NC Supreme Court: access to social networking sites not about speech or First Amendment rights

written by NARSOL | November 10, 2015

By David Post . . . As most VC readers know, First Amendment law is dominated by a single question, the 800-pound constitutional gorilla that's always in the room: What "level of scrutiny" will the court apply to the challenged government action? How much will it demand from the government by way of justification for whatever it was that it did? How high will it set the bar?

Critical to that determination is the threshold question: Is the challenged government action a regulation of/burden on *speech*, or is it a regulation of/burden on *conduct,* with merely an "incidental effect" on speech? The distinction is critical (and often outcome-determinative) because, as the Supreme Court of North Carolina put it in a recent case (*State v. Packingham,* available here):

> *. . . a statute that regulates speech is subjected to exacting scrutiny: The State must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. . . . In contrast, a regulation that governs conduct while imposing only an incidental burden upon speech must be evaluated in terms of [its] general effect . . . [and] is permissible so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. [internal quotations and citations omitted]*

So consider this: North Carolina law (N.C.G.S. § 14-202.5)

makes it a criminal offense for anyone previously convicted of a sex offense to:

> *"access a commercial social networking Web site [that] . . . permits minor children to become members or to create or maintain personal Web pages on the [site]."*

The stated purpose of the law is to prevent sex offenders from "gathering information about minors on the Internet." The statute defines a "commercial social networking Web site" within the statutory access prohibition as an Internet site that

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

There are two statutory exceptions: A site is *not* a "commercial social networking Web site" if it either:

> *"(1) Provides only one of the following discrete services:*

> *photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or*
>
> *(2) Has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors."*

Now, there are, I suppose, many things to be said for and against a statute like this. I've made my position clear many times (e.g., here and here): I think statutory schemes like this are ineffective, deeply unfair, counterproductive, cruel and unconstitutional on their face. But reasonable people can disagree, perhaps, about all that.

But one thing I would think we could all agree on is that this is surely a regulation of *speech* as opposed to *conduct*. The statute will – and is designed to – constrain people from communicating with other people in certain specified ways. No Facebook, no Instagram, no Twitter, no Pinterest, no Vine, no Tumblr** . . . – whatever else this is, it would hardly seem plausible to suggest that it is not regulating the ability of previously convicted sex offenders to communicate with others. (Please read entire posting at The Washington Post)