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Reno at 20: The Packingham Decision and the Supreme Court on Online Speech

Article By:

Inside Privacy Blog at Covington and Burling

Twenty years ago, the Supreme Court was faced with the question of whether a federal statute that imposed a content-based restriction on online speech violated the First Amendment. That case, *Reno v. American Civil Liberties Union*, marked the first instance in which the Supreme Court weighed in on the role of the Internet in the marketplace of ideas, and decided affirmatively that speech on the Internet is afforded protection under the First Amendment.

Over the course of the twenty years following *Reno*, the Internet has changed in size, shape, and substance. In 1997, about 40 million people used the Internet and "most colleges and universities," "many corporations," "many communities and local libraries," and "an increasing number of storefront 'computer coffee shops'" provided the public access to the Internet. Today, at least 280 million Americans use the Internet, 102 million U.S. households have in-home broadband Internet access, and 225 million Americans access the Internet through their mobile device. In 1997, popular uses of the Internet included e-mail, listservs, newsgroups, chatrooms, and the "World Wide Web" (which then consisted of around 100,000 websites), but today, social media dominates, with an estimated 81% percent of Americans participating.

Despite the seismic changes to the Internet since the *Reno* case was decided, the Court's views on online speech have remained largely consistent, albeit more tailored to the times. Recently, in *Packingham v. North Carolina*, the Court struck down a content-neutral state law that restricted sex offenders' access to "social networking" websites, finding that it violated the First Amendment. The significance of the *Packingham* opinion, particularly in its partial extension of *Reno*, goes beyond the four corners of the Court's holding.

First, the Supreme Court's view on the role of the Internet in public discourse has evolved alongside the development of the Internet over the past twenty years.

In 1997, the Supreme Court considered the Internet akin to "a vast library . . . and a sprawling mall." Despite the relatively small size of the Internet at that time, the Court nevertheless considered the Internet "vast democratic forums," which enabled "any person with a phone line [to] become a town crier with a voice that resonates farther than it could from any soapbox."

After twenty years of growth and the rise of social media, the Court in *Packingham* identified the Internet, and social media in particular, as one of "the most important places . . . for the exchange of views." The Court described social media as "the modern public square," that "provide[s] perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." Deciding online communications are entitled to First Amendment protection, the Court declared that social media websites are "integral to the fabric of our modern society and culture." *Packingham* makes clear that the Supreme Court views the Internet and social media as having a central and dominant role in public discourse and the exercise of First Amendment rights.

Second, both cases stand for the proposition that federal and state governments may be able to enact both content-based and content-neutral laws that restrict speech on the Internet—so long as such laws are appropriately tailored.

The Court held in *Reno* that a content-based restriction on speech—the Communications Decency Act's prohibition on "the knowing transmission of obscene or indecent messages to any recipient under 18 years of age"—failed to withstand First Amendment scrutiny because of its vagueness and potential overbreadth. Not only did the statute lack a definition of "indecent," but it also would have "effectively suppresse[d] a large amount of speech that adults have a constitutional right to receive and to address to one another."

In *Packingham*, the Court held that a content-neutral restriction on a class of individuals' speech failed to survive intermediate scrutiny also due to its overbreadth. The North Carolina statute restricted sex offenders' access to any "social networking" website where the sex offender "knows that the site permits minor children to become members or to create or maintain personal Web pages." The Court read this definition to include both "commonplace social media websites," and websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com, on which there is minimal risk of a sex offender coming into contact with a minor.

Although the Court in both cases struck down statutory restrictions on online speech, it left open the possibility that other "more specific laws" may be permissible. First, in *Reno*, the Court did not categorically declare that the government cannot impose content-based restrictions on online speech. Second, the Court in *Packingham* so much as stated: "the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor."

In view of the Court's treatment of a content-based restriction in *Reno* and statement about "narrowly tailored" laws in *Packingham*, it appears that federal and state governments may still be able to enact both content-based and content-neutral restrictions on online speech, so long as such laws can withstand strict scrutiny and intermediate scrutiny, respectively.

Third, the Supreme Court has not made any decision on a private actor's ability to limit or permit speech on its online property.

Importantly, the Court in *Reno* and *Packingham* only considered the propriety of federal and state restrictions on individual's speech activities on the Internet. Neither case stated nor implied that private actors are in any way limited in their governance of speech on their online properties. Accordingly, although the Court may consider social media "the modern public square" with respect to speech-limiting government regulations, this does not signify that web users are entitled to use, or speak on, any given privately owned online property—online property owners may choose to restrict or

permit speech on their properties as they wish (so long as such restrictions otherwise comply with law).

The Supreme Court's understanding of the Internet has undoubtedly evolved alongside the Internet's growth; however, the Supreme Court has remained consistent on the "relationship between the First Amendment and the modern Internet." While *Packingham* went beyond *Reno* to make clear that the government's content-neutral restrictions on online speech will be subject to intermediate scrutiny, both cases stand for (and do not stand for) the same propositions: First, federal and state governments are not *de facto* barred from imposing restrictions on online speech—rather, such restrictions must survive First Amendment scrutiny. Second, the right of private actors to restrict or permit private citizens' speech on their privately owned websites has not been limited by these cases.

Sari Sharoni authored this post.

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