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In Techno Parentis: *Teens, Social Media, and the First Amendment*

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Proposed legislation to address teen social media falls into three general buckets. There are laws that require social media companies to take on fiduciary obligations to teenagers, or, in narrower form, a duty of care. There are consumer protection laws, which treat part or all of social media like defective, dangerous, and unsafe products: these include laws that prohibit algorithmic targeting, prohibiting geolocation, or prohibiting social media altogether. Finally there are laws that enhance parental capacity to oversee social media use, like those that require parental consent to open an account or require parental access to accounts against children's wishes. Many laws have some of all of these components.

These laws come into being in the shadow of two major uncertainties in constitutional law: the First Amendment treatment of social media, and the First Amendment rights of teenagers. The Netchoice *decision, due this June, will shed substantial light on how the Court intends to treat social media. Many observers predict a broad decision that social media companies have First Amendment rights when they exercise "editorial discretion", but it is possible the Court will reject the Netchoice challenges but nonetheless signal a path forward.*

The Constitutional rights of teenagers are more uncertain, at least at the Supreme Court level, than may first appear. The approach used in the 2010 case Brown v. Entertainment

[1] Thanks to great ongoing research by Emma Hazeltine and Dawid Skalkowski.

Merchants *would indicate that teen social media laws won't be treated differently than adult laws, but that majority was fragile, and the language in subsequent teen case* Mahanoy *suggests that the Court may allow substantial leeway in teen-specific regulation.*

This Article argues that given these uncertainties, the most robust approach is the consumer protection approach, because it falls well within a well accepted framework for regulation, and requires the least theoretical work on the part of courts. The more the legislation prohibits particular design choices, or prohibits design choices within an accepted unfair business practices/products liability framework, the more comfortable courts will be. On the other hand, the fiduciary approach could also survive constitutional scrutiny, but the logic of constitutional avoidance will lead to courts construing an already weak legal theory in a very limited way. Parental enhancement will almost surely survive constitutional scrutiny, but be unlikely to be very effective on its own.

I. Introduction

There has been a sharp uptick in significant mental health challenges for teenagers since smartphones, and algorithmically targeted feeds, were widely adopted around 2010. There is good reason to conclude that some combination of smartphone introduction and social media are the primary cause of the sharp uptick in depression, anxiety, suicidality, and that these also have long term adjustment impacts. The harm is psychological, pedagogical, and civic: smartphone/social media use does not, like cigarettes, only damage those who use it, and those near those who use it, but collective education, and collectivity itself.

The primary response for the first ten years of the teen social media crisis was one of bewilderment and passivity, perhaps best represented by a spate of opinion columns, advising parents how to regulate phone use. Columns offered advice on how to outwit the 10,000 engineers who have been well-paid to mine children's emotional responses, and engineer individualized feeds that will make teenagers seek out screen time more than love, sleep, friendship, music (and certainly parental approval.). As Gaia Bernstein argued, social media, like many new technologies was initially "invisible" to users, meaning users "can see little of the design choices made to produce [the technologies] and their influence"[2], while the products became entrenched with social norms and business interests. Inertia, entanglement, and bewilderment proved significant obstacles for legal regulation.[3]

In the last three years, however, there has been a blossoming energy around addressing the problem, through both litigation and legislation. Congress has held 40 hearings, and a majority of the Senate has signed on to KOSA (Kids Online Safety Act), a multi-pronged piece of legislation. Legislation has been introduced in the overwhelming majority of states. In eleven states, laws regulating social media safety have passed. The COVID-19 pandemic made technology uniquely "visible," and thus created a new window of opportunity to regulate these addictive platforms, and the social science evidence started to pile up. While courts have stayed laws in four states for violating the First Amendment, litigation is just beginning and the grounds of debate are far from settled.

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[2] Gaia Bernstein, *A Window of Opportunity to Regulate Addictive Technologies*, 2002 WIS. L. REV. FORWARD 64 (2022).

[3] *Id.*

This Article attempts to map the existing universe of proposed American teen social media laws and the existing constitutional frameworks that will either allow or defeat them. The proposed laws range widely. The "Age Appropriate Design Code" model in several proposals, requires that platforms serve "the best interests of the child"; the federal proposal with momentum endows platforms with a "duty of care" and the responsibility to take "reasonable measures" to prevent harm. Some bills require parental consent for anyone under 18 to open a social media account, some require social media companies to give parents access to the accounts of their children. New York, Kentucky and California lawmakers have proposed a law that bans serving any targeted content without parental consent. Florida has an absolute social media ban for under -14 year olds. More modest proposals ban targeted ads. Several laws would prohibit collecting data from minors unless it is "strictly necessary" for the operation of the site. A few proposals would require social media access to be turned off between 10:30 PM and 6:30 AM. Increasingly, states are tying proposed laws to the language of addiction, banning social media from using "a practice, design, or feature on the company's social media platform that the social media company knows, or which by the exercise of reasonable care should know, causes a minor account holder to have an addiction to the social media platform." Addiction is defined not in DSM terms, but as that which results in either "substantial preoccupation or obsession" or "substantial difficulty to cease or reduce use of the social media platform" and causing physical, mental, emotional, development, or material harm.

Several lawsuits have also been filed, with both private and governmental plaintiffs. In January 2024, a master complaint, consolidating hundreds of parents' claims against Meta, Snap, Bytedance, and Google, was brought. 41 states brought a similar claim against Meta, claiming it addicts children by design.[4] The big platforms, and several civil liberties organizations that reliably advocate for them, have yet to see a teen social media law that they like. They argue that platforms are engaged in editorial discretion when they choose what to offer children, and that they have a direct First Amendment right to do so.[5] They also argue that teenagers have a First Amendment right to receive information, a right which is enforced by platforms.

The new laws and litigation enter a vortex of uncertainty, especially when it comes to the Supreme Court. It is unclear how the Supreme Court will treat algorithmic recommendation systems, notification, or other techniques: none are speech, all are speech, or some are speech and some are not speech. When, if at all, will time, place and manner review apply? Does social media force a new era in First Amendment jurisprudence? While the Supreme Court has so far ducked questions about whether to treat platforms as First-Amendment protected in part or full, and the scope of governmental power to regulate social media, it is unlikely it will do so for long. The expected June decisions in the *Netchoice* cases will provide major guideposts for constitutional analysis.

There are also unresolved questions about adolescence and speech. It is unclear what constitutional and democratic logic underpins how courts deal with the liminal ages between 12 and 18. On paper, the rights of teenagers to receive content seems unassailable; a 2010 case, *Brown v. Entertainment Merchants* held that teenagers' right to receive the content of violent video games meant that any limitation on such right was subject to strict scrutiny. However,

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[4] Forty One States sue Meta over the Social Media Giants Impact on Kids, Ed Week (October 2023) https://www.edweek.org/policy-politics/41-states-sue-meta-over-the-social-media-giants-impact-on-kids/2023/10

[5] After the AADC passed in California, it was immediately challenged in Court by Netchoice, the advocacy arm for TikTok, Meta, Google and others. In October 2023, District Court judge Beth Freeman issued a preliminary injunction in Netchoice v. Bonta. The court held that it was very likely Netchoice could prove that the AADC facially violated the First Amendment, and would fail strict or intermediate scrutiny.

Brown is an outlier, and the 5-4 fragile majority for the *Brown* logic likely no longer exists; four of the justices—Alito, Roberts, Stevens and Thomas—concurred in the judgment, but argued against strict scrutiny. As I explain more fully below, the most recent student speech case, *Mahanoy* (Snapchat/Fuck the coach!) is based not around children's rights, but the rights of the parents against the rights of the school. Some scholars think that *Mahanoy* may represent a downshift in free speech doctrine, a change from tiers to "leeway" more generally. I argue that it may also reflect a return to *Barnette*, and to the view that teenagers' interests are not about present exercise of adult-like First Amendment rights, but about the cultivation of their future selves as members of political society. If so, then the Court may be open to state regulation of teen social media in particular.

What *are* teenagers? What *are* social media companies? Both entities are constructed by law and by reference to other entities with incomplete and unsatisfying analogies. Teenagers exist largely in relationship to younger children and to adults, two fairly established categories, not as a distinct, pre-existing category. Similarly, social media companies exist in law as constructed by relationship to newspapers and journalism, on the one hand, and to telecom and telegraph institutions on the other. In both cases, the analogies are wholly unsatisfying, necessary, and incomplete.

In other words, one of the biggest public health and democratic crises in our country lies at the intersection of two major unresolved questions in constitutional law. The challenge of regulating social media for teenagers requires us to explore what a teenager is in our collective theory of government and society, and requires us to make sense of how social media fits into our constitutional system.

In this Article, I explore these questions, and lay out a framework for analysis. I argue that the existing legislative proposals embody four different approaches towards teen social media regulation, and how they interact with visions of adolescence and platforms. One approach is a fiduciary model, essentially putting tech companies like TikTok in a full or partial guardianship role, with the obligations of care and in some cases loyalty. A second is a consumer protection model, identifying functions, or categories of functions, that are too dangerous for teenagers to use. This approach includes algorithmic bans and total bans. A third is an enhanced parental model, essentially requiring tech companies to provide tools for parental oversight of children and teenager activity. These three models are not mutually exclusive, and several of the dozens of proposed pieces of legislation have elements of each. The final model is private regulation, leaving tech companies to make the key decisions about how to interact with teenagers.

While there are advantages and disadvantages to each model, I conclude that the consumer protection model is the strongest. The duty of care is the weakest of the fiduciary duties, so weak as to be essentially nonexistent in corporate law, and is unlikely to be useful in forcing social media companies to change basic harmful practices. But even the "best interests" model—stronger than care— is a thin reed; parental fiduciary obligations sound strong in rhetoric, but are legally weak. Inasmuch as a strong interpretation of the "best interest" would run into First Amendment concerns, because it might require viewpoint-based sorting of content, courts are likely to use the constitutional avoidance doctrine to read the obligation as narrowly as possible. Faced with the question of whether a platform has an obligation *not* to share images of skinny girls, a Court will decide that such an obligation would likely violate the First Amendment, and therefore the fiduciary duty cannot encompass it; faced with evidence that

designs are beneficial to some and harmful to others, a Court would decide that a broad reading is vague, and therefore narrow the duty to the most egregious designs.

The consumer protection model fits most neatly into our existing constitutional scheme, and will be the easiest to enforce. While the harms may be democratic, the health harms are the most straightforward to regulate, and a consumer protection framework focuses on outlawing specific forms of design that are the most harmful that already exist; a regulatory framework for analyzing new design features before they are introduced; and oiling the path for products liability and negligence lawsuits to be brought. Unlike fiduciary duties, unfair and deceptive practices laws and product design laws are First-Amendment tested. Finally, parental tools seem important, and are very likely to be upheld, but unlikely to be meaningful in changing social and cultural practices. Social media re-engineers culture, not just individual brains, and the harms cannot be addressed in an isolated way: parents are left with unsolvable collective action problems.

Many advocates compare the moment we are in to the shift in big tobacco, where major lawsuits brought against big tobacco companies that revealed such acute awareness of the harm to children that legislation followed. Unlike tobacco, where the question of state power had everything to do with the regulatory power of agencies, the question of state power in this arena has everything to do with the First Amendment. Unlike tobacco, the causal claim of the social media harm is not direct, but societal, and unlike tobacco, the impacts of the harm are to the public health of the democracy as well as to the individual health of the users.

Despite being at the center of the political and culture wars maelstrom, and at the intersection of First Amendment and corporate speech rights, the teen social media debate has received limited scholarly attention.[6] This Article breaks new ground in a few ways. It explores the nature of the First Amendment argument made by the big tech platforms in the context of teenage speech rights, and shows how the platforms' argument depends on a vision of what a teenager is in the law that is not born out by a long tradition.

This Article proceeds as follows. In Part I, I briefly rehearse some of the harms. In Part II, I lay out the complex array of teen social media protection proposals in the United States. I show how, while they overlap, they fall roughly into four buckets: fiduciary-based proposals, such as KOSA and California, function-based proposals, such as New York and Florida, parental controls, and private regulation. In Part III, I explore the law of teenagers, and in Part IV, I explore the law of platforms (this section awaits Netchoice). Finally, in Part V, I synthesize all these parts to make a twofold argument: First, I make a strategic argument about the best way to regulate social media given the current court.

There's a lot I do not do in this article. I do not explore, for instance, scope: how to define the universe of companies to which the restrictions apply.[7] I do not cover the several proposals

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[6] There are some articles that lay out the problem of surveillance capitalism and children. See,Cole F**.** Watson, *Protecting Children in the Frontier of Surveillance Capitalism*, 25 J. Consumer & Commercial L. 88 (2023) (arguing that as surveillance capitalism continues to expand, privacy protection—such as COPPA—needs to expand, too describing KOSA as a "welcomed attempt to foster more conversation on this issue" and the California's Consumer Privacy Act is "a current exemplar of how governments should respond to the ascension of surveillance capitalism"; Newton Minow & Martha Minow, *Social Media Companies Should Pursue Serious Self-Supervision—Soon: Response to Professors Douek and Kadri*, 136 Harv. L. Rev. F. 428 (2023) (assuming that no federal legislation is forthcoming, focusing on self-regulation); Amarikwa, infra (says KOSA is a "step in the right direction", but cites Electronic Privacy Information Center's opinion that "it forces platforms to 'over censor' young people and may censor the content of all users rather than parse through.")

[7] See Utah, which covers "Social media" (https://le.utah.gov/~2023/bills/static/SB0152.html),

related to transparency, research, and reporting, and "Data Impact Assessments." I do not address the significant shadow of Section 230, or the vagueness challenges that plague these laws.

Although there have been a handful of articles discussing the significant harms of social media to children and teenagers, there are no articles exploring either the effectiveness or constitutionality of the proposals that exist to combat it.[8] KOSA has generated substantial public discussion and debate, making the paucity of published legal literature especially striking.[9]

The constitutional and practical issues are extremely pressing, adding a special urgency to develop the analysis of these laws. The Supreme Court could intervene as early as next year, if it takes up review of the California Age Appropriate Design Code, which was enjoined by the District Court, appealed by Attorney General Rob Bonta, and is currently awaiting the Ninth Circuit argument on appeal.[10] Many other states are actively drafting and redrafting their own laws. A constitution-proof, but ineffective, law, would leave children without meaningful protection.

I of course hope the article is persuasive about the correct approach to take towards these laws, but if it is not, it might at least instigate greater engagement of the legal academy. As the Article suggests, the challenge of regulating child social media implicates a broad swath of law: social science, fiduciary law, privacy law, health law, First Amendment law, family law, and tort law, just to name a few. To my mind, there is no more pressing issue, because the regulation of social media is not merely about protecting children from the most insidious kinds of harm, harm to the developing self, it is about the public vision for the future of political society.

II. Three Intertwined Crises: Health, Developmental, and Democratic

A twelve-year-old girl, a budding athlete, loves sports and starts spending time on her smartphone. She loves looking at girls and women in sports, and her social media feed initially reflects that which she chooses, friends and sports pages, but it quickly shifts as the platform analyzes her data profile. Within a short time, her feed involves images of extremely thin girls, then posts about how to lose weight, then anorexia. On the day after her 13th birthday she is hospitalized with severe malnutrition and has to spend 16 days in intensive care.[11]

Her story is not unique. Research from the Center for Countering Digital Hate found that the recommendation algorithm would suggest eating disorder and self-harm content to new teen accounts on Instagram within minutes of them signing up to the website.[12] One account saw suicide content within 2.6 minutes, another saw eating disorder within eight minutes, and while most were not so quick, the recommendation algorithm would get there soon, especially for teen girls.

Western teenagers–especially teen girls, but all children–are experiencing a mental health crisis. The current crisis began around 2011, and shows up throughout Europe and in all parts of

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[8] See Elixabeth Jaffe, "*Algorithms, Filters, and Anonymous Messaging: The Addictive Dark Side of Social Media*"
[9] A handful of articles merely mention KOSA in passing, as a possible solution to recognized harms, with general comments, and not a close constitutional analysis. KOSA is a "step in the right direction," but then cite an anti-KOSA source to express a drawback, e.g., "it will be a nightmare to enforce" (Marsden)
[10] *See infra section …*
[11] Katie S. testimony to FTC Bureau of Competition Chair Samuel Levine Feb. 29th. (Recorded but not shared publicly; Notes on file with author).
[12] [DS to add cite]

the English-speaking world.[13] A CDC survey from last years showed that a third of teen girls had seriously considered suicide, a nearly threefold increase from 2011.[14] Most American teen girls (56%) now say they experience persistent sadness or hopelessness, a 20% increase from 36% in 2011.

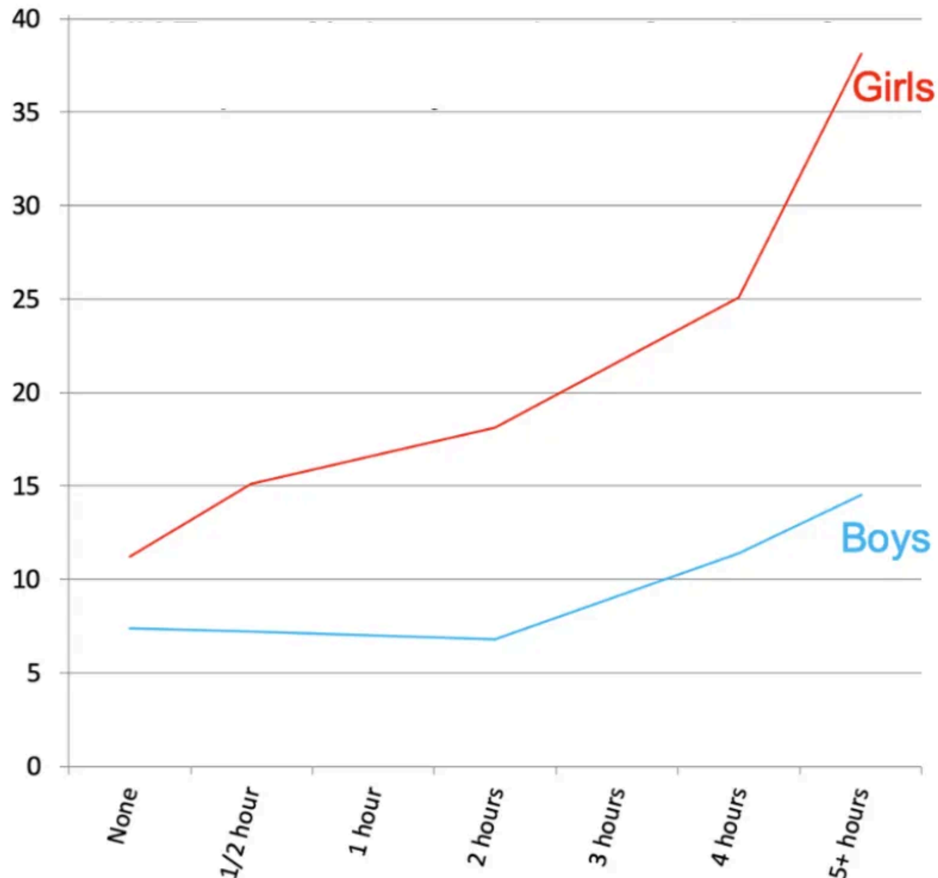
There is good reason to think the relationship between social media use and/or phone use, and the mental health crisis, is causal. The evidence doesn't fall neatly into the kind of evidence that social scientists prefer, where one can test a direct one-to-one relationship, and replicate such tests. However, it is substantial, maps on to the incentives of social media companies to maximize time online, and is the only causal theory that makes sense. While I have no intention of laying out the full scope of evidence, a rough contour of the *nature* of the evidence is relevant for understanding the potential validity and effectiveness of various legal regimes: if strict or intermediate scrutiny is used, the evidence will be under a spotlight.

Jonathan Haidt and Jean Twenge have compiled all the existing research in an open access document, and rely on a series of studies to make their case that the relationship between "social media" use and mental crises is causal.[15] The studies fall into three buckets. First, there are associational studies, those that look at the ways in which social media use is related to depression. As Haidt summarizes, 58 find an association, and 12 do not. A sample of this kind of study is represented in the image here:

[13] Youth Risk Behavior Survey (CDC) (https://www.cdc.gov/healthyyouth/data/yrbs/yrbs_data_summary_and_trends.htm)

[14] https://www.cbsnews.com/news/teen-girls-suicide-depression-mental-health-cdc-survey/

[15] If this kind of question interests you, Haidt and Twenge have helpfully created an open access google doc with all the various studies listed. (https://docs.google.com/document/d/1w-HOfseF2wF9YIpXwUUtP65-olnkPyWcgF5BiAtBEy0/edit)



"Percent of UK adolescents with "clinically relevant depressive symptoms" by hours per weekday of social media use, including controls. Haidt and Twenge created this graph from the data given in Table 2 of Kelly, Zilanawala, Booker, & Sacker (2019), page 6."

The second bucket of studies are longitudinal, looking at repeated surveys of the same people over time. Twenty-seven of these studies, according to Haidt and Twenge, support their conclusion. For instance, Haidt and Twenge looked at school loneliness globally, and found a substantial increase between 2012 and 2018, with a strong correlation between smartphone access and loneliness, and a weak correlation to income inequality, GDP, and family size. School loneliness was also correlated strongly with negative life satisfaction.[16]

Finally, there are 22 experimental or quasi experimental studies, the majority of which show an effect. These are mostly with young adults. For instance 143 undergraduates were randomly assigned to either usual use, or 10 minutes per platform per day use, of Facebook,

[16] Jean M. Twenge, Jonathan Haidt, Andrew B. Blake, Cooper McAllister, Hannah Lemon, Astrid Le Roy, Worldwide increases in adolescent loneliness, 93 Journal of Adolescence Pages 257-269 (2021) https://www.sciencedirect.com/science/article/pii/S0140197121000853

Instagram, and Snapchat. The limited use group showed greater reductions in loneliness and depression three weeks later.[17]

The counter-evidence is largely in the form of the absence of robust associational, longitudinally, and causal evidence.[18] Big, global studies have failed to prove a "smoking gun." Two major studies from last year–one from Oxford and one that looked at a million people from 72 countries between 2008 and 2019, found no associations on the country-wide level, or the individual level. However, both researchers were clear that they didn't absolve social media, they simply did not find associations that they expected to.[19] A recent longitudinal study from 1,200 children in Ireland found no correlation between early social media use and later mental health challenges.[20] The American Psychological Association concluded in a report put out in 2023, that the research is mixed. While the APA noted that there were good causal reasons for concerns, namely that the brain regions associated with feedback, desire for attention, and social sensitivity are extremely sensitive in adolescence. However, it concluded particular context matters, and the particular context in which each child uses social media matters.[21]

The ways in which social media can cause harm are variegated which makes it hard to plug into scrutiny regimes. Much of the causal puzzle is embedded in the nature of harm, the nature of the technology, and the manner in which different technologies are intertwined. Even if one could define the harm simply as time online, then it is clear that tools are explicitly designed to keep users online, but even those tools have a social aspect that is hard to isolate. Snapstreak is perhaps the most well-known, the Snapchat feature that gives points for users to compete on how many consecutive days they can share a picture with each contact. Other platforms promote daily notifications that urge users to take a picture of themselves in the moment.[22] TikTok, for instance, introduced "TikTok Now," which also prompts users to share a spontaneous photo or video everyday.[23] These particular tools look a lot like marketing for addiction. But many of the causal stories involve the smartphone's portability blended with particular, and constantly changing, methods of delivering an algorithm and notifications across multiple social networks. The overall business model is built on users spending more time via more engaging posts, so it is fair to presume that addiction is the business model, but identifying which of the functional features, or what combination of features across the social network landscape, is causing addiction can be difficult.

At the same time, are particular kinds of content that end up being the most damaging to well-being, particularly for girls: body image and body related content being the most obvious.

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[17] Hunt, Marx, Lipson & Young No more FOMO: Limiting social media decreases loneliness and depression. *Journal of Social and Clinical Psychology*.(2018).

[18] For one critique of Haidt's conclusions, based on methodologies of underlying reports, see Reason https://reason.com/2023/03/29/the-statistically-flawed-evidence-that-social-media-is-causing-the-teen-mental-health-crisis/

[19] https://www.euronews.com/health/2023/11/28/no-smoking-gun-evidence-that-internet-harms-our-well-being-study-claims

[20] Christopher J. Ferguson (2024) Longitudinal Associations Between Social Media Use and Mental Health Outcomes in Sample of Irish Youth: A Brief Report, Communication Reports, DOI: 10.1080/08934215.2023.2298948

[21] Health Advisory, Teen Social Media https://www.apa.org/topics/social-media-internet/health-advisory-adolescent-social-media-use.pdf

[22] Callie Holtermann, *They're Over Being Real*, N.Y. Times (Apr. 13, 2023,), https://www.nytimes.com/2023/04/13/style/bereal-app.html.

[23] *Id.*

There is also a reason to think that suicide related content can increase suicidality: many public health organizations have a longstanding policy not to push suicidality, or stories about suicide being caused by particular traits, understanding its contagious nature.[24]

Social media can cause harm by intensifying anxiety about how one is perceived.[25] Cyberbullying and sexting are discrete harms but hard to disentangle from social media use, and may not be related to the number of hours spent online. Failure to focus in class, if phones and social media are present in the hallways, can be an effect that has other, related impacts on self esteem.

But while social media can harm girls by recommending anorexia, as in the story above, it also causes harm by isolating and desocializing, not because of any of the content seen on social media, but because it is addictive. Just as the harm of a one-armed bandit gambling lies not in the image of apples, cherries, oranges, and sevens, but in the inability of many to leave the stimulation, the harm of seeing the targeted content may lie not in the words or meaning, but in what potentiality it interrupts.

One of the biggest impacts of social media may be on sleep and how sleep deprivation impacts cognitive and social emotional functioning.[26]

While some studies try to disentangle these impacts, Teenage mental health cannot be experimented on as a matter of law,[27] and should not be experimented on as a matter of ethics. Therefore, in as much as one hypothesis is that social media use *causes* depression, and *causes* suicidality, the direct causal link will be extremely hard to prove what aspects cause what. To make the kind of causal claim that is made in, eg, the Federal Drug Administration context, one would need to run repeated experiments on slightly older young adults, and isolate the variables. Since there are multiple variables, and social media is not uniform, nor uniformly digested, even designing such an experiment would be extremely difficult. If you removed only Facebook, but allowed TikTok, at the precise same prior level, and we saw no change, would that be a meaningful experiment on impacts? This leads to the third problem, which is that the more plausible, powerful explanatory argument is not that individual doses of Snapchat impact individual teens, but that the social environment caused by the ubiquity of social media itself causes depression.

The "dose" problem pervades the health approach to the topic. As Haidt argues, "nearly all of the research… have treated social media as if it were like sugar consumption. The basic question has been: how sick do individuals get as a function of how much sugar they consume? … our objective is to know the size of the 'dose-response relationship.'"[28] Social media is different from even most network effects in health, because it transforms social life for everyone, even for those who don't use social media, whereas sugar consumption just harms the consumer of sugar. Haidt uses the example of a young teen being given a phone and Instagram in an environment with no such phones. She would have to be forced to use it, because none of her friends were using it; the draw is her other friends. The experiment is unrunnable. And the opposite experiment is equally untenable; an early teen being forced to withdraw from social media would be tantamount to a withdrawal from social life and thedevice. In effect,

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[24] Add cite.

[25] *See* Richard B. Lopez and Isabel Polletta, *Regulating Self-Image on Instagram: Links Between Social Anxiety, Instagram Contingent Self-Worth, and Content Control Behaviors*, 21 Front Psychol. 1 (2021).

[26] Add cite.

[27] *See* 45 CFR § 46.408.

[28] Jonathan Haidt, *Social Media is a Major Cause of the Mental Illness Epidemic in Teen Girls. Here's the Evidence.*, After Babel (Feb. 22, 2023), https://www.afterbabel.com/p/social-media-mental-illness-epidemic.

"[c]hildhood has been rewired—it has become phone-based—and rates of anxiety and depression are soaring."[29] A 13 year old "out of the loop and socially isolated" could actually radically decrease her mental health significantly, and "we might even find that the non-users are *more* depressed and anxious than the moderate users (which some studies do find, known as the Goldilocks effect."[30] Social media thereby is harder to measure, while simultaneously creating both a real and perceived collection action problem for parents, because they cannot limit use without cutting off sociability itself.

There is also causation evidence from internal whistleblowers, former employees of big tech companies who report that the companies have internal information showing cause, and fail to act on it. Tristan Harris, a former Facebook engineer, quit the company to publicly describe how engineers were attempting to compete with sleep in teenage lives, using the fear of missing out and other negative emotions to keep children online.[31] In 2021, former Facebook employee Frances Haugen, who had worked at the election interference unit inside Facebook, leaked internal documents from Facebook, showing how much Facebook knew about the impacts of the way in which the platform operated on mental health. The internal documents from Facebook showed that itwas selling advertisers access to young people who were feeling, according to Facebook, "worthless," "insecure," "defeated," "anxious," "silly," "useless," "stupid," "overwhelmed," "stressed," and "a failure."

Her public testimony focused on how Facebook prioritized profit over user safety, and how internal research found extremely negative impacts of Instagram on teenage girls. One study showed that 17% of UK teenage girls say Instagram use worsens eating disorder. An internal study showed that 13.5% of teen girls in the United Kingdom said that Instagram caused suicidal thoughts. A third of girls, and a sixth of boys, reported lower self image and body image because of Instagram use[32]

In 2023, another whistleblower came forward, with a new set of documents. His testimony built on that of Haugen, and he testified that he repeatedly interacted with top executives at Meta, at both Facebook and Instagram, asking for action related to harmful experiences of teenagers.

He testified that while Meta claims to be interested in addressing harm, they have a "very narrow definition of harm."[33] He was particularly focused on ways that discrete groups experienced significant harms, that Meta was aware of, but because harm was defined in terms of overall impact, not discrete impact, the business behavior didn't change. He testified to correspondence with CEO Mark Zuckerberg, then-COO Sheryl Sandberg and Instagram CEO Adam Mosseri, showing that top leadership at Facebook was hostile to changes that would protect children. One of the surveys that he shared showed that 13% of teen instagram users had received unwanted sexual advances within the last week, 26% had witnessed identity-based discrimination, and 20% felt worse about themselves after using the service.

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[29] *Id.*

[30] https://journals.sagepub.com/doi/full/10.1177/0956797616678438

[31] See Nicholas Thompson, Our Minds Have Been Hijacked by Our Phones. Tristan Harris Wants to Rescue Them, Wired.com (July 26, 2017, 4:31 PM), https://www.wired.com/story/our-minds-have-been-hijacked-by-our-phones-tristan-harris-wants-to-rescue-them/.

[32] Facebook Files (see also Jeff Hauser's book by the same name.

[33] Lauren Feiner, Meta Failed to Act to Protect Teens, Second Whistleblower Testifies, CNBC (Nov. 7, 2023, 2:29PM), https://www.cnbc.com/2023/11/07/meta-failed-to-act-to-protect-teens-second-whistleblower-testifies.html.

The other piece of evidence is the logic of incentive and opportunity. We know that platforms are A/B tested to maximize user lock-in, what we might think of as addiction. They are testing different uses of targeted algorithms, and different uses of notification. While we don't have direct, experimental evidence that algorithms themselves, or notifications themselves, are the causes of harm, there is good reason to think that they would be the causes, because they are the heart of so much experimentation.

Democratic/education harms

Even critics of state power frequently do so by calling on the fundamentally public nature of the platforms.[34] When we think about the nature of the harm–both as a catalyst for action action and as a justification for a potentially closely scrutinized law–it is important to broaden the lens beyond public health. Depression itself poses a democratic problem:it dulls interest in politics, and anxiety disables open engagement in politics. At the same time there are other, more difficult to quantify, democratic repercussions. There is, for instance, the impact on information retention, learning, and the ability to focus, which is tied to extensive smartphone use. We are just now broaching the surface to understand the far-reaching consequences that social media addiction may have on democratic participation and informed decision-making.

Unlike the smoking or video games debate, social media is bound up in American pedagogy, because the platforms are also the most significant educators in America— the only shared ones, and for most children over 10, learn as much or more from social media than from any other source, including parents and school.

Another democratic harm derives from race-correlative differential treatment. Social media and smartphone use is uniquely harmful to teenagers of color, because of discriminatory over surveillance, discriminatory exclusion, and discriminatory predation. Children of color "may be at an even greater risk [of encountering harmful content online], as they spend more time online compared to their White peers."[35] It is not surprising that recent research by the Brookings Foundation showed that over 90% of Latino parents–whose children spend more time than white children online–support regulating the addictive features of tech overwhelmingly.[36]

And finally, there is the harm of loneliness and isolation, harms that may impact the body politic whether or not they impact individuals through suffering. They are not dissimilar to the frequent sci-fi imagining drug which makes everyone happy but disconnected. Add to that concerns about radicalization and conspiracy theories, or concerns about fundamental distrust of news sources, or concerns about entertainment displacing news. Not sure how deep I want to go here, but I do want to spend some time talking about the freestanding harm of receiving different facts in different time sequences, to be literally out of step with others, the heartbeats of life disconnected over both time and space and by big data.

Discriminatory algorithms create alternative realities that fragment the common ground shared by individuals. They create tiny echo chambers, not of community, but of the self, encouraging unhealthy narcissism, and displacing shared, public news with targeted commentary.

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[34] See, eg, Knight foundation brief, Grimmelman Scholars brief.

[35] Melany Amarikwa, Note, *Social Media Platforms' Reckoning: The Harmful Impact of TikTok's Algorithm on People of Color*, 29 RICH. J.L. & TECH. 69 (2023).

[36] Latino Parents Support Policies Addressing Social Medias Impact on Children's Mental Health https://www.brookings.edu/articles/latino-parents-support-policies-addressing-social-medias-impact-on-childrens-mental-health/

They replace public, critical engagement with individualized "content" and disintegrate both the town square and the child's own important role in it. In other words, the impact of targeted content, in particular, like surveillance wages or surveillance prices, doesn't just amplify extremism, or create bubbles of belief (both of models build on visions of community, however problematic), but wholly reshapes politics, how it is encountered, how it is processed, in an atomistic way.

III. Frameworks of Regulation

If we think of regulators as those who control, in a non-negotiable way, the shape of life, in a teenage life, there are four primary regulators: the parent, social media platforms, the state as embodied in the school, and the state outside of school. There are now over a dozen different pieces of legislation that have been proposed, and many copycat bills that take elements of the initial ones and mix and match them. In these laws, and in the growing number of liability lawsuits, patterns have started to emerge, representing different implicit conceptual frameworks for the regulatory model. Crudely put, four different visions of the appropriate interaction between teenagers and social media are embodied in these approaches.

The first, and (initially) dominant framework, which lends its name to this paper, represents social platforms as fiduciaries, who should play quasi-parental or school-like roles in the regulation of teenage time, emotion, and relationships. The second framework, to which I am partial, regards social media as presenting a set of public health harms, similar to cigarettes or gambling. This approach puts the regulatory relationship in the consumer protection bucket, which helpfully demands *the least* specification in defining a teenager's constitutional status, is the easiest to enforce, and is the least susceptible to constitutional challenge. Third, the parental paradigm emphasizes the role of the state and society in enhancing the parental capacity to fulfill obligations to their children. This framework uses regulation to technologically strengthen the parental role by mandating parents access to teen online interactions. Finally, there's a robust defense of a private regulation framework, that could be called neoliberal or libertarian, that is best represented by civil liberties organizations. This paradigm sits between two distinct frameworks: the belief that the teen is the best regulator (as opposed to parent or state), and the idea that the private market is the best regulator (as opposed to parent or state). This approach, embraced by, for instance, the Electronic Frontier Foundation and the ACLU, supports teenagers having maximal rights as against both parents and the state, and platforms having maximal rights as against the state.

I will address each in turn. As this paper is in flux, and intersects with many different areas of study, I am eager to gain insights from my colleagues about how to strengthen and test these frameworks.

A. The Fiduciary Framework

Fiduciaries are agents who act on behalf of another and are obligated to act in that party's best interests. This duty arises from a unique position of confidence, authority, or sway. Fiduciaries include trustees and their beneficiaries, corporate leaders and their investors, or executors handling a will. The role is traditionally understood to arise from the inherent structure of these relationships. They're built on a foundation where information doesn't flow freely in

both directions, where the capacity to monitor self-serving behavior is limited, and where discretion is a necessary feature of the relationship.

Given the towering position of influence and control that social media companies exercise over children, it is not surprising that the fiduciary model appeals as a regulatory framework. There's an asymmetry of information: platforms operate vast, opaque algorithms and data analytics against the profound need of teenage users to connect with each other. The platforms exercise enormous discretion, in an ongoing way, arguably similar to the fiduciary's management of assets. Teenagers, by function of their age in part, but primarily by function the data power relationship are wholly incapable of overseeing or dictating the actions of TikTok or YouTube, and are therefore wholly dependent.

And so one approach to the social media crisis has been lawmakers attempting to superimpose fiduciary obligations on these social media operators. The traditional triad of fiduciary obligations–care, confidentiality, and loyalty–are imposed on platforms as they are on lawyers, realtors, and doctors. As Jack Balkin argued in a related context, "The law recognizes fiduciary relationships for precisely these kinds of situations. In general, the law looks to whether the stronger party has issued an implicit or explicit invitation to trust that the weaker party has accepted."[37]

The first American law of this kind was passed in 2022, when California passed the California Age Appropriate Design Code Act (AADC), with a requirement that platforms keep "the best interests of children" at heart (among other provisions).[38] It requires platforms to put children's interests ahead of commercial interests where there is a conflict.[39] Mirror AADCs have been passed in Maryland, and introduced in Minnesota, New Mexico, Illinois, Vermont and Hawaii. Advocates and lawmakers celebrate the laws in fiduciary terms.[40] As the Center for Humane Tech argues, the AADC means there is a fiduciary obligation to minors, and that, in turn, means that "if a conflict of interest arises between what is best for the platform and what is best for a user under 18, the child's best interest must come first."[41]

Besides the appeal of the fiduciary/best interest theory, these laws were inspired by UK's Age Appropriate Design Code. When the UK AADC was passed in 2021, it was quickly heralded as the gold standard. It was rooted in the United Nations Convention on the Child, and required "the best interests of the child" to be a primary consideration in the design of online services. Among other principles, it required that platforms not use children's data in ways that are proven detrimental to their wellbeing, and that they collect the minimal amount of personal data from the child needed.[42] When it was passed, the platforms responded with some design

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[37] Jack Balkin, The Fiduciary Model of Privacy, 133 Harvard Law Review Forum (2022) https://harvardlawreview.org/forum/vol-133/the-fiduciary-model-of-privacy/

[38] Given the language, one *could* see this

[39] Text of California's AADC https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2273

[40] See, Eg,Brian Schatz talking about the fiduciary obligation https://www.theverge.com/24054658/senator-brian-schatz-congress-kosa-first-amendment-regulation-decoder-interview

[41] https://www.humanetech.com/insights/why-the-california-age-appropriate-design-code-is-groundbreaking#:~:text=Most%20importantly%2C%20the%20CA%20Kids,best%20interest%20must%20come%20first.

[42] *Age appropriate design: a code of practice for online services*, INFO. COMM'RS OFFICE (2021), https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/childrens-information/childrens-code-guidance-and-resources/age-appropriate-design-a-code-of-practice-for-online-services/.

changes: Meta limited targeting based on age, gender, and location for under 18-year olds, and launched "take a break" features. YouTube turned off autoplay by default and turned on "take a break" features by default for under 18 year olds. TikTok changed its privacy settings for under 16 year olds.[43] It has not led to much in the way of complaints, although some have begun (litigation against TikTok for abuse of children's data has centered around GDPR-compliance instead of the AADC).[44]

Another reason for the fiduciary/best interest appeal is the shocking revelations of whistleblowers, and the resultant desire to grant dissidents within big tech companies power in conflict with management. The fiduciary duty is imagined as an internal tool, a weapon for ethical engineers to wield in debates with management. Haugens' testimony was largely about revelation, not policy, but it also pointed in certain policy directions: she suggested that transparency about the decisions Facebook was making were critical and encouraged Congress to create tools that could be used by engineers who were pushing for different internal decision making on different particular kinds of content.

The discussion on the Daily with Sheera Frankel of the New York Times after the testimony points to this, in the context of Covid "misinformation":

> Well, if you're a Facebook engineer — and I spoke to one Facebook engineer late last night who was like, yes, please. This is what I want. This is what I've been asking my managers for. Let's do what we say we're going to do and let them hold us accountable. I think there are actually a lot of people inside Facebook that are hoping that's what happens.[45]

In other words, the AADC legal intervention is imagined to as a tool to wield at a time of internal disagreement, where one party wants to turn down the dial on something inflammatory, or false, or potentially harmful to children, and they are being overturned by a higher up manager.

Finally, there is the appeal of the moral thrust of the fiduciary model, as well as the desire to create a framework, instead of just specific prohibitions. The structure of the fiduciary

[43] Elizabeth Denham CBE & Steve Wood, *Children's privacy laws and freedom of expression: Lessons from the UK Age-Appropriate Design Code*, IAPP (Nov. 13, 2023), https://iapp.org/news/a/childrens-privacy-laws-and-freedom-of-expression-lessons-from-the-uk-age-appropriate-design-code/.

[44] The first complaint appears to have been filed a year ago, to the UK's Information Commissioner's Office: a father of three young children claimed YouTube for unlawfully processing the personal data of children under the age of 13. *First complaint to the ICO filed against YouTube under the Children's Code*, HAUSFELD: FOR THE CHALLENGE (Mar. 1, 2023), https://www.hausfeld.com/en-gb/news/first-complaint-to-the-ico-filed-against-youtube-under-the-children-s-code/.; The UK's Information Commissioner's Office fined TikTok £12,700,000 in 2023 for allowing up to 1.4 million UK children under age 13 to use its platform between 2018 and 2020, despite its rules about now allowing children of that age to create an account, under the GDPR. *ICO fines TikTok £12.7 million for misusing children's data,* ICO (Apr. 4, 2023), https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2023/04/ico-fines-tiktok-127-million-for-misusing-children-s-data/.

[45] Transcript of The Daily, October 6, 2021, with Frances Haugen, The New York Times https://www.nytimes.com/2021/10/06/podcasts/the-daily/facebook-whistleblower-frances-haugen.html?showTranscript=1

relationship suggests one where one party entrusts another, and then they violate that trust in immoral ways, and the anger that so many understandably feel at the exploitative relationship seems well expressed in the duty framework. As imagined, the fiduciary obligation would be sufficient to encompass future techniques, not just present ones, and so not require the updating that a series of technique bans might. However, when it comes to implementation, the fiduciary model has significant challenges, some practical, and some constitutional.

a. Practical Challenges

The best interest of the child language is at first jarring. In American law, the best interests of the child standard is typically used in custody disputes between two parents, where courts have to adjudicate between competing visions. Since that context does not make sense for social media, it appears that the "best interests of the child" is a stand in for the duties of loyalty, care, and confidentiality, the traditional fiduciary triad. This fits with the "best interests of the child" language from the international convention of the child, which requires that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." The closest analogy in American law appears to be the duty of loyalty in fiduciary law, which requires the fiduciary to put the principal's interest before that of the fiduciary when there is a conflict.

The first practical challenge is defining when a conflict exists. Unlike in the typical pediatric, governmental or agency context, there is not one child to whom a duty is owed, but millions of principals; certain designs can be both beneficial and detrimental to a subset of those principals, and to any given principal at any given time.

To take a crude example, imagine TikTok doubles its average notifications to children, in response to A/B testing that children liked having more notifications, based on uptake and surveys. TikTok also sees that more notifications means 20 more minutes a day online on average, and knows, in general, that more time online is bad for children's mental health. Is this a standalone violation of the duty of loyalty? In some ways, it seems to fall squarely within the vision of the statute, but litigating it seems extremely difficult in the absence of internal documents showing that the company explicitly chose profits over wellbeing. TikTok could argue that it finds that children like more notifications, or like those specific notifications. Proof that it constituted a violation would require winning expert battles about impact, models of harm, and would easily run into the millions, given the cost of experts, and take several years. The litigation would be particularly vexed because of the mixed evidence on social media; while it harms many children, there will often be subsets of children who are in fact helped. Inasmuch as the fiduciary obligation is understood individually, would it amplify the justification for discriminatory treatment, tailoring duties to individual children? The platforms already argue that algorithmic targeting is necessary to protect individual children, and it is easy to imagine them pushing the same response in litigation.

The appeal of the fiduciary model does not appear to have sprung out of academic arguments for a "fiduciary" model for the privacy law of platforms, but reflects many of the same tensions–and amplifies them. The initial idea for the platform as an information fiduciary is over 30 years old.[46] Professor Jack Balkin took the idea, and explored it in the mid-2010s. Balkin argued that the platforms should be treated as "information fiduciaries" because they have

[46] See Kenneth Lauden

taken on the fiduciary obligations by the nature of the intimate and sensitive information they receive from their users. He focused on the naturally dependent and vulnerable relationship between platform users and platforms, and the ways in which platforms have profound asymmetries of power, because they know what they collect, what it is worth, and how it is used, while users have none of that access. The asymmetry of information, and the asymmetry of control add to the asymmetry of power. Moreover, he explored how tech platforms describe themselves and offer themselves to the public as trustworthy, insisting on their power to protect our data and wellbeing.[47]

Even in his advocacy, he recognized that it might be seen as a second-best, but a bargain that would bring the big platforms to the table, and allow for joining private profit making and privacy needs, while satisfying the demands of the First Amendment. Or, as Jonathan Zittrain argues, it allows for shifting legal incentives without "heavy handed regulations" that might run afoul of both law and creativity.[48] The most powerful critique of the model came from David Pozen and Lina Khan, who argued in the *Harvard Law Review* that the information fiduciary model was conceptually and foundationally flawed, because the business model of advertising is irreconcilable with the fiduciary obligation.[49] Unlike a Doctor, who has a core obligation to a patient and is paid by that patient, the financial interest of platforms is maintaining people on the platform for as long as possible, and doing so is in tension with the interests of the users. As a result, while "a small fraction" of the problems of online platforms could be addressed with this model, the result of a fiduciary model would be the occasional lawsuit and the fundamental harm continuing.

In short, the responsibility to put the best interests of children first proves too much or too little; it could either shut the companies down all together or end up doing little to stop core business practices. As I explain in the next section, the shadow of constitutional challenge means that it is more likely that courts will tend towards too little.

Teenagers have never had their lives so closely directed in a minute-by-minute way, not even by parents. More than a third of American 13 to 17 year olds self-report that they use social media "almost constantly," with almost all teenagers reporting some usage.[50] The four social media companies that they are on most often: TikTok, Instagram, SnapChat, and Youtube build mathematical models of each teenager and then select content for them. The regulation is far more intimate than the regulation of a private company choosing to keep certain images out of the packaging for 14-year-old directed toys, because it is designed to respond to and elicit emotional reactions on an individualized scale. Even if the teenagers choose only search, and do not follow the feed prescribed by the platforms, the search itself is also designed to respond to their mathematical portrait, and to elicit responses. The regulation continues even if they are "off app." Companies track teenagers across the internet, their physical movements, and their social connections, and use that for the in-app interactions they dictate.

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[47] See, E.g., Jack Balkin, The Fiduciary Model of Privacy
https://harvardlawreview.org/forum/vol-133/the-fiduciary-model-of-privacy/

[48] Jonathan Zittrain, How to Exercise the Power You Didn't Ask For, HARV. BUS. REV. (Sept. 19, 2018), https://hbr.org/2018/09/how-to-exercise-the-power-you-didnt-ask-for

[49] David Pozen, Lina Khan, A Skeptical View of Information Fiduciaries, Harvard Law Review 133 HARV. L. REV. 497 (2019)
https://harvardlawreview.org/print/vol-133/a-skeptical-view-of-information-fiduciaries/#:~:text=This%20Article%20seeks%20to%20disrupt,capacity%20to%20resolve%20them%20satisfactorily.

[50] https://www.cnn.com/2023/05/23/health/social-media-kids-surgeon-general-advisory-wellness/index.html

Would a true "best interest" model then profile each child and make inverse minority report guesses about how to help them achieve confidence and social success? There is no clear fit between the strongest version of the duty and the platform context

b. Constitutional Challenges

The second challenge with the fiduciary model is constitutional. The fiduciary premise and the free speech principles make extremely awkward bedfellows. A doctor has an obligation to put the interests of the patient first, and that can lead to speech-forcing and speech-suppressing requirements. For instance, if a Doctor believes, on balance, that it is better to give a sexually active woman birth control than not, knowing as she knows that on average it improves lives and prevents unwanted pregnancies, she still has an obligation to share any side effects of that birth control, and failure to do so is a violation of the fiduciary relationship. If she believes that vaccines cause infertility, even though the science does not back that up, she cannot share that view. However, that kind of speech-monitoring via a fiduciary obligation is not generally understood as problematic for the First Amendment.[51]

Inasmuch as we see parents as fiduciaries,[52] the parent has the obligation to put the best interests of the child first, and that necessarily includes a huge range of questions around religion, relationships, morality, and political views. Yet the state enforcement of the fiduciary obligation is limited because of the special need for parental/child closeness; while it exists in theory, it carefully guards the independent right of parents to express and enforce whatever ideological system they may have. The substantial scope of the relationship, the high value the state puts on preserving that relationship even in the face of recognizable harm, and the difficulty of using the fiduciary tool to monitor parental treatment, has led to the fiduciary relationship of parent and child to be enforced in a relatively small scope that does not reach free speech issues: physical care, for instance.

When the fiduciary relationship is transposed onto platforms, as regards children, the speech questions are far more difficult. Does a platform have an obligation *not* to share pro-Anorexic content? Not to share images of skinny girls? Not to push in-group gossip that a data model might suggest is highly compelling to an out-group teen? Not to share details on how to hide cutting or other self-harming from parents? If we apply the parental fiduciary framework, and see platforms as standing in for parents, with no greater obligations than a parent would have, the answer is clearly no: parents have broad latitude to share potential harmful content with their children. If we apply the doctor-like fiduciary relationship, the answer is the opposite, but the obligations are so constraining that there is little that the platform could share at all. Given the range of options, Courts would be more likely to find something approaching non-existent speech amplifying or speech suppressing obligations. There could be a rare instance where an executive says, "children be damned, I want to be rich!" but outside those instances, the duty would do very little.

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[51] *See* Claudia E. Haupt, *The Limits of Professional Speech*, 128 Yale L.J.F. 185, 189-193 (2018) ("Fiduciary duties address the knowledge asymmetries between professionals and their clients or patients, creating duties of loyalty and care. The patient, for example, entrusts the doctor with providing guidance regarding their health decisions. In return, the doctor must act in the patient's best interests according to the knowledge of the profession. Thus, professional speech is unlike speech in public discourse, where fiduciary duties between speakers ordinarily do not exist.") (citations omitted). Is it? Haven't found the article on fiduciary/speech conflict, but I'm eager to find it! (Check out Sean Griffiths' work… Nebraska? L reve

[52] Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).

So let us assume that the fiduciary obligations apply only to design, not to speech: there, the constitutional questions live in the shadow of the forthcoming Netchoice decision (see below). The Court in *Netchoice* will likely give strong signals that will help determine the nature of the First Amendment issues. Do platform users have a *Citizens United*-like right to hear, a "right" to receive notifications, and to be targeted? Do platforms themselves have expressive rights to organize information in certain ways? *Netchoice* may not directly decide these issues, but it will illuminate the Court's current thinking.

Opponents of the laws argue that they will lead to direct speech regulation, by requiring platforms to monitor what kinds of content (climate disasters? Gaza?) lead to more depressive emotional states. Proponents argue that it would only apply to design features, not to any content features. These are not trivial questions, given that they flow directly from the testimony of Frances Haugen and others: If Tiktok sees that body image content is having a profound negative impact on the well-being of girls, does it have an obligation only to not promote that to girls, can it parse by those girls who it thinks will not be impacted? And is suppressing body image related content a viewpoint based speech suppression that favors one viewpoint (anorexia is bad) over another (anorexia is good)?[53]

My suspicion is that the opponents of the laws are as exaggerated as the proponents in imagining its effects, and that courts will interpret the laws in relatively weak ways. Both constitutional avoidance, and the insistence of sponsors that these are design-only laws, not speech codes, will lead courts to interpret them as narrowly as possible, only impacting the most egregious forms of new techniques – perhaps like Snapstreak, the Snapchat prompt that encourages getting online and messaging at least once a day, for its own sake–and doing very little about the general purpose harms of social media.

B. Duty of Care–Stripped down Fiduciary, or Negligence?

Duty of care, or of reasonable care, is a variation that is worth spending a moment on, because it is the centerpiece of KOSA (the Kids Online Safety Act), the federal law with support from over 60 Senators. The duty of care shows up in two areas in law: in fiduciary law, and in negligence law. Inasmuch as KOSA is merely calling on negligence law, **it might, in the outlier case, add a little punch to a freestanding state law negligence claim.** However, it seems more likely that it is a stripped down version of fiduciary law, having dropped the duty of loyalty.

The particular duty of care in KOSA is that it requires reasonable care in the design and implementation of any feature that "encourage[s] or increase[s] the frequency, time spent, or activity of minors on the covered platforms," including but not limited to "infinite scrolling or auto play, rewards for time spent, notifications, personalized recommendation systems, in-game purchases, or appearance altering features."

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[53] Opponents are also concerned that state enforcers who see the proliferation of content that, eg, promotes medical interventions, would threaten to prosecute for those interventions that they believed are mutilations, whereas in states with the opposite view, the enforcers would enforce or threaten to enforce if there was negative content about child medical interventions. (The fears on this are less about speech, generally, and more about particular kinds of speech). This category of concern is almost exclusively focused on the highly contested issues of medical care related to gender identity. There is also a desire to enable promotion of content given that the feeds are algorithmically ordered. They are particularly concerned that the Child Sexual Abuse materials ban would lead to the suppression of content that could help children out of abusive situations.

Let's start with the fiduciary option. Of the triad of fiduciary duties, the weakest is the duty of care. KOSA started with "best interest but shifting to "duty of reasonable care" to minors.[54] Even as it moved away from "best interests" language (and into something sounding more like tort law) the model seems to be an effort to shift quasi-parental obligations to the platforms, to require them to think like caretakers instead of for-profit companies.[55] The duty of care standalone is particularly weak in fiduciary law.[56] In other contexts is that it is a thin legal reed, not a duty on which many obligations can be hung. In corporate law, the duty of care is so weak that it is taught, but sometimes treated as approaching non-existence.[57] [58]

The other option is that the duty of reasonable care is a version of negligence law. The additional KOSA language of mitigation and reasonable measures, suggests that it might. If it is a version of negligence law, the question is what work it does beyond state law negligence claims. Like state law negligence claims, there are several suggestions that platforms could rely on industry standards, a commonplace defense in tort law, to avoid liability. Reasonable measures, for instance, are used to analyze whether a doctor, or construction company, took appropriate steps to protect against foreseeable harm, and in determining reasonable standards, courts will look to what is the general practice of an industry. But in the case of social media, where industry standards are maximal legal information gathering, and maximal engagement, with a few community rules, looking to standards may not be particularly helpful.

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[54] 5 Rights Foundation
https://5rightsfoundation.com/in-action/momentum-for-children-s-privacy-and-safety-continues-to-build-in-the-us.html Earlier draft text: PREVENTION OF HARM TO MINORS.—A covered platform **shall act in the best interests of a user that the platform knows or reasonably should know is a minor by taking reasonable measures in its design and operation of products and services to prevent and mitigate the following:**

> (1) Consistent with evidence-informed medical information, the following mental health disorders: anxiety, depression, eating disorders, substance use disorders, and suicidal behaviors. (2) Patterns of use that indicate or encourage addiction-like behaviors. (3) Physical violence, online bullying, and harassment of minors. (4) Sexual exploitation and abuse. (5) Promotion and marketing of narcotic drugs (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), tobacco products, gambling, or alcohol. (6) Predatory, unfair, or deceptive marketing practices, or other financial harms; (b) LIMITATION.—Nothing in subsection (a) shall be construed to require a covered platform to prevent or preclude— (1) any minor from deliberately and independently searching for, or specifically requesting, content; or (2) the covered platform or individuals on the platform from providing resources for the prevention or mitigation of suicidal behaviors, substance use, and other harms, including evidence-informed information and clinical resources.

[55] Other states, like Connecticut, have adopted a "duty of care" obligation for platforms to children.

[56] Matthew P. Bergman, *Assaulting the Citadel of Section 230 Immunity: Products Liability, Social Media, and the Youth Mental Health Crisis*, 26 LEWIS & CLARK L. REV. 1159 (2023) (KOSA will "do very little to create enduring economic incentives for companies to proactively research and design safer products.")

[57] *See, e.g.,* Dennis Block et al, The Business Judgment Rule Fiduciary Duties of Corporate Directors (1998). The weakness of the duty of care has been recognized since the 1960s (see Joseph W. Bishop, *Sitting Ducks and Decoy Duck- New Trends in the Identification of Corporate Directors and Officers,* 77 YALE L.J. 1078, 1099-1100 (1968)), and even defendants of the duty of care celebrate how narrow it is. See Julian Velasco, A Defense of the Corporate Law Duty of Care, 40 J. Corp. L. 647 (2015).

[58] **I'm treating KOSA as a shrunken fiduciary duty instead of a tort duty of care but the language shift suggests that there may be some effort to move this into a negligence bill–curious about the history of industry-specific negligence bills. (Ben?)**

The recently passed Maryland law uses the "best interest of the child" as the starting off point, but then modified it to be an obligation to serve the "best interest of children".[59] The "Best interests of the children" is defined to include that which causes "reasonably foreseeable and material physical or mental harm" and "severe and reasonably foreseeable psychological harm." to children. Maryland forbids covered platforms from processing children's data in a way that would cause such harm. As it stands, then the law uses fiduciary language but then defines it in something more like negligence terms, although **it is not clear where and how this differs from the negligence standard.**

The deeper concern with KOSAs duty of care is that it pairs a general duty with specific prohibitions. This may serve to insulate currently damaging features from regulation, and could even preempt state laws. KOSA creates a opt out default for recommender systems, while also creating a fiduciary obligation, the law appears to endorse recommender systems as presumptively not harmful.[60] KOSA indicates that platforms must bring a duty of care to the design and implementation of, inter alia, infinite scroll and rewards for time spent online. The statutory acknowledgments of these reward systems indicate that the statute blesses them generally, and would only prohibit egregious versions of them.[61]

It is not unlike telling alcohol companies that they have a duty of care to minors, and should take reasonable measures to design alcohol advertisements to minors with the child's best interest in mind. Such a law would not allow anything, but would implicitly allow for, say, Dewars advertising to children, and perhaps require that Dewars include warning about addiction in its Cub Scout advertisements.

C. The Consumer Protection Framework

The consumer protection framework, which has moved to the forefront of new proposals, treats social media more like cars and like other harmful technologies, and either through empowering regulators, or through specific bans, identifies particular technologies that cannot be used. As such, it falls within the frame of most safety laws, which require either an unwaivable default (like front-seat seatbelts), or a waivable default (like backseat seatbelts).[62]

The platforms "actively control, promote, and arrange content to generate profits" and "design their products in ways that cause their users to engage in detrimental behaviors" [63] The

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[59] Passed April 2024 https://mgaleg.maryland.gov/2024RS/bills/sb/sb0571t.pdf ("the child" has been replaced with "children").

[60] Other aspect of the legislation has similar limitations, derived from similar problems: Section 5, which requires platforms to default to the highest level of privacy that is offered by the platform is circular; it does not demand a particularly high level of privacy to be offered, merely that minors get whatever the most restrictive option is. So if TikTok has no least restrictive option, and Facebook has a more restrictive least restrictive option, Facebook will be held to violate the law with a far less intrusive use of data than Tiktok.

[61] https://www.blumenthal.senate.gov/imo/media/doc/21424kosabilltext.pdf

[62] See Elixabeth Jaffe, "Algorithms, Filters, and Anonymous Messaging: The Addictive Dark Side of Social Media" (2023) Elizabeth Jaffe uses a consumer welfare framework to explore the harm and argues that the private right of action in state laws may be among their most important tools.

[63] Nancy S. Kim, *Beyond Section 230 Liability for Facebook*, 96 ST. JOHN'S L. REV. 353 (2022).

consumer protection framework focuses exclusively on specific harmful designs, and prohibits them because they are unsafe.

For instance, New York's proposed SAFE for Kids Act,[64] grounds itself in rules against specific tools. It prohibits the use of feeds which target content to users based on any personally identifiable information (broadly defined) without parental consent. It requires parental consent before a platform can send notifications to children between 12 AM and 6 AM. It makes sure that the platforms cannot withhold their services because the parents don't provide consent to either of these features. Finally, it requires platforms to offer a service where parents can limit the overall number of hours a minor can use, and can opt out of access between 12 and 6 AM.[65]

Florida also recently passed a law banning access to children under the age of forteen from using social media. The "function" it bans is social media, not sub-functions of social media like algorithmic targeting. HB 3 requires that social media platforms prohibit those under 14 from creating accounts.

The consumer protection framework also encompasses the social media lawsuits that are ongoing, brought on the grounds of negligence and products liability. For instance, in *Lemmon v. Snap*, three teenagers died while using Snapchat's "speed filter" feature, and the court concluded that liability arising from algorithms could be treated under the products liability doctrine.[66]

Many more lawsuits are popping up, but two are particularly important: a private consolidated lawsuit against Meta, Bytedance, Snap, and Google, on behalf of children who suffered personal injury. The suit alleges that the companies purposefully targeted and addicted children, designing their systems without reasonable protections and in defective ways.[67]

The legal claims included design defect, negligent design, general negligence, violation of unfair trade practices. Wrongful death, and violation of various federal statutes relating to protecting children from sexual solicitation and conduct. While the defendants claimed 230

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[64] SAFE FOR KIDS ACT https://www.nysenate.gov/legislation/bills/2023/S7694#:~:text=2023%2DS7694%20(ACTIVE)%20%2D%20Summary,platforms%3B%20establishes%20remedies%20and%20penalties.

[65] New York's companion bill, the Child Data Privacy Act, a bill prohibits any site from collecting, using, or selling personal information of any minor in the absence of either (a) strict necessity and (b) informed consent. It effectively outlaws commercialization of minor's data across the board, and makes clear that consent or necessity for one purpose does not mean consent or necessity for another purpose.

[66] Tyler Lisea, Comment, *Lemmon Leads the Way to Algorithm Liability: Navigating the Internet Immunity Labyrinth*, 50 PEPP. L. REV. 785 (2023). Much of Lemmon has to do with Section 230. Bergman compares the issue to the 19th century "privity doctrine," which shielded manufacturers from liability for defective products, and argues that like the privity doctrine, it should not only be abandoned, but be replaced with strict liability for mental health harms. Matthew P. Bergman, *Assaulting the Citadel of Section 230 Immunity: Products Liability, Social Media, and the Youth Mental Health Crisis*, 26 LEWIS & CLARK L. REV. 1159 (2023).

[67] The nine general factual allegations are:

(1) Defendants have targeted children as a core market.
(2) Children are uniquely susceptible to harm from Defendants' apps.
(3) Defendants designed their apps to attract and addict youth.
(4) Millions of kids use Defendants' products compulsively.
(5) Defendants' apps have created a youth mental health crisis.
(6) Defendants' defective products encourage dangerous "challenges."
(7) Defendants' defective social media apps facilitate and contribute to the sexual exploitation and sextortion of children, and the ongoing production and spread of child sex abuse material online.
(8) Defendants could have avoided harming Plaintiffs.
(9) Defendants consistently refer to and treat their apps as products.

immunity, a lack of duty and lack of products, the Court rejected those claims. The First Amendment claims were also largely rejected, as the Court found that a failure to provide screen time limitation and parental controls were design choices *not* protected by the First Amendment.[68]

The majority of states also recently brought a complaint against Meta,[69] claiming that the company has violated 53 state consumer protection laws.[70] The states also argue that Meta focuses on engagement to make profits, is aware of the harms it causes, and has failed to address those harms.

The consumer protection framework is substantially easier to enforce, and far less vulnerable to constitutional challenge. Because it does not target any particular content, but particular design features explicitly separated from content, the claim that it limits access to content is more attenuated. Because it does not require expert assessments of harm and mitigation, the cost of bringing an action lies simply in proving that an illegal, or unconsented to, design was allowed.

The peculiarity of some of the consumer protection laws lies in the consent mechanism, because if the logic is that algorithms are bad for children in the way that, say, cigarettes are bad for children, then consent seems incoherent. [More on this maybe?]

One of the great values of the consumer protection framework is that unlike the fiduciary duty, most consumer rules limit or ban things that have unquestionably great features. Some elements of social media (finding communities of similar interests or anxieties, learning about healthcare, finding music or art) are extremely positive. The same can be said for seesaws, the delight of my own childhood.[71] But a combination of litigation and federal regulation limited their use nonetheless; the presence of positive features does not undermine a consumer protection vision in the way it does a fiduciary vision.

The biggest challenge for consumer protection, and the reason that advocacy groups prefer the fiduciary model, is two fold. First, its closed nature: just as the fiduciary model seems to grandfather in existing tools, but speak to future designs, the consumer model may prohibit existing tool, but be unprepared for future developments. This is one reason that some states

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[68] *In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, No. 430 (Case No. 4:22-md-03047-YGR) (Nov. 14, 2023).

[69] Complaint, People of the State of California v. Meta Platforms, Inc., No. 1 (Case No. 4:23-cv-05448) (Oct. 24, 2023).

[70] The state laws include:
- Consumer Fraud laws (AZ, DE, IL, NJ, NY)
- False and Misleading Statements laws (CA, NY, OR)
- Unfair Competition/Trade laws (CA, CT, LA, MA, MN, OR, PA, SC)
- Deceptive Acts or Practices laws (CO, DE, GA, HI, IL, IN, KS, MO, NE, NY, NC, ND, OH, RI, WA, WI)
- Deceptive Consumer Sales laws (IN)
- Unconscionable Acts or Practices laws (KS, MN, NE, OH)
- General Consumer Protection laws (KY, MI, VA)

[71] The Downward Slide of the Seeway, The New York Times, November 11, 2016 https://www.nytimes.com/2016/12/11/nyregion/the-downward-slide-of-the-seesaw.html

have expanded consumer protection to any device that addicts, or has addictive features, so that the core harm of excessive time designs can be addressed. Unlike the viewpoint-adjacent prohibitions related to self harm, depression, and eating disorders, addiction seems to fall neatly within the long tradition of prohibiting gambling.

The closed nature of the consumer protection model is, however, fixable. KOSA grants rulemaking authority (and responsibility) to the Federal Trade Commission, and enhancing UDAP authority within states could do something similar. In many areas of public health regulation, like the environment, this approach may make sense, because it gives regulatory power to expert agencies to analyze new harms. Such an approach may also be useful for future new technologies that harm people.

D. The Enhanced Parental Framework

The parental regulatory role is well established. Rhetorically, they have broad responsibilities and broad rights, but their rights are far more legally powerful than their responsibilities. While parents are sometimes held up as the sine qua non of fiduciaries, the nature of the state government of their relationship is far less than the state monitoring of the fiduciary relationship of boards to shareholders, or of realtors to clients. Instead, the parental fiduciary obligation and the parental rights sit in theoretical tension with each other (the degree to which they sit in actual tension with each other is up for debate.

While parental rights can be limited when there is disagreement between parents, in harmonious parent-to-parent relationships, the parents have extensive rights to direct the wellbeing of their children, a right which is limited in only a few ways. They have the right to send their children to religious schooling, keep their child home for home schooling, refuse medical treatment (up to an extreme point), and set up whatever discipline system they desire. The Court has held that parents rights to direct the rearing of children is fundamental to our society.[72]

United States Supreme Court decisions "establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[73] Indeed, when confronted with a case involving parent and child, courts are required to give great weight to the sanctity for the relationships that develop within the unitary family.[74]

In a forthcoming article, Katharine Silbaugh & Adi Caplan-Bricker,[75] make the most explicit version of this argument, suggesting that there is a fractured and misunderstood family law that appears occasionally and in disconnected ways in the existing litigation around child social media. Recognizing the power of parental rights over minors and the underlying vision of what minors are in our constitutional framework, they argue that legislation should lean into the parental role and, in contrast, the unusual interloper role given social media companies, in their efforts. They support a "Parental Decision-Making Registry" that gives parents easy tools to opt

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[72] *Ginsberg v. New York,* 390 U.S. 629, 639 (1968). *Quilloin* v. *Walcott,* 434 U.S. 246, 255 (1978)("basic civil rights of man,") *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942) (more precious . . . than property rights." *May v. Anderson,* 345 U.S. 528, 533 (1953).

[73] *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 503 (1977) (plurality opinion).

[74] Michael H. *v. Gerald D.,* 491 U.S. 110, 123-24 (1989) (plurality opinion) (rejecting biological father's liberty interest for the historically recognized rights of the marital father).

[75] *Regulating Social Media Through Family Law*, Forthcoming U.C. Irvine L. Rev. (2024)

out of social media platforms. They see social media as interloper, representing an "unjustifiable and anomalous" access to minors outside the supervision of parents.[76]

The issue of parental consent is a hot button issue for some LGBTQ and civil liberties groups, who tend to see parents through the lens of hostility to free expression, including gender expression and sexuality. It is a key issue for many parents, deeply concerned that the absence of parents in highly sexualized spaces leaves girls especially unprotected from repeated, aggressive solicitations.

But as a matter of impact on the overall experience of social media, my biggest concern is that it will be limited. As Professor Takshid argues in the COPPA context, "parents themselves are not sufficiently aware of the potential harms of online activities and their technological complexities to be able to meaningfully consent to the on the behalf of their children."[77] Even more than parental waivers for tort liability are insufficient, parental waivers, or parental controls, are likely to do very little to change the overall shape of addictive experience.

E. Private Regulation

The big tech companies are inconsistent in the degree to which they publicly take ownership of the responsibility for harm. Sometimes they say they are addressing issues; other times they say that given the blend of good and ill, the responsibility to police lies solely with the parents. Mark Zuckerberg recently turned to a group of parents at a Congressional hearing and apologized.

However, in legal cases, they wholly endorse the private regulation framework for regulation: neither the state, nor parents empowered by the state, should be involved in regulating teen use of social media. The lead advocates for this vision are the tech companies themselves, of course, but also the ACLU, the Heritage Foundation, and several law professors. This is the view of the ACLU, Electronic Frontier Foundation, and other groups actively litigating and speaking about the proposed legislation.

Teenagers get almost all their news from social media, and social media is how they come together in groups, whether they be groups of gamers or groups of climate activists. Social media combines the tools of communication and connection in one place. The final vision of regulation is largely the status quo: teeangers have an absolute right to access that communication and connection; almost regulation of that right violates the first amendment rights of the teenagers, as listeners, consumers, and connectors, and the first amendment rights of the platforms, as the modern instantiation of the printing printing press.

Unlike the other visions, this framework is explicitly stated.[78] For instance, a group of tech trade associations and civil liberties advocates argued that California's AADC violates the First Amendment, because an online platform has a First Amendment right to make decisions on "which content to publish and how to curate it" and also by creating incentives for intermediaries

[76] Katharine Silbaugh & Adi Caplan-Bricker, *Regulating Social Media Through Family Law*, Forthcoming U.C. Irvine L. Rev. (2024)

[77] Zahra Takhshid, *Children's Digital Privacy and the Case Against Parental Consent*, 101 Tex. L. Rev. 1417 (2023)(COPPA's parental-consent requirement insufficient in protecting children's digital privacy esp in Ed tech).

[78] Some of the self-regulation approach comes from radical pessimism about legislative capacity. See, eg, Newton Minow & Martha Minow, arguing for self-regulation, *Social Media Companies Should Pursue Serious Self-Supervision — Soon: Response To Professors Douek And Kadri*, (2023)

to self-censor.[79] In this view, the First Amendment protects the rights to distribute speech, curate and distribute speech online, and receive speech, and that these rights all extend to minors. The AADC "effectively forbids a wide range of protected online communications or makes those communication fraught with legal peril"[80] Part of the *New York Times* brief in the AADC case (which was mainly concerned with how the definitions of website size impacted new orgs), also talked about the importance of children's involved in public affairs and their civic development, and how ability to "access online news content is necessary to participate in contemporary public life."[81]

Because so much of the discourse is legal, and cloaked in fear of content suppression, it can be harder to uncover the positive vision of the relationship between teenagers, social media, and state. It could reflect a view that people over 14 are fundamentally adult-like in their social capacities, or, if they are not, that they are at least superior to parents and the state in such decision-making.

The other defense of private regulation has less to do with the capacity of the teenager and more to do with the belief that market forces are institutionally preferable to the state in making choices about the technologies and tools of communication. Versions of this view showed up in many of the amici in a case in a different arena, *Netchoice v. Moody*, in which liberal supporters of the big tech companies First Amendment rights. Justice Kagan, at oral argument, echoed this perspective, arguing that the platforms largely do a good job in content moderation.

There are strong and weak versions of the private regulation model. The strong version is that private industry, influenced by market forces and the fear of embarrassment and scandal, will always be better at making decisions for what is best for teenagers. The weak form is legislation specific: the Knight Foundation purports to take the weak form, claiming that it does support forms of tech regulation, for instance (although it has yet to identify any laws that satisfy its standards.)[82]

The private regulation model for teenagers is, in many ways, a variation of the raging debate about the private regulation model for adults–and perhaps should be seen only as that.[83] As in that debate, the overriding problem is that the current corporate structuring of

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[79] Amici Curiae Brief of Chamber of Progress et al. in Support of Plaintiff's Motion for Preliminary Injunction, *LLC v. Bonta*, 2023 WL 6135551 (N.D. Cal. Sept. 18, 2023) (No. 22-cv-08861-BLF).(On the brief were the Chamber of Progress (a nonprofit trade group representing technology companies), IP Justice (a civil liberties organization that promotes internet freedom and innovation policy), and LGBT Tech Institute (a nonprofit that seeks to bridge technology gaps for LGBTQ individuals))(The brief also argues that the law's Data Protection Impact Assessments constitute prior restraints that violate the editorial discretion of the online services)

[80] Brief of *Amicus Curiae* Comput. & Commc'ns Indus. Ass'n, *LLC v. Bonta*, 2023 WL 6135551 (N.D. Cal. Sept. 18, 2023) (No. 22-cv-08861-BLF).

[81] Brief of the N.Y. Times Co. et al. as *Amici Curiae* in Support of Plaintiff, *LLC v. Bonta*, 2023 WL 6135551 (N.D. Cal. Sept. 18, 2023) (No. 22-cv-08861-BLF).

[82] Notes from conversation with Knight Foundation, need a better source.

[83] See, eg, Olivier Sylvain, *Platform Realism, Informational Inequality, and Section 230 Reform*, 131 YALE L. J. F. 475 (2022) (discussing the problematic incentives (holding consumer attention) that undermine the positive theory of the prevailing "laissez-faire" approach to content moderation.); Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45 (2020) (challenging settled fictions of modern platforms as open speech-enabling); Mark Kende, *Social Media, the First Amendment, and Democratic Dysfunction in the Trump Era*, 68 DRAKE L. REV. 273 (2020)(identifying the substantial democratic risks related to a libertarian First Amendment approach, including bias, polarization, conspiracy theories).

incentives–and the inability of market boycotts to meaningfully change behavior[84]-- means that the intimate information to keep young people addicted, and offering precise and invasive information to marketers.

IV. What is a Teenager?

Teenagers were invented as a public, separate, category in the 1940s,[85] but the liminal age between childhood and full adulthood has of course existed forever. In the United States, we largely think of teenagers as encompassing the six years between 12 to 18; the lower bound has, throughout history, been around the age of puberty, and the upper bound has ranged from 15 to 30.[86] Children have of course worked much younger than puberty, but throughout history, the time from puberty to full adulthood has been understood as a critically important developmental age, both in terms of civic and public responsibility and in terms of emotional and social development. In ancient Athens, the 18-19 year olds were treated as citizens in training, ephebes.

The "age of majority" when the full rights and responsibilities of adulthood obtain has ranged from 14 to 25. Early Roman law set the age of majority at 15 for males, the age at which they were initially imagined to obtain the intellectual capacities required to be full citizens, manage affairs, and become heads of households. But during the Roman Empire, the age was raised to 25, and males between 15 and 25 needed approval from a guardian to validate formal acts and contracts. In most of Europe the age of majority was tied to the age of eligibility for war between the ninth and eleventh centuries: 15. As war technologies developed, the age of majority moved up to 21, a standard that was spread throughout the Western world. Farmers who were not fighting had lower ages, 14 and 15. The American colonies adopted the British age of 21, which lasted until conscription was lowered to 18 in 1942.[87]

In the United States the age of majority was largely 21 until 1971, when the 26th Amendment gave 18 year olds the right to vote in elections, and the voting age was lowered in every state to 18. The decision about whether teens over 14 can work or not is a state issue, one which was never addressed in the 1938 Fair Labor Standards Act, or subsequent federal laws. Federal law prohibits non-agricultural labor for children under 14. In the 20s several states are actively modifying the role of teenagers as workers: Florida recently changed its law to allow 16 and 17 year olds to work unlimited hours. Kentucky is considering a bill that would allow nonprofits to hire 12 and 13 year olds, and three states are considering laws that would eliminate existing youth permit requirements. Along with evidence of punishing child labor in violation of

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[84] A massive campaign led by civil rights groups in 2020 led to over 1,000 major advertisers pulling their ads from Facebook until they changed their approach towards content moderation. The boycott was widely celebrated and Facebook's response widely condemned. It had a trivial impact. https://www.nytimes.com/2020/08/01/business/media/facebook-boycott.html

[85] The Invention of Teenagers and the Triumph of Youth Culture, Time, https://time.com/3639041/the-invention-of-teenagers-life-and-the-triumph-of-youth-culture/

[86] Hugh Cunningham, Children and Childhood in Western Society Since 1500 (Routledge Press, 2020).

[87] Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55, 63–65 (2016); T.E. James, *The Age of Majority*, 4 AM. J. L. HIST. 22 (1960).

existing laws[88], these laws are generating a furious debate about the relationship between teenagers and work.[89]

When it comes to medical consent, the overwhelming default is that 18 is the age of majority, and parents have the right to determine medical care, and must consent to medical treatment. That includes the choice to enter rehabilitation, the use of individual therapies, the use of cancer treatments. (There are specific exceptions for specific areas, largely having to do with reproductive health.[90]). All surgeries including cosmetic surgeries require informed parental consent, and tattoos, where not banned outright for minors, must typically be consented to and the parent must be present before age 18. On the other hand, in about half of the states, minors age 14 and over can unilaterally consent to outpatient mental health services without parental consent.[91]

But what is a teenager–or whatever you want to call this liminal age–in constitutional law? Much about it is contested, both rhetorically and legally.[92] From 13 to 21 people live in an odd, liminal category, old enough to be convicted of murder as an adult, but not old enough for the the upper end of punishment and associated culpability that comes with adulthood. 20 year olds are typically barred from drinking, 16 year olds can drive in most states, although they are increasingly not allowed to drive with their friends. 16 year olds can consent to sex in most states (with exceptions to consenting with adults), but cannot enter mutually enforceable contracts. And even while teenagers gain rights, few of them are rights *as against* their parents, they live within their parents' construction of a regulatory regime until they are 18 with few exceptions.

As a constitutional matter, teenagers are sometimes described as "having" the full suite of constitutional rights. Alternatively they are described as "enjoying" those rights. We can all recite phrases about not losing rights at the schoolhouse door, or that rights do not "magically come into being," and yet, implying the full suite of rights that adults do. However, as Laurence Houlgate argues, many of those cases–and phrases–were from an expansionary period that ended in the 1980s, and the bulk of the case law is far more circumspect, not granting, for instance, due process rights to teens. In fact, we should be wary, he argues, of talking about children "having" rights when in fact we mean they do not have the same rights, although they may have the right to have some rights-having interest recognized in them.

How is this status defensible? Why isn't the basic cognitive capacity sufficient? As a philosophical matter, it can be hard to explain what justifies such a narrow view of rights-bearing, especially because in the individual circumstances, teenagers can suffer substantially at the decisions of their parents.

John Garvey argued nearly 45 years ago–even in the wake of Tinker–that that children's free speech rights exist, but are substantially different than those of adults. The speech rights of children, he argues, involve some fairly limited understanding of direct, immediate rights against

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[88] Kids as Young as 14 were found working at a Tennessee factory that makes lawn mower parts for John Deere and others
https://www.nbcnews.com/news/us-news/child-labor-tennessee-kids-young-14-lawn-mower-tuff-torq-john-deere-rcna144938

[89]

[90] Teens in New York, for instance, can consent without parental involvement to family planning, abortion, pregnancy care, testing for HIV, some mental health and drug/alcohol abuse services, and sexual assault.

[91] https://www.icanotes.com/2022/12/23/age-of-consent-mental-health-treatment/

[92] When I drafted a press release about an FTC listening event, Common Sense media dutifully went through and changed every reference to "teenager" to "young person", apparently reflecting a deep discomfort with the notion of an unrespected category.

the government, as well as a range of "future-oriented" rights, that are designed to preserve future rights as much or more than they are to protect existing rights.[93]

Provides an account that, at least under the particularity of our constitutional system, children possess different free speech rights than those of adults. Article is apparently one of the earliest attempts to try to systematically consider the philosophical case for expression rights for children (and its limits), and then examines the Supreme Court's opinions addressing those questions. The specific contexts in which rights had been uncovered as of 1979 were just that (specific contexts), and as Garvey argues, the Court presents as being confident and comfortable with assessing those interests in light of the future-oriented interests as well as independent state needs, like non-disrupted schools.

One can think of this as a modern version of the ephebe, the citizen in waiting, that a citizen in waiting, in education for citizenry, cannot be fully free to have all the trappings of freedom while they learn how to exercise them. Teenagers are essentially collective apprentices in the exercise of constitutional rights. This view, of course, has implications for what we think rights are, something other than wholly natural.

Another is that *because* the structure of society has developed such that parents are taking care of the material well-being of children, it is (collectively again, not individually) dangerous to allow. Whatever the age, responsibility and power should accompany each other, and a separation of one from the other leads to psychic as well as democratic failures.

A third, and that which is more comfortable, albeit not wholly satisfying, is based on neuroscience and the nature of the undeveloped teenage brain. Children by age 14 or 15 have no significant differences in their reasoning capacity, their ability to retain information, or other aspects of their basic intellectual capacity for informed decision-making than adults. While they are more likely to take risks with low likelihood of a highly dangerous outcome, they are actually more accurate than adults at assessing risk probabilities and updating their priors.[94] The parts of their brain related to control, however, are underdeveloped until the mid-20s, and they are especially responses to social cues and feedback. While we would not want to individually call out those who had teenage brains, and shove them back into quasi-constitutional no man's land, we collectively believe we can punish less, and constitutionally protect less, those with this highly-reactive brain status.

But before we dwell too long on these questions, let's look at where the Court has taken us. While there was a long period from 1969 to 2010 in which the Court seemed to treat the rights of teenagers as closely akin to those of adults, there were not that many cases involving teen first amendment rights, and in the last 14 years there are signs that the Court may be more comfortable with granting substantial leeway to the state to regulate teenagers that might not be available were they adults.

In the next section I review the cases regarding three different kinds of confrontations: teenager v. parent, teenager v. school, and teenager v. state.

A. Teenager v. Parent

The bulk of cases presume radical parental power over the teenager, a power that is granted by the state. In other words, teenagers have relatively few rights when the state and the parent are aligned, and their rights emerge only when they are standing shoulder to shoulder (or,

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[93] John H. Garvey, *Children and the First Amendment*, 57 Tex. L. Rev. 321 (1979).
[94] See https://www.sciencedirect.com/science/article/pii/S1878929317301020?via%3Dihub

rather wrapped in the arms of) the parent. If a 16 year old wants to write a letter to the editor on a topic the parents disagree with, the parents–empowered by the state–can choose to punish her by hitting her, grounding her, and taking away her money, and can request that she pen a letter to the editor of their support by using threats of physical violence.[95] Parents do not have a right to abuse or neglect their child, but the standard for abuse and neglect is very high. Their liberty interests, recognized in theory 1967 in the Supreme Court, have not developed significantly past the point of rhetoric when it comes to parent-child relationships.[96]

The law is no different in regard to teen access to social media. In theory, parents have the absolute right to ban social media, or to require it, or to demand access to their children's social media accounts, and to use almost whatever punishment and reward mechanism, short of neglect or keeping them out of schooling, that they wish.

The exception proves the rule. A third circuit case, *Polavcheck* involved a court identifying the rights of a teenager as against his parents, not merely against the state. In 1979, at the height of the cold war, a Soviet family moved to the United States, and then decided to return to the USSR, but a teenage son (initially 12, then 18 at the time of the decision) sought asylum. He claimed that as a practicing Christian, the need for asylum because of fear he would be persecuted in the USSR. The Third Circuit split the baby, as it were, concluding that the rights of the child took on adult-like features as they approached the age of majority, but also recognizing that parents had some due process rights that were violated. Because the child turned 18 before the case could be finally decided, so the question of rights is still uncertain, and the radical nature of the case, involving a child who had grown up the US wanting to stay here and a national enemy in the midst of the cold war suggests the case should be taken as fact-specific, not overly precedential.[97]

In short, the relatively closed question is whether teenagers have constitutional rights as against their parents–they don't, except in marginal cases, or with statutory exceptions. The open question is whether teenagers have constitutional rights as against the state, and how the state-teenager relationship is imagined. The question is muddied by the fact that most of the so-called teen First Amendment speech cases actually reinforce the parental role, and are not so much about teen speech, as about policing the boundary between parental power and state power.

There have been four cases in the last twenty years that the Court has said that minors must be sentenced differently from adults. Under 18 year olds cannot be executed, per the Supreme Court's 2005 decision, In a 5-4 decision, Justice Kennedy, writing for himself, Breyer, Ginsburg, Souter, and Stevens, said, "'when a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity."[98]

B. State v. Parent

Many of the constitutional cases arise in the context of school, into the parental role, and in those cases, courts occasionally determine that the state can make the choices that a parent would typically be able to make. When the minor and the parent are aligned, the minor's speech

[95] It is legal to spank your child in all states, although some states have limits on how and with what. https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1477&context=faculty_scholarship
[96] *ee e.g.,* Laurence D. Houlgate, *Three Concepts of Children's Constitutional Rights: Reflections on the Enjoyment Theory*, 2 U. PA. J. CONST. 77, 78 (Dec. 1999).
[97] *Polovchak v. Meese*, 774 F.2d 731 (3d Cir. 1985),
[98] *Roper v. Simmons* (2005)

rights are at their maximum, but not just because of the minor's right, but the fusion of minor and parental rights; when the parents rights are opposite the minor, the minor may have fewer rights.

One significant wing of teen/First Amendment scholarship has been in the schools context, where unique circumstances make the logic difficult to transport outside of the schools context, but nonetheless give some clues. Instead of student first amendment rights, in loco parentis "has become a way of referring to a generalized power to make decisions affecting children that might conceivably have something to do with schooling."

In 1972, parents of older teenagers (15, 16, and 17) wanted to pull them out of compulsory schooling above 8th grade, against state law. The Supreme Court held that the parents' interest in the free exercise of religion outweighed the state's interest in developing future citizens and avoiding harsh work or idleness. In *Wisconsin v. Yoder*, the Court set out the primary way to imagine the rights of teenagers, parents, and the state, describing the "involv[ing] the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. ". The teenagers are described as "children" throughout, and show up without any independent rights or interests from that of their parents.

In fact, though one might be forgiven for thinking that minors, especially older minors, have fairly robust First Amendment rights, given the bold-name teenage-speech cases that come to mind–*Tinker* and *Mahanoy*, almost all of the constitutional cases on teenagers' speech rights fall easily within the Yoder framework, of being about parental speech rights.The better reading may be that cases represent the victory of parents' speech rights in governing the speech of their children, as against that of a school.

While *Brown v. Entertainment Merchants*, discussed below, discovers freestanding speech right of minors, it is an outlier. Before and after *Brown*, there is far greater hesitation to find such rights. In almost every other interest, the minors rights cases are more likely to be actually cases about the rights of parents vis a vis a school.

The key language of most of the speech cases–*Tinker* notwithstanding– can be read through parental resistance to state power. As *Yoder* said, "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition". That case was echoing *Pierce* v. *Society of Sisters*, a case discovering "the liberty of parents and guardians to direct the upbringing and education of children under their control".[99]

In 1942, in *West Virginia v. Barnette, supra*, the Court held that a resistant student in public school cannot be forced to salute the flag. Justice Jackson noted that the parents and children were both subject to punishment for a child's failure to comply, and argued that the symbolic salute constituted compulsory belief. Jackon also concluded that the proffered state interests were not persuasive, and instead extensively explored the dangers of compulsory belief, balancing school/state rights against state/constitutional interests in the development of free thinking adults.[100] For Jackson, the students' interests are very present, but they are present in the ephebian sense–for serving their future roles, not for realizing their present rights.

In *Tinker*, nearly thirty years later, the parents barely appear. They are part of the protest planning, but they do not show up separately. In Tinker, as you'll recall, students wanted to wear armbands to protest the war, and were disciplined for doing so. The Court discoursed extensively

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[99] 268 U. S. 510, 534–535 (1925)

[100] 319 U.S. at 637.

on the risk of school-driven homogeneity, and the danger of authoritarian tendencies within schools. It held that students' independent First Amendment rights were violated, and that the school could not enforce a policy unless there was evidence that the student action would "materially and substantially disrupt the work and discipline of the school."

And now, forty years later, we now come to *Mahanoy Area School District v. B.L.* (2021), the Court's most recent school speech case. That case involved no general political protest, but vulgar words on snapchat. A student who played volleyball in a school-sponsored extracurricular team posted images to Snapchat that complained about her school and volleyball team with a picture of a middle finger and "Fuck school fuck softball fuck cheer fuck everything." The school suspended her from the cheerleading squad for a year. The district argued that the language concerned school activities and had led to in-school issues. They noted that some cheerleaders had been upset about the post and approached the coach, and two students had brought up the issue during Algebra class. The girl and her parents successfully sued under Tinker and got an injunction so she could play volleyball. The Third Circuit and Supreme Court affirmed. However, the opinion was no Fortas in *Tinker.*

Instead, Breyer, for an 8-1 majority wrote the narrowest possible opinion upholding a lower court injunction against a school district, with a Gorsuch/Alito concurrence reinforcing its narrowness.[101] While *in loco parentis* doesn't even appear as a framework in *Tinker, in loco parentis* is at the center of Mahanoy, suggesting that the clash is between the rights of parents and the rights of schools, not the rights of schools and the rights of students. As much as student speech rights are recognized, it is in service of a broad marketplace of ideas, not the student's own rights. The extreme ambivalence of the majority opinion suggests an extremely narrow understanding of minor's speech rights.[102]

Some of the decision was mere reaffirmation: the Court reaffirmed the principle that schools have the right to regulate speech that "materially disrupts classwork or involves a substantial disorder or invasion of the rights of others." It concluded that there is no clear geographical demarcation, and that the school's authority does not disappear just because the activity occurs off of the school campus, and using none of the instrumentalities of the school.

Breyer reaffirmed that the school has an interest in protecting unpopular speech, the power is not absolute, and the school is not "in loco parentis," 24 hours a day, and should be treated skeptically when it tries to overregulate. Breyer does insist on an interest that the school did not assert in litigation: the interest in open discourse and unpopular ideas. And he reaches back, not to *Brown*, where children have First Amendment rights, but to the key of Jackson in *Barnette,* insisting that "America's public schools are the nurseries of democracy. " (A word choice, nursery, that may have made both the student and teachers wince!). As such, the Court held that future courts should consider the state value in the free exchange of the "marketplace of ideas." and unpopular ideas.

But the overall approach was hesitant. The Court talks about the "leeway the First Amendment grants to schools' ' because of special characteristics. The loco parentis comment is telling, because the court is fundamentally reiterating the power of parents to restrict student

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[101] Thomas' dissent takes *in loco parentis* as the starting point as well, but concludes that the Court ignores the long history of schools having the delegated power to punish off campus speech " so long as it has a proximate tendency to harm the school, its faculty or students, or its programs," and finds the proximate tendency satisfied.

[102] Cheng, Jenny, Deciding Not to Decide: Mahanoy Area School District v. B.L. and the Supreme Court's Ambivalence Towards Student Speech Rights (October 31, 2021). Vanderbilt Law Review En Banc, Available at SSRN: https://ssrn.com/abstract=3953815

speech, and therefore not granting a full vision. Dicta suggested a broad reach for school power. The Court noted that a school could have regulatory interests in a series of cases, involving lying, "severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices."

But what is most notable is the dog that doesn't bark: the Court never frames the issue in terms of B.L's speech rights. Although it concludes that "B. L. uttered the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection,." it never says that her speech *is* protected, only that the school justification is inadequate. Moreover, the Court softened the decision of the Third Circuit, which had announced a fairly strict rule for off-campus speech. Whereas the Third Circuit had argued that off campus speech was insulated from the special school speech rule, the Court concluded that "the school's regulatory interests remain *significant* in some off-campus circumstances." However, the Court declined to establish a new rule for the scope of those circumstances, refusing the invitation of both amici and the Third Circuit to establish such a rule.

Finally, when–in typical Breyer fashion– the Court established three principles to guide application of future disputes, it did so in a way that actually infantilized the high school student, and while deciding in her favor, suggested a very weak form of rights.

The *in loco parentis* logic really defines the case. The Court writes that:

> *First*, a school, in relation to off-campus speech, will rarely stand *in loco parentis*. The doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them. Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility.

This is a striking passage, because it is the opposite of a ringing endorsement of unfettered speech rights; it indicates that fettered speech rights are the norm. Students are to be "protect[ed, guide[d] and disciplined" in their speech–just by their parents, not the school. In other words, the Court imagines minors as always regulated in their speech, but by either the parent or the school–not free the way adults are.

The application of this principle to the case merely underlines the point. The Court said: "B. L. spoke under circumstances where the school did not stand *in loco parentis*. And there is no reason to believe B. L.'s parents had delegated to school officials their own control of B. L.'s behavior at the Cocoa Hut." B.L.'s speech rights are not analyzed through the lens of her own rights, but through the lens of delegation of parental power.

Absent is a ringing endorsement of Scalia's vision of the First Amendment; the Court focuses on the rights of the school to regulate. The Court itself recognizes how modest ist approach is, announcing that it would "say little more than this: Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished."[103]

The Concurrence written by Alito (joined by Gorsuch) takes up the *in loco parentis*

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[103] Another tell of its modesty: When the Court cited *Brown*, it did so for the proposition that ""[M]inors are entitled to a significant measure of First Amendment protection." It did *not* cite Brown for the strict scrutiny rationale, and the "a significant measure" language is substantially different than the full panoply language one might expect citing *Brown*. It did not suggest, as it might have, that outside of the schools context minor's speech should be analyzed the same way that adult speech is.

theme, and concludes that the speech limitations are justified by consent, a consent that is exercised by the parent instead of child via loco parentis. Alito argues that parents should be "treated as having re- linquished the measure of authority that the schools must be able to exercise in order to carry out their state- mandated educational mission, as well as the authority to perform any other functions to which parents expressly or implicitly agree." Like the majority, but with even greater force, the *Mahanoy* concurrence argues that the question is the conflict between the parents rights and that of the school. When it comes to applying the concurrence, the Court noted the vulgar language and concluded that 'There are parents who would not have been pleased with B. L.'s language and gesture, but whatever B. L.'s parents thought about what she did, it is not reasonable to infer that they gave the school the authority to regulate her choice of language when she was off school premises."

In sum, while the Third Circuit described the case in terms of the speech rights of B.L. and the speech rights of students,[104] no such analysis applies–the majority does not even use the language of speech rights.

The framework change has not gone unnoticed. Professor Mary Rose Papandrea[105] thinks *Mahanoy* may signal "a seismic shift" in [First Amendment] doctrine away from a default categorical approach to one full of balancing tests, sliding scales, and proportionality inquiries'."[106] She argues that *Mahanoy*'s ad hoc inquiry and "First Amendment leeway" is a win for school officials, a loss for students, and the opinion "create[s] more problems than it solves with its new approach to student speech rights." Whereas traditional First Amendment jurisprudence is structured, *Mahanoy* offers "a handful of 'rules of thumb' that will not provide much guidance for more difficult student speech cases" and abandons foundational First Amendment principles when the government is acting in its institutional or managerial capacity. She notes the absence of proportionality inquiry, the absence of an exploration of "whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regularly objectives". She reads the decision as giving schools power to restrict speech "without having to worry about 'ordinary' First Amendment principles." She believes it may signal a new categorization of kinds of speech, with greater protection for political and religious speech, less tolerance for hegemonic rules, instead of a classic viewpoint/content categorization. She argues, finally, that "*Mahanoy* illustrates a desire to move slowly as the technology continues to develop, as well as an awareness that traditional First Amendment principles might not work as well in these new and changing circumstances."

Christopher Terry *et al* see it as a "canary in the First Amendment coal mine."[107] Terry, like Papandrea, thinks the decision has implications far beyond student speech, and indicates ambivalence towards online speech in particular. For Terry, the key shock of *Mahanoy* is that "it is acceptable for certain citizens to have their right to speak on the internet curtailed because of the content of their speech and the government's opinion on the acceptability of that speech… it is dangerous because it "authorizes public admonitors to justify their determinations based on the context of the speech at issue." He sees it as ominous, because "the more power state actors are

[104] *B. L. v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 175 (3d Cir. 2020).
[105] *Mahanoy v. B.L. & First Amendment "Leeway"*, 2021 SUP. CT. REV. 53 (2021).

[106] Whereas the Court has rejected free-form balancing tests and ad hoc inquiries in traditional First Amendment cases, *Mahanoy* embraces "First Amendment leeway" that could be extended to other contexts where the government acts in an administrative or institutional capacity in the future.
[107] Christopher Terry et al., *A Cheerleader, a Snapchat, and a Profanity Go to Supreme Court but the Punchline in Mahanoy Isn't Funny*, 27 COMM. L. & POL'Y 79 (2022).

given to determine what may permissibly be said, the more likely it is that certain speakers will be silenced"[108]

Terry and Papandrea may be right, but it seems just as likely that the Court is not interested in changing First Amendment law itself from a tiered to a leeway approach, but is interested in revisiting some of the earlier absolutist language around teenagers. Instead of teenager-as-rights bearer, Mahanoy appears to constitutionally construct a teenager as ephebe, future citizen, holder of future but not present rights. Teenager as potentiality, but has essentially no current political, civic, role, unless the parents of that teenager decide to emphasize her current role.

C. State v. Teenager

When school's out, the rules are different. In *Ginsberg v. State of New York*, in 1968, an adult was criminally charged with selling obscene magazines to a 16-year-old boy. The Court affirmed his conviction.[109] In the majority opinion, Brennan concludes that the government has a vital interest in protecting the health, safety, welfare, and morals of children, and one way it does that is by restricting material that is unfit for kids. While the magazines in question were not obscene under an adult test, they were, according to Brennan, "variably obscene" for the child that purchased them. Treating children differently in this way does not violate the First Amendment, and the state statute does not prohibit parents from purchasing such "variably obscene" magazines for their children. Justice Stewart concurred, recognizing that a "doctrinaire, knee-jerk application of the First Amendment would, of course, dictate the nullification of this New York statute"[110] he also believes that "a State may permissibly determine that, at least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees" [111] For instance, children cannot marry or vote–and the state can rightly conclude that the capacity is lacking.

Justice Douglas dissented, arguing that that there should be no exclusion for obscenity—for children or for adults. He notes, "[a]s I read the First Amendment, it was designed to keep the state and the hands of all state officials off the printing presses of America and off the distribution systems for all printed literature" Justice Fortas, finally, agreed that the government has the power to police adults and children differently and that the defendant here violated the statute. But, he takes issue with the majority using the term "variable obscenity" without defining it.

Minors make a small guest appearance in *McConnell*, the behemoth decision striking down a provision of the Bipartisan Reform Act of 2002.[112] Among other provisions, the Court struck down the rule prohibiting campaign contributions by minors as a violation of minors' First Amendment rights on the grounds that the anti corruption logic of the provision was too attenuated. The discussion was fairly summary; the Court analyzed the prohibition and struck it down in under a page, using the gentler Buckley contribution standard, asking whether it was "closely drawn" to satisfy a sufficiently important interest. As to the First Amendment rights of

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[108] Id.
[109] *Ginsberg v. State of N.Y.*, 390 U.S. 629 (1968).
[110] Id at 648–49
[111] Id at 649–50
[112] McConnell v. F.E.C., 540 U.S. 93 (2003)

minors, it merely cited *Tinker* for the proposition that minors have First Amendment rights, without further exploration.[113]

The big case–the case that looms over all discussion of social media legislation–came down in 2011, after California passed a law prohibiting the sale or rental of violent video games to all children under age 18. Violent video games were described as those "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," that is "patently offensive to prevailing standards in the community as to what is suitable for minors," and that "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors."

Justice Scalia struck down the law in 2011 in its entirety, and in doing so established a new framework for considering the speech of minors.[114] In *Brown v. Entertainment Merchants Association*, California enacted a new law that imposed restrictions and labeling requirements on the sale or rental of "violent video games" to minors. Video game companies sued, arguing this violated their First Amendment rights.

In the majority opinion brings a very strange form of originalism. The heart of the opinion is the notion that there are long-standing exceptions to Free Speech principles, but new exceptions will be looked on with extraordinary scrutiny. (Strange, because given the history of First Amendment jurisprudence, these are necessarily modern carveouts to post-war principles.) He explains that video games have First Amendment protections and "'the basic principles of freedom of speech and the press . . . do not vary' when a new and different medium for communication appears."[115] Although there are limitations to First Amendment protections, such as obscenity (sexual conduct), incitement, and fighting words, "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated."[116]

The Court spends a surprisingly little time on the question of teenagers, instead merely stating that "No doubt a State possesses legitimate power to protect children from harm . . . but that does not include a free-floating power to restrict the ideas to which children may be exposed." In applying strict scrutiny, the law had little chance. Scalia noted how it was both overinclusive and underinclusive, because of the presence of a parental consent provision, without any careful method of ascertaining consent.

But while it looks like a 7-2 decision on the merits, a closer look reveals a close case on the mode of analysis. Four justices either dissented or concurred. Justice Alito's concurrence is of special interest today. He argued from both technology and from a different understanding of children. He argued that the Court "should not jump to the conclusion that new technology is fundamentally the same as some older thing." He hesitated on strict scrutiny for minors,

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[113] McConnell v. F.E.C., 540 U.S. 93 (2003)

[114] *Brown v. Entertainment Merchants Association*, 564 U.S. 768 (2011)

[115] Id 789, quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 403 (1952).)

[116] The Court quotes itself from *Stevens v. United States*: "Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law," 699 U.S 460, 472 (2010), but notes that "without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the 'judgment [of] the American people,' embodied in the First Amendment, 'that the benefits of its restrictions on the Government outweigh the costs."

suggesting intermediate scrutiny would be more appropriate, and argued that as an institution, the Court might be poorly suited for understanding online life, and "should not hastily dismiss the judgment of legislators, who may be in a better position… to assess the implications of new technology."

He noted that the California law lacked fair notice required under the Fourteenth Amendment, and for that reason, the majority was correct in enjoining the law. However, Justice Alito says he "would go no further" in expressing whether or not the statute would survive First Amendment scrutiny.

Justice Thomas dissents from a more straightforward rejection of the notion that "the freedom of speech," applies to minors. His originalism is more traditional, relying on evidence to demonstrate that the founding generation believed parents to have absolute authority over their minor children. He acknowledges that "[a]although much has changed in this country since the Revolution, the notion that parents have authority over their children and that the law can support that authority persists today." Justice Breyer dissented on the grounds that the regulation was legitimate, and that a softer standard of review should apply.

So what does *Brown* mean? It could mean that we look to tradition, instead of principle, in particular cases, although Thomas' dissent makes the serious application of the tradition model not that persuasive.[117] And the longstanding tradition approach does not help much when it comes to minors, because there is not a longstanding tradition of banning or regulating social media algorithms and notification features, but there is also not a longstanding tradition of *having access to* these same features.

Until *Brown* is revisited, it is of course good law, but it strikes me as an outlier, and the signs from Alito and Roberts (and Thomas) suggest that the approach of *Brown* is unlikely to survive.

D. The Compelling Interest of Protecting & Cultivating Teenagers

So if teenagers are not consistent rights-bearers, at least not in the traditional sense, what are they? There *is* a longstanding constitutional doctrine that recognizes that there is a special compelling reason in protecting the physical and psychological well being of minors. As the Supreme Court held in *Ferber* (the challenge to child pornography law): "It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well being of a minor" is "compelling." The psychological wellbeing of children is treated as a per se compelling justification for laws.

In *Prince*, for instance, the Court considered a statute that banned the use of children for pamphleteering.[118] Clearly, if adults were involved, the statute that directly implicates core First Amendment activity. However, the Court upheld the law because of the importance of protecting children broadly, engaging in something very different than strict scrutiny, where the tailoring requirement was softened because of the extreme significance of the compelling interest. In *FCC v. Pacifica Foundation*,[119] the Court held that the Government's interest in the "wellbeing of its

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[117] In 2010 also, in *Stevens*, which could come up in social media litigation, the Court struck down a statute outlawing images of living animals being mutilated, tortured, or killed in places where it was already illegal. The Court held that new categories of obscenity could not be created, and that instead, we must look to American traditions of outlawing certain forms of speech.

[118] *See Prince v. Massachusetts,* 321 U. S. 158, 321 U. S. 168 (1944).

[119] 438 U. S. 726 (1978)

youth"was a sufficient justification for regulating indecent broadcasting that would be heard by children, even though it plainly also impacted broadcasting heard by adults.

Teens appear on multiple sides of First Amendment case law: in a way to support children's rights not because they have autonomy, but because they are vulnerable, and because experiencing those rights, and schools creating frameworks for the expressions of those rights, are critical to developing the future adults. These rights cases use the language of the First Amendment, but emphasize the affirmative duties of the state more than the autonomy interests of the child. As the Court in *Pierce* said: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[120] In *Barnette*, the Court found that a compelled pledge of allegiance violated rights, emphasizing the pedagogical and training power: "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." Teenagers do not appear as autonomous rights bearers, but as future autonomous rights-bearers.

So how does this relate to their rights to hear, their rights to scroll, their rights to infinite feeds, notifications, and possibly to see and hear eating disordered content? I could see this Court going in different directions, but the direction I think they should go is to strictly scrutinize those rules that are viewpoint specific, and to largely give legislative discretion to those rules that are not.[121]

E. Teenagers as Indecipherable Online

I would be remiss if I did not mention the age verification debate, because it is at the heart of most litigation. I'm not sure if this is where it belongs, and I don't want to go deep, but I at least have to mention it.

The difficulties of crafting an online-age verification scheme have moved to the center of the debate about almost all of the child online safety bills. Because there is no ultimate physical delivery, and therefore no moment to check signature and id in person, there is a sense that the issue is different in kind, although the accuracy of the in-person verification, the chances of false positives and negatives in person, are by no means airtight. Groups like the ACLU, the Electronic Frontier Foundation and Fight for Future (as well as other tech groups) spend considerable energy arguing that the rights of adults will be damaged by age verification. It formed the basis of the four cases to date enjoining state laws, and could easily form the basis of a skeptical Supreme Court looking for a reason to strike down other laws.

I tend to have confidence that the age-gating issue will be dealt with. While in *Reno v. ACLU*, the Court struck down the Communications Decency Act largely on the grounds that it would burden the rights of adults, Justice O'Connor clearly signaled approval of a future "zoned" or age-gated internet. While the opinion is awkward to read today, the patient description of Justice Stevens of blue highlighted "links," the premise of the opinion is that age0 zoning is normal, but that age-gating must allow for adults to access adult material.

Today, the gating/zoning issue is much simpler. The tech platforms already know, to a high degree of reliability, how old the people who use their platforms are. They have full digital portraits of the users, and can guess age far better than a checkout clerk at a grocery store facing

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[120] Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

[121] I know, I have to fill this out more!

my 8th grade self-trying to buy Playgirl. But more importantly, as this example illustrates, as more content moves online, age verification is necessary for a vast array of reasons; to screen children from porn, to screen children from buying cigarettes online. Online gambling, which is growing in pervasiveness, is illegal for children under age 18 in most states, and to make that law meaningful, we will need to figure out ways. To buy alcohol, or cigarettes, identification is needed. In bars, that either means a bouncer or bartender looking at an ID, aware that under the dram laws of their state, serving drinks to someone under 21 leads to strict liability. They frequently turn away 20, 25, and even 30-year olds who cannot prove their age. For buying cigarettes, that means delis and groceries engaging in a similar practice, and following rules that, eg, cigarettes must be in a space where they cannot easily be reached on a shelf. Older patrons regularly are rejected for failure to show ID. Now that much alcohol sales have started to move online–growth is predicted to grow over 30% in the next few years[122]–an online version of age verification is required.[123] In other words, age-gating will be addressed because without it, much of the law, not just child social media law, cannot operate. Two of the most promising ways to deal with age verification, in my opinion, are those that require devises to send out age signals to any platforms that uses them, and rules that the information used to collect age cannot be used in any other context, with high civil penalties for misuse of age-verification data.[124]

V. What is Social Media? (Section in Waiting Pending *Netchoice*)

****** I am holding this space for analysis of the NETCHOICE decision. But some thoughts below******

At the same time there is a major constitutional debate about how to think about social media. Is social media a regulator/communication infrastructure/common carrier, is it a private media company, is it a private company like any other, is it a akin to a mall or a radio station, is it an employer or a utility, or does it such a different role that analogies to industries and functions whose First Amendment status has been settled fail?

The decisions date enjoining state social media laws, courts have not directly engaged these issues. In the decision enjoining Ohio's child social media law, the Court nodded to *Brown*, assumed strict scrutiny, but relied on vagueness and sloppy drafting.[125] Similarly, the injunction of the Arkansas law relied heavily on vagueness .Inasmuch as it also conditionally used intermediate scrutiny, it enjoined the law on the grounds it impacted the rights of adults.[126] (As I mentioned above, the age verification and vagueness questions are practically significant, but beyond the scope of this paper.)

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[122] https://www.forbes.com/sites/katedingwall/2022/11/29/online-sales-of-alcohol-predicted-to-rise-34/?sh=bf44e833acf3

[123] Practices are varied. Some direct alcohol shippers use either a state-approved online verification provider, who accesses publicly available data to verify that the name and address match that of someone over 21. Alternatively, they collect and store a copy of the buyer's government-issued ID, and do so in a way that ensures that the data is protected as a highly intimate PII, and can't be used for any other purpose. When the direct shipper delivers the alcohol, they are told to ensure that someone is present, show government identification, and sign.

[124] Looking forward to Brett Frischmann's article on this. Cite in future drafts.

[125] https://netchoice.org/wp-content/uploads/2024/01/2024.01.09-ECF-27-ORDER-Granting-TRO.pdf

[126] https://storage.courtlistener.com/recap/gov.uscourts.arwd.68680/gov.uscourts.arwd.68680.44.0.pdf

Decisions in the pair of cases before the Supreme Court this term, *Netchoice v. Paxton* and *Moody v. Netchoice*, will shed substantial light on how the Supreme Court thinks about this question. In those cases, the Court is considering facial challenges to state laws which, among other things, require platforms to sort and treat content in a viewpoint neutral way (Texas), and require platforms to fairly follow their own published terms of service (Florida). Netchoice and its supporters argue that these laws violate the First Amendment rights of the platforms. They call on the principle in the 1979 case, Tornillo v. Miami Herald, that when an entity compiles and curates third-party content and are thus are engaged in editorial discretion, regulation constraining that discretion can only be constitutional if it is narrowly tailored to achieve a compelling governmental interest.

Twenty one states, led by New York, filed an amicus brief in that case, arguing that a decision for Netchoice could threaten state laws and litigation. The lead argument in the brief concerned the potential impact on child social media laws and child social media litigation.[127] I also filed a brief with Tim Wu, Lawrence Lessig, and Matthew Lawrence, and the American Economic Liberties Project, making a similar argument.[128] We noted that if the Court decides, for instance, that Texas' requirement to treat all content the same violates the platform's First Amendment right to sort content using its own "editorial discretion," that decision would directly threaten most state social media laws that do anything but ban or provide parental access. It would also, as the States pointed out in their amici, likely lead to dismissal of the state lawsuits against the social media platforms.

In *Netchoice*, our brief's central contention is that the State's ability to impose non-discrimination obligations on enterprises is an enduring feature of our constitutional system. When a business chooses to operate in the public market, which is facilitated and maintained by the State, it may require that company to "abide by a legal norm of nondiscrimination."[129] There is no sufficient limiting principle to the Solicitor General and Netchoice's argument — all that a company would need to do is to contextualize its product design features as "editorial discretion" or "editorial judgment" in order to be immune from all legislative regulation.[130]

If Netchoice had its way, where would that leave state legislative efforts to address concerns around teenagers and these platforms? Various legislative proposals attempt to intervene in the product design of various social media platforms. KOSA, for example, would require a duty of care in at least the design features of platforms; the AADCs would require a "best interest of the child" model in at least the design features. Those proposals would be especially vulnerable under a Netchoice win, because they require discretion to be used in a particular way, the very discretion that Netchoice claims is uniquely protected. Under an "editorial discretion" test, the platforms would credibly argue that these proposals would be

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[127] https://www.supremecourt.gov/DocketPDF/22/22-555/292783/20231207182233928_Nos.%2022-277%20and%2022-555_Amicus%20Brief.pdf

[128]

[129] *303 Creative LLC v. Elenis*, 600 U.S. 570, 609 (2023) (Sotomayor, J., dissenting)

[130] We argued that social media firms, unlike newspapers, open their doors to the public to have anyone (willing to access a ToS) post content on the platform. No one is under the impression that a newspaper curates and exercises total editorial discretion over how stories are presented on their page. By contrast, the social media platforms have consistently taken the position that their pages are places used by third-parties for public discourse.

subjected to strict scrutiny because they would interfere with the user's ability to view "not only the messages presented by other users, but also the overall messages conveyed by the combination of content the platform has shaped and presented."[131]

The consumer protection laws would also be threatened, albeit less so. The geolocation ban tells platforms what they can't use, not what they can't communicate. New York and California's proposed SAFE Acts would similarly exclude minors from the platform's curation in an expanded geolocation ban. While these proposals do interfere with the platform's curation of content for users in ways that tend to minimize a user's exposure to algorithmic content, they do so by banning the use of banning all personal data use, not just geolocation.

In other words, even if the Court finds that the editorial discretion is protected, there could be room for design-based regulation. . If one takes the position that reporting and regulation of algorithmic design are speech, then "virtually all regulations of the modern information economy would be subject to judicial scrutiny."[132]

The more a law looks like an expanded consumer protection law, the less it looks like it is interfering in the discretion, the heart of the Netchoice argument. Algorithmic outputs are everywhere, and regulation of the design of digital products, like other products, is classic consumer protection regulation. Regulation of the code that builds them, and the data that fuels them is also classic consumer protection. The product is defective because it causes unreasonable harm. For instance, the existing litigation that treats social media as a defective product should be able to survive.[133]

Inasmuch as a good deal of social media is similar to the one-armed bandits in Casinos involve slot machines that deliver different "content"—there may be room to uphold laws that directly build on gambling laws. In most states, gambling is prohibited by those under 18, and in some states, no person under 21 is allowed to gamble. California, for instance, has a complete set of restrictions regarding gambling, typical of state rules. It bans selling lottery tickets to minors, any prizes paid to minors, horse race betting by minors, bingo by minors, and gaming club for minors. With particular game developers "openly boast about their addictiveness, comparing their products to slot machines, and their addicted customers to casino 'whales,' and show little intent of implementing greater self-regulation"[134] But why not see it all as a form of game? There is a longstanding recognition that gambling laws should be upheld against constitutional protection; in fact, the assumption is so profound that there are no serious First Amendment challenges to gambling laws.

- Arguably addictive "speech" should not be considered speech at all, just as obscenity, incitement, and fighting words are not considered "speech" in the First Amendment context. Luke Morgan argues that addictive speech is not communicative, it "actively damages the core interests of the First Amendment (protection of autonomy, promotion of truth, and fostering of democratic self-governance);" and can be analogized to the existing "non-speech" exceptions.
- Matthew Lawrence argues that addiction belongs on the other side of the ledger, and there should be a fundamental constitutional right to freedom from addiction because it "is necessary to address significant modern-day threats[,] . . . would be

[131] Solicitor General's Brief at 19. https://www.supremecourt.gov/DocketPDF/22/22-555/292805/20231207211218819_22-277%20%2022-555%20Moody%20v.%20NetChoice%20-%20%20NetChoice%20v.%20Paxton.pdf
[132] Id.
[133] https://cdn.sanity.io/files/3tzzh18d/production/9de90e5b287b817993aa4e108a555230dc66e559.pdf
[134] Id.

> consistent with the rule of law[,] and . . . would advance the bedrock values of autonomy and antisubordination"[135]

In a fascinating forthcoming article, Francesca Procaccini, argues that we can reconceptualize social media as an employer, because the product, as we all know, is the data we produce. If we conceive of it through the labor lens, she argues, we can also draw on the extensive law enabling state regulation of that labor relationship. "With each letter typed, post clicked, and page scrolled, social media users create massive, and massively profitable, proprietary catalogs of user data. In the process, platforms direct user input of data, compensate users with platform benefits, and then sell access to that data for enormous profit. All the while, users struggle with the same harms labor has endured for centuries: hostile and unsafe environments rife with harassment and misinformation. This labor-exchange relationship, with asymmetries in power akin to those between employers and workers, suggests relying on well-established labor and employment law frameworks for regulating speech on social media."

In her argument, she touches on the ways in which Courts since the 20s have been very favorable to upholding child labor laws, recognizing the distinct risks of coercion and harm, and the importance of social and educational development.[136] Inasmuch as child labor law informs platform regulation, it will do so in a regulatory-enhancing way.

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Finally, there will be room for intermediate scrutiny:

- Weakness of Brown
- Time place and manner discussion[137]
- Narrowly tailored to compelling interest
- If we are within the strict/intermediate framework–or at least strict–there is a level of causality, sometimes called "fit" that is required. Because teenagers cannot be experimented upon, and even if they could it would not reveal fit if the cohort theory is correct, then the "fit" will necessarily be loose.

VI: Synthesis: The First Amendment Law of Minors and the First Amendment Law of Social Media

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[135] Matthew B. Lawrence, *Addiction and Liberty*, 108 CORNELL L. REV. 259 (2023) (He notes that Supreme Court has described "freedom of thought" as a key aspect of constitutional liberty throughout history, which is not far removed from the freedom from addiction, and "[t]he fact that courts have not yet constructed a doctrine to put the constitutional principle of freedom of thought into practice does not apparently reflect any doubt about its importance"[#] Freedom from addiction complies with *Glucksberg*'s "two primary features" that courts should employ: (1) focusing on "those fundamental rights ad liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty" ("The right is old, it is the threat that is new" and (2) requiring "a careful description of the asserted fundamental liberty interest.")

[136] *Social Network as Work*, Forthcoming Cornell L. Rev. (2024) at 50.

[137] See Brett Frischmann and Susan Benesch, Friction in Design Regulation as 21st Centry Time, Place and Manner, 25 YALE J.L. & TECH. 376 (2023)

How to regulate social media in an ideal world, and how to regulate social media in the existing constitutional framework, both point to the same conclusion: consumer protection is the strongest general approach.

a. Consumer protection is the most theoretically modest, based solely on harm, and forces rulemaking that could be, as much consumer protection law is, overly protective.
a. Consumer protection law is the least likely to encroach on extremely difficult areas of first amendment speech.
b. And in many ways, consumer protection law requires the least theory about what a teenager is-which I think is a good thing.
c. It makes it easier to imagine expanding the framework to all adults, instead of cabining it.
d. The fiduciary duty framework is weak
    i. Analogies from other areas show that the duty of care is an extremely weak framework, and the best interests of the child (duty of loyalty) makes such an awkward fit, that although both the proponents and opponents imagine far greater, almost talismanic power in cloaking platforms with duties, constitutional avoidance will lead to weak interpretation of already weak theory.
e. Consumer Protection is well established

Big social media platforms are private regulators.[138] They set terms, not through negotiation, but through fiat, and they set terms not only within the scope of their relationship with a counterparty, but outside it. When Meta changes its algorithm regarding news from news organizations, it has a regulatory effect, shaping how those news organizations operate in an industry wide way. The shift first to, and then away from, prioritizing video content was one such example, leading to industry-wide shifts in the kinds of training and expertise and compensation of different kinds of journalists. Social media is both similar to many regulatory chokepoints, and different. By changing the feed (or, as in the case of Youtube, multiple feeds) in a targeted and a collective way, the owners influence individuals, as well as the overall ideological framework of how we think, as a society.[139]

When companies cease to be governed, and become governing, they threaten democracy, and require several forms of state intervention, including divestiture, nondiscrimination, and limits on forms of commercial activity. When they regulate the emotional lives of children in a profit seeking way, they threaten democracy and human thriving in a more profound, direct way: through exploitation. While we might want to regulate that exploitation by requiring a fiduciary

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[138] Lina Khan, Zephyr Teachout, A taxonomy of power, Duke Law Journal (dsafwd) Break ‘em Up, recovering our Freedom from Big Ag, big Tech, and big money (arguing that governing power) *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1635–48 (2018) (describing bureaucracies at Facebook, YouTube, and Twitter).

[139] Put plainly, we can generally think of the regulatory power of social media companies as threefold: direct regulation of institutional counterparties, direct regulation of the ideological sphere, and indirect power to influence governmental regulators. There are different ways to think about this trifecta. Professor Jack Balkin calls it a kind of pluralism, where the sharing of governing power between private and public power is a constant jostling of views. He discusses how the constant struggles between the popes and individual Christian rulers. Cory Doctorow would call it anti-pluralism, because it delegates excessive power to certain private entities, and therefore suppresses the genuine plural array of perspectives. I would use, however, the same analogy: the jostling of power may have an aesthetic of pluralism from a distance, but in fact was more of a power-conflicted oligarchy. See, eg, Jack Balkin, Free Speech v. theFirst Amendment, 1218 70 UCLA L. REV. 1206 (2023)

obligation, a moral commitment commensurate with the outsized role they play, fiduciary obligations will be among the weakest tools to protect our children.