Pell's* notion that imprisonment does not deprive prisoners of constitutional protection, but sometimes a greater restriction of such rights and are allowed in prison than would be permitted elsewhere.⁹⁷ The *Beard* Court held that the prison's policy of prohibiting prisoners from reading newspapers, magazines, and keeping personal photographs did not violate their First Amendment

87. 417 U.S. 817 (1974).

88. 548 U.S. 521 (2006).

89. See *Turner v. Safley*, 482 U.S. 78, 89 (1987) (holding that a prison regulation impinging on inmates' constitutional rights is valid if it is reasonably relates to legitimate penological interests).

90. See *Pell*, 417 U.S. at 827–28.

91. See *supra* Part II.A.1.

92. *Pell*, 417 U.S. at 822.

93. See *id.*

94. See *id.* at 827.

95. See *id.* at 827–28.

96. See *id.* at 828.

97. See *Beard*, 548 U.S. at 528.

rights.⁹⁸ The Court justified this conclusion by stating that the need to strictly monitor and hold prisoners in harsher confinement outweighed certain First Amendment liberties.⁹⁹ The Court emphasized the other alternatives available to the prisoners¹⁰⁰ and the reasonable balance of maintaining safety and restricting the prisoners' rights.¹⁰¹

*b. Registered Sex Offenders and Free Speech:
How the Law Does Not Clarify
Sex Offenders' First Amendment Rights*

The analysis of prisoners' First Amendment rights helps provide context for determining the scope of registered sex offenders' First Amendment rights. For public and prison safety, prisoners have their speech rights limited. Similarly, because sex offenders face additional restrictions postincarceration (that other felons may not have), they may be subjected to greater speech limitations as well. There are several important differences, however, between prisoners and registered sex offenders.¹⁰²

First, many registered sex offenders have already completed their prison sentences and are released on probation, parole, or another type of supervised release.¹⁰³ There is an argument that they should not be penalized further for prior crimes.¹⁰⁴ Second, the broad sweeping bans may be an efficient way to handle prison inmates, but they are inequitable for offenders whose situations vary greatly.

Despite these arguments, registered offenders have their rights limited by extended restrictions on their behavior in addition to incarceration and parole.¹⁰⁵ All registered sex offenders are monitored by law enforcement through the act of registering.¹⁰⁶ There are also places they are not allowed to live or work.¹⁰⁷ Therefore, it might not seem that offensive to the Constitution to limit their speech rights online as well.

98. *See id.* at 530.

99. *Id.*

100. *See id.* at 532–33 (stating there are reasonable, but not ideal, alternatives).

101. *See id.* at 530–31.

102. *See Hitz, supra* note 44, at 1343.

103. *See id.* at 1335.

104. *See Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1125 (D. Neb. 2012) (holding that criminalizing sex offenders' use of social media, and disclosing Internet identifiers was intended to punish sex offenders and therefore violated the Ex Post Facto Clause).

105. *See* 42 U.S.C. § 16913 (2012).

106. *See* OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, & TRACKING, U.S. DEP'T OF JUSTICE, SEX OFFENDER REGISTRATION AND NOTIFICATION IN THE UNITED STATES: CURRENT CASE LAW AND ISSUES 13 (2016); NGA CTR. FOR BEST PRACTICES, MANAGING CONVICTED SEX OFFENDERS IN THE COMMUNITY 3–7 (2008).

107. *See generally* Blaisdell, *supra* note 2.

B. A National Look at Sex Offender Social Media Bans

To date, there are eleven state statutes that limit or restrict a sex offender's use of social media.¹⁰⁸ States restricting an offender's social media usage vary greatly.¹⁰⁹ Depending on the state, a violation can range from a Class A misdemeanor¹¹⁰ to a Class I felony.¹¹¹ The statutes do not uniformly define "social network," which means permitted Internet usage for sex offenders varies from state to state. For example, some states have broad definitions that can potentially include websites with chat rooms, photo sharing, or email functions.¹¹² This can lead to restricted access of common news sites, popular email servers, and other non-social networking websites.¹¹³

Similarly, the definition of "sex offender" varies. Some statutes ban social media access only if the offender committed crimes against children or used the Internet in the commission of the crime.¹¹⁴ Other states choose to include all registered sex offenders, without regard to the specific type of crime committed or the rate of recidivism for those crimes.¹¹⁵ These differences highlight why some statutes pass constitutional muster, while others might not.

Notably, some states have enacted social networking website bans that do not apply to all registered sex offenders but only to those convicted of certain sex offenses or those who used a computer in the commission of their crimes. New York, Texas, and Minnesota have done this.¹¹⁶ In contrast, other states attempted and failed to entirely ban sex offenders' social media use. Individuals in Indiana, Nebraska, and Louisiana successfully challenged state statutes that were overly broad in their application and the scope of websites prohibited.¹¹⁷

North Carolina, the focus of this Note, restricts all registered sex offenders from using social networking websites.¹¹⁸ A registered sex offender challenged the statute's constitutionality under the First

108. See NAT'L DIST. ATT'YS ASS'N, RESTRICTION OR BAN OF SOCIAL NETWORKING USE FOR SEX OFFENDERS COMPILATION 4–13 (2013), http://www.ndaajustice.org/pdf/Sex%20Offenders%20and%20Social%20Networks_2013.pdf (listing the statutes limiting or restricting sex offenders' use of social media from Florida, Illinois, Indiana, Kentucky, Louisiana, Minnesota, Nebraska, New York, North Carolina, South Carolina, and Texas) [<https://perma.cc/W6RR-5ALU>].

109. See *infra* Part II.B–E.

110. See IND. CODE § 35-42-4-12(b) (2015).

111. See N.C. GEN. STAT. § 14-202.5 (2009).

112. See *id.*

113. See *e.g.*, State v. Packerham, 777 S.E.2d 738, 753 (N.C. 2015) (Hudson, J., dissenting), *cert. granted*, 137 S. Ct. 368 (2016).

114. See N.Y. PENAL LAW § 65.10(4-b) (McKinney 2011), TEX. GOV'T CODE ANN. § 508.1861(a)–(b) (West 2015).

115. See N.C. GEN. STAT. § 14-202.5.

116. See MINN. STAT. § 244.05(6)(c) (2016); N.Y. PENAL LAW § 65.10(4-b); TEX. GOV'T CODE ANN. § 508.1861(a)–(b).

117. See Doe v. Prosecutor, 705 F.3d 694, 703 (7th Cir. 2013); Doe v. Nebraska, 898 F. Supp. 2d 1086, 1131 (D. Neb. 2012); Doe v. Jindal, 853 F. Supp. 2d 596, 605 (M.D. La. 2012).

118. See N.C. GEN. STAT. § 14-202.5.

Amendment.¹¹⁹ After the North Carolina Supreme Court upheld the statute,¹²⁰ the U.S. Supreme Court granted certiorari to determine whether the statute is constitutional.¹²¹ North Carolina's statute presents an opportunity for the U.S. Supreme Court to provide guidance for state legislators.

To understand the relevant issues of North Carolina's statute, a more in-depth comparison of current state legislation is helpful. Part II.C first examines New York, Texas, and Minnesota's statutes. It discusses how these states properly balance public safety concerns with sex offenders' rights. Next, it focuses on successful First Amendment challenges brought against Indiana's, Louisiana's, and Nebraska's statutes. Then, Part II.D examines how these statutes violated registered sex offenders' First Amendment rights and highlights some of the relevant issues state legislators face in drafting legislation. Part II.E discusses where North Carolina fits on the spectrum and presents a basic framework for analyzing the statute's constitutionality.

*C. States That Got It Right: How New York, Texas, and Minnesota
Crafted Constitutional Statutes*

To avoid constitutional concern, states must craft narrowly tailored statutes to balance individual liberties with the state's pursuit of their interest.¹²² The Supreme Court has said, "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy. A complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil."¹²³ Although state governments have articulated compelling state interests in protecting children,¹²⁴ statutes often are overbroad because (1) the restrictions burden too many people, (2) the restricted websites included are too expansive, and (3) there are not alternative substitutes for the restricted websites.¹²⁵

Although the relevant statutes vary slightly, New York, Texas, and Minnesota offer an alternative to a total ban on sex offenders' social media use.¹²⁶ These statutes provide a narrowly tailored approach that balances public welfare concerns with the speech rights of registered sex offenders.

119. See *State v. Packingham*, 748 S.E.2d 146, 149 (N.C. Ct. App. 2013), *rev'd*, 777 S.E.2d 738 (N.C. 2015), *cert. granted*, 137 S. Ct. 368 (2016).

120. See *Packingham*, 777 S.E.2d at 741.

121. See *Packingham*, 137 S. Ct. 368.

122. See *Frisby v. Schultz*, 487 U.S. 474, 488 (1988).

123. See *id.* at 485 (citation omitted).

124. See *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.").

125. See Hitz, *supra* note 44, at 1351.

126. See MINN. STAT. § 244.05(6)(c) (2016); N.Y. PENAL LAW § 65.10 (4-b) (McKinney 2011), TEX. GOV'T CODE ANN. § 508.1861(a)-(b) (West 2015).

1. New York

In New York, access to social networking websites is dependent on the type of offense committed and risk of reoffending, as designated by tier.¹²⁷ The statute prohibits social media access to registered sex offenders who committed an offense against a minor, have the greatest rate of reoffending, or who used the Internet to facilitate the commission of a crime.¹²⁸ New York defines a commercial social networking site as any site owned by any business or entity that allows people under eighteen to create Web pages or profiles that provide information about themselves.¹²⁹ The site must also allow direct or real-time communication (in essence, a chat room or instant messenger) with people under eighteen.¹³⁰ The statute makes clear that the definition of a restricted social networking website does not include websites that have activities not explicitly enumerated in the statute.¹³¹ This statute is narrowly tailored because it does not burden more people than necessary and keeps the scope of restricted websites to a minimum.

2. Texas

Adopting a similar approach, Texas restricts social networking website access depending upon the type of offense committed or the type of offender.¹³² The statute restricts the access of high-risk sex offenders and those who used computers in the commission of their crimes.¹³³ Texas defines a social networking website as an Internet website that allows users, through the creation of online profiles, to provide personal information to the public, or to other users of the Internet website.¹³⁴ Further, the website must have the primary purpose of facilitating online social interactions to be considered a social networking site.¹³⁵ Additionally, the statute permits registered sex offenders to access social networking sites if they are at risk of losing their jobs or suffering other undue hardships as a result of the restriction.¹³⁶ This statute is also narrowly tailored because it burdens only specific offenders, keeps the scope of restricted websites to a minimum, and provides an “undue hardship” caveat for offenders who may be struggling with integrating back into society.

3. Minnesota

Minnesota limited its social networking website ban to sex offenders who pose a higher risk to the community—those placed on “intensive supervised

127. *See* N.Y. PENAL LAW § 65.10(4-b).

128. *See id.*

129. *See id.*

130. *See id.*

131. *See id.*

132. *See* TEX. GOV'T CODE ANN. § 508.1861 (West 2015).

133. *See id.* § 508.1861(a)–(b).

134. *See* TEX. CODE CRIM. PROC. ANN. art. 62.0061 (West 2009).

135. *See id.*

136. *See* TEX. GOV'T CODE ANN. § 508.1861(b).

release.”¹³⁷ These offenders are not only prohibited from using social networking sites but are banned from using instant messaging programs, chat rooms that permit people under eighteen to become a member, or maintaining a personal Web page.¹³⁸ This statute is very narrowly tailored because it is applicable to only one category of high-risk offenders and defines restricted websites narrowly.¹³⁹

Although these statutes vary slightly, they provide an alternative to a total ban on sex offenders’ social media use through narrowly tailored approaches that balance protection of children with sex offenders’ rights. These statutes restrict the speech of sex offenders who have a high likelihood of reoffending or who used the Internet to commit their crime of conviction.¹⁴⁰ They restrict only websites whose primary function is to operate as a social networking website. These nuances in statutory language create clear guidelines for offenders and maintain a balance between public safety and offenders’ rights.

*D. States That Got It Wrong: How Indiana’s, Louisiana’s,
and Nebraska’s Statutes Failed to Pass Constitutional Muster*

On the opposite side of the spectrum, various states attempted to ban sex offenders entirely from accessing social networking websites. Indiana, Louisiana, and Nebraska enacted statutes that were ultimately struck down as unconstitutional because they were not narrowly tailored enough.¹⁴¹

1. Indiana

The Indiana statute, passed in 2012, applied to all registered sex offenders.¹⁴² The law did not distinguish based on the victim’s age, how the crime was committed, or the time since the original offense.¹⁴³ The statute banned offenders from using social networking websites,¹⁴⁴ instant messaging programs, and chat rooms.¹⁴⁵

137. See MINN. STAT. § 244.05(6)(c) (2016).

138. See *id.*

139. See *id.*

140. See *id.*; N.Y. PENAL LAW § 65.10(4-b) (McKinney 2011); TEX. GOV’T CODE ANN. § 508.1861(a)–(b).

141. See *Doe v. Prosecutor*, 705 F.3d 694, 703 (7th Cir. 2013); *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1131 (D. Neb. 2012); *Doe v. Jindal*, 853 F. Supp. 2d 596, 605 (M.D. La. 2012).

142. See *Doe*, 705 F.3d at 696.

143. See *id.*

144. Under the statute:

A “social networking web site” means an Internet web site that: (1) facilitates the social introduction between two or more persons; (2) requires a person to register or create an account, a username, or a password to become a member of the web site and to communicate with other members; (3) allows a member to create a web page or a personal profile; and (4) provides a member with the opportunity to communicate with another person. The term does not include an electronic mail program or message board program.

Id. at 695 n.1.

145. See *id.* at 695–96.

In *Doe v. Prosecutor*,¹⁴⁶ the Seventh Circuit found the Indiana statute unconstitutional under the First Amendment because it lacked narrow tailoring under intermediate scrutiny.¹⁴⁷ The statute failed to target the evil of improper communications to minors.¹⁴⁸

The statute banned sex offenders from all social media rather than just solicitation of minors through social media.¹⁴⁹ In effect, the statute burdened substantially more individuals and more speech than necessary to serve the intended interest of protecting children.¹⁵⁰ The court also found the statute too burdensome because Indiana had other ways of addressing communication between minors and sex offenders, specifically, the solicitation of a minor was already a crime in Indiana.¹⁵¹ The Seventh Circuit ultimately found the statute would not stop sex offenders from engaging in illegal activity and the ban prohibited too much expressive conduct.¹⁵² Indiana revised its statute in 2013 and provided amendments that incorporated the Seventh Circuit's narrowing suggestions.¹⁵³

2. Louisiana

In contrast to the Indiana statute, the Louisiana statute applied to specific registered sex offenders who were convicted of indecent behavior with juveniles, pornography involving juveniles, computer-aided solicitation of a minor, or video voyeurism.¹⁵⁴ The statute banned all registered sex offenders from accessing social networking websites, chat rooms, and peer-to-peer networks.¹⁵⁵ Like the Seventh Circuit, the Louisiana Supreme Court found the statute unconstitutional because it was overbroad and not narrowly tailored to balance offenders' rights with the government interest.¹⁵⁶

The restriction on the offenders' use of social networking sites was unrelated to the activity the statute sought to prohibit because the statute imposed a sweeping ban on many commonly used non-social networking websites.¹⁵⁷ The court reasoned that the statute failed to leave alternative channels of communication by banning access to many non-social networking websites.¹⁵⁸ The court found this problematic because it failed to address the statute's goal and involved a greater intrusion on registered

146. 705 F.3d 694 (7th Cir. 2013).

147. *See id.* at 695.

148. *See id.*

149. *See id.* at 699.

150. *See id.*

151. *See id.*

152. *See id.* at 701.

153. *See* IND. CODE § 35-42-4-12 (2014). Indiana revised its statute to penalize sex offenders only for the solicitation of minors through social networking websites and not for the use of social networking websites. *See id.*

154. *See Doe v. Jindal*, 853 F. Supp. 2d 596, 599–600 (M.D. La. 2012).

155. *See id.* at 599.

156. *See id.* at 605.

157. *See id.* at 606.

158. *See id.*

sex offenders' First Amendment rights than what was reasonably necessary.¹⁵⁹ The court also found it confusing for those seeking to comply with the statute because it was unclear which websites are prohibited.¹⁶⁰

3. Nebraska

Passed in 2010, the Nebraska statute applied to registered sex offenders who committed sex offenses involving a minor.¹⁶¹ The statute banned registered sex offenders from knowingly and intentionally using a social networking website, instant messaging service, or chat room that permitted minors.¹⁶²

In *Doe v. Nebraska*,¹⁶³ the court found the statute unconstitutional because it was insufficiently tailored to target offenders who pose a risk to children by use of social media.¹⁶⁴ The court noted how restricting social media use affected offenders' ability to read the news; video chat with other people; participate in discussions of a religious, political, or personal nature; and professionally network.¹⁶⁵ Ultimately, the court concluded that the statute was not narrowly tailored because it restricted too many websites that were not social media websites and failed to leave open ample alternative channels for communication that would afford sex offenders' the same platforms for expression.¹⁶⁶

Indiana, Louisiana, and Nebraska's statutes were unconstitutional because they were not narrowly tailored in their application or scope of websites prohibited or they failed to leave open ample alternatives.¹⁶⁷ Taken together, the cases provide a solid framework to analyze North Carolina's statute at issue in *State v. Packingham*.¹⁶⁸ Before analyzing the case, an in-depth look at the challenged statute is necessary.

E. A Troubling Case: How North Carolina's Statute Creates Constitutional Concerns

On December 1, 2008, the North Carolina legislature passed section 14-202.5 of the North Carolina General Statutes.¹⁶⁹ It broadly prohibits all

159. *See id.* at 607.

160. *See id.*

161. *See Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1093, 1094–95 (D. Neb. 2012). The following offenses required registration: kidnapping of a minor; sexual assault of a child in the first degree; sexual assault of a child in the second or third degree; incest of a minor; pandering of a minor; visual depiction of sexually explicit conduct of a child; possessing any visual depiction of sexually explicit conduct; criminal child enticement; child enticement by means of an electronic communication device; enticement by electronic communication; or an attempt or conspiracy to commit any of the aforementioned offenses. *See id.* at 1094.

162. *See id.*

163. 898 F. Supp. 2d 1086 (D. Neb. 2012).

164. *See id.* at 1111.

165. *See id.*

166. *See id.* at 1109.

167. *See Doe v. Prosecutor*, 705 F.3d 694, 703 (7th Cir. 2013); *Doe*, 898 F. Supp. 2d at 1131; *Doe v. Jindal*, 853 F. Supp. 2d 596, 605 (M.D. La. 2012).

168. 777 S.E.2d 738 (N.C. 2015), *cert. granted*, 137 S. Ct. 368 (2016).

169. *See* N.C. GEN STAT. § 14-202.5 (2009).

registered sex offenders 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.”¹⁷⁰

The statute does not restrict itself to sex offenders who used computers in the commission of their crimes or who are at a particularly high risk for recidivism. Instead, North Carolina’s statute requires every registered sex offender—those under supervision and those not under supervision, high-risk offenders and low-risk offenders, those who committed Internet-related sex offenses and those who did not commit Internet-related sex offenses—to refrain from using social networking websites.¹⁷¹ This broad application of the statute creates constitutional concerns for offenders, and it appears to mirror Indiana’s and Louisiana’s statutes before they were struck down for being impermissible restrictions on speech.¹⁷²

Under North Carolina’s statute, a “commercial social networking Web site” is defined as an Internet site that meets the following requirements:

- (1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.
- (2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.
- (3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.
- (4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.¹⁷³

Under this broad definition, registered sex offenders are not allowed to access sites such as Facebook, Twitter, Google+, LinkedIn, Instagram, Reddit, MySpace, and Snapchat.¹⁷⁴ The statute also likely includes sites like Foodnetwork.com and even the websites for the *New York Times* and North Carolina’s *News & Observer*.¹⁷⁵ The statute may even bar sex

170. *Id.*

171. *See id.*; Jasmine S. Wynton, *Myspace, Yourspace, but Not Theirspace: The Constitutionality of Banning Sex Offenders from Social Networking Sites*, 60 DUKE L.J. 1859, 1867–68 (2011).

172. *See supra* Part II.D.1–2.

173. N.C. GEN. STAT. § 14-202.5(b).

174. *Id.*

175. *See State v. Packingham*, 777 S.E.2d 738, 753 (N.C. 2015) (Hudson, J., dissenting), *cert. granted*, 137 S. Ct. 368 (2016); *see also Terms of Service*, NEWS & OBSERVER (July 9, 2015), <http://www.newsobserver.com/customer-service/terms-of-service/> (stating that “[i]f you are under eighteen (18) then you may only use NewsObserver.com with the consent of a parent or legal guardian” but not limiting registration on the site to adults) [<https://perma.cc/D6WX-U83Y>].

offenders from using Amazon and Google.¹⁷⁶ The legislature attempted to balance this broad definition by requiring that the offender must know that the website permits minors to become members.¹⁷⁷ Even so, the statute raises constitutional concerns, and these concerns are demonstrated in *Packingham*.

III: *PACKINGHAM V. NORTH CAROLINA*:
AN OPPORTUNITY FOR THE U.S. SUPREME COURT
TO CLARIFY FIRST AMENDMENT QUESTIONS

In *State v. Packingham*,¹⁷⁸ Packingham, a registered sex offender, was convicted of violating a North Carolina statute that restricts all registered sex offenders from accessing social networking websites.¹⁷⁹ He challenged the statute's constitutionality under the First Amendment.¹⁸⁰

The North Carolina Court of Appeals found the statute unconstitutional, applying intermediate scrutiny.¹⁸¹ On appeal, the North Carolina Supreme Court reversed and upheld the statute, finding it to be sufficiently narrowly tailored to pass intermediate scrutiny while providing ample alternative channels of communication.¹⁸² Packingham appealed, and the U.S. Supreme Court granted certiorari on October 28, 2016.

The Supreme Court's decision to grant certiorari is important because this is a case of first impression; the Supreme Court has never ruled on whether statutes that ban access to social networking websites are constitutional under the First Amendment. Specifically, the Supreme Court must address what constitutes a narrowly tailored statute and what qualifies as ample alternative channels of communication. Using the framework from cases challenging similar statutes,¹⁸³ this Note analyzes North Carolina's Supreme Court decision in *Packingham* and examines whether North Carolina's statute is constitutional.

176. See *Packingham*, 777 S.E.2d at 400 (Hudson, J., dissenting) (finding the definition of restricted websites confusing and overbroad). The statute does exempt from this definition any website that "[h]as as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors." N.C. GEN. STAT. § 14-202.5(c)(2). However, Amazon's primary purpose is to facilitate transactions between Amazon itself and its visitors, not between Amazon users. Accordingly, it appears that this exception may not apply to websites like Amazon but does apply to websites like Craigslist or eBay. *Packingham*, 777 S.E.2d. at 754 n.2.

177. See N.C. GEN. STAT. § 14-202.5.

178. 748 S.E.2d 146 (N.C. Ct. App. 2013), *rev'd*, 777 S.E.2d 738 (N.C. 2015), *cert. granted*, 137 S. Ct. 368 (2016).

179. See *id.* at 149.

180. See *id.* at 149–50. Packingham brought other constitutional challenges, but this Note focuses solely on his First Amendment free speech challenge. See *id.*

181. See *id.*

182. See *Packingham*, 777 S.E.2d at 747–48.

183. See *supra* note 167 and accompanying text.

A. *The Personal Profile of State v. Packingham*

In 2002, Lester Packingham was convicted and required to register as a sex offender in North Carolina.¹⁸⁴ In 2010, the Durham Police Department investigated profiles on social networking websites like Myspace and Facebook for evidence of use by registered sex offenders.¹⁸⁵ An officer recognized Packingham on a Facebook profile and subsequently arrested him for accessing a social networking website.¹⁸⁶ Packingham was indicted for violating North Carolina General Statutes, chapter 14, section 202.5, which makes it a felony for registered sex offenders to access any commercial social networking website that does not restrict membership to adults.¹⁸⁷ Ultimately, a jury found Packingham guilty,¹⁸⁸ and he appealed to the Court of Appeals of North Carolina.¹⁸⁹

On appeal, Packingham challenged the North Carolina statute's constitutionality under the First and Fourteenth Amendments.¹⁹⁰ He alleged that the statute violated his right to free speech, expression, association, assembly, and the press.¹⁹¹ He asserted the statute was overbroad, vague, and not narrowly tailored to achieve a legitimate government interest.¹⁹² The North Carolina Court of Appeals issued a thoughtful opinion striking down the statute.¹⁹³

B. *Not Narrow Enough: The North Carolina Court of Appeals Declares the Statute Unconstitutional*

The North Carolina Court of Appeals determined that the statute was a content-neutral, time, place, or manner regulation of speech and analyzed it under intermediate scrutiny.¹⁹⁴ To pass intermediate scrutiny as a time, place, or manner restriction, the statute must be narrowly tailored and leave open ample alternative channels of communication.¹⁹⁵ The court found the statute was not narrowly tailored, unconstitutionally vague, and overbroad in failing to target the evil it intended to rectify.¹⁹⁶ The court held the statute unconstitutional on its face and as applied.¹⁹⁷

The court's opinion focused on defining what constitutes a narrowly tailored statute and how North Carolina's statute failed when examined closely.¹⁹⁸ The court found the statute was not narrowly tailored because it

184. *See Packingham*, 748 S.E.2d 146.

185. *See Packingham*, 777 S.E.2d at 742.

186. *See id.*

187. *See Packingham*, 748 S.E.2d at 149; *see also* N.C. GEN. STAT. § 14-202.5 (2009).

188. *See Packingham*, 748 S.E.2d at 149.

189. *See id.*

190. *See id.*

191. *See id.* at 149–50.

192. *See id.*

193. *See id.* at 150.

194. *See id.*

195. *See id.*

196. *See id.* at 154.

197. *See id.*

198. *See id.* at 150–52.

was too broad in its application and too broad in the scope of activities it restricted.¹⁹⁹

The court found that the statute was not narrowly tailored in its application in that it treated all registered sex offenders equally, regardless of the offense committed or the likelihood of reoffending.²⁰⁰ It burdened more people than needed to achieve the purported goal of the statute.²⁰¹ The court of appeals also found that the statute was not narrowly tailored, because it prohibited wide use of sites that are not social networking sites.²⁰² Sites such as Google and Amazon are potentially inaccessible because these sites contain secondary pages that derive revenue from advertising,²⁰³ facilitate the social introduction of two or more people,²⁰⁴ and allow individuals to create personal profiles, email accounts, or comment on message boards or review pages.²⁰⁵ The statute prohibited access to websites with these characteristics, restricting far more websites than necessary to achieve the goal of the statute.²⁰⁶

North Carolina appealed the court of appeals decision to the state's supreme court.²⁰⁷ The North Carolina Supreme Court took the appeal²⁰⁸ and, in a controversial decision, reversed the court of appeals.²⁰⁹

C. The North Carolina Supreme Court Opinion Holds That the Statute Is Constitutional

In a 5–2 decision, the North Carolina Supreme Court upheld the statute as a content-neutral regulation of conduct, only incidentally burdening speech.²¹⁰ It analyzed the statute under the *O'Brien* analysis and upheld it.²¹¹

The court first determined that the statute is a content-neutral regulation of conduct—specifically, regulating an offender's ability to access certain and specific websites.²¹² The court then applied the four-prong test from *O'Brien* to determine whether the regulation of conduct was sufficiently

199. *See id.* at 152–54.

200. *See id.* at 152.

201. *See id.* at 152–53.

202. *See id.* at 152.

203. *See* N.C. GEN. STAT. § 14-202.5(b)(1) (2009).

204. *See id.* § 14-202.5(b)(2).

205. *See id.* § 14-202.5(b)(3).

206. *See id.* § 14-202.5.

207. *See Packingham*, 777 S.E.2d at 742.

208. *Id.*

209. The procedural history of *Packingham*'s case illustrates different ways of characterizing these statutes. *See* Eugene Volokh, *Supreme Court Agrees to Consider N.C. Ban on Sex Offenders' Access to Most Prominent Social Networks*, WASH. POST (Oct. 28, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/10/28/supreme-court-agrees-to-consider-n-c-ban-on-sex-offenders-access-to-most-prominent-social-networks/> [<https://perma.cc/7G4B-9G8W>].

210. *See Packingham*, 777 S.E.2d at 738.

211. *See id.*

212. *See id.* at 744.

justified.²¹³ After concluding that the statute satisfied the first three prongs, the court found the fourth prong of the *O'Brien* test could be satisfied if the statute was both narrowly tailored to serve a significant government interest and provided ample alternative channels of communication.²¹⁴ The analysis of the fourth prong was similar to the analysis that the North Carolina Court of Appeals conducted.²¹⁵

The North Carolina Supreme Court found that the statute was narrowly tailored in its applicability because it “establishes four specific criteria that must be met in order for a commercial social networking Web site to be prohibited.”²¹⁶ The statute also entirely exempts websites exclusively devoted to speech, such as instant messaging services and chat rooms, and websites with the primary purpose of facilitating commercial transactions of goods or services between its members or visitors.²¹⁷ The court also provided examples of various non-social networking websites that serve essentially the same purpose as those restricted under the statute.²¹⁸

The court solidified its decision by noting that the primary purpose of the statute is to prevent offenders from having the opportunity to gather information about minors.²¹⁹ The specific criteria prevent offenders from gathering information, thereby “addressing the [exact] evil that the statute seeks to prevent.”²²⁰ The court ultimately concluded the statute was narrowly tailored, provided ample alternatives,²²¹ and was not unconstitutionally overbroad or vague.²²²

Drawing upon the language from the court of appeals’s opinion, Justice Robin Hudson wrote a dissent that concluded that the statute was not narrowly tailored to pass intermediate scrutiny.²²³

213. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Packingham*, 777 S.E.2d at 746.

214. See *Packingham*, 777 S.E.2d at 746. The court combined the fourth factor of the *O'Brien* test, which requires that the least restrictive means be used, with the language in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), which required that regulations be narrowly tailored and the government demonstrate that less restrictive alternative measures would fail to achieve the government’s interests. *Id.*

215. See *State v. Packingham*, 748 S.E.2d 146, 154 (N.C. Ct. App. 2013), *rev'd*, 777 S.E.2d 738.

216. *Packingham*, 777 S.E.2d at 747.

217. See N.C. GEN. STAT. § 14-202.5(c) (2009).

218. See *Packingham*, 777 S.E.2d at 747–48.

219. See *id.* at 745.

220. See *id.* at 747.

221. See *id.* The court responded to the defendant’s list of restricted non-social networking websites by providing similar (although less popular) websites. For example, accessing LinkedIn may be prohibited, but the court offered Glassdoor.com, a similar but less popular professional networking website, as a substitute. *Id.*

222. See *id.* at 749–51; see also *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982) (“A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.”); *Parker v. Levy*, 417 U.S. 733, 756 (1974) (“One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.”).

223. See *Packingham*, 777 S.E.2d at 749–51 (Hudson, J., dissenting).

*D. Who Got It Right?: The United State Supreme Court
Steps in to Determine the Statute's Fate*

On October 28, 2016, the U.S. Supreme Court granted certiorari to Packingham's appeal.²²⁴ The main issue before the Court is whether North Carolina's statute, on its face or as applied, is constitutional under the First Amendment.²²⁵ This Note focuses on the facial challenge, but the analysis and framework is also useful for the as-applied challenge.²²⁶

1. Content Based v. Content Neutral

To resolve the facial challenge, the Court must first determine whether the statute regulates expression on its face and then whether it is content neutral.²²⁷ As noted previously, statutes that regulate speech and are content based are subject to exacting scrutiny,²²⁸ whereas statutes that regulate speech and are content neutral (time, place, or manner restrictions) or those statutes that regulate conduct and burden speech incidentally²²⁹ are examined under intermediate scrutiny.²³⁰

In this case, the North Carolina Court of Appeals determined that the statute directly regulated speech and was content neutral but found it unconstitutional under intermediate scrutiny.²³¹ The North Carolina Supreme Court, however, determined the statute was content neutral but regulated conduct and incidentally burdened speech, and it upheld the statute.²³²

The U.S. Supreme Court's initial determination of whether North Carolina's statute is content based or content neutral will influence its analysis because it will determine whether the Court applies strict or intermediate scrutiny.²³³ After determining the level of scrutiny, however, the important question is whether the statute is narrowly tailored and leaves

224. See *Packingham*, 137 S. Ct. 368.

225. Petition for a Writ of Certiorari at i, *Packingham*, 137 S. Ct. 368 (No. 15-1194).

226. Constitutional challenges can be sorted into two categories: facial challenges and as-applied challenges. See *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988). A facial attack contends that no application of the statute would be constitutional. *Id.* In contrast, an individual bringing an as-applied challenge maintains that an otherwise valid statute is unconstitutional as applied to that individual. See *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 n.16 (Tex. 1995).

227. See *supra* Part II.A.1.

228. See *supra* Parts II.A.1, III.A–B; see also *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

229. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

230. See *United States v. Albertini*, 472 U.S. 675, 689 (1985).

231. See *State v. Packingham*, 748 S.E.2d 146, 154 (N.C. Ct. App. 2013), *rev'd*, 777 S.E.2d 738 (N.C. 2015), *cert. granted*, 137 S. Ct. 368 (2016); see also *supra* Part III.A–B.

232. See *Packingham*, 777 S.E.2d at 740, 743; see also *supra* notes 210–23 and accompanying text.

233. See Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 49, 53 (2000) (noting that "increasingly in free speech law, the central inquiry is whether the government action is content-based or content-neutral").

open ample alternative channels of communication to registered sex offenders.

Overwhelmingly, courts have determined that statutes like North Carolina's are content-neutral regulations.²³⁴ This is because the statutes restrict the sex offenders' speech by denying them the ability to communicate via social media without reference to what the offenders' would actually say on social media.²³⁵ Consequently, it is likely that the Supreme Court will analyze the statute as a content-neutral regulation and will impose intermediate scrutiny.²³⁶ From here, the Court's analysis may depend on whether the Court determines that the statute regulates speech directly or regulates conduct and places an incidental burden on speech.

If the Court determines the statute is a content-neutral regulation of speech or expression, then the regulation is a time, place, or manner restriction.²³⁷ To be constitutional, these restrictions must serve a significant government interest, be narrowly tailored, and leave open ample alternative channels for communicating the information.²³⁸ The North Carolina Court of Appeals determined that the statute was a time, place, and manner restriction, but it found that the statute failed to pass intermediate scrutiny because it was not narrowly tailored.²³⁹

In contrast, if the Court determines the statute regulates conduct but incidentally burdens speech, it will apply the four-factor test from *O'Brien* to determine whether the statute is sufficiently justified.²⁴⁰

In this case, the statute would satisfy the first two *O'Brien* factors because it is within the constitutional power of the government and furthers a substantial governmental interest.²⁴¹ North Carolina has the authority to enact laws, and there is no question that the state has an important interest in protecting minors.²⁴² The statute would likely satisfy the third factor

234. See *supra* Part II.C–D.

235. See *Doe v. Prosecutor*, 705 F.3d 694, 698 (7th Cir. 2013).

236. If the Supreme Court determines North Carolina's statute is a content-based regulation, it will most likely be deemed unconstitutional. To pass strict scrutiny, the statute must be narrowly tailored and the least restrictive means for achieving that interest. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Regulations based on the content of speech trigger strict scrutiny and are presumptively unconstitutional. See *Packingham*, 777 S.E.2d at 744. North Carolina's statute would most likely fail under strict scrutiny. First, the statute burdens more people than necessary to achieve its purported goal and is not narrowly tailored. See *Packingham*, 748 S.E.2d at 154. The statute prohibits all registered offenders from accessing social networking websites, regardless of the underlying offense which required registry. Second, because the statute applies to all offenders and permits no exceptions, it lacks the flexibility necessary to address unique situations. There are better alternatives to achieving these interests, as other states have enacted less restrictive statutes. See *supra* Part II.C.

237. See *Ward*, 491 U.S. at 791.

238. See *id.*

239. See *Packingham*, 748 S.E.2d at 150.

240. See *supra* notes 78–80 and accompanying text; see also *Packingham*, 777 S.E.2d at 746.

241. See *Packingham*, 777 S.E.2d at 746.

242. *Id.*

because the interest in protecting children from the potential harm is unrelated to the suppression of the offender's speech.²⁴³

From here, the Supreme Court's analysis could move in a few different directions. First, the Supreme Court could examine the fourth *O'Brien* factor independently and assess whether the incidental burden on First Amendment freedoms is no greater than is necessary in the furtherance of the state interest.²⁴⁴ More likely, the Supreme Court will, as the North Carolina Supreme Court did, find the fourth factor satisfied if the statute is both narrowly tailored to serve the significant government interest and provides ample alternative channels of communication.²⁴⁵

Under either determination—whether the Court finds the statute a regulation of general conduct or a direct (but content-neutral) regulation of speech—the Supreme Court must decide whether the statute is narrowly tailored and provides ample alternative channels of communication. Further, the Supreme Court will likely use this test because North Carolina, in its brief to the Supreme Court, presented its statute as a time, place, and manner restriction of sex offenders and not a regulation of conduct.²⁴⁶ Therefore, it is likely the Court will apply this test. But the outcome of this test is not clear; the North Carolina Court of Appeals found that the statute was not narrowly tailored enough, and struck it down without considering whether the statute left open ample alternative channels.²⁴⁷ In contrast, the North Carolina Supreme Court found the statute was narrowly tailored and provided ample alternative channels of communication.²⁴⁸ Both opinions provide arguments for the U.S. Supreme Court to consider in analyzing the statute.

2. Narrow Tailoring

Under the standard announced in *Ward v. Rock Against Racism*,²⁴⁹ a statute is “narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.”²⁵⁰ The Court of Appeals of North Carolina found that the North Carolina statute was not narrowly tailored under this definition, because it burdened more people than necessary and prohibited use of non-social networking sites like Google and

243. *See id.* The North Carolina Supreme Court did not include an in-depth exploration of the first three *O'Brien* factors because they were not questioned by the court. *See id.*

244. *See* *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

245. *See* *Packingham*, 777 S.E.2d at 747–48; *see also* *McCullen v. Coakley*, 134 S. Ct. 2518, 2540 (2014); *O'Brien*, 391 U.S. at 377.

246. *See* Brief for the Respondent at 15, *Packingham*, 137 S. Ct. 368 (No. 15-1194). As mentioned previously, time, place, and manner restrictions must be narrowly tailored and provide ample alternative channels of communication. *See* *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

247. *See* *State v. Packingham*, 748 S.E.2d 146, 150 (N.C. Ct. App. 2013), *rev'd*, 777 S.E.2d 738.

248. *See* *Packingham*, 777 S.E.2d at 747.

249. 491 U.S. 781 (1989).

250. *See* *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

Amazon.²⁵¹ The North Carolina Supreme Court, however, found that the statute was narrowly tailored because it “established four specific criteria that must be met in order for a commercial social networking Web Sites to be prohibited.”²⁵² Moreover, the statute exempted websites, instant messaging services, and chat rooms that were devoted exclusively to speech.²⁵³ The U.S. Supreme Court must consider these two approaches when determining whether the statute is narrowly tailored.

3. Ample Alternative Channels of Communication

The Supreme Court must determine whether the statute leaves open ample alternative channels of communications. The North Carolina Court of Appeals did not need to address this prong because it concluded that the statute suffered from both audience and content overbreadth. Thus, it did not pass the narrow tailoring requirement.²⁵⁴ The North Carolina Supreme Court disagreed and additionally found that the statute provided ample alternative channels of communication to the websites prohibited under the statute.²⁵⁵ But the “ample alternative channels” requirement presents a larger issue for the U.S. Supreme Court: lower court decisions have split on how this requirement is understood.²⁵⁶ The Court should address this issue.

*City of Ladue v. Gilleo*²⁵⁷ provides guidance in determining whether a speech restriction leaves open ample alternative channels of communication.²⁵⁸ In *Gilleo*, the Supreme Court invalidated an ordinance that banned homeowners from displaying signs on their property.²⁵⁹ The Court concluded that the ordinance did not leave open “adequate substitutes” for the important medium of speech that it foreclosed.²⁶⁰ While the city argued that the ordinance left people free to convey their desired messages by other means,²⁶¹ the Court found the alternatives inadequate.²⁶² The alternatives conveyed substantively different messages, were not as cost effective, or failed to reach the speaker’s intended audience.²⁶³ This decision created some confusion as to the definition of “ample alternative channels of communication.”

251. *See supra* Part III.B.

252. *Packingham*, 777 S.E.2d at 747; *see also supra* Part III.C.

253. *See supra* Part III.C.

254. *See State v. Packingham*, 748 S.E.2d 146, 150 (N.C. Ct. App. 2013), *rev'd*, 777 S.E.2d 738.

255. *Packingham*, 777 S.E.2d at 747–48.

256. Brief Amici Curiae of Ashutosh Bhagwat et al. in Support of Petitioners at 9–12, *Packingham*, 137 S. Ct. 368 (No. 15-1194).

257. 512 U.S. 43 (1994).

258. *See id.* at 54–56.

259. *See id.* at 47–48.

260. *See id.* at 56.

261. *See id.* The city claimed that ordinance provided adequate alternatives such as hand-held signs, letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings. *See id.*

262. *See id.*

263. *See id.* at 57.

The Sixth, Seventh, and D.C. Circuits have held that alternative channels are adequate only if the speaker reaches essentially the same audience through reasonable means.²⁶⁴ The Second and Ninth Circuits have conflicting precedents.²⁶⁵ The North Carolina Supreme Court decision adds to this confusion because the court found ample alternatives even when access is prohibited to an entire subcategory (social networking websites) of a protected medium (the Internet). Because the Internet is a constantly evolving medium of protected speech, this decision presents an opportunity for the Supreme Court to resolve the inconsistent interpretations and provide guidance for future decisions.

*E. A Comment on the Case:
The Unbearable Burden of North Carolina's Statute*

In light of these issues, the North Carolina statute is unconstitutional because it is a content-neutral statute that regulates expression but is not narrowly tailored enough to meet intermediate scrutiny. It violates the First Amendment because it is not narrowly tailored nor does it provide ample alternative channels of communication. North Carolina's statute highlights the unanswered questions that all future legislation must address: Who falls under these statutes' purview? How much behavior is restricted? What alternatives are available?²⁶⁶ These questions are crucial for state legislators to consider when drafting legislation, and North Carolina failed to answer them in crafting this statute.

264. See *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299, 1312 (D.C. Cir. 2005) (holding that there were not ample alternative channels and, consequently, the ban significantly limited the size of the audience); *Weinberg v. City of Chicago*, 310 F.3d 1029, 1042–43 (7th Cir. 2002) (holding broadly that an alternative channel is not adequate if it forecloses the ability to reach one audience even if it allows the speaker to reach other groups); *Cleveland Area Bd. of Realtors v. City of Euclid*, 88 F.3d 382, 390 (6th Cir. 1996) (stating that ample alternatives must include reasonably priced and effective alternatives).

265. See *Bery v. City of New York*, 97 F.3d 689, 698–99 (2d Cir. 1996) (stating that the complete ban on artists to sell their work in public spaces without a license failed to leave open ample alternative channels of communication); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) (stating that “[a]n alternative is not ample if the speaker is not permitted to reach the ‘intended audience’”). *But see* *Marcavage v. City of New York*, 689 F.3d 98, 108 (2d Cir. 2012) (concluding that an ordinance, which required a demonstration zone not to be within sight and sound of the intended audience, still provided ample alternatives); *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 437 (9th Cir. 2008) (holding a restriction on students displaying printed messages on their school clothing left open ample alternatives). The Second Circuit's speech-restrictive *Marcavage* decision does not discuss the speech-protective ample alternative channels analysis in *Bery*, and the Ninth Circuit's speech-restrictive *Jacobs* decision does not discuss the speech-protective ample alternative channels analysis in *Bay Area Peace Navy*. See Brief Amici Curiae of Ashutosh Bhagwat et al. in Support of Petitioners, *supra* note 256, at 18–19.

266. See, e.g., *Brown v. Entm't Merchs. Ass'n*, 584 U.S. 786, 790 (2011) (“And whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears.”); *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (observing that previous cases from that Court “provide no basis for qualifying the level of First Amendment scrutiny that should be applied” to online activities); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

North Carolina's statute is fatally flawed for two reasons: it is overbroad as to audience and to speech. The statute does not consider the underlying offense of an offender when denying access to one of the main mediums of speech available today; it is not tied to the protection of minors when it restricts offenders who are not a threat to minors. For example, if an individual is required to register as a sex offender in another state (e.g., for public urination),²⁶⁷ and then moves to North Carolina, North Carolina requires the individual to register, and he is now no longer allowed access to social networking websites due to a crime unrelated to harming minors.²⁶⁸ Further, some offenders may not have used the Internet in the facilitation of their crime, yet they are restricted from accessing websites that are fundamental to their integration into society, such as LinkedIn.²⁶⁹ Although the protection of children is of chief importance, the statute must be crafted narrowly to avoid unconstitutionally infringing upon people's rights.

The statute is overly restrictive in its scope of websites prohibited. Websites such as Facebook, Twitter, Snapchat, and Instagram are clearly prohibited. But less obvious sites such as Google or Amazon may be prohibited as well.²⁷⁰ The statute's broad (and unclear) language captures many non-social networking websites and makes it difficult for offenders to determine which websites are accessible. For these reasons, it is clear that the statute is not narrowly tailored and therefore unconstitutional under the First Amendment.

The statute is also unconstitutional for failing to leave open ample alternative channels of communication. The suggested alternatives²⁷¹ do not rise to the level of expression that is communicated and absorbed on Facebook, Twitter, the *New York Times* Web page, and similar unique platforms. Like *Gilleo*, there is no adequate alternative to the communicative impact of the forbidden social media.²⁷²

Although alternate channels of communication exist, they may not be adequate substitutes for the channels prohibited. Because of their uniqueness and core expressive content, there are no adequate substitutes for the social networking websites foreclosed by the statute. With all of these issues before the Court, this statute cannot be reconciled with prior jurisprudence, and it fails intermediate scrutiny when thrust into the constitutional light.

267. See e.g., ARIZ. REV. STAT. ANN. § 13-3821(17) (2015); CAL. PENAL CODE §§ 290(c), 314 (West 2012); S.C. CODE ANN. § 23-3-430(c)(14) (2015). South Carolina also makes consensual anal intercourse between two adults a registerable offense. See S.C. CODE ANN. § 23-3-430(C)(11). This would permit North Carolina to deny social networking website access to any individual convicted under section 23-3-430(c)(11) who later decides to reside in North Carolina. See N.C. GEN. STAT. § 14-208.6(4)(b) (2015).

268. See N.C. GEN. STAT. § 14-208.6(4)(b).

269. See *State v. Packingham*, 777 S.E.2d 738, 753 (N.C. 2015) (Hudson, J., dissenting), cert. granted, 137 S. Ct. 368 (2016).

270. See *id.* at 753–54.

271. See *id.* at 747.

272. See *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994).

IV: WHAT NEXT?:
THE PATH TO CONSTITUTIONAL LEGISLATION

North Carolina's statute provides relevant issues for state legislators to consider when drafting legislation. Social networking restrictions should be allowed when they are narrowly tailored to apply to specific offenders, restrict only social networking sites, and provide offenders with ample alternatives. This will minimize the liberty deprivations of the released offenders while addressing public safety concerns. But in light of the challenges discussed in this Note, many states lack statutory language regarding social networking restrictions for sex offenders.

This Note proposes a model statute for states to consider, set forth in the appendix.²⁷³ The model statute clearly states to whom it applies so as to avoid conflicting statutory interpretations. It applies to offenders whose underlying offense involved minors, those who used the Internet in the facilitation of their crime, or offenders whose risk of recidivism is high. However, the statute does not define who qualifies as a sex offender or which sex offenses should be covered under the statute; the state legislative body can use its discretion to define the applicable offender and offenses.

The model statute also determines the scope of restricted activities with clear and concise language. It defines a social networking site narrowly, while providing authoritative bodies (such as judges, parole boards, or parole officers) the discretion to redefine what constitutes a social networking website. For example, a statute can define social networking website by focusing on the "primary purpose" of the website and examining the type of activities on the website. Clear language regarding prohibited websites will aid in defining available alternatives.

The statute also has some flexibility to adjust restrictions for work-related purposes, undue hardship, or parental involvement. By doing so, the statute addresses the difficulties many offenders face in integrating into society—if a website is needed for a job, a registered sex offender will still be allowed to use it to avoid losing employment. He can bring his petition to the court, the parole board, or a parole officer for relief.

Finally, the statute allows for future technological advancements. This serves two purposes: (1) it creates flexibility for the courts, parole boards, and parole officers to respond to technological advancements without the statute becoming invalid and (2) it prevents offenders from being able to take advantage of loopholes created by the statute or the release process.

In conclusion, an ideal statute must offer state legislatures a narrowly tailored but flexible approach to address the balance of First Amendment rights with public safety concerns. The regulation of Internet expression is a difficult path to navigate because the medium continues to evolve faster than the law can adapt. The lack of corresponding evolution between the law and the Internet should not provide a haven for unconstitutional laws. Indiana, Louisiana, and Nebraska, and potentially North Carolina,

273. See *infra* Appendix.

demonstrate that poorly worded statutes can deprive many of their fundamental rights. Moving forward, states must consider these issues when enacting legislation to both protect the virtual communities and those who wish to access them.

APPENDIX

SECTION [X]: MANDATORY CONDITIONS FOR SEX OFFENDERS:

1. The court shall require, as a mandatory condition of release, that certain registered sex offenders be prohibited from accessing social networking websites.
2. This section applies only to those registered sex offenders who:
 - (a) Were convicted of an offense for which registration as a sex offender is required pursuant to [the applicable law], and the victim of such offense was under the age of eighteen at the time of such offense or
 - (b) [Such person] has been designated a level-three sex offender pursuant [to the applicable law or SORNA] or
 - (c) Used the Internet or any other type of electronic device used for Internet access to commit the offense or engage in the conduct for which the person was convicted.
3. As used in this section a “social networking website” shall mean:
 - (a) Any business, organization, or other entity operating a website that permits persons under eighteen years of age to be registered users, and whose website has the *primary purpose* of establishing personal relationships with other users, where people may:
 - (1) create Web pages or profiles that provide personal information and that such pages or profiles are available to the public or to other users;
 - (2) facilitate a social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges;
 - (3) engage in direct, real time, delayed communication with other users, such as a chat room or instant messenger, and commenting on or “liking” information shared; and
 - (4) communicate with persons under eighteen years of age.
 - (b) However, a social networking website shall not include:
 - (1) Websites that permit users to engage in activities other than those enumerated above, or
 - (2) Websites whose *primary purpose* is facilitating commercial transactions involving goods or services between its members, between members and itself, and between members and visitors or third parties.

- (c) The [court, parole board, parole officer] has the authority to determine whether a website is considered a social networking website under this section.
4. Upon petition for relief by the registered offender, the [court, parole board, parole officer] may modify, at any time, the condition in [subsection 2] if:
 - (a) the condition interferes with the offender's ability to attend school or to become or remain employed, and constitutes an undue hardship for the offender; or
 - (b) the offender is the parent or guardian of an individual who is under the age of eighteen years and the offender is not otherwise prohibited from communicating with that individual. If the individual under the age of eighteen contests the petition for relief sought by the registered offender, the [court, parole board, parole officer] may consider this a relevant factor in determining whether to lift the condition.
 5. In addition to the mandatory condition in [subsection 2], offenders must submit to any other appropriate restrictions concerning the person's use or access of the Internet as dictated by the [court, parole board, parole officer].