

Our Fellow American, the Registered Sex Offender

David T. Goldberg and Emily R. Zhang***

In the memorable closing scene of *The Producers*, the protagonists find themselves in a court of law, their can't-miss scheme thwarted by the unexpected theatrical success of *Springtime for Hitler*, the musical. The jury returns, and as all rise, the foreperson announces the verdict in *People v. Bialystock and Bloom*: “Your honor, we find the defendants *incredibly* guilty.”

So too with North Carolina General Statutes Section 14-202.5, which bars people on the state's sex offender registry from accessing social-networking websites. Although the opinion in *Packingham v. North Carolina* did not use those exact words—Justice Anthony Kennedy's aversion to “ly” adverbs is well known—its verdict on North Carolina's ban was to the same effect. The Court described the law as a more flagrant violation than the measure struck down in *Jews for Jesus*, which earned its place in the canon of easy First Amendment cases by outlawing all “First Amendment activity.”¹ Indeed, the three-justice *Packingham* concurrence took the view that the case was so easy that the majority should have simply struck down Section 202.5 as facially unconstitutional and then stopped talking.

* Instructor, Stanford Law School Supreme Court Litigation Clinic. Before that, Goldberg taught for a decade at the University of Virginia, where he cofounded and codirected that law school's Supreme Court Litigation Clinic.

** Ph.D. candidate in political science at Stanford University. Graduated from Stanford Law School in 2016.

The authors represented petitioner before the U.S. Supreme Court, as counsel and a law student member of the Stanford Supreme Court Litigation Clinic team. We thank J.R. Packingham, Glenn Gerding, the students on both the Stanford and UVA teams (Trevor Ezell, Samson Schatz, and Grace Zhou; Jackie Bechera, Monica Raymond, Emily Riff, and Dan Stefany), Dan Ortiz, Mark Stancil, John Elwood, Toby Heytens, Pam Karlan, Jeff Fisher, Sean Donahue, and David Post.

¹ Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987).

As we explain below, we don't disagree. Under settled doctrine, *Packingham* is as easy a First Amendment case as the Court will see—made easier still by the Roberts Court's recent muscular free-speech pronouncements. Nor was it the "new media" watershed that some seemed to think. Harry Kalven famously suggested that Americans owed "our" expanded free-speech rights to "the Negro"—that the Warren Court's righteous sympathy for civil rights led it to deepen and broaden protections for free speech.² But "we" don't owe "our" rights to Lester (a.k.a. J.R.) Packingham. It is inconceivable that a democratic majority would impose a restriction anything like Section 202.5 on "us." It is likewise beyond doubt that our right to speak over the dominant communications medium of our age is anything but fully protected.

But the First Amendment question *Packingham* raised of whether "they"—the class of people Section 202.5 targets, registered sex offenders—have the same rights as "us," was a nail-biter. Before Section 202.5 was toast, it was the toast of North Carolina. The law passed unanimously and was held constitutional "in all respects" by two courts.³ And numerous other laws in North Carolina and across the country exclude "them" from streets, parks, and public places.

These laws have provoked barely a judicial peep. Indeed, these rapidly cumulating, ever-heavier burdens have taken on a life of their own. They have come to be understood by legislators and judges as a sign that people on sex-offender registries have a degraded citizenship status, and that there is no real constitutional limit on the disabilities that may be imposed in the interest of community safety. Twenty-five years ago, convicted child molesters were feared and loathed no less than now, but "sex offender" was not a legal category; and 15 years ago, "registration" was nothing but a description of the informational obligations imposed on people convicted of certain crimes. Now, registrant status is a gateway to routine, substantive, and decades-long impositions on basic liberties. And it is that force, which we (and others before us) call "sex offender exceptionalism," that *Packingham* was up against.

Although the U.S. Supreme Court has never upheld registration-based burdens, its opinions (much more than its holdings) have

² Harry Kalven, *The Negro and the First Amendment* 6 (1965).

³ *Packingham v. North Carolina*, 368 N.C. 380, 381 (N.C. 2015).

played a complex, surprisingly important, and largely ignoble role in shifting this baseline. The Court has been none too careful about distinguishing between people who are required to register and “predators” who exhibit an uncontrollable and undeterrable proclivity to offend. When the plurality opinion in *McKune v. Lile* first said that “[s]ex offenders are a serious threat in this Nation,” it was talking about individuals with a medically recognized disorder.⁴ But the Court, by repeating that dictum in very different contexts—along with its deeply problematic evidentiary basis—has infected the entire registrant population with ticking-human-time-bomb dangerousness.

In upholding J.R. Packingham’s First Amendment right to access social networking websites, the Court has broken free of this self-perpetuating cycle of cross-citations. The majority opinion is, for understandable reasons, fairly quiet about this, but the reasoning and language of the decision signaled an important departure from the habits of thinking that supported zoning people like J.R. Packingham out of the Constitution.

But on that point, troublingly, *Packingham* was more a 5-3 decision than an 8-0. Justices Samuel Alito and Clarence Thomas, as well as Chief Justice John Roberts, seemed willing to open a registered sex offender hole in existing doctrine by permitting punishment to be imposed for speech that neither causes nor was intended to cause harm, simply because the speaker is a registrant. And the concurrence’s attempt to perpetuate “facts” about registrants’ recidivism recycled from prior opinions—alongside some fresh anecdotes—prompted an unprecedented *Washington Post* “fact check” of a Supreme Court opinion.

So what will *Packingham* mean? While it is no Magna Carta for registrants, there is reason for optimism. The combination of this decision, the outside fact check, and broader societal shifts may lead legislatures and courts to think twice about imposing or rubber-stamping onerous and degrading restrictions, which reflect and reinforce the notion that registrants are permanent outcasts.

The dustup over the reliability and accuracy of the statistics in the *Packingham* concurrence highlights the need for an entirely different kind of caution than that opinion insisted on. Justice Alito insisted

⁴ 536 U.S. 24, 32 (2002)

that the Court must be careful about the “implication of its rhetoric,” but the path from *McKune* to *Packingham* shows that it must be more careful about its facts. It is a given that the Court’s role in our system requires it literally to “find” facts—to look far beyond the record for information bearing on the broad legal questions it decides. But this imbroglio highlights both the Court’s underappreciated power, through repetition and its own authority, to *create* facts and the dangers that this power poses.

I. Background: How Packingham Became *Packingham*

J.R. Packingham’s journey to the U.S. Supreme Court began with his July 2010 victory in a less august tribunal: Durham County Traffic Court. When a traffic citation was dismissed, he decided to share the good news on Facebook:

Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court costs, no nothing spent Praise be to GOD, WOW! Thanks JESUS!

While it would never be part of the case, it is relevant to Mr. Packingham’s journey through America’s judicial system that this invocation of the deity was no mere figure of speech. He is a person of deep religious faith, who generally believes that everything happens for a purpose, which turns out to be an excellent disposition to have if you’re a Supreme Court litigant.

But Mr. Packingham was not looking to become a litigant that day and would not have become one but for the exertions of Corporal Brian Schnee of the Durham Police Department. Schnee had recently learned about an arrestee who had been charged with violating a 2008 law that made it a felony for persons on the state’s Sex Offender and Public Protection Registry to “access” a “commercial social networking website.”⁵ Schnee was “intrigued.”⁶ So, sitting at his desk

⁵ Transcript of Hearing, Vol. I, at 10–11, *State v. Packingham*, Apr. 5, 2011 (10-CRS-57146).

⁶ *Id.* at 11.

one evening, he compiled a list of registrants in Durham County and began to search for them on Facebook and MySpace.⁷

He searched for the name “Lester Packingham,” which landed him on J.R.’s father’s page, which led to J.R.’s page and to the celebratory post.⁸ J.R. Packingham had been a registrant for eight years because of a one-count guilty plea for taking indecent liberties with a minor when he was in college. That conviction, for which the judge had imposed a suspended sentence and a relatively brief period of supervised release, had occurred well before Section 202.5 was passed and before many of North Carolina’s other restrictions on registrants were put in place. When he put up the fateful Facebook post, Packingham was not incarcerated, on probation, or on post-release supervision.

Trained detective that he was, Schnee checked the traffic court records to verify that J.R. Packingham was in fact the man responsible for the incriminating post. After he had confirmed that it was the same man, police went to Packingham’s apartment to arrest him and execute a warrant enabling them to seize his computer drives. Law enforcement also subpoenaed account records from Facebook.

None of this activity turned up anything more incriminating than the original post—which became the basis for charging him with a single felony count of unlawful accessing. It soon became clear that the main issue would be the First Amendment; guilt under the statute was not seriously an issue. Packingham moved to dismiss the indictment on constitutional grounds. He and another man facing trial before the same judge for violating Section 202.5 were given a hearing, at which they identified a dizzying array of websites to which Section 202.5 might apply. The state, which in theory has the burden of justifying its law, put on no evidence at all. Nonetheless, the judge’s common sense favored the prosecution, and the motion was denied. Packingham’s case went to trial before a jury. The state presumably liked its chances of conviction, but it plainly recognized that jurors might see things differently than had the judge. So, in her summation, the prosecutor urged the jury not to think about all the

⁷ *Id.* at 12. It’s hard to believe now, but MySpace passed Google as the most visited website in the United States in 2006, and had more users than did Facebook until well into 2008.

⁸ *Id.* at 75–77.

more narrow laws North Carolina *could have* enacted, but only to do their duty and convict under this one.⁹ It worked. The judge imposed a suspended sentence, and Packingham appealed the conviction, persuading the state's intermediate court, but not its supreme court, that Section 202.5 was unconstitutional.

II. An Incredibly Unconstitutional Abridgment of First Amendment Rights

We'll now explain why, under First Amendment precedent both venerable and recent, *Packingham* was such an easy case. First, and unlike many of the Supreme Court's recent free-speech-protecting decisions, *Packingham* involved . . . speech. A time traveler from a different First Amendment era might have genuine difficulty understanding what data-mining, a trademark, advertisements of haircut prices, or campaign contributions have to do with the freedom of *speech*.¹⁰ Not so here. The speech that led to Packingham's conviction was at the First Amendment's core. While the post may have been quotidian, by exclaiming "God is Good!" to celebrate the dismissal of the citation, Packingham was both commenting on a government proceeding and expressing his religious views. Contrast this with the speech that recent decisions have protected: the right to falsely represent one's military service, play luridly violent video games, broadcast unlawfully recorded conversations, and distribute depictions of unlawful animal cruelty.¹¹

Nor did *Packingham* have another factor that can make for a hard First Amendment case: the presence of real or intended harm. The Court's first Facebook case, *Elonis v. United States*, involved a defendant whose vituperative posts about his ex-wife, expressed in the form of graphically violent rap lyrics, had indisputably made her fearful.¹² The Court vacated his conviction, holding—on very

⁹ Trial Transcript, Vol. I, at 253–54, *State v. Packingham*, May 29, 2012, Durham County, N.C. (10-CRS-57148).

¹⁰ See *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017); and *Citizens United v. FEC*, 558 U.S. 310 (2010), respectively.

¹¹ See *United States v. Alvarez*, 132 S. Ct. 2537 (2012); *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011); *Bartnicki v. Vopper*, 532 U.S. 514 (2001); and *United States v. Stevens*, 559 U.S. 460 (2010), respectively.

¹² 135 S. Ct. 2001 (2015).

free-speech-y statutory grounds—that proof of *mens rea* was required for a threat to be punishable. And in *Snyder v. Phelps*, the Court overturned a tort judgment for the Westboro Baptist Church’s intentional—and repugnant—infliction of emotional distress on the family of a fallen soldier by picketing his funeral with signs declaring he had deserved to die.¹³ To complete the picture, *Packingham*’s was not a “partial sanction” situation. North Carolina did not restrict access to trademark registration or refuse government funding. It imposed criminal punishment without requiring proof of either an “evil-doing hand” or an “evil mind.”

To be sure, *Packingham* is not the easiest possible case. North Carolina did not impose criminal punishment because the defendant had said “Thank you, Jesus” as opposed to “Praise Satan.” Regardless of its content, the post was evidence of what was prohibited: the accessing of social networking websites. However, North Carolina was not concerned that physical “accessing” would overburden internet bandwidth, but rather that it would enable communication and the receipt of information—in other words, speech. It would be a free-speech restriction to prohibit reading the *New York Times* (or *nytimes.com*) on the theory that information could be gathered from it and put to criminal use. And it would be no less an abridgment to criminalize the “act” of picking up the newspaper to prevent that from happening.

It also doesn’t make a First Amendment difference that North Carolina’s ultimate purpose was to prevent crime. The Court has recognized two distinct “crime” exceptions to the First Amendment’s otherwise categorical protections. The Constitution does not protect speech that is criminal in itself: if treason or criminal price-fixing is accomplished through words, that doesn’t impair the government’s power to punish those misdeeds. Nor does the First Amendment protect words that do not in themselves cause harm but are “integral to a criminal transaction”: soliciting a hitman may be criminalized, and so may using Facebook to plot a getaway. J.R. *Packingham*’s post (or his accessing, for that matter) cannot possibly be fit into those exceptions.

The power that North Carolina sought to exercise was in many respects the very one that the Court rejected in its early 20th-century

¹³ 562 U.S. 443 (2011).

cases: by keeping people “like” J.R. Packingham from communicating or gathering information, social harm can be avoided. But the Supreme Court held decades ago that the First Amendment does not allow the government to prevent litter by prohibiting leafleting. And the “clear and present danger” doctrine seems especially appropriate to cases like these—and plainly fatal to Section 202.5. As expounded in the Court’s later cases, the government *may* hold a speaker liable for what might happen as a result of his speech, but *only* if it demonstrates that he intended those unlawful consequences and that they were likely and imminent.¹⁴ Section 202.5 requires no such showing, and J.R. Packingham’s case lacked all three constitutionally required elements.

It might understandably be interjected that these rules can’t *really* apply when the harm targeted is serious—preventing litter is one thing, but sexual abuse of a minor is another. The Court’s precedents have this answer: “No.” The Court in *Ashcroft v. Free Speech Coalition* confronted the same theory and same governmental purpose advanced here for speech suppression.¹⁵ The government defended the federal statutory prohibition on “virtual child pornography” (that is, images that appear to depict actual children engaged in sexual activity, but in fact show computer-generated ones) by pointing to express congressional findings that possessing such materials would enable predatory pedophilic behavior—both by overcoming young targets’ resistance (showing sexual contacts with adults to be “normal”) and by making prosecutions for possessing true child pornography impossible to win.¹⁶

The Court would have none of that. *Ashcroft* told the government it had the First Amendment backward: it could not punish an innocent, fully protected activity on the theory that *someone* with a criminal purpose could put it to bad ends. The government may not criminalize possession of comic books merely because they might facilitate criminal abuse by someone inclined to do so. The way to go is to prosecute those who use it (or attempt to) for criminal purposes.

And there were still more First Amendment winds at *Packingham*’s back. A central theme of the Roberts Court’s jurisprudence

¹⁴ See *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973).

¹⁵ 535 U.S. 234 (2002).

¹⁶ *Id.* at 263.

has been that judicial balancing and judicially established exceptions are “dangerous” to the free-speech guarantee.¹⁷ The Court has expressed hostility to arguments that different types of speakers, kinds of speech, and media of speech warrant different treatment. The Court declined to treat speech by corporations differently from that of natural persons;¹⁸ a majority of justices have expressed second thoughts about treating zoning restrictions on adult bookstores as “content neutral”;¹⁹ and similar regret has been expressed about special doctrines for broadcasting and commercial speech.²⁰ *United States v. Stevens* can be read as the Court’s commitment device for avoiding new exceptions.²¹ And *Reed*’s refusal to exempt truly benign content-based distinctions from exacting scrutiny reflects just how rigidly the Court is holding itself to those rules.²² Section 202.5’s imposition of speech burdens purely on the basis of the identity of the speaker were vulnerable in light of the Court’s increasingly noisy rumblings against speaker-based discrimination.

In addition, the state court’s decision upholding Section 202.5 was riddled with problems. The North Carolina Supreme Court’s primary rationale—that Section 202.5 regulated conduct—was plainly wrong; the state disavowed it at the certiorari stage. And the court’s alternative suggestion that Section 202.5 could properly be analyzed under the Supreme Court’s standards for “time, place, and manner” regulations ran into persistent difficulty. The essence of that doctrine is that normal, even-handed government activity will require that *some* speech be suppressed. That two parades can’t march on the same street on the same day may necessitate a permit regime, but not a rule that a certain subset of speakers may never parade there. Moreover, social networking websites are very different “places.”

¹⁷ *Stevens*, 559 U.S. at 470.

¹⁸ *Citizens United v. FEC*, 558 U.S. 310 (2010).

¹⁹ *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) (“[The] fiction that such ordinances are content-neutral . . . is perhaps more confusing than helpful. These ordinances are content-based and we should call them so.”).

²⁰ See, e.g., *FCC v. Fox Television Stations*, 556 U.S. 502, 530, 535 (2009) (Thomas, J., concurring) (declaring interest in “reconsidering” *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), which imposed a different standard for broadcast speech); *Greater New Orleans Broad. Ass’n v. US*, 527 U.S. 173, 197 (1999) (Thomas, J., concurring).

²¹ 559 U.S. at 470.

²² *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

Facebook alone contains more people than any single continent. The canonical time, place, and manner case, *Ward v. Rock Against Racism*, limited how loud music could be played in a single venue in a single public park, and the dissent thought even that decision “eviscerate[d] the First Amendment.”²³

In any event, the upshot of the Court’s improbable doctrinal stretches would still have been “intermediate” scrutiny—not no scrutiny. The central requirement of that test is that the law not suppress substantial quantities of speech that do not implicate the governmental purpose, and the Court’s recent decision in *McCullen v. Coakley* had applied that requirement with real bite.²⁴ Here, the vast majority of what Section 202.5 suppressed is patently unrelated to the government’s harm-prevention purpose.

Moreover, the North Carolina Supreme Court had included assertions that helped ensure that its opinion would be viewed as unserious. Assessing the requirement that “ample alternative channels” remain open, that court urged Mr. Packingham to look on the bright side: *New York Times*, Facebook, and Twitter might be off-limits, but not *wral.com* (local Raleigh news) or *pauladeen.com*, which did not permit minors to create accounts. And of course, he could express himself through phone calls and email. In an era when the president is announcing Supreme Court nominations on Twitter, these assertions would prove to be a millstone around the neck of Section 202.5. But it was not entirely the state court’s fault—what *could* it have said to establish that there are meaningful alternatives?

Finally, and as a matter of legal realism, Section 202.5 was the kind of law the justices are comfortable striking down. Only a handful of other jurisdictions had attempted anything similar, and the law was, on its own terms, obviously ineffectual and lacking in common sense. The law contained an express—but inexplicable—exemption for “stand-alone” photo-sharing and “chat” sites, even though

²³ *Ward v. Rock Against Racism*, 491 U.S. 781, 812 (1989) (Marshall, J., dissenting). Justice Kennedy at oral argument asked the state for the best case support for upholding a law like Section 202.5; and when the state gave its answer, “*Burson v. Freeman*,” which upheld a 75-foot buffer around a polling place on Election Day, the justice could not help but say “If you cite *Burson*, I think -- I think you lose” (a comment that the superstitious co-author strained to forget as he awaited the Court’s decision). Transcript of Oral Arg. at 40, *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (No. 15-1194).

²⁴ 134 S. Ct. 2518, 2535–41 (2014).

pedophiles have long used the former, and the latter have been found to pose far greater dangers than sites like Facebook. And for obvious reasons, the law was most likely to catch a person like J.R. Packingham, who was saying things publicly, than a registrant who was up to no good (or a nonregistrant predator who used the sites to “harvest” information about teenagers). Those on petitioner’s side in the Supreme Court were genuinely surprised that North Carolina’s brief did not even muster an *anecdote* in defense of Section 202.5—not a single case in which a registrant’s prohibited access had been used to enable a crime or even an instance in which an individual’s other nefarious activities were uncovered through a Section 202.5 arrest and ensuing search of computer drives.

If that were not enough, North Carolina—in an attempt to minimize what Section 202.5 forecloses—argued that Section 202.5 would not have prevented J.R. Packingham from having a *friend* post his message on Facebook. That led our side to ask (rhetorically), wouldn’t that also mean that a registrant with predatory intent could, without running afoul of Section 202.5, ask a friend to print out profile pages of the members of the local high school cheerleading squad? To our considerable surprise, the answer from the state was that that would be okay too.

III. Sex Offender Exceptionalism: A Caste of Thousands?

With all this going for *Packingham*, it would be tempting to say—as did Bialystock and Bloom over champagne at intermission— “What could possibly go wrong?” But here too, that seemingly rhetorical question has an answer: “sex offender exceptionalism.”²⁵ The Supreme Court could have simply concluded that basic First Amendment rules do not apply to a measure that suppresses the rights of the particular group burdened by Section 202.5.

Such worry might seem far-fetched. There is no end of authority for the proposition that those whom we hate get full First Amendment protection. Indeed, some say that is the whole point of the First Amendment. The right of true-believing Nazis to parade amid the homes of Holocaust survivors in Skokie, Illinois is not even an interesting First Amendment question. And the Supreme Court recently

²⁵ We borrow this term from the title of Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventive Detention*, 101 *J. Crim. L. & Criminology* 969 (2011).

announced—albeit in a conspicuously divided opinion—that the government commits an “independent constitutional wrong” when it draws speaker-based distinctions.²⁶ Presumably “the class” of persons targeted by Section 202.5 have no less a “right to use speech to strive to establish worth, standing, and respect” than, say, the artificial persons whose equal rights *Citizens United* vindicated.²⁷

Moreover, Packingham’s side could (and did) take solace from the Court’s decisions in *Simon & Schuster v. Members of N.Y. State Crime Victims Board*²⁸ and *Ashcroft*.²⁹ The former held unconstitutional a law that, like Section 202.5, disadvantaged a particular class of speakers defined by a prior criminal conviction: it imposed special burdens on their making money by selling their crime stories. That measure—in an augur of the emotive naming conventions that would prevail in sex-offender legislation—was known as the “Son of Sam” law and apparently had been prompted by rumors that David Berkowitz, the serial killer who had terrorized New York City in 1977, was interested in a book deal. The *Simon and Schuster* opinion did not take long before it likened him—for First Amendment purposes—to Henry David Thoreau, Malcolm X, and Saint Augustine, whose memoirs had recounted their criminal exploits.³⁰ The *Ashcroft* decision was likewise a valuable data point for the “no exceptions” side. The plaintiff in that case was the “Free Speech Coalition” (producers of adult pornography), but, in vindicating the First Amendment, the Court did not shrink from the reality that there exists “subcultures” of persons—pedophiles—who could and would use virtual child pornography to overcome resistance of young victims.³¹

²⁶ *Citizens United*, 558 U.S. at 340–41.

²⁷ *Id.*

²⁸ 502 U.S. 105 (1991).

²⁹ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

³⁰ *Simon & Schuster*, 502 U.S. at 121–22. Amazingly, David Berkowitz, the “Son of Sam”—still serving the over-300-year sentence imposed at a time when transistor radios were many New Yorkers’ primary source of information—has a vital internet presence. He experienced a religious conversion in 1987 and now calls himself the “Son of Hope.” Supporters have created a site that contains his religion-themed videos, along with an apologetic account of his murder spree.

³¹ *Ashcroft*, 535 U.S. at 245. Neither decision was directly controlling. *Simon & Schuster* addressed content-based distinction between crime memoirs and other writings. The law in *Ashcroft* did not single out pedophiles, but rather prohibited all virtual child pornography.

But sex offender exceptionalism is what the state argued, unapologetically. North Carolina's brief asserted that it was a First Amendment "virtue, not a vice" that Section 202.5 targeted the free speech rights of only a "small percentage of the population."³² "Sex offenders, in particular," the state explained, "have been subjected to a variety of registration, reporting, and residency restrictions, that could not have been imposed on the public at large."³³ And "courts have upheld" these laws "based on the predictive judgment that sex offenders are far more likely to commit future crimes than other citizens."³⁴ To the reader in search of a limiting principle, the state offered this not-very-reassuring one: the government's "leeway" in "dealing with" the constitutional rights of "this class of individuals" does "not mean, of course, that States may without cause deprive convicted persons of all their First Amendment rights."³⁵

Bedrock constitutional principles are sometimes honored in the breach. That the civil rights movement had broadened First Amendment rights for everyone was only part of Harry Kalven's celebrated thesis. His full statement was that "the Negro" was "winning back" for "us" what "the Communists" had seemingly lost.³⁶ As he and others have long noted, the vaunted "clear and present danger" test was first announced in cases that did not protect the speech rights of those with revolutionary views; and the standard failed—in dramatic fashion—in *Dennis v. United States*,³⁷ in which the Court applied it to uphold the McCarthy-era campaign to extinguish the Communist Party. Nor, as Mary Ann Case points out, should it be forgotten that Justice John Marshall Harlan's legendary *Plessy* dissent, after remonstrating that "there is no caste here," went on to say "[except] the Chinese," who are "a race so different from our own that we do not permit those belonging to it to become citizens."³⁸

³² Brief for Respondent at 11, *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (No. 15-1194).

³³ *Id.* at 19.

³⁴ *Id.*

³⁵ *Id.* at 19–20.

³⁶ Kalven, *supra* note 2, at 6.

³⁷ 341 U.S. 494 (1951).

³⁸ *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896). Indeed, Professor Case made this very point in contrasting Justice Kennedy's sensitive and respectful account in *Lawrence v. Texas* of the lives of gays and lesbians to his harsh words about individuals convicted

A. *Civil Death by 1000 Cuts?*

North Carolina's plea for exceptionalism drew on both of these strands. First, it suggested that registered sex offenders are so different from "us" that they might be "stranger[s]" to the Constitution.³⁹ The state cited the very regularity with which registrants are subject to restraints that "could not have been imposed on the public at large," and the ease with which "courts have upheld" these restraints as evidence of their degraded citizenship status.⁴⁰ Second, it pointed to the reason for this: like Communists in the mid-20th century (but unlike, say, Jehovah's Witnesses), sex offenders are not only despised, they are feared. They are perceived to be so dangerous, so intent on causing harm (or constitutionally incapable of stopping themselves), and so stealthy in evading detection that their mere presence among the ordinary citizenry is an emergency condition, the sort of "ticking time bomb" or "clear and present danger" before which ordinary constitutional rules recede.

As a descriptive matter, North Carolina was not wrong that states *do* impose on registrants a vast array of oppressive restrictions that they could not—and would not—impose on any other free citizens. Under other provisions of North Carolina law, the same class of people (sometimes a subset of them) is excluded from churches, the grounds of the General Assembly, the state fair, and public schools and universities, not to mention shopping malls, all because of the concern that minors might at some point be present there.⁴¹ Registrants nationwide are prohibited—either for life or for decades after completing their sentences—from living, working, or just being near such places. These burdens are qualitatively different from the

of sexual offenses in *McKune v. Lile*. "This coupling of the extension of protection to a newly respectable group with a more thoroughgoing willingness to fence out and treat harshly other groups still viewed as outcast," she observed, "is a common and much remarked on phenomenon." Mary Ann Case, Of "This" And "That" in *Lawrence v. Texas*, 55 Sup. Ct. Rev. 75, 99 n.107 (2003).

³⁹ *Romer v. Evans*, 517 U.S. 620, 635 (1996).

⁴⁰ This line of argument has more than faint echoes of the ultimate target of Justice Harlan's *Plessy* dissent—the majority opinion in *Dred Scott v. Sandford*, 60 U.S. 393, 409 (1857), which had treated the indignities piled on free African Americans as proof that, as a matter of constitutional law, their rights "might [be] . . . withh[e]ld or grant[ed] at [the] pleasure" of the majority.

⁴¹ N.C. Gen. Stat. § 14-208.18(a). Some of these provisions were enjoined in *Does v. Cooper*, 148 F. Supp. 3d 477 (M.D.N.C. 2015) while *Packingham* was pending.

collateral consequences of convictions for other crimes (which are themselves often mean-spirited and counterproductive). Elected representatives freely refer to registrants in dehumanizing terms (“toxic waste”),⁴² express glee at their hardships,⁴³ seek re-election based on toughness against them—and when their toughness is called into question by TV provocateurs, they have been known to convene a special session to take action.⁴⁴

Nor was the state wrong about how overwhelmingly and readily these laws have been upheld by many courts. The North Carolina Supreme Court upheld a town’s ban of registrants from its parks, rejecting a challenge by a man who had suffered a stroke who asked that his mother be allowed to push his wheelchair through the park across the street from where they lived.⁴⁵ Although it was “stipulated that the park . . . contain[ed] no amenities for children,” the court of appeals reasoned, that “by restricting only registered sex offenders from entering public parks . . . the ordinance promotes the general welfare and safety of Woodfin’s citizens, which is a legitimate government purpose.”⁴⁶ And in *Grady v. North Carolina*,⁴⁷ a North Carolina appellate court held, even after the Supreme Court’s decision

⁴² See, e.g., *Doe v. Pataki*, 940 F. Supp. 603, 621–22 (S.D.N.Y. 1996), rev’d in part, 120 F.3d 1263 (2d Cir. 1997) (noting that, during the debate on New York’s Megan’s Law, state legislators referred to convicted sex offenders as “depraved,” “animals,” and “the human equivalent of toxic waste” (emphasis omitted)).

⁴³ See Jesse James Deconto, *Arrested for Going to Church*, *Charlotte Observer*, Aug. 22, 2009, http://www.bishop-accountability.org/news2009/07_08/2009_08_22_Deconto_ArrestedFor.htm (quoting state Sen. David Hoyle, Dem., sponsor of the North Carolina law as saying, “as far as I’m concerned, they’ve lost all their rights—to go to church . . . to go to McDonald’s to get a cheeseburger if they’ve got the slides. They have made that choice. They have imposed that on themselves. I didn’t.”).

⁴⁴ See Recent Legislation, 119 *Harv. L. Rev.* 940, 942 (2006) (explaining that stringent Alabama legislation was passed at special session convened one week after the host of “The O’Reilly Factor” described the state’s laws governing sex offenders as evidence it didn’t “seem to care about” protecting children); Bonnie Rochman, *Should Sex Offenders Be Barred from Church?*, *Time*, Oct. 14, 2009, <http://www.time.com/time/nation/article/0,8599,1929736,00.html> (quoting sponsor of North Carolina law as saying, “We feel it is a good law. When a person takes advantage of a child, I don’t worry about their constitutional rights.”).

⁴⁵ *Standley v. Woodfin*, 362 N.C. 328, 333 (N.C. 2008).

⁴⁶ *Standley v. Woodfin*, 186 N.C. App. 134, 138, 164 n.9 (Ct. App. 2007).

⁴⁷ 135 S. Ct. 1368 (2015).

in *United States v. Jones*,⁴⁸ that lifetime 24-hour-satellite-monitoring of certain registrants did not even count as a “search” for Fourth Amendment purposes.

Before he hit “post” on his fateful Facebook announcement, J.R. Packingham had been compelled to quit a job in a shopping mall kiosk because there was a daycare facility on the premises; he had had to move when he was informed that his apartment was too close to another facility. He surely had felt the sting of these laws in less direct ways. Indeed, the premise of these measures is that registrants are nothing but dangerous and that their presence in a place pollutes it for everyone else.

But in addition to these perils for Mr. Packingham, this landscape created problems for *Packingham*. If, as courts and legislators widely assume, registrants may readily be excluded from the “streets and parks” and public places that “time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,”⁴⁹ then why not Facebook? If these exclusions are permissible, does that mean that registrants are not a part of the “public” or the “citizen[ry]” whose “privileges, immunities, rights, and liberty” the Constitution protects?⁵⁰ More than any First Amendment doctrine, this logic of status-based degradation posed the most serious threat to Packingham’s challenge.

How likely was it that the Supreme Court would be swayed by the logic of these other “perfectly constitutional” infringements? Does the record of relative futility really mean that these laws are perfectly constitutional? If so, how did this come to pass? How did we get to the point where basic liberties of free people to live, work, and go about their business are routinely subject to legislative extinction? Relatedly, how did we get to the point at which it is permissible to view every person on a registry as if he were like the defendant in the 1997 case of *Kansas v. Hendricks*, a member of the truly tiny class

⁴⁸ 565 U.S. 400 (2012) (holding that the attachment of a GPS device to a vehicle is a search within the meaning of the Fourth Amendment).

⁴⁹ *Hague v. CIO*, 307 U.S. 496, 515 (1939).

⁵⁰ Somewhat incongruously, registrants—and other felons—are not stripped of the franchise in North Carolina, though, lest they forget their status, the state does have a special law requiring that they notify the school principal if their polling place is in a school. N.C. Gen. Stat. § 14-208.18 (e).

of persons whose personality disorder compels them to commit sexual acts against children?⁵¹

As a matter of doctrine, the U.S. Supreme Court had not, before *Packingham*, passed upon second-generation state laws that imposed substantive burdens on liberty based on registrant status. Indeed, its precedents show signs that it would not endorse exceptionalism. But the Court has played an outsized and lamentable indirect role in the “signal bleed”⁵² that has led to the widespread belief among legislators and reviewing courts that such laws are sensible and unassailable, and increasingly that the liberties of registrants are matters of grace and not right.

B. The Supreme Court’s Responsibility

When we say the U.S. Supreme Court has played an important role in this development, it is not because of what the Court’s decisions have held, but rather what the Court’s opinions have taught. In terms of holdings, the two most relevant Supreme Court decisions—*Smith v. Doe*⁵³ and *Connecticut Department of Public Safety v. Doe*⁵⁴—sustained registration and community notification laws only after highlighting their purely procedural character. *Smith* observed that the Alaska law did “not restrain activities sex offenders may pursue but leaves them free to change jobs or residences.”⁵⁵ For its part, the *Connecticut* Court denied non-dangerous registrants’ claim to an individualized hearing on the ground that public dissemination of registrant status was not a representation of individual dangerousness.⁵⁶

Indeed, the case that brought the Court closest to unvarnished “sex offender exceptionalism” before last term was when it summarily reversed the North Carolina courts’ decision in *Grady*.⁵⁷ The Court had upheld federal registration a handful of times, but also struck it

⁵¹ 521 U.S. 346 (1997).

⁵² *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 807 (2000).

⁵³ 538 U.S. 84 (2003).

⁵⁴ 538 U.S. 1 (2003).

⁵⁵ *Smith*, 538 U.S. at 100.

⁵⁶ 538 U.S. at 7.

⁵⁷ 135 S. Ct. 1368 (2015).

down once,⁵⁸ as it had with civil commitment.⁵⁹ (Indeed, as we note below, one of the registration cases, the 2013 opinion in *United States v. Kebodeaux*⁶⁰ took a no-drama approach to the very same empirical questions that drew attention to the *Packingham* concurrence.) And while less directly relevant, the decisions in *Ashcroft*,⁶¹ *Kennedy v. Louisiana*,⁶² and *Stogner v. California*⁶³ at least stand against the suggestion that, in the Supreme Court, all laws might go silent once sexual harm to minors is a part of a case.

But to focus only on the holdings of these cases—*Smith* decided no more than that the particular registration obligations imposed in the 1994 Alaska statute did not violate the Ex Post Facto Clause—is to ignore the myriad other ways the Court’s output can shape the course of the law. And in this arena, those effects have been powerful and lamentable.

A fuller reckoning begins with Justice Kennedy’s plurality opinion in *McKune v. Lile*, which offered a litany of deeply problematic factual assertions about “sex offenders” that continue to shape legal decisions to this day.⁶⁴ Indeed, many of the same assertions prompted the *Washington Post*’s fact check after *Packingham*.⁶⁵ The *McKune* passage, laden with citations to a variety of Justice Department sources, appeared to indicate that recidivism by sex offenders was different in kind from the ordinary recidivism problems that the criminal justice system must deal with. The opinion cited one “estimate” that placed the “rate of recidivism of untreated offenders. . . as high as 80%.”⁶⁶ It

⁵⁸ Carr v. United States, 560 U.S. 438 (2010).

⁵⁹ Compare *Kansas v. Crane*, 534 U.S. 407 (2002) with *Kansas v. Hendricks*, 521 U.S. 346 (1997).

⁶⁰ 133 S. Ct. 2496 (2013).

⁶¹ 535 U.S. 234 (2002).

⁶² 554 U.S. 407 (2008).

⁶³ 539 U.S. 607 (2003).

⁶⁴ 536 U.S. 24 (2002).

⁶⁵ Michelle Ye Hee Lee, Justice Alito’s Misleading Claim about Sex Offender Rearrests, *Wash. Post*, June 21, 2017, <https://www.washingtonpost.com/news/fact-checker/wp/2017/06/21/justice-alitos-misleading-claim-about-sex-offender-rearrests/>; see also Ira Mark Ellman & Tara Ellman, “Frightening and High”: The Supreme Court’s Crucial Mistake about Sex Crime Statistics, 30 *Const. Comment.* 495 (2015).

⁶⁶ *McKune*, 536 U.S. at 32–33 (citing U.S. Dept. of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders* (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983* (1997)).

then identified two other documents as establishing that convicted sex offenders are “much more likely than any other type of offender to be rearrested for a new rape or sexual assault.”⁶⁷ The “estimate,” as critics would later show, was essentially rubbish; it had appeared in a “practitioner’s guide” and was little more than the sales pitch of someone marketing his treatment services to corrections officials. The second “factual” assertion was so incomplete as to be seriously misleading. The “likel[i]hood” alluded to was an order of magnitude lower than the 80 percent figure the opinion actually mentioned, and “more likely” did not mean what one might expect. The underlying data did show the rates at which persons previously convicted of sex offenses were rearrested on sexual charges to be higher than the rates at which persons released after incarceration for nonsexual offenses were rearrested on sex crime charges. But the data *also* showed sexual offenders’ same-offense and general recidivism rates to be *lower* than others, and further, that released burglars accounted for a larger *number* of sexual offense arrests than those who served time for sexual offenses (though the opinion did not mention a “frightening” problem of sexual assaults by convicted burglars).⁶⁸

These errors and imprecisions, however unfortunate, appeared in *McKune* to address matters that were (or seemed) far removed from the constitutionality of broad-based, life-long disabilities for registrants. They were offered in an opinion upholding a program that the Court believed was meant to *help* those convicted, by offering what the dissenters in *Hendricks* had clamored for: in-prison treatment. It did so by aggressive means, leveraging the state’s power over conditions of confinement to reward those who participated in the program (or disadvantage nonparticipants) and requiring participants to honestly account for their misdeeds—but refusing to guarantee immunity for those disclosures, ostensibly for therapeutic reasons. The result in *McKune* may have been (almost certainly) wrong as a matter of constitutional law, but it was by no means unreasonable—or vindictive. The same seems to be true of Justice Kennedy’s litany of “facts” about “sex offenders.” It was offered to make a point—that the government has a “vital interest” in providing treatment—that

⁶⁷ *Id.* at 33.

⁶⁸ U.S. Dept. of Justice, *Recidivism of Prisoners Released in 1983*, Bureau of Justice Statistics 6 (1997).

had scant real relevance to the Self-Incrimination Clause question presented and was not one on which there was disagreement. (Lile, the convicted rapist, *wanted* the treatment—but also immunity.) And when Justice Kennedy looked about for support for his relatively anodyne point, he went where most justices would have gone—to an amicus brief filed by the solicitor general, from which he lifted nearly all the still-controversial citations, characterizations, and assertions.⁶⁹

But the *McKune* dictum should not be let off *too* easily. The Supreme Court should vet statistics or quasi-statistics far more carefully—and so should the solicitor general. Mere carelessness is not the whole story. Justice Kennedy did not just cite the statistics in a footnote. He placed them at the beginning of the legal reasoning section of the opinion. Moreover, he introduced them with the following pronouncement: “Sex offenders are a serious threat in this Nation” and described the Kansas program as reckoning with the “frightening and high risk of recidivism” within this offender “group.”⁷⁰ The first statement was a paraphrase of the solicitor general’s introduction, which had started “[s]exual offenders inflict a terrible toll each year on this Nation,” in the apparent belief that this aspect of the case might help an underwhelming self-incrimination argument over the finish line.⁷¹

Nonetheless, *McKune* was nobody’s epochal case. Indeed, even the *Doe* cases are more fairly described as the ones that brought the loaded gun on stage that others would later discharge. The holdings of both cases were relatively narrow and quite plausibly correct under applicable Supreme Court precedent. The claim in *Connecticut Department of Public Safety v. Doe*—that those required to register were entitled under due process to an individualized determination of dangerousness before the state published their registration information on the internet—seemingly was doomed by the decision in *Paul v. Davis*:⁷² there is no constitutional “liberty interest” that prohibits the government from releasing stigmatizing information. If

⁶⁹ Brief for the United States as Amicus Curiae Supporting Petitioners, *McKune v. Lile*, 536 U.S. 24 (2002) (No. 00-1187).

⁷⁰ *McKune*, 536 U.S. at 32, 34.

⁷¹ *Supra* note 69, at *2.

⁷² 424 U.S. 693 (1976).

government defamation is not unconstitutional, then disclosure of truthful information—the fact of conviction—through a state-registry website could not be a deprivation of liberty warranting special procedures. This was all the more so, as the Court explained, because the criminal proceedings that result in convictions are, by constitutional design, public. And if that were not enough, Connecticut had included a disclaimer on the registry website that denied the premise of the plaintiffs' claim that inclusion on the registry was tantamount to a determination that a person was currently dangerous. The website, Connecticut explained, explicitly announced the opposite: that it made no representation either way of any registrant's individual danger, meaning that the further process plaintiffs sought would be pointless.

In *Smith v. Doe*, the path to victory was almost as unpromising. To begin, the ship had already sailed for declaring registration obligations broadly unconstitutional. Congress had enacted and amended a federal statute before the Supreme Court took the *Doe* cases (on petitions from states—with John Roberts representing Alaska); and, by then, 50 states had established registries. In theory, the Ex Post Facto Clause challenge in *Smith* should have been “easier” to win in that it would not require invalidating the law, only its application to earlier-convicted persons. But in reality, such claims introduce an element of fortuity. If having a registry is sensible and constitutional, a patchwork regime in which those with pre-statute convictions are “grandfathered in” but neighbors are informed that a later-convicted registrant has moved next door, is not really an appealing middle ground.

Moreover, the nature of the showing under the Ex Post Facto Clause is itself a strange one: the ultimate question is whether the state has improperly labeled a truly “punitive” regime as “civil or regulatory.” Indeed, *Smith* could easily have been decided along the lines proposed in Justice David Souter's concurrence, which rested exclusively on “the presumption of constitutionality normally accorded a State's law [which entitles it to] . . . the benefit of the doubt in close cases like this one.”⁷³ But that was unlikely to, and did not, happen. Having decided to hear the case, the Court did not limit itself to the provision before the Court, and in the face of a vigorous dissent,

⁷³ 538 U.S. at 110 (Souter, J., concurring).

the majority had strong incentive to make the challenged law look important and wise—not merely constitutionally permissible.

Both *Doe* opinions deployed the questionable language from *McKune*, which took on an entirely different character in the new context. In these cases, the Court was no longer addressing treatment of an individual serving a prison sentence, but rather a class of people—registrants—who *had been released*. If *they* truly are likely to recidivate at alarming rates upon release, that sounds like a present danger, not (as in *McKune*) a debater's point in argument about the Self-Incrimination Clause. Worse still, to say that "[s]ex offenders are a serious threat in this Nation" is to say that these people, widely referred to as "registered sex offenders," pose an ongoing threat, necessitating preventative measures. The solicitor general's *McKune* brief had at least referenced the "terrible toll" that *offenses* inflict, focusing on the consequences of actual crimes (committed overwhelmingly by non-registrants) rather than potential ones.

The Court's dismissiveness in both *Doe* opinions of individualized determinations of risk has sent a strong and dangerous message. In the course of concluding (plausibly) that individual determinations were not required for Connecticut's regime and that their absence did not make Alaska's law *ex post facto*, the Court signaled that it was generally permissible to treat registrants as a group, indeed a group *defined by* a similarly high individual risk of recidivism. But that is wrong twice over. First, none of the statistics the Supreme Court has cited have purported to describe rates for registrants, a highly heterogeneous group created by state law. Indeed, that was the forgotten linchpin of the *Connecticut* analysis: group averages say nothing about the dangerousness of individual members. Second, if registrants as a collective did have a higher average rate of recidivism, what would that show? If you, reader, were grouped with the likes of Hendricks, then your "group" would manifest an elevated (average) risk of offending.⁷⁴ The ensuing legal climate—where the public and their legislators say "predator" and "sex offender" and then enact

⁷⁴ The government's brief in *Smith v. Doe* began "[t]hey are the least likely to be cured"; "[t]hey are the most likely to reoffend"—quotations from a conference. There is no explanation on what "cure" means or which other offenders are more likely to be "cured." See Brief for United States as Amicus Curiae, *Godfrey v. Doe*, No. 01-729 at 1 (quoting comments from 1998 "Conference on Sex Offender Registries").

laws that burden *registrants*, citing high rates of recidivism—owes much to these Supreme Court-encouraged blurrings.

Third, the *Smith* opinion modeled a formalism and a certain cold-bloodedness that has infected courts confronting challenges to later, truly draconian laws. Rather than seeing the case as a “close one,” the *Smith* majority sought to demolish every objection raised. There was not a hint of sympathy for the plight of registrants like the lead plaintiffs, who had offended many years earlier and had done hard work to reconnect with their families and persuade courts that they individually posed no real danger. The Court further suggested that posting on the internet was no different from going to a record archive and dismissed as “conjecture” what the justices surely knew to be the case⁷⁵—that being publicly labeled a “sex offender” would worsen any registrant’s job and housing prospects or worsen their lives. (The court cited an absence of record evidence on this point—an ironic assertion given the loose and unsupported “facts” it repeated from *McKune*.⁷⁶) Indeed, the Court, relying on the public-private distinction that is a favorite of Justice Kennedy’s (and presumably of our Cato readers, too), brushed aside the prospect of vigilante violence because the state’s website warned against “the use of displayed information ‘to commit a criminal act against another person.’”⁷⁷ Indeed, the Court evinced an almost Panglossian optimism: the public would know just the facts of registrants’ offense; registrants who were not fearsome would be treated accordingly, notwithstanding the “sex offender” label and their ostensible “high risk of recidivism.”

Finally, the *Smith* opinion did little to highlight the peculiar nature of what it was deciding and not deciding.⁷⁸ Since the *ex post facto* doctrine in *Smith* pivoted around a very unusual issue—whether the law was “punitive” or “regulatory”—there was a great danger that a “nonpunitive” holding will be taken to mean “generally appropriate” or “constitutional.” Thus, the principle that laws which impose

⁷⁵ *Smith*, 538 U.S. at 100.

⁷⁶ *Id.*

⁷⁷ *Id.* at 105.

⁷⁸ Justice Souter tried to do so in both cases. *Connecticut*, 538 U.S. at 9 (Souter, J., concurring) (highlighting that decision did not “foreclose” a substantive due process or equal protection challenge to Connecticut’s statute); see also, generally, *Smith*, 538 U.S. 107–110 (Souter, J., concurring).

disabilities or are needlessly excessive are not *necessarily* condemned as “punitive” under the Ex Post Facto Clause can sound like “laws may impose disabilities” or be excessive. The fact that “no one factor necessarily condemns a measure as *ex post facto*” can sound like “nothing condemns a law that operates on registrants.” And just the simple fact that *ex post facto* claims are resolved by a balancing test can sound like the interests of “sex offenders” in, say, using a park may be properly “balanced” against the interest in protecting children from assault.

The *Doe* cases might be likened to *Clinton v. Jones*,⁷⁹ another instance when the Court’s vision of what would happen as a result of its decision was wildly off the mark. There, the Court’s confidence that civil litigation would not disrupt the presidency soon gave way to televised impeachment hearings. In the *Doe* cases, the Court seemed to envision registration (and public disclosure) as the stopping point, utterly failing to foresee that registrant status would become a legal category, on which transient anxieties and antipathies could find ready legislative expression. The latest panic—for example, might predators use drones to watch children?⁸⁰—may be addressed through a law that imposes a restriction, along with a cross-reference to the registration chapter. Whether or not the Court should have foreseen in 2003 that the world it seemed to approve, where registrants would be “living where they wanted,” would devolve into one where registrants are regularly subject to government-enforced homelessness, it exhibited a troubling insouciance about how its opinions could and likely would be understood. And, of course, the Court supplied a set of citations around which subsequent legal developments have long gravitated. Once the Supreme Court has recognized these alarming “facts” about registrants, what lower court will question them?

IV. The Supreme Court Decides: Thank God for the First Amendment

Packingham v. North Carolina arrived against this backdrop of casual but consequential Supreme Court statements about “sex offenders” and registrants. The ideas the majority opinion pronounces the

⁷⁹ 520 U.S. 681 (1997).

⁸⁰ See, e.g., Peter N. Borden, The Peering Predator: Drone Technology Leaves Children Unprotected from Registered Sex Offenders, 39 *Campbell L. Rev.* 167 (2017).

most are the less remarkable parts of the opinion. Instead, the principle that the opinion vindicates with little fanfare—that the First Amendment provides equal free-speech protection—is its most important contribution.

As befits a case so overdetermined, the First Amendment analysis in Justice Kennedy's majority opinion goes by in the blink of an eye. In one sentence, the Court assumes, but declines to decide, that the "time, place, and manner" intermediate scrutiny test applies; and in another sentence, the opinion states that Section 202.5 cannot meet that test. At various other points along the way, the majority grazes at the smorgasbord of other principles that condemn the law. At one point, the Kennedy five, citing *Ashcroft v. Free Speech Coalition*, announce that the case is controlled by the "well established . . . general rule" that the government "may not suppress lawful speech as the means to suppress unlawful speech. That is what North Carolina has done here. Its law must be held invalid."⁸¹ At another juncture, the opinion says that Section 202.5's unconstitutionality follows *a fortiori* from *Jews for Jesus*: If a law prohibiting "all protected expression" at a single airport is not constitutional, "it follows with even greater force that North Carolina may not enact this complete bar to the exercise of First Amendment rights on social networking sites."⁸²

Packingham will perhaps be most noted (and most widely cited) for its musings about the internet and social media. Whatever subtle signals the opinion sends about sex offender exceptionalism, all its rhetorical high notes sound in internet triumphalism. Indeed, the opinion reads like the remarks of someone who, invited to deliver an address about the rights of registered sex offenders, announces "I'd like to talk to you today about the social history of the Internet . . ." and plunges on from there. The opinion name-checks the Electronic Frontier Foundation's superb amicus brief three times—and, of course, acknowledges the excellent brief from Mr. Packingham's friends at the Cato Institute—but not the fact-rich brief submitted by the National Association for Rational Sex Offender Laws. And with paeans to the internet's "vast potential to alter how we think, express

⁸¹ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1738 (2017) (internal citations omitted).

⁸² *Id.* at 1733.

ourselves, and define who we want to be,”⁸³ it earned a “like” from *Wired* magazine.⁸⁴ If gems like that were not enough, the Court suggests that its long and frustrating quest to identify and taxonomize “public forums” has reached its terminus: “While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace . . . and social media in particular.”⁸⁵

But none of this broke new ground. That *Packingham* may be remembered as a “new media” speech case and sees itself as “address[ing] the relationship between the First Amendment and the modern Internet” is amusing.⁸⁶ The proposition that speech on the internet should receive full First Amendment protection was forcefully established almost 20 years ago in *Reno v. ACLU*,⁸⁷ when the internet truly was “new [and] protean.”⁸⁸

By contrast, early on during oral argument in *Packingham*, Justice Elena Kagan casually outed the elephant in the room by referring to President Trump’s unbridled use of Twitter.⁸⁹ While we may not be able to imagine with specificity how the internet will be used in our future—encyclopedic knowledge, singularity, or a purely cloud-based U.S. Supreme Court?—the importance of the internet and its role as the dominant communications medium (among other things) is no longer uncertain as it was in *Reno*. The first part of the opinion may therefore be understood as a *Reno treppenwitz*: the language Justice Kennedy wished had accompanied the truly visionary and path-breaking decision. The fact that the following was said 20 years too late makes it all the more true: “The nature of a revolution in thought can be that, in its early stages, even its participants may be unaware of it.”⁹⁰

⁸³ *Id.* at 1736.

⁸⁴ Issie Lapowsky, The Supreme Court Just Protected Your Right to Facebook, *Wired*, Jun 19, 2017, <https://www.wired.com/story/free-speech-facebook-supreme-court>.

⁸⁵ *Packingham*, 137 S. Ct. at 1735.

⁸⁶ *Id.* at 1736.

⁸⁷ 521 U.S. 844 (1997).

⁸⁸ *Packingham*, 137 S. Ct. at 1735.

⁸⁹ Transcript of Oral Arg. *supra* note 23, at 27–28.

⁹⁰ *Packingham*, 137 S. Ct. at 1736.

Although the opinion does not break new ground on the technological boundaries of the First Amendment, that does not mean it is unimportant. But discerning the opinion's contributions requires attention to something mostly unsaid in the opinion: its almost complete, if exceptionally understated, embrace of the proposition that registrants are entitled to full citizenship rights.

First and most important, the Court decided the case according to usual First Amendment rules, applying the *same* principles that would govern any other law. That might itself be "cause for dancing in the streets"⁹¹—at least those streets which do not pass within 300 feet of a school or licensed daycare facility. While the legal analysis in Justice Kennedy's *McKune* opinion kicks off with "sex offenders are a serious threat in this Nation" (uh oh), his *Packingham* opinion begins with "the fundamental principle of the First Amendment that all persons have access to places where they can speak and listen."⁹² All persons. Section 202.5 may be said to be much more unconstitutional than the measure in *Jews for Jesus* only if the First Amendment rights burdened by the two laws—those of registrants and those of "all of us"—are made of the same stuff.

Second, on a rhetorical level, the opinion exhibits similar progress. It twice describes those whose First Amendment rights are abridged by Section 202.5 as "persons who have completed their sentences" and elsewhere describes them plainly as "convicted criminals" and "registered sex offenders," as opposed to "sex offenders"—a term that appears some 17 times in Justice Alito's concurrence (alongside references to "abusers" and "predators"). By contrast, the concurrence sees today's registrant as tomorrow's "repeat sex offender," and everyone with a prior conviction—including, presumably, Henry David Thoreau and Martin Luther King Jr.—as a "potential recidivist."

Apart from labels, the Court made several substantive moves that warrant notice. First, although the Court unsurprisingly did not take up the invitation to announce when and whether speaker-based discrimination triggers strict scrutiny, it surely rejected North Carolina's position in the "virtue or vice" debate. The Court pointedly

⁹¹ Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, 221 & n.125.

⁹² *Packingham*, 137 S. Ct. at 1735.

refused to say that Section 202.5 is or could be analyzed as a garden-variety time, place, or manner regulation. It said only that the state had failed the test that the standard imposes.⁹³

Third, the opinion made no mention of the statistics and the “facts” about “sex offenders” that have caused so much trouble. Though well short of a *mea culpa*, this silence—along with the notable outside fact-checking on this subject—offers up the hope that the cycle has been broken. Indeed, the opinion refuses to say anything about how dangerous “sex offenders” are. The closest it gets is its statement of how repugnant sexual *offenses* are—a statement supported with a citation not to *McKune* but rather to *Ashcroft*, which, of course, struck down a statute on First Amendment grounds—followed by an acknowledgment that “*valid laws*” to protect children from sexual abuse may be enacted.⁹⁴

Fourth, the Court recognized, though less forcefully than did Judge Jay Bybee’s opinion for the Ninth Circuit in *Doe v. Harris*,⁹⁵ that registrants who are not under criminal justice supervision are free people who do not owe their liberties to the government (or to the grace of the legislative majorities). It is significant as a principle that prisoners “have” First Amendment rights and there is no tradition of imposing speech-based disabilities as a consequence of conviction; in practice, those rights may be and almost always are traded off to accomplish “penological objectives.”⁹⁶ But registrants who have finished their sentence stand on the same footing as individuals who have exited the criminal justice system after convictions for nonreportable offenses or those of us who have no criminal justice history.

Fifth, the Court observed that “even convicted criminals—and in some instances especially convicted criminals,” may have important things to say on social media—“in particular if they seek to reform and to pursue lawful and rewarding lives.”⁹⁷ That in itself is a milestone. This brief nod stops well short of the heartfelt welcome

⁹³ *Id.* at 1737.

⁹⁴ *Ashcroft*, 535 U.S. at 245.

⁹⁵ *Doe v. Harris*, 772 F.3d 563, 570–72 (9th Cir. 2014) (“Doe and Roe were convicted of sex-related crimes more than two decades ago and have completed their terms of probation and parole. . . . [They] are no longer on the ‘continuum’ of state-imposed punishments.”).

⁹⁶ *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

⁹⁷ *Packingham*, 137 S. Ct. at 1737.

into the political community that *Lawrence v. Texas* and *Obergefell v. Hodges* extended to other Americans formerly disdained as “sexual deviants.” But acknowledging that there are registrants who seek “lawful and rewarding lives”—and are entitled to that pursuit—is entirely new terrain. In no other majority opinion has the Court recognized the individual humanity and agency of persons on registries or the possibility that they are “especially” in need of enforceable constitutional rights. Nor has the Court previously pronounced itself “troubled” or “unsettle[ed]” by the imposition of disabilities on people who have been convicted of registrable offenses.

Finally, the Court’s discussion of the alternatives at North Carolina’s disposal impressively (but imperfectly) avoids sex offender exceptionalism. As did *Ashcroft, Packingham* expressly affirms the fundamental principle that crime prevention must be pursued through the enactment of laws that target and punish wrongdoers (but that speech undertaken for criminal purposes is unprotected). It left no doubt that the mere presence of minors on the same platform was not enough to impose punishment and that valid laws must instead target activities, such as using a website to gather information about a minor or to contact a minor, which “often presage[] a sexual crime”—though here the Court arguably faltered, seeming to suggest that these conditions might be applied to registrants only.⁹⁸

Taking these omissions and assumptions together, the Court effectively held—even without saying so as directly as Judge Bybee did—that registrants are not second-class citizens and that they are entitled (presumptively) to full free-speech rights.⁹⁹ There is reason for wishing that *Packingham* were an even more visible “milestone on the path to a more decent, tolerant, progressive society,”¹⁰⁰ but it is a solid victory for the important principle of free-speech equality and a welcome step away from meanness and intolerance.

⁹⁸ *Id.*

⁹⁹ Harris, 772 F.3d at 572 (“We accordingly agree with the district court that registered sex offenders who have completed their terms of probation and parole ‘enjoy[] the full protection of the First Amendment.’”) (citation omitted).

¹⁰⁰ Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 375 (2001).

V. The Concurrence: Taking Exception to “No Exceptions”

That Justice Alito concurred only in the judgment was not necessarily a surprise. He has been the least enthusiastic participant in the Roberts Court’s fast-moving First Amendment march. And as in other cases, Justice Alito’s theme was restraint. In *Snyder v. Phelps*, as the lone dissenter on a Court that seldom breaks 8-1, he had admirably interrupted the majority’s civics lesson to highlight the real harm inflicted and to ask why the Court was so certain the First Amendment required this harm to go unremedied.¹⁰¹

But Justices Alito, Roberts, and Thomas did not *dissent* in this case. They too acknowledged that Section 202.5 was so unconstitutional they were “compelled” to strike it down.¹⁰² But they were unwilling to say that the criminal punishment in J.R. Packingham’s case went beyond the First Amendment pale. It may fairly be said that on the question of sex offender exceptionalism, the *Packingham* Court voted 5-3, not 8-0. That is extraordinary given that this law would be a flagrant, not a subtle, violation of free-speech rights if applied to anyone else, including to any other class of people who are believed to re-offend or offend at a higher-than-average rate. Indeed, the concurrence used the same *McKune/Smith* litany of facts—partly, perhaps, to make things uncomfortable for their author, who wrote for the Court in *Packingham*.

But while the concurrence chided Justice Kennedy for going further than necessary, the “caution” it championed was of a very odd sort. First, Justice Alito avoided opining on the constitutionality of the criminal prosecution actually before the Court. Instead, the concurrence imposed the broadest possible construction on Section 202.5—one the state’s attorney general emphatically disavowed—and then decided that the law, thus construed, was facially unconstitutional.

The concurrence’s legal conclusions were not incorrect. The question of statutory interpretation on which Justice Alito and the state’s attorney general disagreed was whether Section 202.5’s definition of “commercial social networking web sites” might be read as applying “only” to “true social networking sites” or whether sites such as WebMD and the *Washington Post* were prohibited. The concurrence was right that the statutory language could really only be read the

¹⁰¹ 562 U.S. 443, 464–66 (2011) (Alito, J., dissenting).

¹⁰² *Packingham*, 137 S. Ct. at 1743 (Alito, J., concurring).

second way. And it was also right that Section 202.5 was “substantially overbroad” and therefore merited facial invalidation. But in taking an approach that avoids a difficult constitutional question by reaching a *broader* constitutional question, one likely loses the right to criticize others’ failures of restraint.¹⁰³ If, as here, doing so also entails overruling a state’s construction of its own law, the Felix Frankfurter bobblehead on one’s desk may begin to wag its finger.¹⁰⁴

There is a second way in which the concurrence’s accusations rings hollow. On the concurrence’s telling, the majority had committed itself to “caution” based on the judiciary’s relative lack of experience with internet-related First Amendment issues, only to break faith with that pledge by according broad (that is, standard) First Amendment protection to social media speech. But the majority opinion suffers from no such internal inconsistency: the “caution” Justice Kennedy championed related to according *exceptions* to settled First Amendment rules on the basis of the novelty of the medium. That, of course, is essentially the opposite of the kind of “caution” Justice Alito urged, which counsels hesitation before fully *protecting* speech (or recognizing free-speech rights) in novel settings. Whether one approach or the other is “restrained” depends on the baseline (and on what sort of “judicial activism” one seeks to guard against).

On this point, Justice Kennedy’s opinion in *Packingham* is consistent with itself and with the stance taken in many other cases—that judges risk impermissibly picking winners when they fashion exceptions to the First Amendment rule. Two of the concurring justices have elsewhere been eloquent proponents of that view. The chief justice in *Stevens* considered the judiciary’s deciding case-by-case what categories of speech should go unprotected to be “startling and dangerous.”¹⁰⁵ And in *Reed*, Justice Thomas found that exempting political signs and temporary directional signs from an otherwise

¹⁰³ See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (courts should begin with narrowest constitutional ground).

¹⁰⁴ We do not suggest that the majority opinion was especially narrow. The bases on which it struck down J.R. Packingham’s conviction would apply to anyone prosecuted under Section 202.5, so that was a facial invalidation too. It is not clear what would be gained by allowing North Carolina to enact a less overbroad, but still facially unconstitutional law.

¹⁰⁵ 559 U.S. 460, 470 (2010).

general prohibition triggered strict and fatal scrutiny.¹⁰⁶ Justice Alito has more frequently championed the different kind of judicial restraint urged in their *Packingham* concurrence—one that highlights modesty vis-a-vis legislatures.

But this was a strange case to beat that drum. In *Alvarez*, for example, Justice Alito could point to a tradition of prohibiting false speech about military honors. In *Snyder*, he highlighted that the funeral picketers’ “outrageous conduct caused [the father of the deceased soldier] great injury,” and that the Court should allow this acknowledgment of wrong to stand. By contrast, the legislative freedom that the majority opinion in *Packingham* was accused of needlessly foreclosing was the power to enact a law that would keep “predators” from accessing a “teen dating website.”¹⁰⁷ But no law targeting only registrants is needed to suppress that behavior. The instinct driving this hypothetical is that *adults* have no legitimate reason to be on a teens-only site. And a law that prohibited adults generally from doing some creepy thing could of course be applied to registrants and would punish predators, the vast majority of whom will be non-registrants.¹⁰⁸ The state would not be “powerless.”¹⁰⁹ (Indeed, “powerless” is not the word that comes to mind in describing North Carolina’s relationship with persons on its registry.¹¹⁰)

While discussing the two extreme cases—inherently innocent activity (no predator is looking for teenagers on WebMD) and plainly, or at least presumptively, inappropriate activity (visiting a teen-dating site)—the concurrence did not directly address the truly important First Amendment question the *Packingham* case presented: whether the presence, in some metaphysical way, of minors on a website—including one with 2 billion active users—is enough to make the vast

¹⁰⁶ 135 S. Ct. 2218, 2224 (2015).

¹⁰⁷ *Packingham*, 137 S. Ct. at 1743 (Alito, J., concurring).

¹⁰⁸ See *Dallas v. Stanglin*, 490 U.S. 19, 20–21 (1989) (upholding licensing regime that allows age restrictions for admission to dance halls for teenagers).

¹⁰⁹ *Packingham*, 137 S. Ct. at 1738 (Alito, J., concurring).

¹¹⁰ Of course, the law would not actually stop anyone from visiting the sites. It could deter them, but only if the risk of detection and penalty were high enough, at which point the motivated predator could go elsewhere. But that is no different from how Section 202.5 worked—and failed to.

array of entirely innocent uses, like that here, proscribable.¹¹¹ The very notion that the concurrence seems comfortable accepting—that vast swaths of protected free speech could be punished based on the possibility that individuals *could* abuse their rights for a nefarious purpose—is what the First Amendment strongly rejects. (Indeed, it is a notion that ordinary criminal law principles would reject: reading the *New York Times* could not be punished as attempted bank robbery simply because the newspaper contains articles that a safe-cracker might find useful.)

This is where sex-offender exceptionalism enters the equation. The concurrence’s reasons for implying that J.R. Packingham *did* do something punishable rely not on facts of this case, but rather on citations to *McKune* and *Connecticut Department of Public Safety v. Doe* (and *United States v. Kebodeaux*), said to establish that “sex offenders” are a “serious threat” to children and “more likely than” anyone else “to be rearrested” for a rape or assault. (Indeed, the concurrence is adamant that “repeat sex offenders pose an especially grave risk.”¹¹²)

The concurrence does not engage with the bases for these assertions, or with the serious and specific criticisms leveled against them. None of the underlying reports, for example, has anything to say about *registrants*, as opposed to persons committed to medical treatment programs for pedophiles or sentenced to federal prison. Updated statistics from the Justice Department report cited in *McKune* find that sex crime re-arrest rates were higher for those who committed sex offenses (as a whole, irrespective of the particular underlying offense) than for non-sex offenders. But those previously convicted of non-sex offenses committed the overwhelming number (87 percent) of sex crimes committed by all recidivists.¹¹³ That finding is consistent with the widely recognized reality that the vast majority of sexual offenses are committed by those without prior convictions and that the vast majority of sexual assaults against minors are

¹¹¹ The difference between a law prohibiting speaking on Facebook and one prohibiting speech in North Carolina based on the “presence” of minors is that the percentage of minors in North Carolina is higher.

¹¹² Packingham, 137 S. Ct. at 1739 (Alito, J., concurring).

¹¹³ Patrick A. Langan et al., *Recidivism of Sex Offenders Released from Prison in 1994*, Bureau of Justice Statistics 24 (2003), <https://www.bjs.gov/content/pub/pdf/rsorp94.pdf>.

perpetrated by family members and others whom they know, not predatory strangers like Hendricks or Lile.

It was enough for the concurrence that these “facts” have made it into the U.S. Reports. But it is not every day that a Supreme Court opinion is subject to a newspaper fact check. And it was disconcerting to see the highly trouble-making *McKune* dicta play a prominent role in a separate opinion whose thesis is that “[t]he Court should be more attentive to the implications of its rhetoric.”¹¹⁴ Indeed, the concurrence’s inclusion of *Kebodeaux* in its litany deserves special mention. Justice Stephen Breyer’s opinion for the Court in that case did acknowledge the same Justice Department report in *Smith* and did note that “[t]here is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals.”¹¹⁵ But the opinion’s next sentence observed that “[t]here is conflicting evidence on the point” and cited research supporting the opposite.¹¹⁶ In the face of that opinion, to continue treating “frightening and high” recidivism as a Supreme Court-established fact and to claim *Kebo-deaux* as fresh reinforcement, as the concurrence did, was something worse than a missed opportunity.

Moreover, the concurrence went further than just committing the same old offense of citing prior Supreme Court dicta without seriously interrogating their accuracy. It undertook its own Westlaw research to find lurid cases to show that social networking websites are—or at least can be—used in sexual offenses against minors (though several of these anecdotal examples appear to involve perpetrators who were not previously on registries).¹¹⁷

Finally, and still more troubling, the concurrence attempted to enlist academic “research” on its side, citing an article entitled “Online ‘Predators’ and Their Victims.”¹¹⁸ In fact, as the title’s use of quotation marks suggests, and other research (cited in the *Packingham* briefs) confirms, academics who are experts on internet victimization of youth have been persistent, rigorous, and forceful critics of the assumptions underlying North Carolina’s law and the concurring

¹¹⁴ *Packingham*, 137 S. Ct. at 1743 (Alito, J., concurring).

¹¹⁵ *Kebodeaux*, 133 S. Ct. at 2503.

¹¹⁶ *Id.*

¹¹⁷ *Packingham*, 137 S. Ct. at 1740 n.3 (Alito, J., concurring).

¹¹⁸ *Id.* at 1740 n.2 (Alito, J., concurring).

opinion.¹¹⁹ They have urged that “it is important for the public and officials [including Supreme Court Justices, presumably] to know that policies targeted at registered sex offenders are aimed at a very small part of the problem.”¹²⁰ Indeed, the concurrence might have been reassured that their “findings (based on studying trends in arrests of ‘online predators’) do not suggest that the Internet is more dangerous than other environments that children and adolescents frequent.”¹²¹ Had Justice Alito’s opinion commanded a majority, that important empirical reality would no longer matter. The opinion’s pronouncement that “it is easier for parents to monitor the physical locations that their children visit and the individuals with whom they speak in person than it is to monitor their internet use” would effectively be the law of the land.¹²²

VI. Conclusion: *Packingham*’s Significance (?)

If the trajectory of *McKune* and *Doe* teaches anything, it is that Supreme Court opinions do not always mean what they hold or were intended to say. At the very least, much has happened since 2003 that the justices did not foresee or intend to approve. But the content and rhetoric of their opinions, in concert with cultural and political forces far removed from One First Street, N.E., helped bring sex offender exceptionalism to the First Amendment’s door.

What will happen with *Packingham*? We first address some of the decision’s potential implications for new media and the First Amendment rights of all of us. Then, we consider whether *Packingham*’s discernable though muted turn from sex offender exceptionalism might signal a more general upturn in the status of registrants—or whether it is merely a case where a mighty force met its match, a First Amendment exceptionalism. Finally, we highlight a somewhat different *Packingham* effect, one attributable to the increased attention to the Supreme Court’s ways of finding relevant facts and the

¹¹⁹ See, e.g., Janis Wolak et al., Univ. of New Hampshire Crimes Against Children Research Center, Trends in Arrests of “Online Predators” 2 (2009) (“There was no evidence that online predators were stalking or abducting unsuspecting victims based on information posted at social networking sites. . . . Few of those arrested for online predation were registered sex offenders.” (4 percent)).

¹²⁰ *Id.* at 9.

¹²¹ *Id.* at 8.

¹²² *Packingham*, 137 S. Ct. at 1743 (Alito J., concurring).

very real institutional difficulties that *Packingham*—and subsequent nonjudicial “fact checks”—have surfaced.

A. *First Amendment and New Media*

As we explained above, there was nothing new that needed to be said about the First Amendment to adjudge Section 202.5 (very) unconstitutional. Much of what sounded new or important is fairly described as commentary on the master text. *Reno* is the Magna Carta for the freedom of speech on the internet. That decision looks more impressive, even prophetic, with 20 years’ hindsight.¹²³

But *Packingham*’s significance for First Amendment law and “our” free-speech rights should not be too deeply discounted. First, the decision appears to signal a welcome development for a doctrine that has long vexed First Amendment doctrine: forum analysis. It is pretty clear that the *Jews for Jesus* case became an easy one because the justices were unexcited about deciding whether or not the airport terminal was a “public forum” (and if so, what kind). So the Court took the route—or exit ramp—favored by the *Packingham* concurrence: make the measure so silly that the justices’ substantive disagreements would no longer matter. When the Court did address that question, in splintered fashion, in *International Society for Krishna Consciousness, Inc. v. Lee*,¹²⁴ Justice Kennedy lamented how utterly unmoored from both practical reality and its original purposes the public forum doctrine had become. Originally formulated—by Professor Kalven (!)—to describe a general limitation on the government’s authority to regulate speech, the doctrine, he argued, had devolved into a favorite tool for those seeking to justify exclusions of First Amendment activities from public property. Further, Justice Kennedy contended that special First Amendment places should instead be identified functionally, without requiring a historic pedigree or a governmental dedication.¹²⁵ In other words, what matters

¹²³ See Noa Yachot, The “Magna Carta” of Cyberspace Turns 20: An Interview with the ACLU Lawyer Who Helped Save the Internet, ACLU Blog, June 23, 2017, <https://www.aclu.org/blog/speak-freely/magna-carta-cyberspace-turns-20-interview-aclu-lawyer-who-helped-save-internet> (noting that when the case was argued in the Court, “only one of the justices had ever been online and that several others were taken down to the court basement by their clerks and shown the internet.”).

¹²⁴ 505 U.S. 672, 693–94 (1992).

¹²⁵ *Id.* at 694 (Kennedy, J., concurring).

most is whether a property is suitable for use by citizens to engage in speech activities. After many decades of spilled ink about whether a particular “forum” is “traditional,”¹²⁶ not to mention whether it has “a limited purpose,”¹²⁷ that is what the Court said in *Packingham*.

To be sure, *Packingham* did not—and could not—hold that Facebook.com is a “public forum.” The doctrine was designed to restrain government from leveraging its powers as owner or trustee of property. Facebook is “public” in the sense that everyone (and their moms) are on it; but it is also the property of an (enormous) private corporation; and, broadly speaking, no one has a “First Amendment” right to post anything on Facebook if Facebook, Inc., does not want them there (think about restrictions on “offensive” posts). But the Court forcefully and admirably pronounced that speech-suppressive governmental interventions are least tolerated in “places” where Americans actually exercise their First Amendment rights.

In this regard, it is worth noting one last line of attack in North Carolina’s argument that threatened real mischief—but that got no encouragement from the justices at oral argument and no mention in either opinion. In defending J.R. Packingham’s conviction on appeal, the state pointed to language on the Facebook website (never introduced at trial), stating that registered sex offenders should not create accounts, and argued that he had no “independent First Amendment right” that Section 202.5 could abridge.¹²⁸ This late-breaking argument was not only improper, Packingham told the Court, it was also a red herring. It was undisputed that the state could prosecute—and had prosecuted—registrants under Section 202.5 for accessing social networking websites that have no such exclusionary policy (as appears to be true of Twitter, LinkedIn, Snapchat, and the Facebook subsidiary Instagram). And if saying “God is Good” were a breach of contract with Facebook or a (metaphorical) trespass, that would make his case no different from those of litigants whose First Amendment rights were vindicated in *R.A.V. v. St. Paul* and *Virginia v. Black*, who burned crosses on the private property of African-American neighbors, or in *United States v. Stevens* and *Bartnicki v. Hopper*, whose

¹²⁶ See, e.g., Justice Alito’s question during oral argument about how to translate Section 202.5 “into terms that would be familiar at the time of the adoption of the First Amendment.” Transcript of Oral Arg., *supra* note 23, at 7.

¹²⁷ See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

¹²⁸ Brief for Respondent, *supra* note 32, at 53–54.

protected speech consisted, respectively, of depicting unlawful acts of animal cruelty and rebroadcasting illegally intercepted communications. Had the Court given any encouragement to the suggestion that the government has greater leeway, let alone plenary power, to regulate speech that occurs on property it does not control, *Packingham* would have been a First Amendment blockbuster—and not in a good way.

It is also likely that the opinion's exuberant celebration of social media's place in the First Amendment will exert influence in the "real world" deliberations of legislatures and courts. As the experience with *McKune* illustrates, the language of Supreme Court opinions can go viral. It is fair to say that Section 202.5 arose at the confluence of two moral panics: people are terrified about predators, and they are also highly anxious about what their own teenagers are saying and doing on social media. (Justice Alito's assertion—unadorned with cited authority—about parents' diminished ability to keep track of their kids reads like the lamentations of a worried dad.) And when their constituents are afraid, elected representatives are quick to take action. To the legislatures and judges who will deliberate over measures responding to future internet-related "crises," the grandfatherly assurances in Justice Kennedy's majority opinion could well provide a counterweight. "It's not as bad as it looks," the Court tells them—noting that "before it was the internet, it was the railroads"—and any "solution" is unlikely to make things better.¹²⁹

B. Hope for Registrants

What hope, if any, does *Packingham* offer for the hundreds of thousands of Americans who find themselves on registries? On one reading, *Packingham* was a clash of exceptionalisms, pitting the judiciary's vast willingness to tolerate disfavored treatment for people with sex offense convictions against its longstanding readiness to probe the rationality of legislation when First Amendment freedoms (but only those) are burdened. It surely does not help that *Packingham's* break with sex offender exceptionalism and its embrace of First Amendment rights for all were so understated. *Packingham*, as noted above,

¹²⁹ There is some danger that the opinion's language will be used to support absolutist arguments that one of this article's authors—the one who's not an ACLU lawyer—would wince at.

was no *Lawrence v. Texas* or *Romer v. Evans*, opinions that broadly challenged society to rethink irrational exclusions and the human toll of marginalization. Moreover, the fact that Justice Alito's harsh and unapologetic statements were expressed in a concurrence, rather than a dissent, may cloud the message still further—a signal that the Court's judgment is really about a silly law and is otherwise consistent with viewing the entire class of registrants as a threat.

In fact, it is not impossible that some states will attempt to blunt *Packingham's* significance even for the First Amendment rights of those in J.R. Packingham's position. The Court's opinion rightly highlighted that Section 202.5 imposed on registrants burdens that no other free citizen—who had completed his prison sentence and term of supervised release—would be subjected to. It is thus theoretically possible that a state might attempt to impose a Section 202.5-like restriction by making “supervised release” permanent and imposing a social media ban as a mandatory condition. Such circumventions would not eliminate the constitutional violation, and they are unlikely to succeed. Indeed, the New Jersey Supreme Court rejected one such attempt, largely on state constitutional grounds, shortly before *Packingham* was decided.¹³⁰ Federal courts likewise have a long record of meaningfully scrutinizing restrictions on internet use by those under criminal justice supervision, albeit under a statutory provision that forbids “greater deprivation[s] of liberty than is reasonably necessary.”¹³¹

We think that such pessimistic assessments miss much. First, the “signal bleed” that threatened the First Amendment claim can operate in both directions. If it is hard to articulate why park and Facebook restrictions should be different, the fact that the latter are now unconstitutional puts pressure on the premise that these other legislated disabilities are perfectly constitutional. And though the opinion could have said more, the Court's description of registrants as a segment of the populace that includes many ordinary people who want to get on with their lives surely takes some of the edge off the narrative of a single group-based “threat” to the nation.

Importantly, there is another way of understanding the case law that seemed to place so much wind at North Carolina's back. The

¹³⁰ *J.I. v. New Jersey State Parole Bd.*, 155 A.3d 1008, 1023 (N.J. 2017).

¹³¹ 18 U.S.C. § 3583(d)(2).

judicial success that laws like the one in *Woodfin* have enjoyed is less a sign that they—but not Section 202.5—are perfectly constitutional, but rather another “case of the missing amendments.”¹³² As Justice Antonin Scalia famously said, decrying the Court’s willingness to entertain substantive due process arguments: “Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.”¹³³ That principle, whether or not fully judicially enforced, condemns laws that have grown up for the past two decades “singling out a certain class of citizens for disfavored legal status or general hardships.”¹³⁴ Even though courts rarely strike down laws on that basis, their decisions applying other protections may—and should—be powerfully informed by these principles.

An interesting example is *United States v. Brown*¹³⁵—a decision issued after the national alarm about Communist threat began to recede. The Court held that a law barring Communists from holding union office was an unconstitutional bill of attainder. The government had said the law was like “a general rule to the effect that persons possessing characteristics which make them likely to incite political strikes should not hold union office, [which had] simply inserted in place of a list of those characteristics an alternative, shorthand criterion—membership in the Communist Party.”¹³⁶ The “fallacy” *Brown* rejected—that treating “Communists” as “those persons likely to cause political strikes” was a mere “substitution of a semantically equivalent phrase”¹³⁷—has been central to oppressive legislation targeting registrants: treating persons on the registry as the semantic equivalent for “predators” because they “as a group” are (believed to be) more likely to offend.

There are also important signs that the wave of panic and vituperation has crested. States have studied the actual effects of residency

¹³²Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 Harv. L. Rev. 124 (1992).

¹³³*Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 300–01 (1990) (Scalia, J., concurring).

¹³⁴*Romer*, 517 U.S. at 633.

¹³⁵381 U.S. 437 (1965).

¹³⁶*Id.* at 455.

¹³⁷*Id.*

restrictions and have concluded that they are ineffectual at best.¹³⁸ Many in public safety have increasingly voiced opposition to ever-more intensive registration requirements, on the ground that they divert resources from what the laws are supposed to accomplish—that is, closely tracking the very small subset of individuals post-supervision whose behavior suggests an ongoing, substantial safety threat.¹³⁹ Even the mother of Jacob Wetterling—whose 1989 abduction at age 11 gripped the nation and whose name is memorialized in the federal statute mandating that states maintain registries—has spoken out against the harsh conditions that are now imposed.¹⁴⁰

The results and tenor of judicial opinions considering non-free-speech challenges to restrictions seem to be shifting as well, in the direction of fairness, proportionality, and rationality. As noted above, the holdings of the Supreme Court's *Doe* cases were exceedingly narrow and fact-specific. They do not require that lower courts deciding challenges to residency restrictions, or even to present-day registration requirements, treat them as constitutional, even under the Ex Post Facto Clause. The multifactor balancing test relied on to uphold the law in *Smith* can produce very different results when the facts establish that the challenged restrictions are simultaneously draconian and ineffective. This is exactly what happened recently in the U.S. Court of Appeals for the Sixth Circuit in *Doe v. Snyder*: the court held numerous provisions of Michigan's law invalid on *ex post facto* grounds, highlighting evidence that these laws make it difficult for registrants to "find[] a home in which they can legally live or a job

¹³⁸ See, e.g., White Paper on the Use of Residence Restrictions as a Sex Offender Management Strategy, Colorado Sex Offender Management Board, Colorado Department of Public Safety (June 2009), <http://www.csom.org/pubs/CO%20Residence%20Restrictions%202.pdf> (noting that trend within Colorado and in other states in recognizing that restrictions are counterproductive).

¹³⁹ See, e.g., A Better Path to Community Safety: Sex Offender Registration in California, California Sex Offender Management Board at 5-6 (2014), <http://www.casomb.org/docs/Tiering%20Background%20Paper%20FINAL%20FINAL%204-2-14.pdf> (noting that California's system of lifetime registration produces a "very large" registry that has become "counterproductive" because law enforcement and the public cannot "differentiate between who is truly high risk and more likely to reoffend" and emphasizing the "need . . . to distinguish between sex offenders who require increased monitoring, attention and resources and those who are unlikely to reoffend").

¹⁴⁰ Jennifer Bleyer, Patty Wetterling Questions Sex Offender Laws, City Pages, Mar. 20, 2016, <http://www.citypages.com/news/patty-wetterling-questions-sex-offender-laws-6766534>.

where they can legally work” and keep the many registrants “who have children (or grandchildren) from watching them participate in school plays” or accompanying them to “public playgrounds.”¹⁴¹ The very recognition that many registrants are parents (and that many children have a parent who is on a registry) itself frustrates the narrative of “sex offenders” as a nonhuman “threat.”

Of course, it is possible that by the time you read this or soon after, the Supreme Court will have granted review or even reversed that decision. Regardless, it is still a remarkable shift that Alice Batchelder, a conservative appellate judge, led the charge, and that, when the Court asked for the government’s views, the acting solicitor general (in President Trump’s Justice Department) indicated that he did not take issue with the holdings of federal circuit courts striking down liberty restrictions. Indeed, the government disputed Michigan’s claim that *Smith* foreclosed the Sixth Circuit’s consideration of the challenge to its registration laws, explaining that Michigan’s regime was “altogether different from and more troubling than Alaska’s first-generation registry law upheld in *Smith*.”¹⁴²

For these purposes, *Packingham*’s most significant contribution may prove to be not what the Court or the concurrence said on June 19—the day of the decision—but what appeared in the *Washington Post* soon thereafter. As we have discussed, the “fact check” awarded three “Pinocchios” out of a possible four to the discussion of recidivism in Justice Alito’s concurring opinion. We have no interest in litigating that judgment (or the underlying, complex disputes about recidivism rates), and, in fairness, the statements the fact-checker highlighted had a long pedigree. But the *Post* highlighted, as had academic commentators,¹⁴³ that the ways in which those statistics were presented fostered misimpressions that recidivism rates are much higher than they actually are and obscured important realities about sexual offenses and people on registries. Those statements,

¹⁴¹ 834 F.3d 696, 698 (6th Cir. 2016). See also *id.* at 702 for language from the court equating premises restrictions to “the ancient punishment of banishment,” and for a map displaying visually the limited geographic areas in which registered sex offenders can live and work.

¹⁴² Brief for the United States as Amicus Curiae 17, *Snyder v. Doe*, 834 F.3d 696 (6th Cir. 2016), petition for cert. filed, 2016 U.S. Briefs 768 (U.S. Dec. 14, 2016) (No. 16-768).

¹⁴³ See, e.g., Ellman & Ellman, *supra* note 65.

problematic on their own terms, are especially so in the use to which the opinions have put them.

Even more important than the underlying accuracy is the increasing public perception that the Supreme Court has not played it straight on these issues and that its litany of “facts” about registrants, in particular, is tainted. It seems highly improbable that courts going forward will be able to do what they have repeatedly done in the past—simply say that “Our General Assembly has recognized ‘that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration,’” followed by “*see also Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (discussing the threat posed by sex offenders); *McKune v. Lile*, 536 U.S. 24, 32–33 (2002) (plurality) (same).”¹⁴⁴

All of which is to say that we likely have reached a new day. Courts will expect to see more challenges to restrictions on registrants that marshal the true facts and then ask judges to decide under equal-protection-infused understandings of state constitutions and the federal Ex Post Facto, Due Process, and other clauses.

C. *The Supreme Court’s Alternative Facts*

Whatever *Packingham* spells for the future course of sex offender registration jurisprudence, the appearance of a *Washington Post* fact check of the opinion calls further attention to basic and truly difficult questions about how the Supreme Court goes about its work. Which facts should the Court consider when it decides cases and where and how should it find them?

Indeed, *Packingham* was the second flare-up relating to this difficulty in the 2016-17 term. In *Jennings v. Rodriguez*, a case that was argued in November of 2016 but set for re-argument, the solicitor general submitted a letter advising the Court that it learned that statistics it had supplied in *Demore v. Kim*¹⁴⁵—on which the Court’s opinion had relied—had misrepresented the average length of time that immigration detainees were being held without a hearing. These figures, compiled from executive branch data, had made their first appearance in the government’s Supreme Court brief.

¹⁴⁴ *Standley v. Town of Woodfin*, 362 N.C. at 333.

¹⁴⁵ 538 U.S. 510 (2003).

Although the solicitor general played an indirect role, the *Packingham* problem seems even more intractable. The Court likes to be viewed as a tribunal deciding concrete cases between parties, but its distinct responsibility is to formulate legal rules that broadly settle important issues. In fulfilling that role, the Court surely needs facts beyond what the parties provide. Taking *Packingham* as an example, both opinions and both parties reached for facts far beyond the record. Petitioners drew in facts about how many people use Facebook, how often registrants commit bad acts after being released, how many individuals were prosecuted under Section 202.5, how hard or easy it is for parents or social networking websites to detect nefarious conduct online. And amici flooded the Court with facts about the internet, social media, and sex offender recidivism.

But how to accurately interpret and represent facts—especially those learned through social science research—is a feature, not a bug of the Supreme Court decisionmaking process. What started as little more than a rhetorical flourish became a “fact,” whereupon it has significantly and unhelpfully affected the course of the law. Long after they have forgotten that equal-protection and substantive-due-process claims were not before the Court, or that Connecticut in *Doe* disavowed any claim that registrants were dangerous individuals, courts know that the U.S. Supreme Court stated, as a fact, that “sex offenders are a serious threat in this Nation.”

If anything, the *McKune/Smith* experience exposes one strand of the *Packingham* concurrence to be mistaken: it turns out that supported assertions may cause broader harm than unsupported ones. The Court has special power, through paraphrasing of research and repeated (self) citations, to create facts that have a very special status in our legal system. While the Court cannot always help how litigants, lower federal courts, or the press miscite or abridge its opinions, the fact check might prompt the Court to ensure that at least it is not guilty of the same offense.

The Supreme Court responded to the *Washington Post* with a predictable statement: the Court “speaks through its opinions,” which is plainly true and correct. But that is also a familiar slogan of a sort of “judicial exceptionalism,” which chafes at the notion that judicial opinions could be treated like politicians’ speeches or criticized by “lay” journalists, and presumes that there is some inherent misunderstanding (and unfairness) in “fact-checking” the Court. But given

the Court's large and underappreciated power to create facts, there is no reason why fact-checkers should be scared off, least of all by the justices' inability to defend themselves. Part of the vibrant culture described in the *Packingham* opinion is a less deferential attitude toward assertions of institutional authority. On questions of fact, where the Court has considerable power but limited competence, that is likely a salutary development.