

Summer 2014

Removing Disfavored Faces from Facebook: The Freedom of Speech Implications of Banning Sex Offenders from Social Media

John Hitz

Indiana University Maurer School of Law, johnhitz@indiana.edu

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [First Amendment Commons](#), [Internet Law Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Hitz, John (2014) "Removing Disfavored Faces from Facebook: The Freedom of Speech Implications of Banning Sex Offenders from Social Media," *Indiana Law Journal*: Vol. 89: Iss. 3, Article 7.

Available at: <http://www.repository.law.indiana.edu/ilj/vol89/iss3/7>

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Removing Disfavored Faces from Facebook: The Freedom of Speech Implications of Banning Sex Offenders from Social Media

JONATHON HITZ*

INTRODUCTION

The question of how to rehabilitate convicted sex offenders is a complicated, controversial, and pressing issue. States have chosen to answer this question in a multitude of ways. States frequently impose restrictions on the activities of sex offenders who are no longer in custody or under any form of supervised release, and some states have recently passed statutes¹ that ban certain classes of sex offenders from using social media² websites and Internet utilities.

These statutes are meant to serve the purpose of protecting children from exploitation by sexual predators. Protecting children is an extremely important goal that both federal and state governments should seek to achieve. Unfortunately, child sexual abuse has been a very serious problem in this country for a long time,³ and it has been a problem that reaches people across socioeconomic status and ethnic group boundaries.⁴ Child sexual abuse has received frequent media

* J.D. Candidate, 2014, Indiana University Maurer School of Law. I would like to thank my mother, Cindy Hitz, and my grandparents, Ed and Lilly Hitz, for their unconditional love and support throughout law school and life. I would also like to thank Professors Dawn Johnsen and Steve Sanders for their extraordinarily helpful comments and support. Finally, a special thank you to the staff of the *Indiana Law Journal* for their incredible editorial support and comments.

1. See *infra* Part II.A–C.

2. For the purposes of this Note, “social media” is used to reference the collection of websites and Internet utilities that sex offenders are collectively banned from by section 35-42-4-12 of the Indiana Code, section 14:91.5 of the Louisiana Revised Statutes, and section 28:322.05 of the Revised Statutes of Nebraska. However, because these statutes suffer from ambiguities—possibly because it is difficult to draw clear lines between different Internet websites and services—and are arguably overbroad, the definition given to “social media” by these statutes is imprecise. See *infra* Part III. Primarily, “social media” should be thought of as referring to instant messaging (websites and Internet utilities that facilitate one-to-one communication between two users), Internet chat rooms (websites and Internet utilities that facilitate communication between a group of individuals), and social networking websites (websites such as Facebook and Twitter that allow for the creation of a virtual community though individual user accounts). These websites and utilities are what legislators primarily had in mind when drafting social media ban statutes. See *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1105 (D. Neb. 2012) (detailing how one of the State of Nebraska’s witnesses defined the aforementioned terms).

3. In the year 2000 there were approximately 88,000 substantiated or indicated instances of child sexual abuse, accounting for approximately 10% of all officially reported child abuse instances in the United States. Frank W. Putnam, *Ten-Year Research Update Review: Child Sexual Abuse*, 42 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 269, 269–70 (2003). However, even this quite substantial number of incidents amounted to a 41% decrease from a 1992 peak of an estimated 149,800 incidents. *Id.*

4. *Id.* at 270. However, sexual abuse is more common against girls than boys. *Id.*

attention,⁵ with shows like MSNBC's *To Catch a Predator* keeping the public focused on the potential dangers posed by online sexual predators.⁶

Sex offender recidivism, as with recidivism for all crimes, is a significant concern. The Supreme Court has described the sex offender recidivism rate as "frightening and high."⁷ However, some studies have found that this popular assumption is false.⁸ In fact, according to some data, sex offenders have the lowest recidivism rates among different categories of criminal offenders.⁹ The recidivism rate myth, the prevalence of sex offenses, the public scrutiny of sex offenses, and the heinous nature of sex offenses are all factors that have contributed to the adoption of social media ban statutes.

This Note scrutinizes the constitutionality of statutes that ban sex offenders who are no longer under any form of probation, parole, or supervised release from using social media. This Note argues that the incarnations of three of the social media ban statutes that have been examined by the federal judiciary were properly found unconstitutional¹⁰ because they violate the free speech rights of the sex offenders that they ban from social media.¹¹ This Note goes on to argue that states can secure

(citing several studies all showing a greater incidence rate among girls than boys).

5. The issue is frequently covered, but some commentators express displeasure with the way in which it is covered. Pamela Mejia, Andrew Cheyne & Lori Dorfman, *News Coverage of Child Sexual Abuse and Prevention, 2007–2009*, 21 J. CHILD SEXUAL ABUSE 470, 471–72, 480–83 (2012) (finding that child sexual abuse appears regularly in news coverage, but expressing displeasure with the depth of the coverage and what is covered; the media mostly covers only "milestones" reached in the criminal justice system, but provides a minimal amount of coverage related to the prevention of child sexual abuse).

6. Michael T. Martinez, Paper Presented in the Philosophy Division at the International Communication Association Conference, Chicago: "To Catch a Predator:" An Ethical Analysis of Sting Journalism 19 (May 2009), available at http://pressacademy.org/sites/default/files/resources_pdf/sting%20j.pdf (explaining that *To Catch a Predator* benefited society by bringing the issue of child predators to the public's attention and facilitated some arrests, but ultimately concluding that the show was unethical).

7. *Smith v. Doe*, 538 U.S. 84, 103 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002) (internal quotation marks omitted)).

8. R. Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 357 (1998) ("The present findings contradict the popular view that sexual offenders inevitably reoffend. Only a minority of the total sample (13.4% of 23,393) were known to have committed a new sexual offense within the average 4- to 5-year follow-up period examined in this study. . . . [E]ven in studies with thorough records searches and long follow-up periods (15–20 years), the recidivism rates almost never exceeded 40%.").

9. Paul Heroux, *Sex Offenders: Recidivism, Re-Entry Policy and Facts*, HUFFINGTON POST (Nov. 8, 2012, 2:39 PM ET), http://www.huffingtonpost.com/paul-heroux/sex-offenders-recidivism_b_976765.html.

10. This Note will take the position, however, that some of the goals in passing these statutes can be achieved through constitutional means. See *infra* Part IV.

11. This is a similar conclusion to an earlier published note; however, this Note reaches this conclusion through a different path. See Jasmine S. Wynton, Note, *Myspace, Yourspace, but Not Theirspace: The Constitutionality of Banning Sex Offenders from Social Networking Sites*, 60 DUKE L.J. 1859 (2011). Ms. Wynton's note examines the issue through the First Amendment's guarantee of the freedom of association. *Id.* at 1860–61.

the interests they were seeking to protect in adopting these statutes through other means.

Part I of this Note examines the importance of social media in today's society by detailing what groups of individuals use social media, how many individuals use social media, and how these individuals use social media.¹² Part II scrutinizes the development of social media bans and takes a detailed look at the social media bans initially passed by Indiana, Louisiana, and Nebraska.¹³ Part III examines the constitutionality of social media bans by analyzing the extent of the First Amendment's protection for sex offenders who are no longer on probation, parole, or supervised release and wish to use social media; analyzing the proper First Amendment doctrine to apply to social media bans; and analyzing the cases that examine the constitutionality of the social media bans initially passed by Indiana, Louisiana, and Nebraska.¹⁴ Finally, Part IV argues that there is constitutional breathing room for a state or the federal government to craft a statute that properly balances the government interest in protecting children with the First Amendment rights of sex offenders who are no longer on probation, parole, or supervised release.¹⁵

I. THE IMPORTANCE OF SOCIAL MEDIA IN TODAY'S SOCIETY

As one federal court has acknowledged, “[S]ocial networking web sites, instant messaging, and chat rooms [have] become ubiquitous in today's society.”¹⁶ These websites and utilities are powerful communicative and organizational tools; some commentators have even suggested that these tools were indispensable assets to the individuals who took part in the Arab Spring uprisings, which swept the Middle East in the summer of 2012.¹⁷ This Part will examine which individuals use social media, how many individuals use social media, and some of the useful purposes for social media.¹⁸

12. *See infra* Part I.

13. *See infra* Part II.

14. *See infra* Part III.

15. *See infra* Part IV.

16. *Doe v. Marion Cnty.*, No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141, at *1 (S.D. Ind. June 22, 2012) (quoting plaintiff) (internal quotation marks omitted), *rev'd*, 705 F.3d 694 (7th Cir. 2013).

17. Saleem Kassim, *Twitter Revolution: How the Arab Spring Was Helped by Social Media*, POLICYMIC (July 3, 2012), <http://www.policymic.com/articles/10642/twitter-revolution-how-the-arab-spring-was-helped-by-social-media> (“In Arab countries, many activists who played crucial roles in the Arab Spring used social networking as a key tool in expressing their thoughts concerning unjust acts committed by the government.”).

18. This Note will primarily focus on the uses and benefits of social networking websites. Chat rooms and instant messaging are useful utilities, but there is simply more information available on the common uses of social networking websites, and out of the three types of websites and utilities that social media ban statutes apply to, social networking websites seem to be more closely related to a larger number of First Amendment freedoms.

A. Who Uses Social Media

Social media websites and utilities are extremely popular. The most popular social networking website, Facebook, has so many users that if the website's users formed "a country, it would be the third largest country in the world behind only China and India."¹⁹ Facebook has "more than one billion monthly active users" worldwide²⁰ and 171 million monthly active users in the United States alone.²¹ Sixty-six percent of all adults in the United States who use the Internet use Facebook.²² Further, Facebook is a website that is used by adults regardless of age group,²³ and a 2011 study found that twenty million minors had actively used the website in the past year.²⁴ Currently, Facebook's terms of service allow only individuals thirteen years old and older to use the website,²⁵ but Facebook is considering allowing younger individuals access to the website through certain parental controls.²⁶ However, in spite of Facebook's restrictions, many minors under thirteen years of age do access the website. In 2011, 7.5 million active Facebook users were under the age of thirteen.²⁷

Facebook is not the only popular social networking website. Twitter and LinkedIn are also very popular, although they are not nearly as widely used as Facebook.²⁸ Both of these websites appeal to slightly different demographics. Twitter appeals primarily to younger adults;²⁹ LinkedIn appeals mostly to college-educated individuals over the age of thirty.³⁰ There are other popular social

19. ERIK QUALMAN, SOCIALNOMICS: HOW SOCIAL MEDIA TRANSFORMS THE WAY WE LIVE AND DO BUSINESS, at xvii (2d ed. 2013).

20. SEC, FACEBOOK, QUARTERLY REPORT, SEC FORM 10-Q 19 (2012), <http://investor.fb.com/secfiling.cfm?filingID=1326801-12-6&CIK=1326801>.

21. *Id.* at 20.

22. LEE RAINIE, JOANNA BRENNER & KRISTEN PURCELL, PEW INTERNET & AM. LIFE PROJECT, PHOTOS AND VIDEOS AS SOCIAL CURRENCY ONLINE 3 (2012), *available at* http://pewinternet.org/~media/Files/Reports/2012/PIP_OnlineLifeinPictures_PDF.pdf.

23. The percentage of individuals using Facebook in given age groups does vary; nonetheless, 40% of Internet users at or over the age of sixty-five use Facebook. *See id.* at 13.

24. *Online Exposure*, CONSUMER REP., June 2011, at 29, 30.

25. Anton Troianovski & Shayndi Raice, *Facebook Explores Giving Kids Access*, WALL ST. J., June 4, 2012, at A1.

26. *Id.*

27. *Online Exposure*, *supra* note 24, at 30.

28. Twenty percent of adult Internet users use LinkedIn, while 16% use Twitter. Rainie et al., *supra* note 22, at 3. While Rainie's study demonstrates that LinkedIn is slightly more popular than Twitter with adult Internet users, Twitter is more popular than LinkedIn overall, with more than 200 million monthly active users, compared to 187 million monthly active users for LinkedIn. Seth Fiegerman, *Twitter Now Has More than 200 Million Monthly Active Users*, MASHABLE (Dec. 18, 2012), <http://mashable.com/2012/12/18/twitter-200-million-active-users/>.

29. Rainie et al., *supra* note 22, at 15 (finding that 27% of Internet users ages eighteen to twenty-nine use Twitter, while only 15% of Internet users ages thirty to forty-nine and 12% of Internet users ages fifty to sixty-four use the website).

30. *Id.* at 14 (finding that 25% of Internet users ages thirty to forty-nine and 22% of Internet users ages fifty to sixty-four use LinkedIn, while only 16% of Internet users eighteen to

networking websites,³¹ and there are even more websites that arguably serve a social networking function but are too numerous to mention.³²

Instant messaging is also an extremely popular element of social media. “[M]ore than four in ten online Americans instant message,”³³ and “[o]n a typical day, 12% of internet users” will use an instant messaging service.³⁴ Instant messaging is beginning to appear as a built-in feature on many popular social networking websites, like Facebook.³⁵ This type of service is also making inroads into the workplace: 40% of users of instant messaging in the workplace report that it has improved teamwork, and 50% of users of instant messaging in the workplace have reported that it helps save time.³⁶

B. The Usefulness of Social Media

Listing all the possible uses of social media goes well beyond the scope of this Note; however, this Note will make an effort to list the most popular and important uses of social media, with a particular emphasis on the most popular website, Facebook.

Many of the potential uses of social media go hand-in-hand with the freedoms that the Supreme Court has made clear are at the core of the First Amendment’s protection.³⁷ Social networks have the principal purpose of facilitating interactions

twenty-nine use the website, and that 36% of Internet users who graduated from college use the website, while only 7% of Internet users who did not attend college use the website).

31. Pinterest (12% of adult Internet users), Instagram (12% of adult Internet users), and Tumblr (5% of adult Internet users) are some notable examples. *See id.* at 10–12.

32. The exceptionally large number of social networking websites can be partially attributed to the problems encountered when attempting to precisely define the term “social networking website.” *See infra* Part III.C.1.

33. EULYNN SHIU & AMANDA LENHART, PEW INTERNET & AM. LIFE PROJECT, HOW AMERICANS USE INSTANT MESSAGING, at i (2004), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Society_and_the_Internet/pew_internet_instant_message_090104.pdf.

34. *Id.*

35. *See* Josh Wiseman, *Facebook Chat: Now We’re Talking*, FACEBOOK BLOG (Apr. 6, 2008, 2:33 AM), https://blog.facebook.com/blog.php?blog_id=company& blogger=219074 (announcing the launch of Facebook Chat, an instant messaging service that is automatically accessible from Facebook accounts).

36. Shiu & Lenhart, *supra* note 33, at ii. Not everyone has had such a positive experience with instant messaging in the workplace. “[Thirty-two percent] say [instant messaging] at work encourages gossip; 29% say [it] has been distracting, and 11% say it has added stress to their lives.” *Id.*

37. These uses of social media include communicating ideas, taking part in political speech, associating with like-minded individuals, and receiving ideas from others. *See* Hill v. Colorado, 530 U.S. 703, 728 (2000) (“[T]he First Amendment protects the right of every citizen to ‘reach the minds of willing listeners.’” (quoting *Hefron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1991))); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (“When a law burdens core political speech, we apply ‘exactingly scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.” (citing *First Nat’l Bank of Bos. v. Bellotti* 435 U.S. 765, 786 (1978))); *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (“[T]he right to receive ideas follows ineluctably from the *sender’s* First Amendment right to send them.” (emphasis in

between individuals. This principal purpose makes social networks a key element in an individual's effective exercise of his or her right to freedom of speech and association. Because so many people use these websites and services, it is easy to see why they are collectively a powerful communicative and associational tool.

Social media has morphed into a tool that a respectable percentage of individuals see as critical to their active and competent participation in the political process.³⁸ Both Barack Obama and Mitt Romney used social networking websites, such as Facebook, in their 2012 presidential campaigns in an effort to energize the electorate in their favor.³⁹ During the 2012 presidential campaign, the "GOP convention was one of the most talked about news events of the year on Facebook."⁴⁰ Further, the Republican Party's convention drew five million tweets on Twitter.⁴¹

Social networks and other social media were principally designed to facilitate communication and interactions in the virtual world. Social networks have enhanced communication to such an extent that they have created unprecedented additional benefits. Social networks have proved to be an exceptionally useful organizational and planning tool for real-world protests and assemblies.⁴² Further, these networks have increased personal transparency; some commentators argue that this consequence is beneficial for individuals and society because transparency forces individuals to be themselves in all aspects of their life (as opposed to maintaining a professional life personality and a personal life personality), thus reducing the stress of "social schizophrenia."⁴³ Social networking has also gained

original)); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 861 (7th Cir. 2006) ("Implicit in the First Amendment freedoms of speech, assembly, and petition is the freedom to gather together to express ideas—the freedom to associate." (citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66–69 (2006))).

38. See LEE RAINIE & AARON SMITH, PEW INTERNET & AM. LIFE PROJECT, *POLITICS ON SOCIAL NETWORKING SITES 2* (2012), available at <http://pewinternet.org/Reports/2012/Politics-on-SNS.aspx> (finding that 36% of individuals who use social networking websites say that the websites are either "very important" or "somewhat important" to them in keeping up with political news").

39. *Id.* at 5; see also QUALMAN, *supra* note 19, at 50–56 (explaining how Barack Obama used social media as an asset in his rise to the presidency).

40. Beth Fouhy, *For Conventions, TV Viewing Down, Social Media Up*, ASSOCIATED PRESS, Sept. 3, 2012, available at <http://bigstory.ap.org/article/conventions-tv-viewing-down-social-media-0>.

41. *Id.* One reason social networks have become such a popular platform for political expression and news gathering is that they allow people to participate from anywhere. People no longer need to be at the convention or tied to their television set; they can participate on their computers and other mobile electronic devices. *Id.*

42. Kassim, *supra* note 17 (quoting an Arab Spring activist in Egypt who explained that protestors used Facebook to schedule protests).

43. See QUALMAN, *supra* note 19, at 95–98 (arguing that the increased transparency created by social media is positive, but that this transparency can have serious consequences, especially when people try to be someone else through social media—an example of this would be the case of a mother who may have caused the suicide of one of her daughter's former friends by pretending to be a teenage boy and harassing the former friend).

tremendous traction in the business world; a 2011 study found that nearly 74% of companies⁴⁴ used Facebook and 73% used LinkedIn.⁴⁵

This Note would be incomplete without answering an important question: How do the sex offenders affected by social media ban statutes want to use these resources? States that have implemented social media bans point to the nefarious purposes to which these resources may be put.⁴⁶ A 2006 study found that one in seven youths had experienced unwelcomed sexual solicitation over the Internet, and one in three youths had experienced unwelcomed exposure to sexual material over the Internet.⁴⁷ Many of these unwelcomed experiences likely occurred through the use of social media, as social media represents the dominant form of communication on the Internet.⁴⁸

In spite of the possible nefarious uses, some individuals who are banned from social media by social media bans wish to put these tools to legitimate use. One example is the John Doe plaintiff who brought suit in *Doe v. Marion County*. John Doe wanted to use social networks for a variety of legitimate purposes, such as using “Facebook to monitor his teenage son’s social networking activity,”⁴⁹ to participate in political speech that can only be accomplished through social networks, to advertise for his small business, to “view photographs and videos of family members who are scattered throughout the United States,”⁵⁰ to communicate with other members of his profession, and to join in petitions that are relevant to his profession.⁵¹ Because social media is such a useful tool in modern society, it is unsurprising that some sex offenders would want to use social media for legitimate purposes.

44. The study used a sample of companies listed on the Inc. 500, “an elite group of the fastest-growing companies in the United States.” NORA GANIM BARNES & AVA M. LESCAULT, THE 2011 INC. 500 SOCIAL MEDIA UPDATE: BLOGGING DECLINES AS NEWER TOOLS RULE 4, available at http://www.umassd.edu/media/umassdartmouth/cmr/studiesandresearch/2011_Inc500.pdf.

45. *Id.* at 3.

46. *Doe v. Marion Cnty.*, No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141, at *2 (S.D. Ind. June 22, 2012) (noting that Indiana passed its social media ban in an effort “to combat online sexual exploitation”), *rev'd*, 705 F.3d 694 (7th Cir. 2013). For a more thorough examination of social networking in the workplace, see Christina Parajon Skinner, *The Unprofessional Sides of Social Media and Social Networking: How Current Standards Fall Short*, 63 S.C. L. REV. 241, 251–53 (2011).

47. JANIS WOLAK, KIMBERLY MITCHELL & DAVID FINKELHOR, CRIMES AGAINST CHILDREN RESEARCH CTR, ONLINE VICTIMIZATION OF YOUTH: FIVE YEARS LATER, at vii (2006), available at <http://www.unh.edu/ccrc/pdf/CV138.pdf>.

48. “Social media” as used in this Note is not meant to include e-mail, which is arguably the most dominant form of Internet communication. E-mail, however, does not seem to be the primary target of these statutes (although some of the statutes are probably broad enough to include e-mail within their definitions of banned websites). The communications that are of concern are more likely to be sent over social networks and other forms of social media because these services facilitate interaction and introduction between individuals, while e-mail—although capable of fulfilling these functions—is less well-suited for this task.

49. *Doe v. Marion Cnty.*, 2012 WL 2376141, at *5.

50. *Id.*

51. *Id.*

II. SEX OFFENDER SOCIAL MEDIA BANS

Sex offenders, as a group, are widely believed to be plagued with an extremely high recidivism rate.⁵² Possibly because of this belief, state legislators and federal courts occasionally overreach and push the boundaries of constitutionally permissible action in their efforts to combat the threat of sex offender recidivism.⁵³

52. The Supreme Court has described this rate as “frightening and high.” *Smith v. Doe*, 538 U.S. 84, 103 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002) (internal quotation marks omitted)). However, this belief in a high recidivism rate may be misplaced. *See Doe*, 2012 WL 2376141, at *8 n.5 (S.D. Ind. 2012) (“Conventional wisdom says people released after serving time for sex crimes are likely to strike again. The numbers aren’t as certain. Among convicted criminals released from prison, sex offenders released from prison are less likely to be arrested for any new crime than most other offenders, with the notable exception of murderers, researchers say.” (quoting Carl Bialik, *Underreporting Clouds Attempt to Count Repeat Sex Offender*, WALL ST. J., Jan. 25, 2008, at B1)). A 2003 Department of Justice study showed that sex offenders are more likely to be rearrested for another sex crime than offenders who are released for non-sex crimes. Patrick A. Langan, Erica L. Schmitt & Matthew R. Durose, U.S. BUREAU OF JUSTICE STATISTICS, NCJ 198281, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, at 1–2 (2003) (finding that sex offenders were “[four] times more likely to be rearrested for a sex crime” than non-sex offenders, but finding that “sex offenders had a lower overall rearrest rate” than non-sex offenders). The same study found the sex offender recidivism rate for sex offenses to be 5.3%. *Id.* at 1. Notwithstanding these findings, there are significant difficulties in measuring sex offender recidivism rates, including difficulties in defining the sex offender population—a wide array of offenses are often termed “sex offenses” and this causes sex offenders to be a highly heterogeneous group of individuals (it may not be analytically helpful to analyze the recidivism rates of a group of individuals that potentially includes individuals that committed such varying offenses as rape, possession of child pornography, and incest); difficulties in defining recidivism (does this term mean subsequent arrest—as used by the aforementioned Department of Justice study—subsequent conviction, or subsequent incarceration?); underreporting of certain sex crimes to the authorities (particularly rape and child sexual assault); and the length of time before a study “follows-up” (the longer the follow-up period, the greater chance that repeat offense will occur). *See* CTR. FOR SEX OFFENDER MGMT., RECIDIVISM OF SEX OFFENDERS 1–4 (2001), available at <http://www.csom.org/pubs/recidsexof.pdf>.

53. Efforts by states that arguably violate constitutional limits include (but are not limited to) chemical castration for certain classes of sex offenders, CAL. PENAL CODE § 645 (West 2010); MONT. CODE ANN. § 45-5-512 (2013); Matthew V. Daley, Note, *A Flawed Solution to the Sex Offender Situation in the United States: The Legality of Chemical Castration for Sex Offenders*, 5 IND. HEALTH L. REV. 87 (2008) (arguing that chemical castration is both misguided and unconstitutional); long-term (potentially even life-long) civil commitment, *see* Tanya Kessler, Comment, “Purgatory Cannot Be Worse Than Hell”: *The First Amendment Rights of Civilly Committed Sex Offenders*, 12 N.Y. CITY. L. REV. 283 (2009) (arguing that civil commitment disregards individual constitutional rights); and, the topic of this Note, social media bans. Efforts by federal courts that arguably violate constitutional limits include (but are not limited to) banning sex offenders from possessing any material containing nudity or that “alludes to sexual activity,” *United States v. Simons*, 614 F.3d 475, 483–85 (8th Cir. 2010) (distinguishing court of appeals cases that upheld special conditions of release that banned the possession of pornography as being more narrow than the condition imposed by the district court, and finding that the district court plainly erred in imposing a condition that banned the defendant from possessing “any material, legal or illegal, that contains nudity or that depicts or

However, it is exceptionally difficult to determine whether these extreme measures are being used against individuals who are likely to commit another sex offense.⁵⁴ Despite the inherent difficulty of predicting which sex offenders continue to pose a threat to society, state and federal courts seem to be becoming more willing to reduce the online freedoms of convicted sex offenders through the imposition of conditions of probation, parole, and supervised release.⁵⁵

Statutory restrictions of the online freedom of sex offenders are even more onerous than those imposed by courts. Conditions imposed by courts are more tailored to an individual offender than the blanket social media bans imposed by statute.⁵⁶ A court has an opportunity to analyze each individual offender, while a legislator must vote for or against a particular law based on broad generalizations. Despite the obvious advantages of allowing the courts to impose post-prison release conditions on offenders, several states have passed statutes that categorically ban certain types of sex offenders from using social media, even after they are no longer on probation, parole, or supervised release. This Note will focus on the bans originally passed by Indiana,⁵⁷ Louisiana,⁵⁸ and Nebraska⁵⁹ because

alludes to sexual activity or depicts sexually arousing material”); total Internet bans, *see, e.g.*, *United States v. Holm*, 326 F.3d 872, 876–78 (7th Cir. 2003) (requiring that conditions of supervised release involve no greater deprivation of liberty than reasonably necessary and striking down a total Internet ban as a condition of probation imposed by a federal district court because it did not comport to the narrow tailoring requirement of 18 U.S.C. § 3583). *But see* *United States v. Angle*, 598 F.3d 352 (7th Cir. 2010) (distinguishing *Holm* and upholding a ban on “personal” access to Internet services” where the defendant’s conviction involved Internet use and his profession did not require him to use the Internet); and total bans on the possession of computers, *United States v. Russell*, 600 F.3d 631, 636–39 (D.C. Cir. 2010) (holding that the district court abused its discretion in imposing a condition of supervised release that banned a sex offender from possessing a computer because the condition deprived the defendant of more liberty than was reasonably necessary).

54. *See* Fredrick E. Vars, *Rethinking the Indefinite Detention of Sex Offenders*, 44 CONN. L. REV. 161, 193 (2011) (concluding that even the best researched tool for predicting recidivism was likely not good enough to meet the legal standard for sex offender civil commitment).

55. *See* Wynton, *supra* note 11, at 1861–66. The constitutionality of these prohibitions is beyond the scope of this Note, which focuses exclusively on conditions imposed by state legislators on sex offenders no longer on probation, parole, or supervised release.

56. *See id.* at 1867. In fact, the conditions of supervised release imposed by federal courts are required to meet a “narrow tailoring” requirement by federal law. *Holm*, 326 F.3d at 877 (citing 18 U.S.C. § 3583).

57. IND. CODE § 35-42-4-12 (2008), *amended by* Act of May 11, 2013, Pub. L. No. 247-2013, sec. 8, § 12, 2013 Ind. Acts 3384, 3398. The Indiana social media ban was amended to apply only to individuals on probation, parole, or taking part in a community transition program. The amendments were a response to the Seventh Circuit ruling that Indiana’s original social media ban was unconstitutional. *See Doe v. Marion Cnty.*, 705 F.3d 694, 697 (7th Cir. 2013).

58. LA. REV. STAT. ANN. § 14:91.5 (2012), *amended by* Act of May 22, 2012, No. 205, § 14:91.5, 2012 La. Sess. Law Serv. Act 205 (H.B. 620) (West). Louisiana amended and narrowed this statute in 2012 after it was found unconstitutional by a federal district court. The amendments will be discussed later in this Note. *See infra* Part IV.

59. NEB. REV. STAT. ANN. § 28-322.05 (LexisNexis 2009), *held unconstitutional*, *Doe v. Nebraska*, 898 F. Supp. 2d 1086 (D. Neb. 2012). Kentucky and North Carolina have also

these three statutes have been analyzed by the federal judiciary. In Part IV, this Note will scrutinize the constitutionality of the updated social media bans that were passed by Indiana and Louisiana after their original bans were found to be unconstitutional.⁶⁰

The original statutes passed by these three states all have the same goal: prevent potential harm to children by restricting sex offenders' access to social media. However, the three states strive to accomplish the goal in slightly different ways. Because there are some nuanced differences between the statutes of Indiana, Louisiana, and Nebraska, this Part will examine each statute and its differences from the others thoroughly.⁶¹ The important details about each statute that will be addressed herein are (1) who the statute applies to, (2) what the statute's definition of social media is, and (3) the characteristics that are unique to each statute.

A. Indiana's 2012 Statute Banning Sex Offenders from Social Media

Indiana's statute applied to sex offenders who were required to register as a sex or violent offender⁶² for committing one or more of several enumerated offenses.⁶³ The offenses listed in Indiana's statute were primarily crimes against children; however, the statute also applied to individuals who were required to register as "sexually violent predators."⁶⁴ Individuals in Indiana who are required to register as sexually violent predators include those who have committed rape,⁶⁵ criminal deviate conduct,⁶⁶ or a sex offense⁶⁷ "while having a previous unrelated conviction

passed statutes that ban sex offenders from using social media after they are no longer on probation, parole, or supervised release. KY. REV. STAT. ANN. § 17.546 (LexisNexis Supp. 2013); N.C. GEN. STAT. ANN. § 14-202.5 (West Supp. 2012).

60. *See infra* Part IV. Indiana's new statute will be discussed very briefly because the newly amended statute is significantly different from its original form and no longer applies to sex offenders who are not on probation, parole, or supervised release—such statutes are the focus of this Note. *See supra* note 57.

61. *See infra* Parts II.A–C.

62. An adult can be required to register as a sex or violent offender for two different reasons: (1) committing one of a multitude of different sex offenses; or (2) committing the violent crimes of murder and voluntary manslaughter. A child can be required to register as a sex or violent offender if they would be required to register as an adult, they are at least fourteen years of age, and they are found likely to repeat the act by clear and convincing evidence. *See* IND. CODE § 11-8-8-4.5 (Supp. 2013) (defining "sex offender"); *id.* § 11-8-8-5 (defining "sex or violent offender").

63. Indiana's social media ban statute applied to those who committed the crimes of child molestation, child exploitation, possession of child pornography, vicarious sexual gratification (which can be summarily described as inducing a child to engage in masturbation or intercourse, *id.* § 35-42-4-5(a)–(b)), sexual conduct in the presence of a minor, child solicitation, child seduction, and kidnapping of a victim less than eighteen years old that is not the offender's child. *Id.* § 35-42-4-12(b)(2)(A)–(H).

64. *Id.* § 35-42-4-12(b)(1).

65. *Id.* § 35-42-4-1 (defining rape).

66. *Id.* § 35-42-4-2 (repealed 2014) (defining criminal deviate conduct). Effective July 1, 2014, the criminal deviate conduct statute has been repealed by the Indiana legislature, 2013 Ind. Legis. Serv. 158-2013 (West), but individuals who committed the crime before its repeal are still required to register as sex or violent offenders. *Id.* § 11-8-8-5(a)(2).

67. *Id.* § 11-8-8-5.2 (2010) (defining sex offense).

for a sex offense for which the person is required to register as a sex or violent offender under [Indiana's sex and violent offender registration laws]."⁶⁸ Under Indiana's definition of "sexually violent predator," there is no requirement that an offender have completed their crimes against a child.

Indiana's statute made an important exception for some offenders; this exception was referred to by some as the "Romeo and Juliet" exception.⁶⁹ Essentially, individuals who became sex offenders as a result of a dating relationship with someone who was underage but near the offender in age were free from the social media ban, but for the exception to apply, an offender's crime was required to satisfy a large number of conditions.⁷⁰ Because the exception demanded the satisfaction of a laundry list of requirements, it was relatively narrow, but nonetheless, the exception did cut the number of sex offenders to which the social media ban was applicable.

Indiana's statute banned sex offenders from both social networking websites and instant messaging or chat room programs.⁷¹ The statute defined a "social networking website" as an Internet site that facilitates introduction between people;

requires a person to register or create an account, a username, or a password to become a member of the web site and to communicate with other members; . . . allows a member to create a web page or personal profile; and . . . provides a member with the opportunity to communicate with another person.⁷²

The statute defined both "instant messaging" and "chat room" as "a software program that requires a person to register or create an account, a username, or a password to become a member or registered user of the program and allows two . . . or more members or authorized users to communicate over the Internet in real time

68. *Id.* § 35-38-1-7.5(b)(2). Individuals who have committed sex crimes as minors or who have committed certain crimes against children may also be required to register as sexually violent predators. *Id.* § 35-38-1-7.5(b)(4).

69. *Doe v. Marion Cnty.*, No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141, at *4 (S.D. Ind. June 22, 2012), *rev'd*, 705 F.3d 694 (7th Cir. 2013).

70. For the exception to have applied, (1) the offender must have committed his or her crime against a victim who was close to the offender in age (within four or five years depending on the date of the offense), (2) the offender must have been involved in some sort of a dating relationship with the victim or an "ongoing personal relationship" (unfortunately, "ongoing personal relationship" is not clearly defined; the statute simply makes it clear that this term "does not include a family relationship"), (3) the offender must have not been twenty-one years old or older when he or she committed the offense, (4) the offender must not have carried out the offense by using or threatening the use of deadly force, (5) the offender must not have been armed with a deadly weapon while committing the offense, (6) the offender must not have carried out the offense by drugging the victim or causing the victim to fall under the influence of a controlled substance without the victim's knowledge, (7) the offender must not have carried out the offense while in a position of authority or substantial influence over the victim, and (8) the offender must not have inflicted serious bodily injury in carrying out the offense. IND. CODE § 35-42-4-12(a).

71. *Id.* § 35-42-4-12(e).

72. *Id.* § 35-42-4-12(d).

using typed text.”⁷³ Indiana excluded electronic mail programs (e-mail) and message boards from its original social media ban.⁷⁴ Indiana also excluded websites that do not allow individuals who are under eighteen years old to access the site. The statute seemed to be primarily directed at preventing sex offenders from using websites like Facebook and Twitter that allow the creation of an account and facilitate organization among groups of friends and individuals with common interests, programs that allow private computer-to-computer communication via typed text, and programs that allow groups of people to communicate via text in Internet chat rooms.

Indiana’s statute used some of the most detailed definitions for the social media websites to which it applied. Compared to the other three statutes discussed in this Part, Indiana’s statute was unique in its use of a “Romeo and Juliet” exception for offenders that were close to the age of their victim at the time of the crime. Indiana’s statute was arguably the narrowest statute in terms of the social media websites to which it applied; however, even when considering the “Romeo and Juliet” exception, Indiana’s statute applied to a broader category of offenders than the statutes of Louisiana and Nebraska.⁷⁵

B. Louisiana’s 2011 Statute Banning Sex Offenders from Social Media

Louisiana’s original statute that banned sex offenders from social media⁷⁶ applied to a number of different classes of sex offenders. All individuals who were required to register as sex offenders⁷⁷ and who were convicted of indecent behavior with juveniles,⁷⁸ pornography involving juveniles,⁷⁹ computer-aided solicitation of a minor,⁸⁰ or video voyeurism⁸¹ were banned from social media.⁸² Louisiana’s statute applied primarily to offenders who committed their offenses against

73. *Id.* § 35-42-4-12(c).

74. *Id.* § 35-42-4-12(c)–(d).

75. *See infra* Parts II.B–C.

76. This section explores the details of Louisiana’s original statute because this was the statute that was examined by a federal court, and knowledge of the specific provisions of Louisiana’s original statute will be important in understanding the case that explores its constitutionality. The details of Louisiana’s updated statute will be explored later in this Note. *See infra* Part IV.

77. Essentially anyone who is convicted of a sex offense (as defined by section 15:541(24)(a) of the Louisiana Revised Statutes, which lists a number of different offenses ranging from rape to incest) or is convicted of a criminal offense against a minor is required to register as a sex offender in Louisiana. LA. REV. STAT. ANN. § 15:542(A)(1)(a)–(b) (Supp. 2013).

78. *Id.* § 14:81 (defining indecent behavior with juveniles).

79. *Id.* § 14:81.1 (defining pornography involving juveniles).

80. *Id.* § 14:81.3 (defining computer-aided solicitation of a minor).

81. *Id.* § 14:283 (defining video voyeurism).

82. *Id.* § 14:91.5 (2012), amended by Act of May 22, 2012, No. 205, § 14:91.5, 2012 La. Sess. Law Serv. Act 205 (H.B. 620) (West). Louisiana’s social media ban statute also applied more broadly to anyone who committed a sex offense against a minor. *Id.*

children; however, video voyeurism, as defined by Louisiana law, does not require the victim to be a minor.⁸³

The statute banned sex offenders from “social networking websites, chat rooms, and peer-to-peer networks.”⁸⁴ The definitions used by Louisiana were similar to those used by Indiana,⁸⁵ however, Louisiana opted for a substantially broader definition for “social networking website” than Indiana. Louisiana’s definition encompassed a large portion of the Internet, including e-mail services and basic newspaper websites.⁸⁶ The statute also banned access to any peer-to-peer network, which was defined as “a connection of computer systems whereby files are shared directly between the systems on a network without the need of a central server.”⁸⁷

Louisiana’s statute was unique of the three discussed in this Part in that it banned both use and access to social media.⁸⁸ This trait may have made an individual liable simply for viewing a site’s terms of use to determine if the website fit the statutory definition for any of the banned websites. Further, Louisiana’s statute was the only statute with a built-in safety valve. The statute allowed an offender to seek permission to use social media from his or her “probation or parole officer or the court of original jurisdiction.”⁸⁹ Louisiana’s statute was further unique in that, as mentioned earlier, it included peer-to-peer networks in the group of websites that it banned sex offenders from using or accessing.⁹⁰ Finally, Louisiana’s statute was the only statute that did not carve out an exception for websites that do not allow individuals under the age of eighteen to access the website.⁹¹

83. *See id.* § 14:283 (Supp. 2013).

84. *Id.* § 14:91.5(A)(1) (2012).

85. Louisiana’s original statute defined a “chat room” as “any Internet website through which users have the ability to communicate via text and which allows messages to be visible to all other users or to a designated segment of all other users.” *Id.* § 14:91.5(C)(1). The original statute defined a “social networking website” as a site that “[a]llows users to create web pages or profiles about themselves that are available to the general public or to any other users . . . [or] [o]ffers a mechanism for communication among users, such as a forum, chat room, electronic mail, or instant messaging.” *Id.* § 14:91.5(C)(4)(a)–(b).

86. *See Doe v. Jindal*, 853 F. Supp. 2d 596, 604 (M.D. La. 2012) (“[T]his Court construes the Act to impose a sweeping ban on many commonly read news and information websites, in addition to social networking websites such as MySpace and Facebook.”); *see also* LA. REV. STAT. ANN. § 14:91.5(C)(4) (explaining that a social networking website includes any website that “[o]ffers a mechanism for communication among users, such as . . . electronic mail”).

87. LA. REV. STAT. ANN. § 14:91.5(C)(3).

88. *Id.* § 14:91.5(A)(1).

89. *Id.* § 14:91.5(B). However, this protection has been criticized by the only federal court to examine the statute. The federal court pointed out that “a state cannot create jurisdiction for federal courts or for courts in other states.” *Doe v. Jindal*, 853 F. Supp. 2d at 605 (explaining that because of this issue, the exception would likely only be effective in Louisiana; a federal court does not maintain jurisdiction after a convict has been released and would not be able to grant an exception to individuals that it has already convicted).

90. LA. REV. STAT. ANN. § 14:91.5(A)(1).

91. *Id.* § 14:91.5.

C. Nebraska's Statute Banning Sex Offenders from Social Media

Nebraska's social media ban statute applies to sex offenders who are required to register under Nebraska's Sex Offender Registration Act⁹² and have committed one of several different offenses. These offenses include the kidnapping of a minor,⁹³ sexual assault of a minor,⁹⁴ incest of a minor,⁹⁵ pandering of a minor,⁹⁶ visual depiction of the sexually explicit conduct of a child,⁹⁷ possessing any visual depiction of sexually explicit conduct,⁹⁸ and criminally enticing a child.⁹⁹ All of the offenses that trigger applicability of Nebraska's statute involve a minor.¹⁰⁰

The statute crafted by Nebraska's legislature applies to "social networking web site[s], instant messaging [programs/websites], [and] chat room service[s]" that permit access by individuals who are less than eighteen years of age.¹⁰¹ Nebraska's definition of a social networking website is similar to Indiana's; however, Nebraska's definition is slightly more inclusive because it uses broader language.¹⁰² In spite of the broad definition given to social networking websites, the definitions given to "instant messaging"¹⁰³ and "chat room"¹⁰⁴ are relatively specific.

92. Nebraska's Sex Offender Registration Act lists a number of offenses that require registration, NEB. REV. STAT. ANN. § 29-4003(1) (LexisNexis Supp. 2013), and it requires registration for fifteen years, twenty-five years, or life (starting after the period of supervised release, probation, or parole ends), *id.* § 29-4005(1).

93. *Id.* § 28-313.

94. *Id.* §§ 28-319.01, -320.01.

95. *Id.* § 28-703.

96. *Id.* § 28-802.

97. *Id.* §§ 28-1463.03, .05.

98. *Id.* § 28-813.01.

99. *Id.* §§ 28-311, -320.02.

100. *Id.* § 28-322.05(1) (LexisNexis 2009).

101. *Id.*

102. A "social networking web site" is a website or group of websites "that enables users or subscribers to create, display, and maintain a profile or Internet domain containing biographical data, personal information, photos, or other types of media, . . . that can be searched, viewed, or accessed by other users or visitors to the web site, . . . [and] that may permit some form of communication" between different users of the website. *Id.* § 29-4001.01(13) (emphasis added). This can be compared with Indiana's definition, which uses more limiting language: "'social networking web site' means an Internet web site that . . . requires a person to register . . . to communicate with other members." IND. CODE § 35-42-4-12(d)(2) (Supp. 2013) (emphasis added). At the very least, it seems that only websites that facilitate communication between account holders will fall into Indiana's definition, while websites that allow communication between non-account holders and account holders could fall into Nebraska's definition (because of the use of the word *may* as opposed to *requires*).

103. "Instant messaging means a direct, dedicated, and private communication service, accessed with a computer or electronic communication device, that enables a user of the service to send and receive virtually instantaneous text transmissions . . . to other selected users of the service through the Internet or a computer communications network . . ." NEB. REV. STAT. ANN. § 29-4001.01(10) (LexisNexis 2009).

104. "Chat room means a web site or server space on the Internet or communication network primarily designated for the virtually instantaneous exchange of text or voice

Nebraska's statutory scheme uses some of the most detailed definitions for the websites and Internet utilities that it bans sex offenders from. However, aside from these differences, the statute does not have any unique characteristics that truly set it apart from the other two statutes.

III. THE CONSTITUTIONALITY OF SOCIAL MEDIA BANS

Several important questions must be answered to determine whether it is constitutional to ban certain classes of sex offenders from social media. First, this Part will examine whether convicted sex offenders have First Amendment rights that protect their access to social media.¹⁰⁵ Second, this Part will examine which First Amendment doctrine provides the most appropriate means of analysis for social media bans.¹⁰⁶ And third, this Part will apply the underlying constitutional framework to the original social media ban statutes adopted by Indiana, Louisiana, and Nebraska and conclude that, under current Supreme Court precedent, statutes that ban sex offenders from social media are incompatible with the free speech rights guaranteed by the First Amendment.¹⁰⁷

A. Sex Offenders Who Are on No Form of Supervised Release Are Guaranteed the Full Protection of the First Amendment in Their Use of Social Media

This Part examines whether some uses of social media by convicted sex offenders are protected by the First Amendment. Social media ban statutes only affect the right of convicted sex offenders to access social media, so if convicted sex offenders do not have rights under the First Amendment that protect access to social media, there is no need to examine the constitutionality of social media bans further. The social media bans of Indiana, Louisiana, and Nebraska apply fully to individuals who are no longer on probation, parole, or any form of supervised release.¹⁰⁸ Therefore, this Part focuses on determining the extent of similarly situated sex offenders' First Amendment rights,¹⁰⁹ and concludes that sex offenders' right to access social media is protected by the First Amendment.

transmissions or computer file attachments amongst two or more computers or electronic communication device users" *Id.* § 29-4001.01(3).

105. See *infra* Part III.A. This Note does not address the extent to which the First Amendment applies to the Internet. It seems "settled that the First Amendment's protections 'extend fully to communications made through the medium of the internet.'" *Doe v. Marion Cnty.*, No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141, at *5 (S.D. Ind. June 22, 2012) (quoting *Doe v. Shurtleff*, 628 F.3d 1217, 1222 (10th Cir. 2010)), *rev'd*, 705 F.3d 694 (7th Cir. 2013); see also *Reno v. ACLU*, 521 U.S. 844, 866–68 (1997) (concluding that there should be "stringent [First Amendment] review" of a statute that restricted access to explicit material available on the Internet); *Doe v. Shurtleff*, 628 F.3d at 1222 (10th Cir. 2010) ("The Supreme Court has also made clear that First Amendment protections for speech extend fully to communications made through the medium of the internet.").

106. See *infra* Part III.B.

107. See *infra* Part III.C.

108. These statutes also apply to individuals who may be on some form of probation, parole, or supervised release. For a discussion of the constitutional rights held by individuals on probation, parole, or supervised release, see Wynton, *supra* note 11, at 1878–81.

109. This Note does not examine the rights of sex offenders in prison or on probation,

The Supreme Court has consistently made clear that even prisoners are guaranteed some, albeit limited, protection under the U.S. Constitution. In the words of the Supreme Court, “Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.”¹¹⁰ Prisoners are protected from racial discrimination under the Fourteenth Amendment’s Equal Protection Clause, are entitled to petition for the redress of grievance, and are entitled to due process.¹¹¹

The Supreme Court has also extended additional constitutional protections to individuals on probation, parole, and supervised release, such as a less robust version of the Fourth Amendment’s protection of privacy.¹¹² In *Griffin v. Wisconsin*,¹¹³ the Supreme Court explained that there is a “continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service.”¹¹⁴ Constitutional protections vary on that continuum, with probationers and parolees both receiving privacy protection, but with probationers receiving greater protection than parolees.¹¹⁵

If convicted felons are entitled to limited protection when they are in prison or on probation, parole, or supervised release, they should be entitled to at least that same level of protection once they are no longer under the supervision of the criminal justice system. It would not be logically consistent with the continuum concept that the Supreme Court articulated in *Griffin v. Wisconsin* for a felon’s constitutional rights to decrease once they are no longer under the criminal justice system’s supervision.¹¹⁶ An individual receives greater constitutional protection as the punishment for their crime moves along the continuum from more liberty intrusive to less liberty intrusive;¹¹⁷ therefore, once they are no longer being punished, an individual should receive at least the same constitutional protections that they would have received during the term of their punishment. Unfortunately, the Supreme Court has not specifically ruled on the extent to which the First Amendment protects convicted felons;¹¹⁸ however, because prisoners enjoy limited First Amendment protections,¹¹⁹ it seems that convicted felons are at least entitled to some First Amendment protection. As one commentator has noted, after a felon

parole, or supervised release.

110. *Turner v. Safley*, 482 U.S. 78, 84 (1987).

111. *Id.*

112. The Fourth Amendment’s protection of privacy is inapplicable to individuals in prison. *Hudson v. Palmer*, 468 U.S. 517, 525–26 (1984).

113. 483 U.S. 868 (1997).

114. *Id.* at 874.

115. *Id.* at 875. Parolees enjoy less protection because “parole is more akin to imprisonment than probation is to imprisonment.” *Samson v. California*, 547 U.S. 843, 850 (2006). For a more thorough discussion of the constitutional rights of individuals on probation, parole, and supervised release, see Wynton, *supra* note 11, at 1878–81.

116. *See supra* notes 114–15 and accompanying text.

117. *See Samson*, 547 U.S. at 850 (“On this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.”).

118. Wynton, *supra* note 11, at 1882.

119. *See Turner v. Safley*, 482 U.S. 78, 89 (1987) (holding that prisoners are entitled to First Amendment protection but that a “regulation is valid if it is reasonably related to legitimate penological interests”).

is released from the control of the criminal justice system, there are no longer any penological or supervisory reasons for limiting their First Amendment rights.¹²⁰

Although it is likely true that felons enjoy *some* of the Constitution's protections, the Supreme Court has permitted certain constitutional rights of felons to be abridged, such as the right to vote.¹²¹ Nevertheless, there are good reasons why felons should enjoy the full protection of the First Amendment. The framers of the First Amendment did not include any limiting language that would indicate any intent to deny felons the protections granted by the amendment.¹²² Further, society benefits from additional ideas competing in the marketplace of ideas,¹²³ regardless of where the idea originated. The Supreme Court has recognized that "the public [has] the right and privilege to determine for itself what speech and *speakers* are worthy of consideration."¹²⁴ Denying felons the protections of the First Amendment would deny the public of the aforementioned right and privilege.

The lower federal courts that have examined the First Amendment rights of felons have found that these individuals are protected by the amendment's breadth.¹²⁵ All four of the federal courts that have examined sex offender social media bans have either impliedly or explicitly assumed that the individuals covered by the statutes were entitled to full First Amendment protection. The Seventh Circuit Court of Appeals found that Indiana's social media ban "clearly implicate[d] [sex offenders'] First Amendment rights."¹²⁶ The court in *Doe v.*

120. Wynton, *supra* note 11, at 1881–82.

121. *Richardson v. Ramirez*, 418 U.S. 24 (1974). It bears pointing out that *Richardson* rests on relatively narrow grounds. Wynton, *supra* note 11, at 1881 n.109 ("[T]he Supreme Court has upheld laws disenfranchising felons based upon the express language of 'participation in rebellion, or other crime' in the Appointment Clause in Section 2 of the Fourteenth Amendment and because it was historically viewed as valid to disenfranchise criminals with felony convictions, not because felons have limited constitutional rights in general.").

122. *See* U.S. CONST. amend. I.

123. For a discussion and criticism of the theory of the marketplace of ideas, see Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 6–16.

124. *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010) (emphasis added).

125. *See Doe v. Shurtleff*, No. 1:08-CV-64 TC, 2008 WL 4427594, at *6 (D. Utah Sept. 25, 2008) ("A review of various federal cases leads the court to conclude [that] Mr. Doe has not given up his right to anonymous internet speech because of his status as a sex offender."), *vacated as moot*, 2009 WL 2601458 (D. Utah Aug. 20, 2009); *Doe v. Marion Cnty.*, 566 F. Supp. 2d 862, 879 (S.D. Ind. 2008) ("[Those who] are no longer under any court supervision. . . are entitled to full Fourth Amendment protection . . ."). The same analysis also applies to other constitutional rights. *See, e.g., Doe v. Nebraska*, 734 F. Supp. 2d 882, 902 (D. Neb. 2010) ("[The government has] cited no case where a 'sex offender' who has completed his or her punishment and supervision for a sex crime was held to have a weaker claim to Fourth Amendment protection than ordinary citizens. Without precedent (or at least an analogous and well-reasoned case), I am unwilling to vitiate the Fourth Amendment for individuals who have paid their debt to society.").

126. *Doe v. Marion Cnty.*, 705 F.3d 694, 697 (7th Cir. 2013). The district court in *Doe v. Marion County*, which was reversed by the aforementioned Seventh Circuit decision, did not even consider that the individual challenging the statute might have diminished First Amendment rights simply because he was a convicted sex offender. *See Doe v. Marion Cnty.*, No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141, at *5–10 (S.D. Ind. June 22, 2012), *rev'd*, 705 F.3d 694.

*Nebraska*¹²⁷ explained that “[p]eople who are convicted of crimes, even felony crimes related to children, do not forfeit their First Amendment right to speak by accessing the Internet.”¹²⁸ In *Doe v. Jindal*¹²⁹—a case examining the constitutionality of Louisiana’s initial ban¹³⁰ of sex offenders from social media—the district court made no reference to the possibility that convicted sex offenders might have diminished First Amendment rights and examined the statute as it would any other restriction on speech rights.¹³¹

It is also evident that social media should receive full First Amendment protection.¹³² As discussed earlier, a significant amount of political discourse takes place via social media,¹³³ and the Supreme Court considers political speech to be the “core” of the First Amendment.¹³⁴ Beyond core political speech, social media allows users to take part in other activities that have been traditionally thought to be within the purview of the First Amendment.¹³⁵ One commentator has even made the argument that the First Amendment protects activities that are only possible through social media, such as clicking Facebook’s “like” button—which allows a user to express their appreciation for a particular piece of shared content.¹³⁶

For all of the previously discussed reasons, sex offenders’ and other felons’ right to access social media is fully protected by the First Amendment and should continue to be for the foreseeable future.

B. Proper Analytical Framework

The scholarly community has made several different suggestions for the proper analytical framework through which to examine social media bans. One commentator has argued that social media bans violate a sex offender’s expressive association rights,¹³⁷ and other commentators have argued that social media bans violate a sex offender’s right to freedom of expression.¹³⁸ Among those who argue

127. The opinion referenced here is a memorandum and order issued after a summary judgment motion. This order demanded a trial on the issue of the constitutionality of Nebraska’s sex offender social media ban. *Doe v. Nebraska*, 734 F. Supp. 2d at 892, 911.

128. *Id.* at 911 (citing *United States v. Crume*, 422 F.3d 728, 733 (8th Cir. 2005)).

129. 853 F. Supp. 2d 596 (M.D. La. 2012).

130. Louisiana has redrafted their social media ban after this decision was issued. *See Act of May 22, 2012, No. 205, § 14:91.5, 2012 La. Sess. Law Serv. Act 205 (H.B. 620) (West).*

131. *See Doe v. Jindal*, 853 F. Supp. 2d at 603–07.

132. For a discussion of lower court cases that have held that activity on Facebook is protected speech, see Leigh Ellen Gray, Note, *Thumb War: The Facebook “Like” Button and Free Speech in the Era of Social Networking*, 7 *Charleston L. Rev.* 447, 478–80 (2013).

133. *See supra* notes 38–42 and accompanying text.

134. *See, e.g., McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995); *see also supra* note 37.

135. *See supra* note 37.

136. Gray, *supra* note 132, at 483–87.

137. Wynton, *supra* note 11, at 1901–02.

138. Douglas B. McKechnie, *Facebook Is Off-Limits? Criminalizing Bidirectional Communication via the Internet Is Prior Restraint 2.0*, 46 *IND. L. REV.* 643, 663–69 (2013); Eva Conner, Comment, *Why Don’t You Take a Seat Away from that Computer?: Why Louisiana Revised Statute 14:91.4 Is Unconstitutional*, 73 *LA. L. REV.* 883, 904–09 (2013).

that social media bans create a freedom of expression problem, one commentator, Professor McKechnie, has argued that social media bans should be viewed as a prior restraint,¹³⁹ and one commentator has argued that social media bans should be viewed as content-neutral restrictions on speech.¹⁴⁰ This subpart will first examine whether social media bans should be analyzed through the Supreme Court's freedom of expression or freedom of expressive association jurisprudence. After arguing that social media bans should be viewed as creating a freedom of expression issue, this subpart will examine whether social media bans should be examined as prior restraints or as content-neutral restrictions on speech and will argue that social media bans should be viewed as content-neutral restrictions on speech.

1. Social Media Ban Statutes Impinge on Sex Offenders' Freedom of Expression

It is undeniable that social media bans impinge on both the free speech rights and the expressive associational rights of the individuals that they apply to; however, examining the issue from a freedom of speech perspective seems to be more appropriate for several reasons. First, the Supreme Court has more thoroughly developed the contours of free speech jurisprudence, as compared to freedom of association jurisprudence, and these contours have withstood the test of time. Second, the freedom of expression is better suited to examine social media statutes because social media ban statutes implicate the First Amendment rights of individuals, not groups. Third, the Internet's usefulness in distributing protected speech is already well established by Supreme Court precedent, unlike the Internet's usefulness for enhancing expressive association.

As one commentator has put it, "[T]he Supreme Court's categories of expressive and intimate association . . . are neither well-settled nor defensible."¹⁴¹ The current freedom of expressive association doctrine evolved from a 1984 decision,¹⁴² the bedrock cases in the Supreme Court's freedom of expression jurisprudence emerged much earlier.¹⁴³ The fact that the Supreme Court's freedom of expression jurisprudence has had more time to develop shows that the doctrines established within the freedom of expression framework have withstood the test of time. Further, freedom of expression doctrines have become more clearly defined, which allows lower federal courts and state courts to reach a particular result with more confidence. If a doctrine has a lot of gray area, lower courts should attempt to avoid the gray area and rest their rulings on more secure jurisprudential footing in order to maintain consistency.

139. McKechnie, *supra* note 138, at 663–69.

140. The commentator actually describes social media ban statutes as time, place, and manner restrictions. Conner, *supra* note 138, at 904–09. This Note uses the term content-neutral restriction, but the terms can be thought of as one in the same. *See* McKechnie, *supra* note 138, at 659.

141. John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 149 (2010).

142. *Id.*

143. *See* *Martin v. City of Struthers*, 319 U.S. 141 (1943).

As the Supreme Court has put it, “Government actions that may unconstitutionally infringe upon th[e] freedom [of expressive association] can take a number of forms.”¹⁴⁴ These forms include the withholding of benefits or the imposition of penalties on members of a disfavored group,¹⁴⁵ the prohibition of anonymous membership in a group seeking anonymity,¹⁴⁶ and the interference with the “internal organization or affairs of [a] group.”¹⁴⁷ Groups are protected by expressive association because “[a]ccording protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.”¹⁴⁸ In sum, the expressive associational doctrine is currently geared toward ensuring that *members of groups* are protected from oppressive government intrusion,¹⁴⁹ not toward ensuring an *individual’s* ability to communicate and interact with groups and other individuals.

It is true that social media bans will have an incidental effect on the expressive associational rights of some individual sex offenders, but individual sex offenders are not the type of group acting towards a shared goal discussed in the Supreme Court’s precedents.¹⁵⁰ In fact, individual sex offenders likely have a variety of different groups and political causes that they would like to use social media to connect with, but no single formalized group is likely to be substantially affected by social media ban statutes. Ultimately, social media bans implicate an *individual’s* right to freedom of expression, not a *group’s* right to expressive association.

Even commentary in support of expressive association acknowledges that “the Supreme Court has recognized the Internet’s important role in facilitating the dissemination of protected speech, [but] it has not acknowledged the Internet’s role in facilitating expressive association to the same extent.”¹⁵¹ At least some of the services that sex offenders are denied access to by social media ban statutes are purely expressive and are not especially useful for group associations. As an example, instant messaging services, which are included in many social media bans,¹⁵² only facilitate one-to-one communication, not group associational activity. Banning access to instant messaging services clearly implicates an individual’s

144. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

145. *Id.* (citing *Healy v. James*, 408 U.S. 169, 180–84 (1972)).

146. *Id.* at 622–23 (citing *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87, 91–92 (1982)).

147. *Id.* at 623 (citing *Cousins v. Wigoda*, 419 U.S. 477, 487–88 (1975)).

148. *Id.* at 622.

149. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (“To determine whether a *group* is protected by the First Amendment’s expressive associational right, we must determine whether the *group* engages in ‘expressive association.’” (emphasis added)); *U.S. Jaycees*, 468 U.S. at 622–29 (holding that the expressive associational right applied to the U.S. Jaycees’ exclusion of certain members, but holding “that Minnesota’s compelling interest in eradicating discrimination against its female citizens justify[d] the impact . . . on the male members’ associational freedoms”).

150. *See U.S. Jaycees*, 468 U.S. at 622.

151. *Wynton*, *supra* note 11, at 1872 (internal footnote omitted).

152. *See supra* Part II.

right to freedom of expression. Because freedom of expression is implicated in some way by all of the services that social media ban statutes touch, it is both practical and appropriate to use the Supreme Court's freedom of expression jurisprudence to analyze the constitutionality of social media bans.

2. Social Media Ban Statutes Are Content-Neutral Restrictions on Speech

Social media bans are best viewed as content-neutral restrictions¹⁵³ on the freedom of expression instead of prior restraints for two reasons. First, social media ban statutes do not actually stop communication before it occurs. Second, social media bans are distinct from judicial prior restraints because an individual subject to a social media ban is permitted to communicate using social media and then challenge the constitutionality of the restriction at their criminal trial.

Professor McKechnie asserts that "social [media ban] statutes aim to stop communication before it occurs."¹⁵⁴ This is simply not true. Social media ban statutes aim to stop communication through a particular *channel*—social media—before the communication occurs. Sex offenders subject to social media bans are permitted to use offline forms of communication and forms of Internet communication that are not banned by the statute—which, depending on the social media ban statute, may be an extremely limited portion of the Internet—to convey whatever communication they wish.¹⁵⁵ Professor McKechnie seems to suggest that there is communication that can only occur through social media channels,¹⁵⁶ a point that this Note is in concurrency with.¹⁵⁷ This point seems to give more weight to the theory that social media bans stop communication before it occurs because, if social media ban statutes ban an individual from utilizing all channels of communication that are suitable for a particular type of communication, then that individual is effectively banned from making that type of communication; however, the content-neutral doctrine already prevents individuals from being banned from channels that are necessary to make certain communications. The content-neutral doctrine examines whether a particular restriction leaves open ample alternative channels of communication¹⁵⁸ and is, therefore, well-suited to ensure that such restrictions are found unconstitutional.

Individuals who are subject to social media ban statutes are free to violate these statutes and then challenge the constitutionality of the restrictions during their criminal trials. This has already occurred at least twice, once in Indiana and once in North Carolina.¹⁵⁹ In both cases, an individual that was subject to a social media

153. This class of restrictions is also referred to as time, place, and manner restrictions. *See* McKechnie, *supra* note 138, at 659–60 (explaining that a time, place, and manner restriction is a form of content-neutral restriction that is acceptable under the First Amendment).

154. McKechnie, *supra* note 138, at 666–67.

155. *See supra* Part II.

156. *See* McKechnie, *supra* note 138, at 666.

157. *See infra* Part III.C.2.

158. *See infra* Part III.C.2.

159. *See Harris v. State*, 985 N.E.2d 767 (Ind. Ct. App. 2013); *State v. Packingham*, 748 S.E.2d 146 (N.C. Ct. App. 2013).

ban violated the ban and then successfully avoided criminal punishment by challenging the constitutionality of the social media ban at trial and on appeal.¹⁶⁰ This facet of social media ban statutes is very different from judicial injunctions, which are commonly viewed as prior restraints.¹⁶¹ The “collateral bar rule” demands that “persons subject to an injunctive order . . . obey th[e] decree until it is modified or reversed, even if they have proper grounds to object to the order.”¹⁶²

One criticism that has been levied against viewing social media bans as content-neutral restrictions on speech is that social media bans “do not aim to balance the speakers’ rights with the orderly and convenient use of the community environs,” which, according to Professor McKechnie, is the goal of a typical content-neutral restriction.¹⁶³ The drafters of social media ban statutes would likely disagree that these statutes were not crafted, in some sense, to allow for “the orderly and convenient use” of social media. It is clear that the key state interest at stake in drafting social media bans was to ensure the safety of children using social media.¹⁶⁴ It is difficult to imagine how children could use social media in an “orderly and convenient” fashion if their safety was in jeopardy.

Professor McKechnie goes on to assert that content-neutral restrictions “are not created because of, or formulated to deal with, the inherent dangerousness—perceived or otherwise—of a speaker, the content of his or her message, or the message’s effect on the listener.”¹⁶⁵ This point is simply untrue. The Supreme Court has endorsed content-neutral restrictions on speech that are directed to preventing lawless conduct on behalf of a particular group. In *Madsen v. Women’s Health Center, Inc.*,¹⁶⁶ the Supreme Court partially upheld an injunction that imposed restrictions on the activities of antiabortion protestors that had illegally disrupted the activities of an abortion clinic.¹⁶⁷ Professor McKechnie seeks to distinguish *Madsen* by pointing out that the injunction was tailored in response to the illegal conduct of a particular group of protestors and not a blanket ban on the activities of a particular group, like social media bans.¹⁶⁸ What Professor McKechnie points out is true, but this is not a criticism of using the content-neutral doctrine as a framework for examining the constitutionality of social media bans; rather, this point simply demonstrates that social media bans are unconstitutional within the content-neutral framework.¹⁶⁹ Rather than demonstrating that “the [content-neutral] doctrine is unworkable, and thus ill-suited to determine the . . . constitutionality [of social media bans],”¹⁷⁰ Professor McKechnie merely makes an

160. *Harris*, 985 N.E.2d at 781; *Packingham*, 748 S.E.2d at 149–50, 154.

161. See McKechnie, *supra* note 138, at 664.

162. *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 386 (1980).

163. McKechnie, *supra* note 138, at 660.

164. See, e.g., *Doe v. Marion Cnty.*, 705 F.3d 694, 698 (7th Cir. 2013) (“The state initially asserts an interest in ‘protecting public safety, and specifically in protecting minors from harmful online communications.’”).

165. McKechnie, *supra* note 138, at 660.

166. 512 U.S. 753 (1994).

167. *Id.* at 776.

168. See McKechnie, *supra* note 138, at 661–62.

169. A position consistent with the position of this Note. See *infra* Part III.C.

170. McKechnie, *supra* note 138, at 662.

effective argument that social media bans are impermissible content-neutral restrictions.

It bears pointing out that the Seventh Circuit Court of Appeals and all three federal district courts that have examined the constitutionality of social media bans have done so through the freedom of expression and the content-neutral doctrine.¹⁷¹ No litigant has argued that social media bans should be treated as a prior restraint, but several litigants have attempted to argue that social media bans violate their right to freedom of association. The Seventh Circuit in *Doe v. Marion County* makes no reference to the freedom of association in its opinion and rests its holding exclusively on the freedom of expression.¹⁷² This is despite the fact that the district court mentions that the plaintiff challenged the statute on both freedom of speech and freedom of association grounds, and even concluded that “[i]t appears well-settled that [both the freedom of speech and freedom of association] are secured by the First Amendment.”¹⁷³ However, even after noting this, the district court does not mention the freedom of association again in its analysis.¹⁷⁴ In *Doe v. Nebraska*, the district court recognized that associational rights are hindered by the social media ban in question;¹⁷⁵ however, the court—like the Indiana district court—simply examined the statute through the freedom of speech doctrine.¹⁷⁶ The district court that examined Louisiana’s social media ban in *Doe v. Jindal* made no mention of the freedom of association whatsoever.¹⁷⁷

C. Social Media Bans are Impermissible Content-Neutral Restrictions

The social media bans initially passed by Indiana, Louisiana, and Nebraska are all “justified without reference to the content of the regulated speech.”¹⁷⁸ This

171. See *infra* note 180 and accompanying text. Two state courts that have examined the constitutionality of social media bans have also looked at the issue as a content-neutral freedom of expression problem. *Harris v. State*, 985 N.E.2d 767, 779 (Ind. Ct. App. 2013); *State v. Packingham*, 748 S.E.2d 146, 150 (N.C. Ct. App. 2013).

172. See *Doe v. Marion Cnty.*, 705 F.3d 694, 697–703 (7th Cir. 2013).

173. *Doe v. Marion Cnty.*, No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141, at *5 (S.D. Ind. June 22, 2012), *rev’d*, 705 F.3d 694 (7th Cir. 2013).

174. See *id.* at *5–10.

175. *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1119 (D. Neb. 2012) (“[I]t is clear that the language is properly interpreted to ‘criminalize[] a substantial amount of protected expressive activity,’—from *associating* with friends, family, and business associates over the Internet (the most common method of association in the modern age) to communicating with consumers, customers, or manufacturers regarding a commercial product or service, to posting and discussing one’s political opinions on an interactive blog or news web site.” (emphasis added) (citation omitted) (quoting *United States v. Williams*, 553 U.S. 285, 297) (2008))).

176. See *id.* at 1119–23.

177. See *Doe v. Jindal*, 853 F. Supp. 2d 596, 599–607 (M.D. La. 2012). It is not clear, from the opinion or the filings that are available, if this is due to the freedom of association not being raised as an issue by the plaintiffs. The court only explained that “[p]laintiffs allege[d] that [Louisiana’s social media ban was] facially overbroad and unconstitutional in that it significantly infringe[d] on their First Amendment rights.” *Id.* at 600.

178. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation marks omitted) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

attribute makes these social media bans content-neutral speech restrictions.¹⁷⁹ Every court that has examined a social media ban statute has determined that social media ban statutes are content neutral.¹⁸⁰

Content-neutral speech restrictions are examined under a lower level of scrutiny than content-based restrictions.¹⁸¹ Content-neutral restrictions will be upheld if “they are narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information.”¹⁸² Two of the federal district courts that have examined social media bans have found that they failed this test (Louisiana and Nebraska), while one came to the opposite conclusion (Indiana).¹⁸³ However, the district court that found that Indiana’s social media ban was constitutional was later overruled by the Seventh Circuit, which determined that Indiana’s social media ban did not survive First Amendment scrutiny.¹⁸⁴ This Part will examine the analysis conducted by the Seventh Circuit and the three district courts that have examined social media bans

179. *Id.*

180. *Doe v. Marion Cnty.*, 705 F.3d 694, 698 (7th Cir. 2013) (“The Indiana law . . . is content neutral because it restricts speech without reference to the expression’s content.”); *Doe v. Nebraska*, 898 F. Supp. 2d at 1107 n.7 (“[Nebraska’s social media ban] should be deemed content-neutral for purposes of First Amendment analysis.”); *Doe v. Marion Cnty.*, No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141, at *6 (S.D. Ind. June 22, 2012) (“Mr. Doe concedes that the statute is ‘content neutral’ . . .”), *rev’d*, 705 F.3d 694 (7th Cir. 2013). The district court in *Doe v. Jindal* never expressly stated that Louisiana’s social media ban was content neutral. *See Doe v. Jindal*, 853 F. Supp. 2d at 603–05. However, the district court analyzed the statute as if it were a content-neutral restriction. The court explained that the state’s interest in protecting children is legitimate but the statute was not “narrowly drawn.” *Id.* at 605 (quoting *Hill v. City of Houston*, 789 F.2d 1103, 1113 (5th Cir. 1986) (en banc)). The narrow tailoring requirement is part of the test for content-neutral restrictions. *See infra* Part III.C.1. If the district court believed that this was a content-based restriction, the court would have applied heightened scrutiny because “[c]ontent-based regulations are presumptively invalid.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Further, the Fifth Circuit case that was cited in the analysis by the district court in *Doe v. Jindal* examined the constitutionality of a content-neutral restriction. *See Hill*, 789 F.2d at 1119 (“The restriction is content-neutral . . .”); *Doe v. Jindal*, 853 F. Supp. 2d at 605.

181. “For First Amendment purposes, content-neutral regulations do not pose the same inherent dangers to free expression that content-based regulations do; thus, they are subject to a less rigorous analysis, which affords the government latitude in designing regulatory solutions.” 16A AM. JUR. 2D *Constitutional Law* § 478 (2009) (citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997); *Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996); *Able v. United States*, 88 F.3d 1280 (2d Cir. 1996)).

182. *Rock Against Racism*, 491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). *Rock Against Racism* dealt with a time, place, and manner restriction in a public forum. *Id.* These types of restrictions create a slightly different constitutional issue because instead of regulating public property (as is the case in public forum cases), the state is regulating who can use private property that is open to the public. Because none of the federal cases examining these statutes factors in public forum doctrine in their analysis, this Note will assume that this wrinkle does not change the analysis.

183. *Doe v. Nebraska*, 898 F. Supp. 2d at 1086–1132; *Doe v. Marion Cnty.*, 2012 WL 2376141, at *1–11; *Doe v. Jindal*, 853 F. Supp. 2d at 596–607.

184. *Doe v. Marion Cnty.*, 705 F.3d at 695.

and argue that the Seventh Circuit, the Louisiana district court, and the Nebraska district court—finding that social media bans violate the First Amendment rights of sex offenders—were largely correct in their analysis.

1. Social Media Bans Fail the Narrow Tailoring Requirement

The Supreme Court has made it clear that “[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy. A complete ban can be narrowly tailored, but only if each activity within the proscription’s scope is an appropriately targeted evil.”¹⁸⁵ Narrow tailoring can only be judged in relation to the interest that the state is attempting to serve. In the context of social media bans, the state interest at play is protecting children—an undoubtedly compelling interest.¹⁸⁶ This leaves the question: are social media bans targeted to “eliminate[] no more than the exact source of”¹⁸⁷ harm that is caused to minors by convicted sex offenders using social media? These bans are not narrowly tailored because (1) the conduct they seek to proscribe is already illegal, (2) they apply to more offenders than necessary, and (3) the definitions they use to describe the forbidden websites and utilities are too expansive.

The Seventh Circuit determined in *Doe v. Marion County* that Indiana’s social media ban did not satisfy the narrow tailoring requirement.¹⁸⁸ The court pointed out that “illicit communication comprises a minuscule subset of the universe of social network activity.”¹⁸⁹ However, what seemed to be of greater concern for the court was the fact that “Indiana ha[d] other methods to combat unwanted and inappropriate communication between minors and sex offenders.”¹⁹⁰ The Seventh Circuit was referring to the fact that the conduct Indiana was seeking to prevent—solicitation of a minor by a sex offender through social media—was already a crime in Indiana, and the statutes criminalizing child solicitation accomplish the state’s “end more narrowly (by refusing to burden benign Internet activity).”¹⁹¹ This is true not only in Indiana, but in Louisiana and Nebraska as well.¹⁹² Further, the penalties imposed by Indiana, Louisiana, and Nebraska for accessing a social media website are lower than for soliciting a minor using electronic

185. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (citation omitted) (citing *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808–10 (1984)). The Seventh Circuit viewed Indiana’s social media ban as a type of complete ban that the Supreme Court was referencing in *Frisby*. *Doe v. Marion Cnty.*, 705 F.3d at 698 (quoting *Frisby*, 487 U.S. at 485). For a detailed analysis of the Supreme Court’s content-neutral jurisprudence, see *id.* at 698–99.

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

187. *Frisby*, 487 U.S. at 485.

188. *Doe v. Marion Cnty.*, 705 F.3d at 698 (“[W]e conclude [Indiana’s social media ban] is not narrowly tailored . . .”).

189. *Id.* at 699.

190. *Id.*

191. *Id.*

192. IND. CODE § 35-42-4-6 (Supp. 2013); LA. REV. STAT. ANN. § 14:81.3 (Supp. 2013); NEB. REV. STAT. ANN. § 28-320.02 (LexisNexis 2009).

communication.¹⁹³ The social media bans implemented by these states are, therefore, unlikely to stop illegitimate conduct—because sex offenders who are not deterred by the punishment for solicitation will likely not be deterred by the lesser punishment imposed by the social media ban.¹⁹⁴ The only likely effect of social media bans is to chill legitimate expressive conduct.¹⁹⁵

193. Compare IND. CODE § 35-42-4-6 (2008) (“[An offender who] commits child solicitation . . . [has committed] a Class D felony. However, the offense is a Class C felony if it is committed by using a computer network . . . and a Class B felony if the person commits the offense by using a computer network . . . and has a previous unrelated conviction for committing the offense by using a computer network . . .”), amended by Act of May 11, 2013, Pub. L. No. 247-2013, sec. 7, § 6, 2013 Ind. Acts 3384, 3397, and LA. REV. STAT. ANN. § 14:81.3 (imposing varying levels of punishment ranging from a fine of “not more than ten thousand dollars and [imprisonment] at hard labor for not less than five years nor more than ten years, without benefit of parole, probation or suspension of sentence” to imprisonment “for not less than ten years nor more than twenty years at hard labor without benefit of parole, probation, or suspension of sentence” depending on the age difference between the victim and offender and other factors), and NEB. REV. STAT. ANN. § 28-320.02(2) (“A person who violates this section is guilty of a Class ID felony. If a person who violates this section has previously been convicted of a violation of this section [or certain other sex offenses] . . . the person is guilty of a Class IC felony.”), with IND. CODE § 35-42-4-12 (2008) (“A person [banned from social media that accesses one of the banned sites or utilities] commits a sex offender Internet offense, a Class A misdemeanor. However, the offense is a Class D felony if the person has a prior unrelated conviction under this section.”), amended by Act of May 11, 2013, Pub. L. No. 247-2013, sec. 8, § 12, 2013 Ind. Acts 3384, 3398, and LA. REV. STAT. ANN. § 14:91.5(D) (2012) (“Whoever commits the crime of unlawful use or access of social media shall, upon a first conviction, be fined not more than ten thousand dollars and shall be imprisoned with hard labor for not more than ten years without benefit of parole, probation, or suspension of sentence. . . . Whoever commits the crime . . . upon a second or subsequent conviction, shall be fined not more than twenty thousand dollars and shall be imprisoned with hard labor for not less than five years nor more than twenty years without benefit of parole, probation or suspension of sentence.”), amended by Act of May 22, 2012, No. 205, § 14:91.5, 2012 La. Sess. Law Serv. Act 205 (H.B. 620) (West), and NEB. REV. STAT. ANN. § 28-322.05 (LexisNexis 2009) (“Unlawful use of the Internet by a prohibited sex offender is a Class I misdemeanor for a first offense. Any second or subsequent conviction under this section is a Class IIIA felony.”).

194. *Doe v. Marion Cnty.*, 705 F.3d at 701 (“[I]f [sex offenders] are willing to break the existing antisolicitation law, why would the social networking law provide any more deterrence? By breaking two laws, the sex offender will face increased sentences; however, the state can avoid First Amendment pitfalls by just increasing the sentences for solicitation . . .”).

195. The district court in *Doe v. Marion County* also addressed this argument in its opinion and found that the “argument has some appeal, but the Court [wa]s not persuaded.” *Doe v. Marion Cnty.*, No. 1:12-cv-00062-TWP-JD, 2012 WL 2376141, at *8 (S.D. Ind. June 22, 2012), *rev’d*, 705 F.3d 694. The court made a distinction between the two statutes because one set “aims to *punish* those who have *already committed* the crime of solicitation. [Indiana’s social media ban] . . . aims to *prevent and deter* the sexual exploitation of minors by barring certain sexual offenders from entering a virtual world where they have access to minors.” *Id.* (emphasis in original). The Seventh Circuit was critical of this argument because all laws are meant to serve a deterrence function through the punishment they apply, and explained that “[t]he legislature attached criminal penalties to solicitations in order to prevent conduct in the same way decade-long sentences are promulgated to deter repeat drug

The district courts in *Doe v. Jindal* and *Doe v. Nebraska* found that Louisiana's and Nebraska's social media bans, respectively, did not satisfy the narrow tailoring requirement.¹⁹⁶ In *Doe v. Nebraska*, the court pointed to a trait that all three of the statutes had in common at the time they were analyzed—the bans do not “require a showing that the offender poses a present threat to use [social media] to get at children.”¹⁹⁷ The court found that this meant “the statute is not narrowly tailored to target those offenders who pose a factually based risk to children through the use or threatened use of banned sites or services.”¹⁹⁸

Not only did the statutes initially passed by Indiana, Louisiana, and Nebraska fail to require a showing that a banned sex offender pose a present risk to children, but the statutes also applied to sex offenders that did not use a social network—even a computer—in committing their offense.¹⁹⁹ The court in *Doe v. Nebraska* recognized that this created a narrow tailoring issue.²⁰⁰ In all of the federal cases examining the constitutionality of sex offender social media ban, no court's opinion mentioned any factual data brought forward by the state indicating that sex offenders as a class are likely to use social media to exploit children.²⁰¹ Without some data supporting the proposition, it strains credulity to believe that sex offenders that committed crimes that did not involve social media or a computer would pose a serious threat to use social media to commit crimes against children in the future.²⁰²

offenses.” *Doe v. Marion Cnty.*, 705 F.3d at 701. However, the district court's distinction is flawed further: it assumes that individuals who are banned by the statute are unable to control themselves if they are exposed to children online. If this is true, these individuals are likely just as dangerous in public as they are on the Internet and should not be allowed to be out of prison or off probation, parole, or supervised release. One might argue that social media poses a greater danger than allowing these individuals to be relatively free in public because of the anonymity offered by the Internet. However, federal regulations already require that sex offenders disclose “all designations used by sex offenders for purposes of routing or self-identification in Internet communications or postings.” National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38055 (July 2, 2008). Sex offenders have no more privacy online than they do in public.

196. *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1109 (D. Neb. 2012) (“After very careful deliberation, I decide that [Nebraska's social media ban] is not narrowly tailored.”); *Doe v. Jindal*, 853 F. Supp. 2d 596, 605 (M.D. La. 2012) (“In its current form, [Louisiana's social media ban] is not crafted precisely or narrowly enough—as is required by constitutional standards—to limit the conduct it seeks to proscribe.”).

197. *Doe v. Nebraska*, 898 F. Supp. 2d at 1111; see IND. CODE § 35-42-4-12; LA. REV. STAT. ANN. § 14:91.5; NEB. REV. STAT. ANN. § 28-322.05.

198. *Doe v. Nebraska*, 898 F. Supp. 2d at 1111.

199. See *supra* notes 62–70 and accompanying text (detailing the crimes to which Indiana's social media ban applied); *supra* notes 76–83 and accompanying text (detailing the crimes to which Louisiana's social media ban applied); *supra* notes 92–100 and accompanying text (detailing the crimes to which Nebraska's social media ban applied).

200. See *Doe v. Nebraska*, 898 F. Supp. 2d at 1111.

201. *Doe v. Marion Cnty.*, 705 F.3d 694 (7th Cir. 2013); *Doe v. Nebraska*, 898 F. Supp. 2d at 1086–132; *Doe v. Marion Cnty.*, No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141 (S.D. Ind. June 22, 2012), *rev'd*, 705 F.3d 694; *Doe v. Jindal*, 853 F. Supp. 2d at 596–607.

202. It is obviously possible that a *particular* sex offender that commits a crime without using social media or a computer may be likely to use social media to commit additional crimes against children in the future, but it is difficult to believe that *all* sex offenders that

The social media ban statutes passed by Indiana, Louisiana, and Nebraska all posed an additional narrowing tailoring problem in the scope of utilities and websites to which they applied. The court in *Doe v. Nebraska* seized on the fact that Nebraska's social media ban used definitions that included more utilities and websites than necessary to achieve the state's goal. One particularly problematic definition for the court was the statute's definition of instant messaging services, which the court feared would include text messaging with a cellular phone.²⁰³ Even if cellular phone text messaging was not included within Nebraska's definition, it was and is possible to use many online instant messaging services to send and receive text messages, without using their other functions.²⁰⁴ The court explained that banning offenders from text messaging would be an "insurmountable burden" for the statute to overcome, because of the astounding number of text messages sent per day in the United States.²⁰⁵

The court in *Doe v. Jindal* recognized that Louisiana's initial attempt at a social media ban did not meet the narrow tailoring requirement because of the substantial number of websites that it applied to. The court did not provide much analysis on the narrow tailoring element in its opinion;²⁰⁶ however, the court did indicate that

commit a particular crime that does not involve social media or a computer are likely to use social media to commit offenses against children using social media in the future.

203. *Doe v. Nebraska*, 898 F. Supp. 2d at 1113–19.

204. *Id.* at 1113 (“[T]ext messages’ can be sent and received by instant messaging services such as *Google Talk*, *Windows Live Messenger*, and *Yahoo Messenger*.”).

205. According to a source cited by the court, 2.5 billion text messages are sent per day. *Id.* at 1113 n.22. The court's logic may be a bit off on this point, although the court seems to have reached the correct conclusion. The number of text messages sent per day is not in and of itself evidence of a lack of narrow tailoring. The fact that text messaging is a very popular form of communication does not directly lead to the conclusion that it is a medium of communication that cannot be used to harm minors (otherwise the statute might correctly apply to text messages). However, if text messaging was included in the statute's ban, this might be evidence of a lack of narrow tailoring for another reason. These statutes seem to be primarily concerned with preventing sex offenders from preying on children they do not already know (otherwise these statutes would accomplish very little; if the offender already knows the potential victim, banning them from social media would probably not prevent the potential harm), and therefore a narrowly tailored statute would ban sex offenders only from mediums of communication that are effective at facilitating introduction, like chat rooms and social networks. Text messaging is not an effective means of introduction, as you must have someone's phone number in order to send that person a text message.

206. The Indiana district court was critical of the analysis in *Doe v. Jindal*. The Indiana district court claimed that *Jindal* did not use the content-neutral framework in its analysis and that the court in *Jindal* “relied heavily on the Supreme Court's decision in *United States v. Stevens*.” *Doe v. Marion Cnty.*, No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141, at *11 (S.D. Ind. June 22, 2012), *rev'd*, 705 F.3d 694 (7th Cir. 2013). The Indiana district court was critical of the *Jindal* court's use of *Stevens* because—as the court correctly pointed out—the Supreme Court in *Stevens* was examining a content-based restriction. *Id.*; see *United States v. Stevens* 130 S. Ct. 1577, 1584 (2010). The first point is simply incorrect; although the court in *Jindal* did not expressly state that the statute was content neutral, the court applied a content-neutral framework. See *supra* note 180. The Indiana district court even quoted the portion of the *Jindal* opinion that articulated the narrow tailoring test. See *Doe v. Marion Cnty.*, 2012 WL 2376141, at *10. The second criticism is also misplaced; the *Jindal* court relied on the *Stevens* opinion, but it did so only for the Court's articulation of the

the constitutional problem created by the statute was partially due to the breadth of the ban. Specifically, the court found that the ban applied to “many commonly read news and information websites, . . . social networking websites[, and] . . . the website for [the Louisiana district court].”²⁰⁷

The district court²⁰⁸ in *Doe v. Marion County* “readily acknowledge[d] that [Indiana’s social media ban] captures considerable conduct that has nothing to do with interacting with minors.”²⁰⁹ In spite of this acknowledgement, the district court concluded that “Indiana’s statute is not ‘substantially broader than necessary’ to achieve its goals of prevention and deterrence.”²¹⁰ In reaching this conclusion, the court mentioned an additional state interest that is at play in the consideration of social media bans: keeping sexual predators out of situations that might lead to them reoffending.²¹¹ Compared to the interest in protecting children, this interest is not clearly a “substantial interest.” However, assuming *arguendo* that this is a substantial state interest, the interest does not justify preventing sex offenders from participating in legitimate activities that are difficult, if not impossible, to participate in without the help of social networks, such as communicating with people about politics on a national stage, communicating with large groups of people with similar interests, and easily keeping up with friends and family scattered across the United States and the rest of the world.²¹²

These bans are meant to protect children; therefore, they should only ban sex offenders from social media utilities and websites that children can and do access.²¹³ Indiana and Nebraska both attempted to limit their social media bans to websites that allow access by children under the age of eighteen.²¹⁴ The problem

overbreadth test in *Stevens*. See *Doe v. Jindal*, 853 F. Supp. 2d at 604. The overbreadth doctrine is applicable to content-neutral restrictions. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 683 (1994) (O’Connor, J., dissenting) (“The must-carry provisions are fatally overbroad, even under a content-neutral analysis . . .”). Even the Indiana district court was willing to apply the overbreadth doctrine, but the court ultimately concluded that it was “not needed.” *Doe v. Marion Cnty.*, 2012 WL 2376141, at *6. Therefore, the *Jindal* court was correct to rely on *Stevens*.

207. *Doe v. Jindal*, 853 F. Supp. 2d at 604.

208. The district court opinion in *Doe v. Marion County* is analyzed here to provide counterarguments. Even though the court’s decision was ultimately overruled by the Seventh Circuit, other courts remain unbound by the Seventh Circuit’s opinion and may seize on the district court’s reasoning.

209. *Doe v. Marion Cnty.*, 2012 WL 2376141, at *7.

210. *Id.* at *8.

211. *Id.* (“It stands to reason that many sex offenders might sign up for social networking with pure intentions, only to succumb to their inner demons when given the opportunity to interact with potential victims.”).

212. See *supra* Part I. The court also does not address the fact that the ban applies to more people than necessary. Indiana’s social media ban does not require that the sex offense that triggers the statutes applicability involve a computer, a social network, or even a child. See *Doe v. Marion Cnty.*, 2012 WL 2376141, at *6–9; *supra* Part II.A.

213. This limitation is likely meaningless when it comes to instant messaging and chat room services because, as one expert observed in *Doe v. Nebraska*, there are very few if any instant messaging and chat room services that attempt to limit access by minors. *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1116 (D. Neb. 2012).

214. IND. CODE § 35-42-4-12(e) (2008), amended by Act of May 11, 2013, Pub. L. No.

lies in defining what websites and utilities allow access to minors and how much access can be allowed.²¹⁵ Websites that—by their own terms of service—do not allow access by individuals under a certain age can and are accessed by children under the specified age limit.²¹⁶ The district court in *Doe v. Marion County* sidestepped this problem by interpreting the statute to apply only when a website’s terms of service allow access.²¹⁷ However, the court in *Doe v. Nebraska* criticized this interpretation and noted an important problem with such an interpretation: it imposes a de facto duty on individuals who are limited by the statute to constantly monitor the terms of service of the social media they use to ensure that the websites do not change the terms in order to allow access by minors.²¹⁸

2. Social Media Bans Leave a Lack of Adequate Alternative Channels of Communication

As pointed out by the district court in *Doe v. Nebraska*, “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”²¹⁹ But, the district court in *Doe v. Marion County* relied on Seventh Circuit precedent to point out that “[a]n adequate alternative does not have to be the speaker’s first or best choice . . . or one that provides the same audience or impact for the speech.”²²⁰ However, as the court in *Doe v. Nebraska* aptly stated, “The Supreme Court uses the word ‘ample’ not as an afterthought, but as a real safeguard.”²²¹ Social media bans do not leave open ample alternative channels of communication because so much speech is now either

247-2013, sec. 7, § 6, 2013 Ind. Acts 3384, 3397; NEB. REV. STAT. ANN. § 28-322.05(1) (LexisNexis 2009). Louisiana’s original statute did not exclude websites and utilities that only allow access by individuals over the age of eighteen. See LA. REV. STAT. ANN. § 14:91.5 (2012), amended by Act of May 22, 2012, No. 205, § 14:91.5, 2012 La. Sess. Law Serv. Act 205 (H.B. 620) (West).

215. In other words, does a website allow minors access if a minor can visit the website simply to read the terms of service and to view an age verification page?

216. See *supra* notes 25–27 and accompanying text.

217. *Doe v. Marion Cnty.*, 2012 WL 2376141, at *8.

218. *Doe v. Nebraska*, 898 F. Supp. 2d at 1116 (“[T]he . . . proposed construction imposes upon the offender the obligation to read and understand the vendor’s terms-of-use policy each time the offender uses the site. Importantly, this construction also fails to acknowledge that the ‘terms of use’ may be worded in such a way as to permit change without notice.” (internal footnotes omitted)).

219. *Id.* at 1117 (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)). The Seventh Circuit Court of Appeals did not reach the question of adequate alternative channels of communication with respect to Indiana’s social media ban because the court found the law was not narrowly tailored and saw no need to analyze the law further. *Doe v. Marion Cnty.*, 705 F.3d 694, 698 (7th Cir. 2013). As such, the Seventh Circuit’s opinion in *Doe v. Marion County* will not be referenced in this Part, but because the district court determined Indiana’s social media ban left open adequate alternative channels of communication, that opinion will be referenced. See *Doe v. Marion Cnty.*, 2012 WL 2376141, at *9–10.

220. *Doe v. Marion Cnty.*, 2012 WL 2376141, at *9 (alteration in original) (citations omitted in original) (quoting *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000)).

221. *Doe v. Nebraska*, 898 F. Supp. 2d at 1117 (citing *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 93 (1977)).

exclusively carried out through social media or exclusively made possible by social media.

Certain news and information can only be attained nearly instantaneously and continuously through social media channels. One example, cited by the district court in *Nebraska*, is information relating to fast-moving world events, such as the “Arab Spring.”²²² “Under Nebraska’s ban, . . . offender[s were] barred from receiving this information from *Twitter* and *Facebook*—news that might not be available from any other source—even though the hunger for that news poses no threat to children.”²²³ The court also pointed to other forms of communication that cannot be carried out without the aid of social media, such as video conferencing with individuals—sick relatives and business associates are some examples—spread across the country.²²⁴ Furthermore, political discussions and debates, discussions among members of professional groups, and business advertising are increasingly taking place exclusively through social media.²²⁵ An individual must have access to social media in order to fully receive this information and fully participate in these discussions.

The district court in *Doe v. Marion County* reached a different conclusion than that of the court in *Doe v. Nebraska*. The district court in *Doe v. Marion County* explained that adequate alternatives were available because those affected by the statute still had numerous “old fashioned” methods of communication at their disposal.²²⁶ However, the court mischaracterizes the problem. Yes, there are many “old fashioned” forms of communications left open by social media bans; unfortunately, many people have migrated away from these channels of communication and have begun using social media as a substitute.²²⁷ If a state banned the telephone, surely the telegraph would not be viewed as an adequate alternative channel of communication, or as the court in *Doe v. Nebraska* put it, “[T]his is a little like banning the use of the telephone and then arguing that First

222. *Id.* at 1117.

223. *Id.* at 1118.

224. *Id.*

225. *See supra* Part I.B.

226. The methods include

the ability to congregate with others, attend civic meetings, call in to radio shows, write letters to newspapers and magazines, post on message boards, comment on online stories that do not require [social media], email . . . , publish a blog, and use social networking sites that do not allow minors

Doe v. Marion Cnty., No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141, at *10 (S.D. Ind. June 22, 2012), *rev'd*, 705 F.3d 694 (7th Cir. 2013).

227. *See supra* Part I. Even the Supreme Court has already recognized this shift. The Court has examined that “the advent of electronic media and social-networking sites reduces the importance of [newsletters, bulletin boards, e-mail, office space, and recruiting fairs (for student organizations)].” *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2991 (2010); *see also Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (“Today, 30-second television ads may be the most effective way to convey a political message. Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues.” (citation omitted)).

Amendment values are preserved because the user can (perhaps) resort to a walkie-talkie.”²²⁸

IV. DRAFTING A CONSTITUTIONALLY PERMISSIBLE SOCIAL MEDIA BAN

Although this Note argues that the three statutes that have been examined by the federal judiciary were properly found unconstitutional, there is still plenty of constitutional space for a state to effectively serve its interest in protecting children. This Part will examine several social media bans that have been passed by state legislatures but have not yet been examined by the judiciary. This Part will then look to some alternatives to blanket social media bans that will be less burdensome on the First Amendment rights of sex offenders.

A. Social Media Bans Not Yet Subject to Federal Constitutional Challenge

Louisiana and Indiana amended their social media bans after the states’ original bans were found to be unconstitutional.²²⁹ Indiana adopted legislation that alters its social media ban so that it only applies to individuals that are under the supervision of the criminal justice system.²³⁰ Minnesota, New York, and Texas have all adopted similar social media bans.²³¹ Unfortunately, it is beyond the scope of this Note to examine social media bans that are only applicable to individuals who are under the supervision of the criminal justice system,²³² and this Subpart will focus only on bans that are similar to the social media bans discussed throughout this Note.

228. *Doe v. Nebraska*, 898 F. Supp. 2d at 1117. To provide further illustration, the Indiana district court explains that individuals affected by social media bans “could create or participate in a LISTSERV (a computer program that allows people to create, manage, and control electronic mailing lists) in order to communicate with fellow pilots or persons who have other similar interests.” *Doe v. Marion Cnty.*, 2012 WL 2376141, at *7. This is true, but the district court assumes that other pilots would be willing to participate in the LISTSERV. Social networks provide instant access to a much broader audience than can be reached easily by compiling a LISTSERV. *See supra* Part I.A. There is no incentive for other pilots to participate in communications through a LISTSERV with someone who is banned from social networks; instead they are much more likely to simply communicate with pilot groups on social networks where they can easily reach a much broader audience.

229. *See* LA. REV. STAT. ANN. § 14:91.5 (Supp. 2013); IND. CODE § 35-42-4-12 (Supp. 2013).

230. IND. CODE § 11-10-11.5-11(b) (banning sex offenders from using social media if they are part of a “community transition program”); *id.* § 35-38-2-2.7 (banning sex offenders on probation or parole from using social media); *id.* § 35-42-4-12 (setting the punishment for violating either of the previously mentioned statutes as a “Class A misdemeanor” unless the person has a “prior unrelated convicted under this section,” at which point “the offense is a Class D felony”).

231. MINN. STAT. ANN. § 244.05(6)(c) (West Supp. 2014); N.Y. PENAL LAW § 65.10(4-a)(b) (McKinney 2013); TEX. GOV’T CODE ANN. § 508.1861 (West 2012).

232. For a discussion of some of the constitutional implications of social media bans that do not apply to individuals outside the criminal justice system, see Wynton, *supra* note 11, at 1869–70, 1890–91.

Louisiana's new ban is similar to the state's original ban,²³³ and as such, Louisiana's amended social media ban suffers from many of the problems that plagued the state's original ban. Louisiana eliminated its social media ban's prohibition on chat rooms and peer-to-peer networks; the ban now only applies to social networks.²³⁴ Louisiana also significantly limited the definition of social networks—which was originally one of the broadest definitions.²³⁵ Several other states have also passed social media bans that have not yet been examined by the federal judiciary; for instance, Kentucky and North Carolina have both passed social media bans that are similar to Louisiana's new ban.²³⁶

These newly passed social media bans suffer from many of the same problems discussed in Part III.C.²³⁷ These social media bans still suffer from at least two narrow tailoring problems: the applicability of the statutes are not limited to offenders who use computers in committing their offense,²³⁸ and these states already criminalize solicitation of minors though the use of a computer.²³⁹ The latter of these narrow tailoring problems is likely constitutionally fatal. As pointed out by the Seventh Circuit, antisolicitation statutes—like those of Louisiana, Kentucky, and North Carolina—fulfill the state's interest in protecting children more narrowly than social media ban statutes by being “neither over- nor under-inclusive.”²⁴⁰ If the statute were to survive the narrow tailoring element, the statute would present an interesting constitutional problem. A court would need to determine whether social networks present such a unique medium of communication that a total ban on their use would not leave open adequate alternative channels of communication.²⁴¹ Because of the unique and ubiquitous

233. Compare LA. REV. STAT. ANN. § 14:91.5 (2012), with LA. REV. STAT. ANN. § 14:91.5 (2011).

234. LA. REV. STAT. ANN. § 14:91.5 (Supp. 2013).

235. *Id.*; see *supra* notes 85–86 and accompanying text.

236. KY. REV. STAT. ANN. § 17.546 (LexisNexis Supp. 2013); N.C. GEN. STAT. ANN. § 14-202.5 (West Supp. 2013), *invalidated by* State v. Packingham, 748 S.E.2d 146 (N.C. Ct. App. 2013). There are some major differences. Kentucky's law applies broadly to anyone that is required to register on Kentucky's sex offender registry, which makes Kentucky's law applicable to the largest swath of sex offenders discussed in this Note. See KY. REV. STAT. ANN. § 17.500(5) (“‘Registrant’ means: (a) [a]ny person eighteen (18) years of age or older at the time of the offense or any youthful offender . . . who has committed . . . [a] sex crime; or . . . [a] criminal offense against a victim who is a minor; (b) or [a]ny person required to register [under federal law or the laws of another state]; or (c) [a]ny sexually violent predator; or (d) [a]ny person whose sexual offense has been diverted . . . , until the diversionary period is successfully completed”). The *Packingham* court found that North Carolina's social media ban did not apply only to offenders that committed their crimes against children, and as such, found that the statute “burdens more people than necessary to achieve its purported goal.” 748 S.E.2d at 152.

237. See *supra* Part III.C.

238. See LA. REV. STAT. ANN. § 14:91.5. For an explanation of why this broad applicability creates a constitutional problem, see *supra* notes 199–202 and accompanying text.

239. KY. REV. STAT. ANN. § 510.155; LA. REV. STAT. ANN. § 14:81.3; N.C. GEN. STAT. ANN. § 14-202.3.

240. Doe v. Marion Cnty., 705 F.3d 694, 699 (7th Cir. 2013); see also *supra* Part III.C.1.

241. It is possible to imagine a federal judge coming to this conclusion. See *supra* Part I

nature of social media,²⁴² social media bans should be viewed as failing to leave open adequate alternative channels of communication. Ultimately, it seems unlikely that blanket social media bans will survive constitutional scrutiny.²⁴³

B. Alternatives to Social Media Bans

States have numerous alternatives that help protect children using social media without adopting blanket sex offender social media bans. Louisiana has passed additional legislation that requires sex offenders who use social networks—who are not banned from social networking websites by Louisiana’s social media ban—to disclose their status as sex offenders on social networking websites and to indicate “the crime for which [they were] convicted, the jurisdiction of conviction, a description of [their] physical characteristics . . . and [their] residential address.”²⁴⁴ Compelled speech is not free of constitutional concerns;²⁴⁵ however, compelled speech creates less of a First Amendment concern than completely foreclosing an individual’s opportunity to use social media.²⁴⁶ At least one commentator believes

(discussing the importance of social media generally); *supra* Part III.C.2 (discussing the “adequate alternatives channel of communication” prong of content-neutral analysis and the implications of banning social media in relation to this prong); *supra* notes 226–28 and accompanying text.

242. See *supra* Part I.

243. *Contra* Conner, *supra* note 138, at 883–85, 918–21 (arguing that Louisiana’s newly adopted social media ban is “likely . . . constitutional under the [First Amendment’s protection of] Free Speech” and proposing a redraft of Louisiana’s original social media ban that would limit the number of websites to which the statute applied). The previously cited scholarship does not address the arguments that no blanket social media ban can be narrowly tailored to protecting children because antisolicitation statutes are the narrowly tailored versions of social media bans and that blanket bans do not leave open adequate alternative channels of communication. See *id.*; *supra* Part III.C.1–2.

244. LA. REV. STAT. ANN. § 15:542.1(D).

245. “Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views . . .” *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001). Compelling sex offenders to post their status as sex offenders when using social networks may be particularly damaging due to the great—but arguably justifiable—stigma associated with sex crimes in our society. Such disclosures may result in sex offenders being ostracized by other users of social media, which would inhibit the usefulness of social media. This Note does not seek to fully explore these constitutional concerns, but only seeks to argue that disclosures, like those mandated by Louisiana, are less burdensome on sex offenders’ First Amendment rights than blanket social media bans.

246. However, Justice Thomas would disagree with this proposition. *Id.* at 418–19 (Thomas, J., concurring) (“I write separately, however, to reiterate my views that . . . compelling speech raises a First Amendment issue just as much as restricting speech.” (internal quotation marks omitted)). Examining this issue in detail is beyond the scope of this Note, but for a commentator’s sharp criticism of a California act that mandates disclosure of sex offenders’ online usernames and identifying information, see Yonatan Moskowitz, Legislative Note, *Not in My Digital Backyard: Proposition 35 and California’s Sex Offender Username Registry*, 24 STAN. L. & POL’Y REV. 571, 575–80 (2013).

that these disclosures may be a viable alternative to social media bans.²⁴⁷ Forcing such disclosures provides parents and guardians of children with an additional tool to help ensure the safety of their children in the virtual and physical world.

Further, Louisiana's disclosure rule will assist social networks that are voluntarily attempting to remove sex offenders from their websites. The federal government is also working to assist social networking websites that are attempting to exclude sex offenders by creating a service that allows social networking websites to compare their users' names against the National Sex Offender Registry.²⁴⁸ Because social networking websites are likely to receive a positive public reaction for an effort to cleanse their services of sex offenders, many popular social networking websites are likely to utilize a government service that facilitates the removal of sex offenders. In fact, Facebook's terms of service indicate that sex offenders are not permitted to use the website.²⁴⁹

However, the federal government assisting Facebook in removing sex offenders from the website may violate the First Amendment. If there is no direct state action, there is not typically a constitutional concern.²⁵⁰ Nevertheless, the government is facilitating the abridgement of speech by a private actor, and in some circumstances, the Supreme Court has found that similar government action violates the First Amendment.²⁵¹ Ultimately, this complex constitutional issue is beyond the scope of this Note, but it is noteworthy that such government activity would at least be less speech restrictive than blanket social media bans because there will always be some social media utility on the vast expanse of the Internet that will keep its doors open to all comers.

Without resorting to helping social media shut their doors to sex offenders, there is a strong possibility that a constitutional social networking ban could be crafted.

247. Barnaby Grzaslewicz, Comment, *Banished from the Virtual Sandbox: How State Bans on Sex Offender Social Networking Access Implicates the Freedom of Speech*, 32 TEMP. J. SCI. TECH. & ENVTL. L. 85, 118–19 (2013).

248. See, e.g., 42 U.S.C. § 16915b (Supp. V 2011) (mandating the creation of a system “that permits social networking websites to compare the information contained in the National Sex Offender Registry with the Internet identifiers of users of the social networking websites”).

249. Kashmir Hill, *So Which Social Networking Sites Can Sex Offenders Actually Use?*, FORBES.COM (June 21, 2012, 12:20 PM), <http://www.forbes.com/sites/kashmirhill/2012/06/21/so-which-social-networking-sites-can-sex-offenders-actually-use/>; Michael Martinez, *New La. Law: Sex Offenders Must List Status on Facebook, Other Social Media*, CNN.COM (June 21, 2012, 12:49 PM EDT), <http://www.cnn.com/2012/06/20/tech/louisiana-sex-offenders-social-media/index.html> (“[Facebook’s] Statement of Rights and Responsibilities already bars sex offenders from using it.”).

250. Cf. *Gilmore v. City of Montgomery*, 417 U.S. 556, 565 (1974).

251. See, e.g., *Marsh v. Alabama*, 326 U.S. 501 (1946) (holding that First Amendment rights can extend onto private property, and creating the foundations of the “quasi-municipality doctrine”); see also Peter Sinclair, Comment, *Freedom of Speech in the Virtual World*, 19 ALB. L.J. SCI. & TECH. 231, 245–57 (2009) (arguing that the Supreme Court’s “quasi-municipality doctrine” should apply to online gaming communities). Presumably, if the protection provided by the “quasi-municipality doctrine” were to extend to online gaming communities, it would also extend to social networks, but the “quasi-municipality doctrine” has not yet been applied in such a way by any court.

The Seventh Circuit in *Doe v. Marion County* specifically made clear that it was not “foreclose[ing] the possibility that keeping certain sex offenders off social networks advances the state’s interest in ways distinct from the existing justifications” for Indiana’s social media ban.²⁵² The court seems to be implying that perhaps the state could redesign social media bans to serve the state’s interest in preventing recidivism, or in other words, the state could create a ban that would apply only to those individuals who would not be able to prevent themselves from committing sex crimes if exposed to social media. Later in the opinion, the Seventh Circuit observed that a permissible law might be able to be created that would “apply to certain persons that present an acute risk—those individuals whose presence on social media impels them to solicit children.”²⁵³

To target only individuals who present an “acute risk” of recidivism, an ideal social media ban could be crafted that would only become effective against a particular individual if the state demonstrated by clear and convincing evidence that a given sex offender would be likely to reoffend if permitted to access social media.²⁵⁴ The ideal social media ban would also include a mechanism for sex offenders banned from social media to seek review of the determination that they are likely to reoffend if permitted to access social media. Such a social media ban would surely survive the narrow-tailoring requirement, for the social media ban would be “neither over- nor under-inclusive.”²⁵⁵ The only potential constitutional issue would be a failure to leave open ample alternative channels of communication,²⁵⁶ but it seems even this stark constitutional requirement would be bent by the overwhelming weight of a social media ban tightly tailored to serve such an exceptionally important state interest.²⁵⁷

CONCLUSION

Although states have an extremely important interest in protecting children, they must do so in constitutionally permissible ways. Current social media bans accomplish little in the way of protecting children—because the conduct they seek to proscribe is already illegal. Yet, they inhibit access to a medium of communication that is already extremely important in our society. Social media will likely continue to grow in importance as an ever growing number of individuals abandon traditional mediums of communication and begin communicating primarily through social media. As people migrate to social media,

252. *Doe v. Marion Cnty.*, 705 F.3d 694, 701 (7th Cir. 2013).

253. *Id.* at 702.

254. The Seventh Circuit seemed to imply that a limited social media ban, like the aforementioned, would survive constitutional scrutiny. *See id.*

255. *Id.* at 699.

256. *See supra* Part III.C.2.

257. This ideal social media ban was crafted based on the sex offender civil commitment statute approved by the Supreme Court in *Kansas v. Hendricks*. 521 U.S. 346 (1997). As the Seventh Circuit recognized, “*Hendricks*-style civil commitment presents a far greater deprivation of liberty than banning social networking.” *Doe v. Marion Cnty.*, 705 F.3d at 702. Therefore, as long as the *Hendricks* procedural safeguards are tracked, it seems likely that a social media ban would be found to be constitutional.

so too will the debates surrounding the important political and economic issues facing the United States and the world. The First Amendment should protect access to this important medium of communication for as many individuals as possible, regardless of their criminal history.