Protecting the Digital Playgrounds: Narrowly Tailoring the Meaning of "Social Media" to Prohibit Sexual Predators from Using Social Media

*DJ Mico**

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* J.D. University of the Pacific, McGeorge School of Law, to be conferred May 2020; B.A., Double Major – Communications and Psychology, University of California, Davis, 2017. Thank you to my family for your endless love and support. I want to thank my girlfriend, Hailey, for being my best friend and companion on the journey of life. Additionally, thank you to Professor Leslie Gielow Jacobs for generously providing time and invaluable insight to developing this Comment as my advisor. Finally, thank you to my colleagues on *The University of the Pacific Law Review* for their efforts in this Comment and dedication to the Law Review.

"The Internet is the first thing that humanity has built that humanity doesn't understand, the largest experiment in anarchy we've ever had." – Eric Schmidt, Former Executive Chairman of Google[1]

I. INTRODUCTION

Since the first recognizable social network site launched in 1997, social networking sites have rapidly grown in popularity worldwide.[2] Social networking sites allow individuals to construct a profile within a system, share a connection with other users, and view others' connections.[3] Facebook, Twitter, Instagram, Snapchat, and Tumblr are among the most popular sites for teenagers.[4] 71 percent of teens report using two or more of these social media sites.[5] The popularity of social networking sites and daily Internet usage has led the United States Supreme Court to state, "the most important place (in a spatial sense) for the exchange of views . . . is cyberspace."[6]

The FBI describes social media's prominence among teens as a "recipe for trouble with naïve teenagers, predatory adults, and a medium—the Internet—that easily connects them."[7] Protecting children from online predation is a real problem because there are nearly half a million online pedophiles.[8] The FBI's 2017 Internet Crime Report noted social media sites were the medium to facilitate almost 20,000 cybercrimes, including over 15,000 "Confidence

1. Jerome Taylor, *Google Chief: My Fears for Generation Facebook*, THE INDEPENDENT (Aug. 18, 2010, 12:00 AM), *available at* https://www.independent.co.uk/life-style/gadgets-and-tech/news/google-chief-my-fears-for-generation-facebook-2055390.html (on file with *The University of the Pacific Law Review*).

2. Danah Boyd & Nicole Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. OF COMPUTER-MEDIATED COMM. 210, 211–17 (2008) (explaining that SixDegrees.com was the first social network site when it launched in 1997).

3. *Id.* at 211.

4. Amanda Lenhart, *Teens, Social Media & Technology Overview 2015: Smartphone Facilitate Shifts in Communication Landscape for Teens*, PEW RES. CTR. 25 (Apr. 9, 2015), *available*) *at* https://www.pewresearch.org/wp-content/uploads/sites/9/2015/04/PI_TeensandTech_Update2015_0409151.pdf (on file with *The University of Pacific Law Review*).

5. *Id.*

6. Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).

7. FBI, *Child Predators: The Online Threat Continues to Grow* (May 17, 2011), https://www.fbi.gov/news/stories/child-predators (on file with *The University of the Pacific Law Review*).

8. *Id.*

Fraud/Romance" crimes and 1,300 "Crimes Against Children."[9]

The National Center for Missing & Exploited Children's (NCMEC) "CyberTipline" received 10.2 million reports of suspected child sexual exploitation in 2017 alone.[10] Of approximately 6,000 reports of "online enticement" across different social media and messaging applications, the most common methods offenders used to entice children included engaging in sexual conversation, asking children for sexually explicit images of themselves, and discussing interests or "liking" the child's online posts to develop a rapport with the child.[11]

To protect against enticement and other online predation, Facebook and MySpace banned registered sex offenders from their sites in 2009.[12] Additionally, Facebook's terms of service prohibit registered sex offenders from signing up for Facebook.[13] Although Facebook's terms of service prohibit registered sex offenders from signing up, a registered sex offender can create an account by using an alias.[14] Since registered sex offenders can still access and use social media sites, like Facebook, states, such as North Carolina, enacted criminal statutes prohibiting registered sex offenders from accessing "commercial social networking website[s]" to additionally deter and prevent online predation.[15]

In *Packingham v. North Carolina*, the United States Supreme Court reviewed the North Carolina statute and found the language defining social media sites was overbroad and an unjustified encroachment on sex offender's free speech rights that was not narrowly tailored to serve governmental interests.[16] Laws like North Carolina's would bar access to a broad range of websites everyone uses daily for communication, news, and self-identity.[17]

The United States Supreme Court recognized child sexual abuse as "a most

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9. FBI INTERNET CRIME COMPLAINT CTR., INTERNET CRIME REPORT 20 (2017), *available at* https://pdf.ic3.gov/2017_IC3Report.pdf (on file with *The University of the Pacific Law Review*).

10. NAT'L CTR. FOR MISSING & EXPLOITED CHILD., *Online Enticement* http://www.missingkids.com/theissues/onlineenticement (last visited Oct. 22, 2018) (on file with *The University of the Pacific Law Review*).

11. *Id.*

12. *Facebook, MySpace Ban New York Sex Offenders*, PHYS ORG. (Dec. 1, 2009), https://phys.org/news/2009-12-facebook-myspace-york-sex.html (on file with *The University of the Pacific Law Review*).

13. Facebook, *Terms of Service*, https://www.facebook.com/legal/terms (last visited Oct. 24, 2018) (on file with *The University of the Pacific Law Review*).

14. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1734 (2017) (explaining how Lester Gerard Packingham, a registered sex offender, posted on Facebook with an account named "J.R. Gerrard" in violation of North Carolina's ban on registered sex offenders accessing social networking sites).

15. N.C. GEN. STAT. ANN. § 14-202.5(a) (West 2009), *declared unconstitutional by* Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

16. *Packingham*, 137 S. Ct. at 1737.

17. *See id.* ("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.").

serious crime and an act repugnant to the moral instincts of a decent people."[18] Despite the compelling interest in protecting children, perpetrators of child sexual abuse still have a right to freedom of speech: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[19] The First Amendment's Free Speech Clause applies to the states under the Due Process Clause of the Fourteenth Amendment.[20] Accordingly, both the federal government and states cannot infringe on sex offenders' constitutional rights when enacting statutes that prohibit sex offenders from using social media.[21]

Registered sex offenders and other marginalized groups, like prisoners, maintain their constitutional rights.[22] Laws such as the one in *Packingham* apply after sex offenders pay their debts to society.[23] While registered sex offenders may have constitutional protections, they must deal with the "shame, exclusion, and stigmatization" of being a sexual predator.[24] Sex offenders must register as "legally recognized sex offenders" with local law enforcement, then law enforcement releases an offender's personal information to the public; failing to register is a crime.[25] Additionally, sex offenders have trouble finding housing, getting jobs, and maintaining personal relationships because of their past.[26] Therefore, while sex offenders keep their constitutional rights upon registering,

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18. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002).

19. U.S. CONST. amend. I.

20. U.S. CONST. amend. XIV; *Packingham*, 137 S. Ct. at 1733.

21. *See Packingham*, 137 S. Ct. at 1738 ("[T]he State may not enact this complete bar to the exercise of the First Amendment rights on websites integral to the fabric of our modern society and culture.").

22. *See* State v. Germane, 971 A.2d 555, 579–80 (R.I. 2009) (describing the appellant, a registered sex offender, was able to present a multifaceted case in the Superior Court, consistent with his constitutional right to due process); *see also* Johnson v. California, 543 U.S. 499, 508 (2005) (explaining prisoners have equal protection of the Fourteenth Amendment to bolster legitimacy of criminal justice system).

23. *See* N.C. GEN. STAT. ANN. § 14-202.5(a) (West 2009), *declared unconstitutional by* Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (applying the prohibition to sex offenders *after* they register according to state registry law) (emphasis added).

24. Carla Schultz, *The Stigmatization of Individuals Convicted of Sex Offenses: Labeling Theory and The Sex Offense Registry*, 2 THEMIS: RES. J. OF JUST. STUD. & FORENSIC SCI., Art. 4, 67 (2014) *available at* http://scholarworks.sjsu.edu/themis/vol2/iss1/4 (on file with *The University of the Pacific Law Review*).

25. *Id.* at 67–68; Douglas Evans, Michelle Cubellis, *Coping with Stigma: How Registered Sex Offenders Manage Their Public Identities*, AM. J. CRIM. JUST., 593, 594 (2015) *available at* https://link.springer.com/content/pdf/10.1007%2Fs12103-014-9277-z.pdf (on file with *The University of the Pacific Law Review*).

26. *See* Evans & Cubellis, *supra* note 25 (noting residency restrictions and other prohibitions that affect lives of registered sex offenders); *see also* James Wagner, *Luke Heimlich Signs with Mexican Team, but Could Be Blocked*, N.Y. TIMES (Mar. 7, 2019), https://www.nytimes.com/2019/03/07/sports/luke-heimlich-mexico-baseball-league.html (on file with *The University of the Pacific Law Review*) (detailing how Major League Baseball, the Chinese Professional Baseball League, and possibly the Mexican Baseball League have shunned Luke Heimlich, a top college pitching prospect, because he pled guilty to sexually molesting his six-year-old niece when he was fifteen).

they retain mostly limited rights.[27]

Laws prohibiting sex offenders from accessing social media sites, like the one in *Packingham*, deprive registered sex offenders of their First Amendment rights.[28] Such laws only comply with the First Amendment if the government proves they are "narrowly-tailored" to serve compelling state interests.[29] Prohibiting sex offenders from using social media undoubtedly serves the compelling governmental interest of protecting children.[30] The issue, to avoid infringing First Amendment rights, is narrowly tailoring the meaning of social media and the speech activities a law prohibits.[31]

This Comment proposes a narrowly-tailored definition of "social media" for use in drafting a model statute that serves the government's compelling purpose of protecting children from online sexual predation without encroaching on sex offenders' First Amendment rights.[32] Part II analyzes the United States Supreme Court's *Packingham v. North Carolina* decision, the First Amendment issues the Court discussed, and the case's implications for social media restrictions on sex offenders.[33] While the *Packingham* opinion discusses activities that legislatures could prohibit, this Comment only addresses narrowly defining "social media" to meet appropriate First Amendment scrutiny.[34] Part III develops the narrowly-tailored definition of social media based on fundamental characteristics of social media, legislative definitions, and judicial opinions post-*Packingham*.[35] Next, Part IV examines prohibited locations to sex offenders and their cyberspace equivalents.[36] Finally, Part V discusses how to restrict these "digital playgrounds" without infringing on First Amendment rights with a narrowly-tailored definition of social media.[37]

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27. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) (noting—while not at issue in the case—laws such as Section 14-202.5 impose severe restrictions on people who have already served their sentence and are not subject to criminal justice supervision); *see also* Schultz, *supra* note 24, at 70–74 (describing difficulties registered sex offenders face when trying to find housing, psychological impact of being a registered sex offender, and public perception of sex offenders).

28. *See* Ilya Shapiro, *Even Sex Offenders Have Constitutional Rights*, CATO INST. (JUNE 22, 2017), https://www.cato.org/blog/even-sex-offenders-have-constitutional-rights (on file with *The University of the Pacific Law Review*) (describing how the North Carolina statute in *Packingham* unconstitutionally violated sex offenders' First Amendment rights).

29. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015).

30. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244–45 (2002) ("The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people. . . [legislatures] may pass valid laws to protect children from abuse.").

31. *Reed*, 135 S. Ct. at 2226.

32. *Infra* Part III.

33. *Infra* Part II.

34. *Infra* Part III; Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) ("[I]t 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 a sexual crime, like contacting a minor or using a website to gather information about a minor.").

35. *Infra* Part III.

36. *Infra* Part IV.

37. *Infra* Part V.

II. PACKINGHAM V. NORTH CAROLINA: THE SUPREME COURT'S FIRST LOOK AT SOCIAL MEDIA

In 2017, the United States Supreme Court decided "one of the first [cases] to address the relationship between the First Amendment and the modern Internet."[38] Subsection A discusses the facts and the case's procedural history before the United States Supreme Court granted certiorari.[39] Subsection B discusses the Supreme Court's analysis of First Amendment concerns such as the level of scrutiny and narrow tailoring.[40]

A. Lester Packingham versus J.R. Gerard and Procedural History

In 2002, Lester Gerard Packingham—a 21-year-old college student—pled guilty to "taking indecent liberties" with a child after having sex with a 13-year-old girl.[41] North Carolina law required Packingham to register as a sex offender, a label which endures for at least 30 years.[42] North Carolina enacted Section 14-202.5 in 2008,[43] which made registered sex offenders accessing a "commercial social networking web site"—where the sex offender knew minors could join—a felony crime.[44]

A member of the Durham Police Department was investigating potential Section 14-202.5 violations and noticed a Facebook post from a "J.R. Gerrard."[45] The post read: "Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent..... Praise be to GOD, WOW! Thanks JESUS!"[46] The officer discovered the post coincided with court records dismissing a ticket against Lester Packingham, a registered sex offender.[47] Evidence later confirmed the officer's suspicions that "J.R. Gerrard" was Lester Packingham; a grand jury later indicted Packingham for violating Section 14-202.5.[48]

The trial court denied Packingham's constitutional challenges to Section 14-202.5, and the jury found Packingham guilty.[49] The North Carolina Court of

38. *Packingham*, 137 S. Ct. at 1736.

39. *Infra* Section II.A.

40. *Infra* Section II.B.

41. *Packingham*, 137 S. Ct. at 1734.

42. *Id.*

43. N.C. GEN. STAT. ANN. § 14-202.5(a), (e) (West 2009), *declared unconstitutional by* Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

44. *Id.*

45. *Packingham*, 137 S. Ct. at 1734.

46. *Id.*

47. *Id.*

48. *Id.*

49. State v. Packingham, 229 N.C. App. 293, 296 (N.C. Ct. App. 2013), *rev'd*, 777 S.E.2d 738 (2015), *cert. granted*, 137 S. Ct. 368 (2016), *and rev'd*, 137 S. Ct. 1730 (2017).

Appeals vacated the conviction and concluded that Section 14-202.5 was unconstitutional on its face and as applied.[50] The Court of Appeals concluded the statute was a content-neutral "time, place, and manner" restriction subject to intermediate scrutiny, and Section 14-202.5 was not narrowly-tailored to serve "significant" governmental interests.[51]

However, the North Carolina Supreme Court concluded that Section 14-202.5 was constitutional because Packingham had "numerous alternatives that provide the same or similar services" as websites that Section 14-202.5 forbade.[52] The North Carolina Supreme Court additionally found the statute constitutional as applied to Packingham based on particular facts.[53] The court reasoned that Packingham signed a written notice of websites he could not access, and he had used an alias to set up his Facebook account: "indicating his awareness that he was indulging in forbidden behavior."[54]

B. Supreme Court Opinion: Justice Kennedy

After granting certiorari, the United States Supreme Court unanimously agreed that Section 14-202.5 was unconstitutionally broad and not "narrowly tailored" to satisfy the First Amendment.[55] The Court did not determine whether the statute was a content-neutral or content-based restriction on speech.[56] The North Carolina Supreme Court had determined the statute was content-neutral, even in light of the United States Supreme Court's *Reed v. Town of Gilbert, Ariz.* decision.[57] Again, the United States Supreme Court did not determine the level of scrutiny—the Court assumed the statute was content-neutral and subject to intermediate scrutiny—and determined its social media definition was unconstitutionally overbroad and not narrowly-tailored to serve the government's significant interest.[58]

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50. *Id.* at 304.

51. *Id.* at 296–97.

52. State v. Packingham, 777 S.E.2d 738, 747 (2015), *cert. granted*, 137 S. Ct. 368 (2016), *and rev'd*, 137 S. Ct. 1730 (2017).

53. *Id.* at 749.

54. *Id.*

55. Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017); 137 S. Ct. at 1739 (Alito, J., concurring).

56. *Packingham*, 137 S. Ct. at 1737.

57. *Packingham*, 777 S.E.2d at 744–45 ("Although *Reed* focused on the interpretation of content-based regulations of *speech*, while we concluded above that section 14–202.5 is a regulation of *conduct*, even under a *Reed* analysis we see that section 14–202.5 is a content-neutral regulation.") (emphasis in original); *but see* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2230 (2015) ("Because '[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content,' we have insisted that 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.'") (internal citations omitted).

58. *Packingham*, 137 S. Ct. at 1737 (2017); *see* McCutcheon v. Fed. Election Com'n, 572 U.S. 185, 199 (2014) (concluding that trying to determine which standard applies, content-based or content-neutral, is unnecessary if a statute would fail the less demanding test).

The statute was unconstitutional because "with one broad stroke" it prohibited access to "principal sources for knowing current events" and other websites that allow a person to "make his or her voice heard."[59] The Court interpreted the statute to completely prohibit merely accessing social networking sites "as commonly understood" like Facebook, Twitter, and LinkedIn, but also websites such as Amazon and WebMD.[60] The impact of such a broad statute is it "burdens more speech than necessary" to further the government's purpose in protecting children and encroaches on an individual's First Amendment rights.[61] The Court did not address the issue, but severe prohibitions to access to vast realms of the Internet *after* serving sentences troubled the Court.[62]

Justice Kennedy's majority opinion recognized that society does not fully understand the Internet's potential and ever-changing nature: "The forces and directions of the Internet are so new, so protean, and so far-reaching that courts must be conscious that what they say today might be obsolete tomorrow."[63] Justice Kennedy noted the Court must be cautious before suggesting the First Amendment gives little protection for accessing certain sections of the Internet.[64] However, Justice Kennedy clarified the Court's decision "should not be interpreted as barring a State from enacting more specific laws than the one at issue."[65] A state could have a law with a narrowly-tailored definition of social media that "prohibit[s] a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor," which would fit within the First Amendment's framework.[66]

Following Justice Kennedy's reasoning, legislatures can enact statutes that narrowly define social media to exclude certain non-social websites, limiting permissible activities on those sites.[67] The *Packingham* Court invalidated North Carolina's statute for overbroadly defining social media under the less rigid intermediate scrutiny standard.[68] Additionally, a model statute would need to narrowly state prohibited activities beyond "access" as North Carolina did;

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59. *Packingham*, 137 S. Ct. at 1737.

60. *Id.* at 1736–37.

61. McCullen v. Coakley, 573 U.S. 464, 464 (2015) (citing Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).

62. *Packingham*, 137 S. Ct. at 1737 ("Of importance, the troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system.") (emphasis added).

63. *Id.* at 1736.

64. *Id.*

65. *Id.* at 1737.

66. *Id.*

67. *Id.* ("[I]t 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 a sexual crime, like contacting a minor or using a website to gather information about a minor.").

68. *Id.* at 1737.

however, this Comment only focuses on defining social media narrowly.[69]

III. NARROWLY DEFINING SOCIAL MEDIA

Government regulation of speech is subject to heightened scrutiny under the Free Speech Clause if a law is content-based.[70] A law is content-based if it targets "the topic discussed or the idea or message expressed. . . [and] 'on its face' draws distinctions based on the message a speaker conveys."[71] Additionally, a law preferring certain speakers is content-based when the reason for the preference is the speech's content.[72] Under *Reed*, a law prohibiting registered sex offenders from using social media would be content-based because it allows non-offenders to use social media, but prohibits sex offenders because of offenders' potential to send predatory messages.[73] Since a law prohibiting registered sex offenders from social media is content-based, it must pass strict scrutiny under the First Amendment.[74]

Under strict scrutiny, the government must prove that the restriction "furthers a *compelling* interest and is *narrowly tailored* to achieve that interest."[75] The United States Supreme Court recognized protecting children from sexual assault is a compelling interest.[76] The Court also recognized that the First Amendment permits enacting laws restricting sex offenders on social media if the law is

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69. *See* N.C. GEN. STAT. ANN. § 14-202.5(a) (West 2009), *declared unconstitutional by* Packingham v. North Carolina, 137 S. Ct. 1730 (2017) ("It is unlawful for a sex offender who is registered [under North Carolina law] to *access* 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 on the commercial social networking Web site.") (emphasis added); *see also* Vangie Beal, *Access Definition*, Webopedia (2019), https://www.webopedia.com/TERM/A/access.html (on file with *The University of the Pacific Law Review*) (defining "access" as simply visiting a website).

70. *See* Reed v. Town of Gilbert., 135 S. Ct. 2218, 2226 (2015) (stating content-based laws are subject to strict scrutiny); *see also Packingham*, 137 S. Ct. at 1736 (assuming the law at issue was content neutral and applying intermediate scrutiny).

71. *Reed*, 135 S. Ct. at 2227 (2015) (citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 564–65 (2011)).

72. *Reed*, 135 S. Ct. at 2230 (2015) ("Because '[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content,' we have insisted that 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.'") (internal citations omitted).

73. *Id.* at 2230; *see Packingham*, 137 S. Ct. at 1737 (2017) ("[I]t 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 a sexual crime, like contacting a minor or using a website to gather information about a minor."); *see also* NAT'L CTR. FOR MISSING & EXPLOITED CHILD., *Online Enticement* http://www.missingkids.com/theissues/onlineexploitation/online-enticement (last visited Oct. 22, 2018) (on file with *The University of the Pacific Law Review*) (noting the most common methods offenders used to entice children online were engaging in sexual conversation, asking children for sexually explicit images of themselves, and developing a rapport with the child by discussing interests or "liking" the child's online posts).

74. *Reed*, 135 S. Ct. at 2228.

75. *Id.* at 2231 (quoting Citizens United v. Federal Election Com'n, 558 U.S. 310, 340 (2010)) (emphasis added).

76. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982) ("[T]he . . . interest [of] safeguarding the physical and psychological well-being of a minor is a compelling one.").

narrowly-tailored.[77] Strict and intermediate scrutiny require a narrowly-tailored law that serves the government's interest, but the meaning of narrow tailoring is not the same for both levels of scrutiny.[78]

The *Packingham* Court assumed the statute was content-neutral and applied intermediate scrutiny.[79] In determining if a law "abridging the freedom of speech"[80] is content-neutral, the principal inquiry is whether the "government has adopted a regulation of speech *because of disagreement with the message* it conveys."[81] Government regulation of expressive activity is "content neutral" so long as "[the regulation] is '*justified* without reference to the content of the regulated speech.'"[82] A content-neutral time, place, or manner regulation must pass intermediate scrutiny.[83] To pass intermediate scrutiny, a law must be narrowly tailored to further a *significant* governmental purpose without substantially burdening more speech than necessary.[84] The restriction does not have to be the least restrictive or least intrusive means of serving the government's interest; meaning, the restriction leaves open adequate alternate channels for expression.[85] The statute in *Packingham* failed "intermediate scrutiny" because the statute was too broad to serve its preventative purpose.[86] The statute's definition of social media and social networking sites was a "complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture."[87]

Alternatively, a "content-based" restriction is based on the substance of the speaker's message.[88] A content-based restriction must pass strict scrutiny because it "raises the specter that the government may effectively drive certain ideas or

77. *Packingham*, 137 S. Ct. at 1737 (2017) ("[I]t 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 a sexual crime, like contacting a minor or using a website to gather information about a minor.").

78. *See* McCullen v. Coakley, 573 U.S. 464, 486, 2535 (2015) ("For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not 'burden substantially more speech than necessary to further the government's legitimate interests' . . . unlike a content-based restriction of speech, [the law] 'need not be the least restrictive or least intrusive means of' serving the government's interests.") (quoting Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989)).

79. *Packingham*, 137 S. Ct. at 1736 (2017); *see* McCutcheon v. Federal Election Com'n, 572 U.S. 185, 199 (2014) (concluding that trying to determine which standard applies, content-based or content-neutral, is unnecessary if a statute would fail the less demanding test).

80. U.S. CONST. amend. I.

81. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (emphasis added).

82. *Id.* (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (emphasis added in Ward)).

83. *McCullen*, 573 U.S. at 486.

84. *Ward*, 491 U.S. at 799 (emphasis added).

85. United States v. O'Brien, 391 U.S. 367, 389 (1968) (Harlan, J., concurring); *Ward*, 491 U.S. at 798.

86. Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

87. *Id.* at 1738.

88. Simon & Schuster, Inc. v. Members of New York State Crime Victims Board, 502 U.S. 105, 115 (1991).

viewpoints from the marketplace."[89] Intermediate and strict scrutiny require "narrowly tailored" laws, but strict scrutiny requires the law to be narrowly-tailored to serve a *compelling* governmental purpose.[90] To satisfy narrow tailoring under strict scrutiny, the government must prove an "actual problem" needs solving, that the narrowly-tailored law is not overbroad, not underinclusive, and there are no alternate means.[91]

Protecting children from online predation is a real problem.[92] Given the Internet's vast range, underinclusivity is not a significant concern for laws restricting sex offenders on social media.[93] Alternative means of preventing online predation are not the focus of this Comment, but there are no available alternatives because sites, like Facebook, state in their Terms and Conditions that users cannot be registered sex offenders, yet registered sex offenders are still able to access and use these websites.[94]

The remainder of this section will develop a narrowly-tailored definition of social media that is not overbroad, which requires understanding the social media landscape.[95] Subsection A examines the fundamental aspects of social media and social networking sites.[96] Subsection B analyzes different state legislative definitions of social media and how those legislative definitions align or differ from the social science definition.[97] Finally, subsection C discusses how cases and legislative changes post-*Packingham* have influenced social media definitions.[98]

A. Most Common Characteristics of Social Media

One of the biggest challenges with defining social media is that "the technologies that make social media possible are flexible, general-purpose

89. *Id.*

90. United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813 (2000) (emphasis added).

91. Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 799 (2011); *Playboy Entertainment Group, Inc.*, 529 U.S. at 813; Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015).

92. NAT'L CTR. FOR MISSING & EXPLOITED CHILD., *Online Enticement* http://www.missingkids.com/theissues/onlineexploitation/online-enticement (last visited Oct. 22, 2018) (on file with *The University of the Pacific Law Review*).

93. Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) ("[T]he most important [place] for the exchange of views. . . is cyberspace—the 'vast democratic forums of the Internet.'") (quoting Reno v. American Civil Liberties Union, 521 U.S. 844, 868 (1997)).

94. Facebook, *Terms of Service*, https://www.facebook.com/legal/terms (last visited Oct. 24, 2018) (on file with *The University of the Pacific Law Review*); *see Packingham*, 137 S. Ct. at 1734 (explaining how Lester Gerard Packingham, a registered sex offender, posted on Facebook with an account named "J.R. Gerrard" in violation of North Carolina's ban on registered sex offenders gaining access to social networking sites).

95. Jan Kietzmann et al., *Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media*, 54 BUS. HORIZONS 241, 241–42 (2011) (on file with *The University of the Pacific Law Review*).

96. *Infra* Section III.A.

97. *Infra* Section III.B.

98. *Infra* Section III.C.

technologies that can support many different types of social media services."[99] Defining social media is especially difficult for judges and legislators where "errors of understanding by these scientific laymen, though honest, have been mammoth."[100] The biggest error with defining social media is failing to understand the character of technology and trying to use existing regulatory schemes with evolving technologies.[101]

To avoid further misunderstanding, the first step in defining social media is to comprehend the fundamentals of social media.[102] Social media has changed the communication landscape with churches, governors, and local businesses using different types of social media to interact with others.[103] While social media sites differ in content and approach, most cites share functional "building blocks:" identity, conversation, sharing, presence, relationships, reputation, and groups.[104] Additionally, four commonalities among different social media sites exist: 1) Web 2.0 Internet-based applications; 2) fueled by user-generated content; 3) individuals and users create and maintain user-specific profiles for the site/application; and 4) social media facilitates the development of social networks by connecting a profile with others.[105] A narrowly-tailored definition of social media would consider these commonalities and social media's functional building blocks.[106]

Today's major social media platforms concentrate on balancing three or four primary features instead of focusing on a single one.[107] Not all of the characteristics need to be present to be "social media," nor are the fundamental aspects of social media mutually exclusive.[108] The following sections explain how various social media sites illustrate the fundamental building blocks and commonalities, but knowing individual sites and their features is not necessary to

99. Jonathan A. Obar & Steve Wildman, *Social Media Definition and the Governance Challenge: An Introduction to the Special Issue*, 39 TELECOMM. POL'Y 745, 749 (2015) (internal citations omitted) (on file with *The University of the Pacific Law Review*).

100. *Id.* at 748.

101. *Id.* at 747–48.

102. Jan Kietzmann et al., *Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media*, 54 BUS. HORIZONS 241, 242 (2011) (on file with *The University of the Pacific Law Review*).

103. *Id.* at 241; *see* Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) (explaining social media's prevalence in society with governors in all 50 states and almost all members of Congress having Twitter accounts to allow users to engage directly with their elected representatives).

104. Kietzmann, *supra* note 102, at 242–43.

105. Jonathan A. Obar & Steve Wildman, *Social Media Definition and the Governance Challenge: An Introduction to the Special Issue*, 39 TELECOMM. POL'Y 745, 746–47 (2015) (on file with *The University of the Pacific Law Review*).

106. *Id.*; *see generally* Danah Boyd & Nicole Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. OF COMPUTER-MEDIATED COMM., 210, 211 (2008) (defining the four basic commonalities of social media).

107. Kietzmann, *supra* note 102, at 249.

108. *Id.* at 243.

draft a narrow definition of social media.[109]

1. SixDegrees and Facebook: Relationships and Networking

In 1997, SixDegrees.com was the first social networking site to combine numerous features by allowing users to create profiles, list their friends, and let users examine others' friends lists.[110] Facebook, which has over 2 billion users since its 2004 launch,[111] builds around establishing an "identity" where users create individual profiles with pictures or listing hobbies.[112] Facebook's other main building block is "relationships," which includes affiliating one user with others based on existing connections.[113]

2. Twitter: User-Generated Conversations and Reputation Building

Twitter is more concerned with conversation than identity.[114] Twitter users exchange short messages, called "tweets," that are essentially real-time status updates to their followers.[115] Relationships and identity are less important and are more informal on Twitter compared to Facebook.[116] Twitter users have "followers," not "friends" like Facebook.[117] "Followers," are more indicators of popularity and reputation than a way to form relationships or to determine how many people read their "tweets."[118]

3. LinkedIn: Professional Relationships and Identity

LinkedIn, "the business-oriented networking site,"[119] predominately focuses on users building an individual reputation and forming relationships to develop a professional network.[120] Like Facebook, LinkedIn also focuses on relationships

109. *Infra* Section III.A.1–5.

110. Boyd & Ellison, *supra* note 106, at 214.

111. Kathleen Chayowski, *Mark Zuckerberg: 2 Billion Users Means Facebook's 'Responsibility Is Expanding,'* FORBES (June 27, 2017, 1:37 PM), https://www.forbes.com/sites/kathleenchaykowski/2017/06/27/facebook-officially-hits-2-billion-users/#5bf7e7173708 (on file with *The University of the Pacific Law Review*).

112. Kietzmann, *supra* note 102, at 243–44.

113. *Id.* at 246.

114. *Id.* at 244.

115. *Id.*

116. *Id.* at 246.

117. Jonathan A. Obar & Steve Wildman, *Social Media Definition and the Governance Challenge: An Introduction to the Special Issue*, 39 TELECOMM. POL'Y 745, 747 (2015).

118. Kietzmann, *supra* note 102, at 247.

119. Nicholas Lemann, *The Network Man: Reid Hoffman's Big Idea*, THE NEW YORKER, Oct. 12, 2015, https://www.newyorker.com/magazine/2015/10/12/the-network-man (on file with *The University of the Pacific Law Review*).

120. Kietzmann, *supra* note 102, at 246.

among users.[121] Users create an identity based on prior work and education experiences to form relationships among their network and create a reputation to further their careers.[122]

4. YouTube: Sharing and Going Viral

YouTube, another of the most popular social media sites, shows the importance of social media's "sharing" characteristics to facilitate social interaction or establish a reputation.[123] YouTube allows users to share videos with the world, but the users do not need to form relationships with viewers.[124] YouTube users can garner a reputation for posting "viral" videos that accumulate numerous views and positive ratings; views and ratings are the equivalent to Facebook "likes" in terms of building a reputation.[125] The ability to gain a reputation through simply posting a public video launched some to music stardom, and allowed others to become "YouTubers" and make a living by streaming content to subscribers.[126]

5. New-Age Social Media: Instagram and Snapchat

While social media services like Facebook, Twitter, and LinkedIn remain the most popular, newer social media platforms such as Instagram and Snapchat have gained popularity among teens while still featuring many of the foundational components of social media.[127] Instagram launched in 2010 and operates like Facebook and Twitter.[128] Instagram users connect with one another and post pictures to establish an identity based on photographs of hobbies or interests.[129]

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121. *Id.*

122. *Id.* at 245.

123. *Id.*

124. *Id.* at 245–46.

125. *Id.* at 247.

126. *See* Isis Briones, *12 Major Artists Who Got Their Starts on YouTube*, TEEN VOGUE (Mar. 29, 2016, 4:22 PM), https://www.teenvogue.com/story/best-artists-discovered-on-youtube (on file with *The University of the Pacific Law Review*) (explaining how 12 major artists, including Grammy winning and international icons such as Justin Bieber, The Weeknd, and Ed Sheeran, started their careers posting videos to YouTube); *see also* Laura Parker, *A Chat With a Live Streamer Is Yours, for a Price*, N. Y. TIMES (Apr. 12, 2017), https://www.nytimes.com/2017/04/12/technology/personaltech/paying-for-live-stream-chat.html (on file with *The University of the Pacific Law Review*) (detailing how YouTube and Twitch streamers can get paid for streaming themselves playing video games).

127. Jonathan A. Obar & Steve Wildman, *Social Media Definition and the Governance Challenge: An Introduction to the Special Issue*, 39 TELECOMM. POL'Y 745, 746 (2015) (on file with *The University of the Pacific Law Review*) (explaining these new social media sites are popular among teens because parents are less likely to join or create accounts for these sites).

128. *Id.* at 747.

129. Stephanie Buck, *The Beginner's Guide to Instagram*, Mashable (May 29, 2012), https://mashable.com/2012/05/29/instagram-for-beginners/ (on file with *The University of the Pacific Law*

Users can also follow pages and hashtags—similar to liking Facebook pages—and post content a user may identify with.[130] Like Twitter, Instagram users can follow one another instead of being "friends" and can post instantaneous content, but in the form of pictures with different filters as opposed to tweets.[131] Additionally, users can gain likes for their photos similar to Facebook,[132] and can further establish a reputation based on the number of followers they have, like Twitter.[133]

Comparable to Facebook, Snapchat users can add "friends" or create groups to share and send "snaps"—temporary text or picture messages between one another—or, users can share a snap on their "story" that remains visible to their friends for 24 hours.[134] Additionally, users can establish a reputation with a high "snap score," indicating the number of snaps sent and received; thus, indicating popularity similar to YouTube views or Facebook likes.[135]

The foundational building blocks of social media are also present within the commonalities.[136] Sites like Facebook, Instagram, YouTube, and Twitter are Web 2.0 applications where users consume the media and can use the application to create content and interact with others.[137] User-generated content—tweets, snaps, status updates, photos and likes on Instagram, YouTube videos, or blog posts—builds on the idea that social media sites are Web 2.0 applications.[138] These various forms of user-generated content go toward social media's primary building blocks—identity, reputation, sharing, relationships, etc.—and are part of the fourth commonality: that social media facilitate and develop social networks.[139] The building blocks and commonalities are both still prevalent in

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Review).

130. *See* Jan Kietzmann et al., *Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media*, 54 BUS. HORIZONS 241, 245 (2011) (on file with *The University of the Pacific Law Review*) (explaining an implication of the "sharing" block of social media is that users can evaluate what they have in common, then identify new objects to mediate their shared interests).

131. Obar & Wildman, *supra* note 127.

132. Kietzmann, *supra* note 130, at 247.

133. *Id*.

134. Pia Ceres, *How to Use Snapchat: Critical Tips for New Users*, WIRED, (Oct. 2, 2018, 8:00 AM), https://www.wired.com/story/how-to-use-snapchat-filters-stories-stickers/ (on file with *The University of the Pacific Law Review*).

135. Briallyn Smith, *How Does the Snapchat Score Work and How to Get Your Points up*, MAKE USE OF (Dec. 28, 2018), https://www.makeuseof.com/tag/improve-snapchat-score/ (on file with *The University of the Pacific Law Review*).

136. Kietzmann, *supra* note 130, at 243; Obar & Wildman, *supra* note 127, at 746–47.

137. Obar & Wildman, *supra* note 127, at 746; *see* Tim O'Reilly, *What is Web 2.0*, O'REILLY (Sep. 30, 2005), https://www.oreilly.com/pub/a/web2/archive/what-is-web-20.html (on file with *The University of the Pacific Law Review*) ("One other feature of Web 2.0 that deserves mention is the fact that it's no longer limited to the PC platform. In his parting advice to Microsoft, long time Microsoft developer Dave Stutz pointed out that 'Useful software written above the level of the single device will command high margins for a long time to come.'").

138. *See* Obar & Wildman, *supra* note 127 (explaining various forms of user-generated content that is the "lifeblood" of social media).

139. *Id*. at 747; Kietzmann, *supra* note 130.

social media.[140]

The functional building blocks and commonalities of social media are present within one another and are what distinguish social media from other technology that may do the same basic functions.[141] A model definition of social media must determine the scope of social media to include sites with the functional building blocks and commonalities, but exclude sites without these traits, or sites not primarily for socialization.[142]

B. Different State Definitions of Social Media

The next step for narrowly tailoring the meaning of social media for a model statute is examining how state legislatures define the term.[143] Despite the fundamental characteristics of social media, states vary greatly in how they define social media with no settled "legal" definition of social media.[144] Subsection 1 discusses the Supreme Court's analysis of where the North Carolina statute failed First Amendment scrutiny.[145] Subsection 2 examines other state definitions of social media to develop a definition for the model statute within North Carolina's framework that is not overbroad.[146]

1. North Carolina's Social Media Ban

The United States Supreme Court held, under less-exacting scrutiny, North Carolina's statute aiming to protect sex offenders from accessing social media sites over broadly defined social media; therefore, the law was not narrowly-tailored to serve a substantial governmental purpose.[147] North Carolina defined a "commercial social networking Web site" as an Internet website meeting the following requirements:

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140. *See generally* Kietzmann, *supra* note 130 (laying out the functional building blocks of social media); Obar & Wildman, *supra* note 127, at 746–47 (illustrating the four commonalities of social media services).

141. Obar & Wildman, *supra* note 127, at 746.

142. *See id.* (reasoning that social media is incredibly broad, so simply saying social media are technologies that facilitate communication and collaboration, and bring people together could incorrectly include technologies like telephones, fax machines, and e-mail as social media).

143. Eric Goldman, *What's the Legal Definition of a "Social Media Site"? Uh. . . (People v. Lopez)*, TECH. & MARKETING L. BLOG (Jan. 27, 2016), https://blog.ericgoldman.org/archives/2016/01/whats-the-legal-definition-of-a-social-media-site-uh-people-v-lopez.htm (on file with *The University of the Pacific Law Review*); *see also* Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017) (reasoning North Carolina's statute prohibiting sex offenders from using social media defined social media too broadly).

144. Goldman, *supra* note 143.

145. *Infra* Section III.B.1

146. *Infra* Section III.B.2; North Carolina's statutory framework is serving as the basis for the model statute because it is the most expansive in terms of what it includes as social media and allows the model statute to right its wrongs based on the Supreme Court's analysis and examining other state definitions.

147. *Packingham*, 137 S. Ct. at 1736.

(1) [Operated] by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the [website].

(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 [webpages] or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal [webpage] by the user, other personal information about the user, and links to other personal [webpages] on the commercial social networking [website] of friends or associates of the user that may be accessed by other users or visitors to the [website].

(4) Provides users or visitors to the commercial social networking [website] mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.[148]

The North Carolina legislature's definition of social media includes many of the commonalities and building blocks such as allowing users to create and share content to build relationships, network, or establish a reputation.[149] Justice Kennedy found provision (2) unconstitutionally overbroad under intermediate scrutiny because it would restrict a "place" where people can communicate about any subject that comes to mind.[150]

Justice Alito in concurrence noted provisions (1) and (4) were incredibly broad and the statute as a whole precluded sites that were "unlikely to facilitate the commission of a sex crime against a child."[151] Justice Alito reasoned that nearly all websites have advertising, so the first requirement does not limit the statute's reach in order to pass intermediate scrutiny by not limiting more speech than necessary.[152] Justice Alito further discussed that provision (4)—the site allows users to communicate in ways like a message board—precluded websites like Amazon and WebMD, which allow back-and-forth comments between users.[153]

While the requirements are very broad, the statute has a limiting provision: "commercial networking website" does not include a website that only provides one service (photo-sharing, email, instant messenger, etc.) or the site's *primary purpose* is facilitating commercial transactions.[154] Therefore, the parties and

148. N.C. GEN. STAT. ANN. § 14-202.5(b)(1-4) (West 2009), *declared unconstitutional by* Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (modifications added).

149. Jonathan A. Obar & Steve Wildman, *Social Media Definition and the Governance Challenge: An Introduction to the Special Issue*, 39 TELECOMM. POL'Y 745, 746 (2015) (on file with *The University of the Pacific Law Review*).

150. *Packingham*, 137 S. Ct. at 1735 ("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.")

151. *Packingham*, 137 S. Ct. at 1740–41 (Alito, J., concurring).

152. *Packingham*, 137 S. Ct. at 1740 (Alito, J., concurring).

153. *Packingham*, 137 S. Ct. at 1741–42 (Alito, J., concurring).

154. N.C. GEN. STAT. ANN. § 14-202.5(c)(1-2) (West 2009), *declared unconstitutional by* Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (emphasis added).

amicus briefs misled the Supreme Court Justices into believing Section 14-202.5 precluded sex offenders from accessing Amazon because Amazon is within the primarily "popular retail website" exception, despite meeting the other statutory qualifications.[155]

While the Court held the statute was too broad under intermediate scrutiny, North Carolina's definition of social media noted foundational characteristics and limitations on what is not social media.[156] The next section examines how other legislatures define social media in order to narrow the definition of the model statute to pass strict First Amendment scrutiny.[157]

2. Other Legislative Definitions of Social Media

Some states define social media, but not for statutes restricting sex offenders from accessing social media.[158] These definitions are in statutes such as labor, education, and administrative codes.[159] California uses the same definition of social media in both its labor and education code: "an electronic service or account, or electronic content, including, but not limited to, videos, photographs, blogs, podcasts, . . . or Internet Web site profiles or locations."[160] Unlike North Carolina, California gives examples of what users can do on social media sites, but California does not mention any of the functions of these activities, like for networking.[161] While not explicit, all of the examples the California codes list are examples of user-generated content—one of social media's commonalities.[162] California's examples could serve as a non-exhaustive list of user-generated content examples for the model statute.[163]

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155. *Packingham*, 137 S. Ct. at 1741–42 (2017) (Alito, J., concurring); N.C. GEN. STAT. ANN. § 14-202.5(b).

156. *See* N.C. GEN. STAT. ANN. § 14-202.5(b) (defining "social media" to prohibit "access" to registered sex offenders).

157. *Infra* Section III.B.2.

158. *See* CAL. EDUC. CODE § 99120 (West 2013); CAL. LAB. CODE § 980(a) (West 2014); 27 MISS. ADMIN. CODE 27-110:7.5.11.2 (2018) and 27 MISS. ADMIN. CODE 27-120:5.15 (2018); NEV. ADMIN. CODE § 632.083 (2012) (defining social media for areas of law not involving registered sex offenders); *but see* N.C. GEN. STAT. ANN. § 14-202.5(a-b) (prohibiting sex offenders from using defined "commercial social networking Web site[s]").

159. CAL. EDUC. CODE § 99120; CAL. LAB. CODE § 980(a); 27 MISS. ADMIN. CODE 27-110:7.5.11.2 and 27 MISS. ADMIN. CODE 27-120:5.15; NEV. ADMIN. CODE § 632.083.

160. CAL. EDUC. CODE § 99120; CAL. LAB. CODE § 980(a).

161. CAL. EDUC. CODE § 99120; CAL. LAB. CODE § 980(a); *see* Jan Kietzmann et al., *Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media*, 54 BUS. HORIZONS 241, 243 (2011) (on file with *The University of the Pacific Law Review*) (explaining the foundational building blocks of social media).

162. Jonathan A. Obar & Steve Wildman, *Social Media Definition and the Governance Challenge: An Introduction to the Special Issue*, 39 TELECOMM. POL'Y 745, 746 (2015) (on file with *The University of the Pacific Law Review*).

163. CAL. EDUC. CODE § 99120; CAL. LAB. CODE § 980(a) ("Examples of user-created social media include, but are not limited to: videos, still photographs, blogs, video blogs, podcasts, instant and text messages,

New York has a definition of social media within its penal code, and its definition of "commercial social networking site" is textually similar to North Carolina's.[164] New York immediately restricts the scope of its social media definition to sites that allow people under 18 to become members.[165] This restriction is proper given the law's context, but the language does not actually limit any of the popular social media sites because sites allow users as young as 13 years-old to sign up; even LinkedIn lets users as young as 16 register.[166] The wording would exclude dating applications because of age, such as Tinder.[167] However, dating sites do not share the social networking commonality present in social media sites.[168]

New York's definition has the commonalities of user-generated content for facilitating social development by establishing an identity and forming relationships.[169] The New York definition could constrict what is a "communication" among users by incorporating examples, like California does, beyond instant messaging to narrowly tailor a model definition under strict scrutiny.[170]

Mississippi defines social media in its administrative code as "various activities that integrate technology, social interaction, and content creation."[171] This definition, like New York's, integrates the commonalities of content creation for furthering social development.[172] Further, the Mississippi legislature notes that individuals or groups can use social media to "create, organize, edit or comment on, combine, and share content."[173] Like California's definition, Mississippi provides different examples of online communications that could

email, online services or accounts, or Internet Web site profiles or locations.").

164. N.Y. PENAL LAW § 65.10 (McKinney 2010) ("a website that permits persons under eighteen years of age to be registered users for the purpose of establishing personal relationships with other users, where such persons . . . may: (i) create web pages or profiles that provide information about themselves . . . available to the public or to other users; (ii) engage in direct or real time communication with other users, such as a chat room or instant messenger; and (iii) communicate with persons over eighteen years of age; . . . a commercial social networking website shall not include a website that permits users to engage in such other activities as are not enumerated herein").

165. N.Y. PENAL LAW § 65.10(b).

166. *Age Restrictions on Social Media Services*, CHILDNET INTERNATIONAL (Apr. 25, 2018), https://www.childnet.com/blog/age-restrictions-on-social-media-services (on file with *The University of the Pacific Law Review*) ("[While] there is no age restriction for watching videos on YouTube, users need to be 13 or older to have their own YouTube account.").

167. Tinder, *Terms*, https://www.gotinder.com/terms/us-2018-05-09 (last visited Jan. 21, 2019) (on file with *The University of the Pacific Law Review*).

168. Jonathan A. Obar & Steve Wildman, *Social Media Definition and the Governance Challenge: An Introduction to the Special Issue*, 39 TELECOMM. POL'Y 745, 747 (2015) (on file with *The University of the Pacific Law Review*).

169. *Id.* at 746.

170. N.Y. PENAL LAW § 65.10(b); *see* CAL. EDUC. CODE § 99120 (West 2013) (listing videos, photographs, and blogs as some examples of communication on the Internet).

171. 27 MISS. ADMIN. CODE 27-110:7.5.11.2, 27-120:5.15 (2018).

172. Obar & Wildman, *supra* note 168, at 746.

173. 27 MISS. ADMIN. CODE 27-110:7.5.11.2, 27-120:5.15.

form a non-exhaustive list of types of social media: "social-networking, blogs, wikis, photo—sharing, video—sharing, podcasts, social bookmarking, mash-ups, widgets, virtual worlds, microblogs, Really Simple Syndication (RSS) and more."[174]

Florida's "Sexual Predators Act"[175] defines social media websites as, "commercially operated Internet website[s] that allow [. . .] users to create web pages or profiles that provide information about themselves and [. . .] that offers a mechanism for communication with other users, such as a forum, chat room, electronic mail, or instant messenger."[176] The definition excludes website communications when the primary purpose of the communication is for commercial transactions of goods or services, the news, or with a governmental entity.[177] Like North Carolina, Florida's definition of social media excludes sites that are not primarily for social networking.[178] Accordingly, a model statute could also have a limiting provision to impose the least restrictive means.[179]

Nevada and Oklahoma also define social media.[180] Nevada's administrative code defines social media very generally: "any form of electronic communication through which a person can create a community on the Internet to share information, ideas, personal messages and other content."[181] The Nevada statute maintains a very general definition that accounts for the "user-generated content" and "networking" aspects of social media.[182] However, unlike New York or North Carolina, Nevada does not have language limiting the scope of social media based on the type of website or a user's age.[183] Sites like Amazon or WebMD—which, the Supreme Court thought North Carolina's statute would include—certainly fall within Nevada's statute.[184] Therefore, the wording of Nevada statute's would likely be overbroad under any scrutiny because it is broader than North Carolina's, and the language should not be part of the model

174. *Id.*

175. FLA. STAT. ANN. § 775.21 (West 2018).

176. FLA. STAT. ANN. § 775.21(m) (referencing FLA. STAT. ANN. § 943.0437(1) (West 2018)).

177. *Id.*

178. *Id.*; N.C. GEN. STAT. ANN. § 14-202.5(c) (West 2009), *declared unconstitutional by* Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

179. FLA. STAT. ANN. § 775.21(m)(1-3); N.C. GEN. STAT. ANN. § 14-202.5(c).

180. NEV. ADMIN. CODE § 632.083 (2012); 40 OKLA. STAT. ANN. § 173.2 (West 2018).

181. NEV. ADMIN. CODE § 632.083.

182. *Id.*; *see* Jonathan A. Obar & Steve Wildman, *Social Media Definition and the Governance Challenge: An Introduction to the Special Issue*, 39 TELECOMM. POL'Y 745, 746–47 (2015) (on file with *The University of the Pacific Law Review*) (detailing the basic commonalities of user-generated content and facilitation of social development of social media).

183. *See* N.Y. PENAL LAW § 65.10(b) (McKinney 2010) (limiting social media to sites that permit minors to register); *see also* N.C. GEN. STAT. ANN. § 14-202.5(c)(1-2) (excluding sites from its definition of "social media" if it only provides one service or is primarily for facilitating commercial transactions).

184. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1741–42 (2017) (Alito, J., concurring) (reasoning Amazon.com would be a prohibited website under North Carolina's statute because it satisfied the statutory definition of social media).

statute's language.[185]

Oklahoma's labor code, on the other hand, has a definition for a personal online social media site: "[an] online account that is used by an employee . . . exclusively for personal communications that an individual establishes and uses through an electronic application, service or platform used to generate or store content, including, but not limited to, videos, still photographs, blogs, video blogs, instant messages, audio recordings or email[.]"[186] Oklahoma's definition focuses on user-generated content that facilitates interactions like Mississippi's and New York's.[187] However, Oklahoma's law pertains only to "*personal communications*," like emails and instant messaging which do not fully include the commonality of user-generated content to facilitate social development and form relationships.[188] California and Mississippi also provide more exhaustive and detailed examples of user-generated content that would be preferable to Oklahoma's examples for narrow tailoring.[189]

*C. Post-*Packingham *Developments*

Since the United States Supreme Court decided *Packingham*, different courts have used *Packingham* to determine issues related to free speech and cyberspace, sex offender rights, or both.[190] Some of these cases include *United States v. Rock*,[191] *Doe v. Kentucky ex rel. Tilley*,[192] and *Mason v. State*.[193]

1. United States v. Rock

In *Rock*, Brandon Rock was in a romantic relationship with a woman who

185. *Compare* N.C. GEN. STAT. ANN. § 14-202.5(a-b) (limiting social media to sites that permit minors to register); *with* NEV. ADMIN. CODE § 632.083 (2012) (defining social media generally as any form of electronic communication).

186. 40 OKLA. STAT. ANN. § 173.2 (West 2018).

187. 27 MISS. ADMIN. CODE 27-110:7.5.11.2, 27-120:5.15 (2018); N.Y. PENAL LAW § 65.10(b).

188. 40 OKLA. STAT. ANN. § 173.2 (emphasis added); Jonathan A. Obar & Steve Wildman, *Social Media Definition and the Governance Challenge: An Introduction to the Special Issue*, 39 TELECOMM. POL'Y 745, 746 (2015) (on file with *The University of the Pacific Law Review*).

189. 27 MISS. ADMIN. CODE 27-110:7.5.11.2, 27-120:5.15; CAL. EDUC. CODE § 99120 (West 2013); CAL. LAB. CODE § 980(a) (West 2014); *see also* Reed v. Town of Gilbert., 135 S. Ct. 2218, 2231 (2015) (providing a law restricting speech must be narrowly tailored to serve governmental interests) (internal citations omitted).

190. *See* United States v. Eaglin, 913 F.3d 88, 95–96 (2nd Cir. 2019) (determining a ban on *all* Internet websites was unconstitutional in light of *Packingham*) (emphasis in original); *see also* Valenti v. Lawson, 889 F.3d 427, 430–31 (7th Cir. 2018) (distinguishing *Packingham* and holding that banning registered sex offenders from entering school property was constitutional, even though their local polling place was a school, because numerous alternatives existed).

191. *Infra* Section III.C.1; United States v. Rock, 863 F.3d 827, 831–32 (D.C. Cir. 2017).

192. *Infra* Section III.C.2; Doe v. Kentucky ex rel. Tilley, 283 F.Supp.3d 608, 612 (E.D. Ky. 2017).

193. *Infra* Section III.C.3; Mason v. State, 563 S.W.3d 166, 170 (Mo. Ct. App. S.D. 2018).

had an 11-year-old daughter.[194] Rock put a hidden video camera in the girl's room and made still photographs from the videos of the girl completely nude.[195] "Rock entered an internet chat room where, unbeknownst to him, he began communicating with undercover Metropolitan Police Department Detective Timothy Palchak [who] was posing as an individual who had access to a fictional 12-year-old girl."[196] During the conversations, "Rock [additionally] expressed interest in having sex with the fictional 12-year-old and openly solicited Detective Palchak's rape of the 12-year-old by offering to pay Palchak with more images of child pornography if Palchak would let him watch the assault."[197]

After Rock plead guilty to distribution of child pornography, the district court sentenced Rock to 172 months' imprisonment and 10 years' supervised release.[198] Rock challenged a condition of his supervised release that prohibited him from "possessing or using a computer, or having access to any online service, without prior approval of the probation officer."[199] Rock contended that condition, and others the district court imposed, were "not reasonably related to his [offensive] conduct and involve a greater deprivation of liberty than is reasonably necessary."[200]

The D.C. Circuit distinguished Rock's condition of release from *Packingham* by reasoning that Rock's condition was a reasonable deprivation of freedom for an offender on probation while the statute in *Packingham* was a "post-custodial restriction."[201] By "post-custodial" the *Rock* court meant that in *Packingham*, the statute applied to all registered sex offenders once integrated back into society *after* completing their sentence and probation.[202] The D.C. Circuit instead determined Rock's limited social media use was a condition of his individual probation, and courts have the power to "impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens."[203]

2. Doe v. Kentucky ex rel. Tilley

A Kentucky district court declared a statute similar to the one at issue in *Packingham* unconstitutional months after the Supreme Court's decision.[204] John

194. *Rock*, 863 F.3d at 829.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 829, 831.

199. *Id.*

200. *Id.* at 831.

201. *Id.*

202. Packingham v. North Carolina, 137 S. Ct. 1730, 1734, 1736 (2017) (emphasis added).

203. *Rock*, 863 F.3d at 829 (D.C. Cir. 2017) (citing United States v. Knights 534 U.S. 112, 119 (2001)) (quoting Griffin v. Wisconsin, 483 U.S. 868, 874 (1987)).

204. Doe v. Kentucky ex rel. Tilley, 283 F.Supp.3d 608, 612 (E.D. Ky. 2017).

Doe "was convicted in 2007 of possessing child pornography . . . he is now subject to the myriad provisions of Kentucky's Sex Offender Registry Act."[205] The particular provisions Doe and other offenders challenged dealt with registered sex offenders' social media use.[206] Regardless of the underlying conduct mandating registration, registered sex offenders could not knowingly use social networking sites, and the registration law required sex offenders to provide all "email addresses, instant messaging names, or 'other Internet communication name identities.'"[207]

The language of Kentucky's statute was comparable to North Carolina's.[208] However, a noticeable difference is that Kentucky's law contained a *mens rea* component: "No registrant shall *knowingly or intentionally* use a social networking site."[209] Contrastingly, North Carolina's made it unlawful to "*access* a commercial social networking [site]."[210] Despite subtle differences between the two laws, the district court concluded that the Kentucky law was unconstitutionally vague and overbroad similar to North Carolina's.[211] Like North Carolina's law, Kentucky's prohibited engaging in any speech on social media—regardless of how innocent—and the court further determined the law did not properly indicate what would be criminal conduct.[212]

Basing its reasoning largely after Justice Kennedy's opinion in *Packingham*, the district court held that Kentucky's ban on sex offenders from using social media was unconstitutional.[213] While the district court declared the law unconstitutional, the Kentucky legislature enacted an amended law in 2018.[214] Instead of outright banning of social media, the amended law significantly narrows the scope of social media restrictions to communicating with or gather information about a minor.[215]

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205. *Id.* at 610.

206. *Id.*

207. *Id.* at 610–11.

208. *Compare* KY. REV. STAT. ANN. § 17.546 (2013), *declared unconstitutional by* Doe v. Kentucky ex rel. Tilley, 283 F.Supp.3d 608 (E.D. KY 2017), *rev'd* KY. REV. STAT. ANN. § 17.546 (2018) ("No registrant shall knowingly or intentionally use a social networking Web site or an instant messaging or chat room program if that Web site or program allows a person who is less than eighteen (18) years of age to access or use the Web site or program."); *with* N.C. GEN. STAT. ANN. § 14-202.5(a) (West 2009), *declared unconstitutional by* Packingham v. North Carolina, 137 S. Ct. 1730 (2017) ("It is unlawful for a sex offender who is registered [under North Carolina law] to access 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 on the commercial social networking Web site.").

209. KY. REV. STAT. ANN. § 17.546 (2013) (emphasis added).

210. N.C. GEN. STAT. ANN. § 14-202.5(a).

211. *Doe v. Kentucky ex rel. Tilley*, 283 F.Supp.3d at 612–13.

212. *Id.* at 613.

213. *Id.* at 613, 615.

214. KY. REV. STAT. ANN. § 17.546 (West 2018).

215. *Id.*

3. Mason v. State

Another recent case involved Kevin Mason, who had convictions for sodomizing a minor and misdemeanor sexual misconduct.[216] Missouri law required that Mason register as a sex offender and report "any 'electronic mail address and instant messaging screen name, user ID, cell phone number or wireless communication device number or identifier, chat or other [I]nternet communication name, or other identity information.'"[217] The motion court charged Mason with the "class D felony of failure to register as a sex offender" because he did not report his Facebook and email accounts.[218] Mason argued that the statute requiring he register and provide information such as an email and Facebook was unconstitutional.[219] His main contention was that the United States Supreme Court decided *Packingham* after his plea, and that the registry law is unconstitutional in light of *Packingham*.[220]

The Missouri Court of Appeals disagreed and reasoned *Packingham* was factually distinguishable.[221] The court drew the distinction on the scope of the Missouri and North Carolina laws.[222] The court reasoned *Packingham* overruled a law that was "unprecedented in scope" because it criminalized across-the-board *access* to the Internet.[223] In contrast, Missouri's law criminalized the "*failure to register*" of specific online identifiers.[224] Given this distinction, the Missouri court turned to the Supreme Court's language, which declared the First Amendment permits enacting "specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime."[225]

Overall, *Packingham*'s holding is limited to the determination that the North Carolina law was unconstitutionally overbroad under intermediate scrutiny.[226] It does not stand for the broad idea that everyone, including registered sex offenders, holds a constitutional right to Facebook and social media under the First Amendment.[227] The ruling merely asserted that a specific and narrowly-tailored law to prohibit registered sex offenders from social media is assumed

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216. Mason v. State, 563 S.W.3d 166, 168 (Mo. Ct. App. S.D. 2018).

217. *Id.* (citing MO. ANN. STAT. § 43.651.1(4) (West 2008)).

218. *Mason*, 563 S.W.3d at 168.

219. *Id.* at 170

220. *Id.* at 169–70.

221. *Id.* at 170–71.

222. *Id*.

223. *Id.* at 170 (citing Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017)) (emphasis in original).

224. *Mason*, 563 S.W.3d at 170 (emphasis in original).

225. *Id.* at 171 (citing *Packingham*, 137 S. Ct. at 1737).

226. *Packingham*, 137 S. Ct. at 1737–38.

227. *See* Issie Lapowsky, *The Supreme Court Just Protected Your Right to Facebook*, WIRED, (June 19, 2017) https://www.wired.com/story/free-speech-facebook-supreme-court/ (on file with *The University of the Pacific Law Review*) (titling article in a way that implies Facebook and social media are a right).

constitutional under the First Amendment.[228] A model statute's definition of "social media" can properly encompass the fundamental characteristics of social media while borrowing language from various state definitions to satisfy strict First Amendment scrutiny.[229] Further, model language defining social media will consider and reflect court decisions after *Packingham* and not be an individual condition of probation, add a *mens rea* component and determine what is wrongful conduct, and limit more than mere "access" to social media sites.[230] The next section discusses physical locations that prohibit registered sex offenders and determine their digital equivalents.[231]

IV. PHYSICAL AND DIGITAL PROHIBITED LOCATIONS FOR SEX OFFENDERS

Various states have laws regulating the release and lives of registered sex offenders.[232] After registering as a sex offender, registry laws prohibit sex offenders from certain locations such as schools or parks.[233] These laws usually prohibit how far a defender must live or stay away from a category of locations.[234] Many of the registration laws even prohibit registered sex offenders from working or volunteering at schools or churches when children are present.[235] Additionally, some states prevent registered sex offenders from participating in holiday events like giving candy on Halloween or dressing up as Santa.[236]

Subsection A discusses characteristics of these locations and why laws exist to prohibit registered sex offenders near playgrounds and schools.[237] Subsection B analogizes these locations to social media sites to determine how to protect children at the "digital playgrounds."[238]

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228. *Mason*, 563 S.W.3d at 171 (citing Packingham v. North Carolina, 137 S. Ct. at 1737).

229. *See* Jonathan A. Obar & Steve Wildman, *Social Media Definition and the Governance Challenge: An Introduction to the Special Issue*, 39 TELECOMM. POL'Y 745, 746–47 (2015) (on file with *The University of the Pacific Law Review*) (explaining the basic commonalities of social media); *see also* CAL. LAB. CODE § 980(a) (West 2014) (defining social media to include user-generated content, which is a commonality of social media).

230. United States v. Rock, 863 F.3d 827, 829, 831–32 (D.C. Cir. 2017); Doe v. Kentucky ex rel. Tilley, 283 F.Supp.3d 608, 612, 613, 615 (E.D. KY 2017); *Mason*, 563 S.W.3d at 170–71.

231. *Infra* Part IV.

232. 720 ILL. COMP. STAT. ANN. 5/11-9.4.1 (b-c) (West 2013); GA. CODE ANN. § 42-1-15(b)–(c) (West 2017); ARK. CODE ANN. § 5-14-128 (West 2015).

233. 720 ILL. COMP. STAT. ANN. 5/11-9.4.1; GA. CODE ANN. § 42-1-15(b); 720 ILL. COMP. STAT. ANN. 5/11-9.3.

234. 720 ILL. COMP. STAT. ANN. 5/11-9.4.1; GA. CODE ANN. § 42-1-15(b); 720 ILL. COMP. STAT. ANN. 5/11-9.3.

235. 720 ILL. COMP. STAT. ANN. 5/11-9.4.1; GA. CODE ANN. § 42-1-15(c); 720 ILL. COMP. STAT. ANN. 5/11-9.3.

236. 720 ILL. COMP. STAT. ANN. 5/11-9.3 (c-2).

237. *Infra* Section IV.A.

238. *Infra* Section IV.B.

A. Common Restricted Areas for Registered Sex Offenders

The most common restrictions prohibit sex offenders from schools, parks, and playgrounds.[239] These restrictions vary: some states prohibit sex offenders from residing within "1000 feet of any child care facility, church, school, or area where minors congregate."[240] Arkansas extends their restriction zone to 2000 feet from those locations.[241] Although Illinois does not impose as large of a restriction, Illinois law prohibits sex offenders from knowingly being present in public parks and knowing loitering within 500 feet of public parks.[242] Whether these restrictions should remain constitutional is a policy consideration for legislatures beyond the scope of this Comment.[243] Assuming the restrictions are constitutional, equating digital social media sites to physical locations will narrowly equate digital playgrounds to physical playgrounds.[244]

Restrictions in some states prohibit sex offenders from certain locations and "other places children congregate."[245] Under the interpretive canon of *ejusdem generis*, "other places children congregate" means places similar to schools, parks, or playgrounds.[246] These locations, which reasonably include playgrounds and arcades, are public locations children can be without adult supervision and exist primarily for minors to play and socialize.[247]

While parks and playgrounds may have been the primary locations for children to congregate to play or socialize a generation ago, that is no longer accurate, and sex offender prohibitions should reflect these changes.[248]

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239. *See* 720 ILL. COMP. STAT. ANN. 5/11-9.4.1 (b-c); ARK. CODE ANN. § 5-14-128(a)(1) (West 2015); CAL. PENAL CODE § 3003(g) (West 2019); IND. CODE ANN. § 11-13-3-4(g)(2) (West 2017) (setting out the various prohibited locations under different registry laws).

240. GA. CODE ANN. § 42-1-15(b).

241. ARK. CODE ANN. § 5-14-128(a)(1).

242. 720 ILL. COMP. STAT. ANN. 5/11-9.4.1 (b-c).

243. Ryan Hawkins, *Human Zoning, The Constitutionality of Sex Offender Residency Restrictions as Applied to Post-Conviction Offenders*, 5 PIERCE L. REV. 331, 332–33 (2007) (noting the United Supreme Court held registry laws constitutional, but states have begun enacting residency restrictions); *see* Andrew Bowen, *San Diego Sex Offender Registry Law Faces Uphill Legal Battle*, KPBS (Aug. 8, 2017) https://www.kpbs.org/news/2017/aug/08/san-diego-sex-offender-residency-law-faces-uphill-/ (on file with *The University of the Pacific Law Review*) (describing San Diego law barring sex offenders living within 2,000 feet of schools and the consequences of enforcing the restriction); *see also* Douglas Evans, Michelle Cubellis, *Coping with Stigma: How Registered Sex Offenders Manage Their Public Identities*, AM. J. CRIM. JUST., 593, 594 (2015) *available at* https://link.springer.com/content/pdf/10.1007%2Fs12103-014-9277-z.pdf (on file with *The University of the Pacific Law Review*) (detailing residency restrictions and other prohibitions that affect lives of registered sex offenders).

244. *Infra* Section IV.B.

245. FLA. STAT. ANN. § 943.0437(1) (West 2018).

246. Circuit City Store, Inc. v. Adams, 532 U.S. 105, 114-115 (2001); FLA. STAT. ANN. § 943.0437(1).

247. TEX. HEALTH & SAFETY CODE ANN. § 481.134(a)(3), (a)(6) (West 2017).

248. *See* Danielle Taylor, *Statistics of Play*, NRPA (Aug. 1, 2012), https://www.nrpa.org/parks-recreation-magazine/2012/august/statistics-of-play/ (on file with *The University of the Pacific Law Review*) (suggesting congressional action in light of children spending less time outdoors than any other generation).

According to a 2012 study, only 29 percent of high school students engaged in the recommended 60 minutes of daily physical activity; children spent only 4–7 *minutes* having unstructured outdoor play.[249] Instead, children aged 8 to 18 *averaged 7.5 hours* on entertainment media without accounting for multitasking, which would make daily media use closer to *11 hours a day*.[250] Today, children are more likely to congregate on screens and social media sites than at parks and playgrounds.[251]

B. Digital Equivalents to Playgrounds

Given the prominence of social media in modern society—especially among children and teens—sex offender prohibitions should reflect this shift in society if the laws want to serve their purpose and prevent recidivism.[252] Some social media platforms ban registered or convicted sex offenders in their terms of use, which could make a model statute unnecessary because the site already imposes restrictions.[253] Other sites do not explicitly prevent sex offenders from joining, but they prohibit users to join who are "barred by applicable law" in the United States or other jurisdictions.[254] The model definition will not include sites that

249. *Id.* (emphasis added).

250. *Id.* (emphasis added).

251. Tim Elmore, *Parent's Guide to Social Media Use for Kids*, PSYCHOL. TODAY (Mar. 15, 2018), https://www.psychologytoday.com/us/blog/artificial-maturity/201803/parent-s-guide-social-media-use-kids (on file with *The University of the Pacific Law Review*); *see* Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (noting the prevalence of the Cyber Age); *see also* Danielle Taylor, *Statistics of Play*, NRPA (Aug. 1, 2012), https://www.nrpa.org/parks-recreation-magazine/2012/august/statistics-of-play/ (on file with *The University of the Pacific Law Review*) (describing the current generation of children's reduction of outdoor play and amount of time children spend using entertainment media).

252. *See* Roger Pryzbylski, *Adult Sex Offender Recidivism*, SEX OFFENDER MANAGEMENT ASSESSMENT AND PLANNING INITIATIVE (Oct. 2014), https://www.smart.gov/SOMAPI/sec1/ch5_recidivism.html#summary (on file with *The University of the Pacific Law Review*) (explaining child molesters are more likely than any other type of offender to commit a crime against a child following release from prison and that overall rates of recidivism may be underestimated).

253. Facebook, *Terms of Service*, https://www.facebook.com/legal/terms (last visited Oct. 24, 2018) (on file with *The University of the Pacific Law Review*); Snapchat, *Snap Inc. Terms of Service*, https://www.snap.com/en-US/terms/ (last visited Jan. 21, 2019) (on file with *The University of the Pacific Law Review*); Instagram, *Terms of Use*, https://help.instagram.com/ (last visited Jan. 21, 2019) (on file with *The University of the Pacific Law Review*); Tinder, *Terms*, https://www.gotinder.com/terms/us-2018-05-09 (last visited Jan. 21, 2019) (on file with *The University of the Pacific Law Review*); YouTube, *Policies and Safety*, https://www.youtube.com/yt/about/policies/#community-guidelines (last visited Jan. 21, 2019) (on file with *The University of the Pacific Law Review*); *see also* Twitter, *Twitter User Agreement*, https://twitter.com/en/tos (last visited Jan. 21, 2019) (on file with *The University of the Pacific Law Review*) ("You may not promote child sexual exploitation . . . You may not direct abuse at someone by sending unwanted sexual content, objectifying them in a sexually explicit manner, or otherwise engaging in sexual misconduct.").

254. Twitter, *Twitter User Agreement*, https://twitter.com/en/tos (last visited Jan. 21, 2019) (on file with *The University of the Pacific Law Review*); LinkedIn, *User Agreement*, https://www.linkedin.com/legal/user-agreement (last visited Jan. 21, 2019) (on file with *The University of the Pacific Law Review*); Snapchat, *Snap Inc. Terms of Service*, https://www.snap.com/en-US/terms/ (last visited Jan. 21, 2019) (on file with *The University of the Pacific Law Review*); Twitch, *Terms of Service*, https://www.twitch.tv/p/legal/terms-of-service/ (last visited Jan. 21, 2019) (on file with *The University of the Pacific Law Review*).

explicitly ban registered sex offenders.[255] However, the model definition of social media will include popular sites among children and sites where users can communicate and develop relationships on the platform.[256]

The "digital playgrounds" of the Internet should include websites where children congregate, meaning popular websites among children.[257] The sites will be ones where children can create their own profiles and post user-generated content to socialize and communicate with a network of other users on the website.[258] Since popular social media sites like Facebook, Twitter, Instagram, Snapchat, LinkedIn, and YouTube already restrict registered sex offenders, other websites are the target of the model statute.[259]

The Texas Health and Safety Code makes arcades a drug-free zone, and given arcades are popular places where children congregate—at least, they were in the past—the model statute should also aim to prevent registered sex offenders from accessing digital arcades.[260] To narrow the scope of the model statute, the gaming site should require that users be able to communicate with each other to simulate a real arcade or playground.[261]

Social media and the Internet are the digital playgrounds where children are more likely to "congregate;" meaning they will sign up or become members of these sites.[262] The model statute would exclude sites that explicitly prohibit sex offenders—a real-life example would be a private playground—which are websites like YouTube, Twitter, and Snapchat that are popular among children.[263] There are also many gaming sites children are likely to use that a model statute should regulate because they satisfy the fundamental characteristics of social media.[264] The next part describes ways to restrict these digital

255. *See* Facebook, *Terms of Service*, *supra* note 253 ("[b]ut you cannot use Facebook if: . . . You are a convicted sex offender."); *see also* Jan Kietzmann et al., *Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media*, 54 BUS. HORIZONS 241, 245 (2011) (on file with *The University of the Pacific Law Review*) (explaining how YouTube took action to avoid copyright violations and hosting offensive content).

256. *See* Kietzmann, *supra* note 255 (explaining that sharing content can lead to communication and forming relationships among users).

257. *See* Danielle Taylor, *Statistics of Play*, NRPA (Aug. 1, 2012), https://www.nrpa.org/parks-recreation-magazine/2012/august/statistics-of-play/ (on file with *The University of the Pacific Law Review*) (explaining that a smaller proportion of children engage in outdoor play and spend significant amounts of time online).

258. Kietzmann, *supra* note 255, at 241–42.

259. Facebook, *Terms of Service*, *supra* note 253; Instagram, *Terms of Use*, https://help.instagram.com/ (last visited Jan. 21, 2019) (on file with *The University of the Pacific Law Review*); Tinder, *Terms*, https://www.gotinder.com/terms/us-2018-05-09 (last visited Jan. 21, 2019) (on file with *The University of the Pacific Law Review*) (prohibiting registered sex offenders from registering an account with these websites).

260. TEX. HEALTH & SAFETY CODE ANN. § 481.134(a)(6) (West 2017).

261. Kietzmann, *supra* note 255, at 246.

262. *Id.* at 242; TEX. HEALTH & SAFETY CODE ANN. § 481.134(a)(3).

263. Amanda Lenhart, *Teens, Social Media & Technology Overview 2015: Smartphone Facilitate Shifts in Communication Landscape for Teens*, PEW RES. CTR. 25 (Apr. 9, 2015).

264. Jonathan A. Obar & Steve Wildman, *Social Media Definition and the Governance Challenge: An*

playgrounds and provide the wording for the model definition of social media.[265]

V. RESTRICTING THE DIGITAL PLAYGROUNDS

A law restricting registered sex offenders on social media is content-based because it aims to prevent unwanted sexual solicitations or messages that "presage a sexual crime," because of its speaker, a registered sex offender.[266] Such law should be narrowly tailored to serve a compelling purpose in the least restrictive manner to pass strict scrutiny.[267] The model statute's prohibited activities must be narrower than "accessing certain websites" like North Carolina's law, and instead, should be more like Illinois' law: unlawful to use the Internet to knowingly communicate with minors, except for lawful purposes, or if the offender is talking with the offender's own minor child.[268] The prohibited activities should also consider the language in *Packingham*: "conduct that often presages a sexual crime[.]"[269] However, registry laws in most states that prohibit certain locations do not list prohibited activities if a sex offender is in a park or playground; they simply cannot be within the specified range.[270] Therefore, the model statute in the subsequent section contains a section about activities as a place holder because the main focus of this Comment's model statute is to narrowly tailor the definition of social media.[271]

The North Carolina statute at issue in *Packingham* made it "unlawful for a registered sex offender to *access* a social networking [site]" as the statute later defined.[272] Violating the North Carolina statute was a felony offense for doing something as simple as visiting a website.[273] Not only did this statute broadly define social media, it was too restrictive of the prohibited behavior; essentially,

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Introduction to the Special Issue, 39 TELECOMM. POL'Y 745, 747 (2015) (on file with *The University of the Pacific Law Review*).

265. *Infra* Part V.

266. Reed v. Town of Gilbert., 135 S. Ct. 2218, 2228 (2015); Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) ("[I]t 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 a sexual crime, like contacting a minor or using a website to gather information about a minor.").

267. *Reed*, 135 S. Ct. at 2226.

268. *See* N.C. GEN. STAT. ANN. § 14-202.5(a) (West 2009) ("It is unlawful for a sex offender who is registered [under North Carolina law] to *access* a commercial social networking Web site") (emphasis added); 720 ILL. COMP. STAT. ANN. 5/11-9.3 (b-20) (West 2018) ("[I]t is unlawful for a child sex offender to knowingly communicate. . . using the Internet or other digital media with a person under 18.") (emphasis added).

269. *Packingham*, 137 S. Ct. at 1737.

270. *E.g.*, FLA. STAT. ANN. § 943.0437(1) (West 2018) (Restricting sex offenders from residing within 1000 feet of a school, park, playground, or "other place where children congregate."); *see also* 720 ILL. COMP. STAT. ANN. 5/11-9.4.1 (b-c) (prohibiting knowing presence in a public park or knowing loitering within 500 feet of a public park).

271. *Infra* Part V(a).

272. N.C. GEN. STAT. ANN. § 14-202.5(a) (emphasis added).

273. N.C. GEN. STAT. ANN. § 14-202.5(e); *see* Vangie Beal, *Access Definition*, Webopedia (2019), https://www.webopedia.com/TERM/A/access.html (on file with *The University of the Pacific Law Review*) (defining "access" as visiting a website).

accidentally clicking something that opens a Facebook or Twitter page was forbidden.[274] Therefore, a model statute must not only narrowly tailor its definition of social media, but also prohibit certain behaviors in the least restrictive way possible.[275] This Comment only addresses the scope of what is social media, but model language should restrict prohibited behaviors beyond merely "accessing" a particular site.[276]

Illinois law prohibits registered sex offenders from the Internet or social media like North Carolina.[277] Illinois law does not mention social media, but provides that "[i]t is unlawful for a child sex offender to knowingly communicate . . . using the Internet or other digital media with a person under 18."[278] There are exceptions if there is a "lawful purpose under Illinois law," or the sex offender is a parent or guardian of a minor.[279] Prescribing a certain state of mind narrows the law towards the least restrictive means by making a person guilty if they act at the specified level of culpability with regard to the required elements of the crime.[280]

Based on the discussion of social media and how to survive a First Amendment challenge, this Comment proposes the following as a model statute to prohibit registered sex offenders from using social media:

(a) It shall be unlawful for a registered sex offender to knowingly use, register for, or otherwise utilize "social media" to contact a minor, collect information regarding a minor, or conduct any other acts in the commission of a sexual crime.[281]

(b) "Social media" for the purposes of this section must meet all of the following requirements:

(1) An Internet website or mobile application;[282]

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274. *Packingham*, 137 S. Ct. at 1736–37; Beal, *supra* note 273.

275. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

276. *See* N.C. GEN. STAT. ANN. § 14-202.5(a) (prohibiting "access" to commercial networking sites, which the statute later defines); *but see* 720 ILL. COMP. STAT. ANN. 5/11-9.3 (b-20) (West 2018) ("it is unlawful for a child sex offender to *knowingly communicate*. . . using the Internet or other digital media with a person under 18.") (emphasis added).

277. N.C. GEN. STAT. ANN. § 14-202.5(a); 720 ILL. COMP. STAT. ANN. 5/11-9.3 (b-20).

278. 720 ILL. COMP. STAT. ANN. 5/11-9.3 (b-20).

279. *Id.*

280. *See* MODEL PENAL CODE § 2.02(1) (Am. Law Inst., Current through 2017 meeting) ("[A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.").

281. Doe v. Kentucky ex rel. Tilley, 283 F.Supp.3d 608, 612–15 (E.D. KY 2017); *see* Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) (explaining that the First Amendment would permit a statute that prohibited activities that "presage" a sexual crime); this clause is only serving as an example for drafting purposes. A fully drafted provision would want to consider the activities that most often presage a sexual crime beyond acces, and how other legislatures punish or define that behavior.

282. This speaks to the commonality that social media is a Web 2.0 application. While it is broad, it is a basic requirement to be a social media. Further, the requirements are an "and" test, so each qualifier is required. Jonathan A. Obar & Steve Wildman, *Social Media Definition and the Governance Challenge: An Introduction*

(2) Allows users to create personal, media-specific, profiles that contain information such as the name, nickname, the user's interests, or other personal information about the user, and links to other user's personal profiles or webpages on the site or application for the purposes of friendship, meeting other persons, or information exchange;[283]

(3) Facilitates the social interaction and development between two or more users on the site through videos, still photographs, blogs, video blogs, podcasts, instant and text messaging, email, or other digital forms of communication;[284] and

(4) Exists primarily to facilitate networking, conversation, or sharing of various forms of interaction as noted in subsection (3).[285]

(c) "Social media" does not include an Internet site or mobile application that primarily exists to do any of the following:

(1) Facilitate transactions for the sale of goods or services;

(2) Disseminates news; or

(3) Communicate with a governmental entity.[286]

(d) A violation of this section shall be punishable as a felony.[287]

VI. CONCLUSION

With the Supreme Court's decision in *Packingham* and the presence of social media in modern society, state legislatures looking to protect children from online predation should consider the narrowly-tailored model definition of social

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to the Special Issue, 39 TELECOMM. POL'Y 745, 746–47 (2015) (on file with *The University of the Pacific Law Review*).

283. This provision incorporates the remaining commonalities like user-generated content and some of the foundational building blocks like identity formation or sharing. Jan Kietzmann et al., *Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media*, 54 BUS. HORIZONS 241, 243 (2011) (on file with *The University of the Pacific Law Review*); Obar & Wildman, *supra* note 282.

284. This qualification includes the interactive features of social media and draws from some of the statutory provisions that provide examples of various communicative forms or features in social media that make social media social mediums. CAL. EDUC. CODE § 99120 (West 2013); CAL. LAB. CODE § 980(a) (West 2014).

285. This is a final qualifier to narrow social media to its primary purpose: socializing. This draws from the North Carolina limiting provision, and other jurisdictions have similar provisions that narrow social media to foundationally social mediums. N.C. GEN. STAT. ANN. § 14-202.5(b)(1-4), (c) (West 2009), *declared unconstitutional by* Packingham v. North Carolina, 137 S. Ct. 1730 (2017); Obar & Wildman, *supra* note 282, at 747.

286. Sections (1) through (3) again serve as limiting provisions. North Carolina had a provision such as this to exclude websites that were primarily for news or conducting transactions. Here, social media must satisfy all four requirements, but any one of the three provisions can exclude a website from consideration as a "social media." These three exceptions are based on other statutory definitions of social media and due to the reduced likelihood children will visit sites of the nature of these exceptions. Additionally, these sites allow registered sex offenders a chance to use technology for utility and convenience to do things like buy goods, pay bills, or receive the news. FLA. STAT. ANN. § 775.21(m)(1-3) (West 2018).

287. Different jurisdictions generally consider violating the prohibition a felony offense. Legislatures are free to choose the desired punishment. N.C. GEN. STAT. ANN. § 14-202.5(e).

media if they want the law to change with society.[288] The model definition accounts for the Supreme Court's reasoning and language of different state legislatures as a way to narrow the gap between what the law says and how society is.[289] The model definition of social media aims to further the government's interest in protecting children from online predation while also conforming to the scrutiny of the First Amendment.[290]

288. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) ("[T]he statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens.").

289. *See* Danielle Taylor, *Statistics of Play*, NRPA (Aug. 1, 2012), https://www.nrpa.org/parks-recreation-magazine/2012/august/statistics-of-play/ (on file with *The University of the Pacific Law Review*) (explaining the prominence of entertainment media among children).

290. *Packingham*, 137 S. Ct. at 1737.