

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech

Packingham v. North Carolina, __ U.S. __ (2017)

In 2008, North Carolina adopted a criminal law prohibiting a registered sex offender from accessing a commercial social networking website that includes minors or to create a personal web page. The state regularly prosecuted individuals for violating the law. As a college student, Lester Packingham was convicted of having sexual relations with a 13-year-old girl and was required to register as a sex offender. In 2010, several years after his conviction, he posted a message on Facebook celebrating a dismissed traffic ticket. The post was noticed by a police officer, and Packingham was convicted of violating the social network ban. An intermediate state appellate court struck down the law, but the state supreme court reversed. Packingham appealed to the U.S. Supreme Court, which ruled 8–0 that the state law violated federal constitutional protections for free speech.

JUSTICE KENNEDY delivered the opinion of the Court.

...

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. See *Ward v. Rock Against Racism* (1989). Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.

While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the “vast democratic forums of the Internet” in general, and social media in particular. Seven in ten American adults use at least one Internet social networking service. . . .

Social media offers “relatively unlimited, low-cost capacity for communication of all kinds.” On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics “as diverse as human thought.”

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This case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.

This background informs the analysis of the North Carolina statute at issue. Even making the assumption that the statute is content neutral and thus subject to intermediate scrutiny, the provision cannot stand. In order to survive intermediate scrutiny, a law must be “narrowly tailored to serve a significant governmental interest.” . . .

. . .

[T]his opinion should not be interpreted as barring a State from enacting more specific laws than the one at issue. Specific criminal acts are not protected speech even if speech is the means for their commission. Though the issue is not before the Court, it can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages asexual crime, like contacting a minor or using a website to gather information about a minor. . . .

Even with these assumptions about the scope of the law and the State’s interest, the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. . . .

In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.

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The better analogy to this case is *Board of Airport Comm’rs of Los Angeles v. Jews for Jesus, Inc.* (1987), where the Court struck down an ordinance prohibiting any “First Amendment activities” at Los Angeles International Airport because the ordinance covered all manner of protected, nondisruptive behavior including “talking and reading, or the wearing of campaign buttons or symbolic clothing.” If a law prohibiting “all protected expression” at a single airport is not constitutional, it follows with even greater force that the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture.

. . .

Reversed.

JUSTICE ALITO, with whom CHIEF JUSTICE ROBERTS and JUSTICE THOMAS join, concurring.

. . . Because of the law’s extraordinary breadth, I agree with the Court that it violates the Free Speech Clause of the First Amendment.

I cannot join the opinion of the Court, however, because of its undisciplined dicta. The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks. And this language is bound to be interpreted by some to mean that the States are largely powerless to restrict even the most dangerous sexual predators from visiting any internet sites, including, for example, teenage dating sites and sites designed to permit minors to discuss personal problems with their peers. I am troubled by the implications of the Court’s unnecessary rhetoric.

. . .

. . . Because protecting children from abuse is a compelling state interest and sex offenders can (and do) use the internet to engage in such abuse, it is legitimate and entirely reasonable for States to try to stop abuse from occurring before it happens.

It is not enough, however, that the law before us is designed to serve a compelling state interest; it also must not “burden substantially more speech than is necessary to further the government’s legitimate interests.”

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The fatal problem for §14–202.5 is that its wide sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child. A handful of examples illustrates this point.

Take, for example, the popular retail website Amazon.com, which allows minors to use its services and meets [the statutory requirements]. . . .

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Or consider WebMD—a website that contains health-related resources, from tools that help users find a doctor to information on preventative care and the symptoms associated with particular medical problems. WebMD, too, allows children on the site.¹¹ And it exhibits the four hallmarks of a “commercial social networking” website. . . .

As these examples illustrate, the North Carolina law has a very broad reach and covers websites that are ill suited for use in stalking or abusing children. . . .

Placing this set of websites categorically off limits from registered sex offenders prohibits them from receiving or engaging in speech that the First Amendment protects and does not appreciably advance the State’s goal of protecting children from recidivist sex offenders. I am therefore compelled to conclude that, while the law before us addresses a critical problem, it sweeps far too broadly to satisfy the demands of the Free Speech Clause.

. . . But if the entirety of the internet or even just “social media” sites¹⁶ are the 21st century equivalent of public streets and parks, then States may have little ability to restrict the sites that may be visited by even the most dangerous sex offenders. May a State preclude an adult previously convicted of molesting children from visiting a dating site for teenagers? Or a site where minors communicate with each other about personal problems? The Court should be more attentive to the implications of its rhetoric for, contrary to the Court’s suggestion, there are important differences between cyberspace and the physical world.

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The Court is correct that we should be cautious in applying our free speech precedents to the internet. Cyberspace is different from the physical world, and if it is true, as the Court believes, that “we cannot appreciate yet” the “full dimensions and vast potential” of “the Cyber Age,” we should proceed circumspectly, taking one step at a time. It is regrettable that the Court has not heeded its own admonition of caution.

JUSTICE GORSUCH took no part in the consideration or decision of this case.