Regulating Social Media Through Family Law

Katharine Silbaugh[*] & Adi Caplan-Bricker[**]

Social media afflicts minors with depression, anxiety, sleeplessness, addiction, suicidality, and eating disorders. States are legislating at a breakneck pace to protect children. Courts strike down every attempt to intervene on First Amendment grounds. This Article clears a path through this stalemate by leveraging two underappreciated frameworks: the latent regulatory power of parental authority arising out of family law and a hidden family law within First Amendment jurisprudence. These two projects yield novel insights. First, the recent cases offer a dangerous understanding of the First Amendment, one that should not survive the family law reasoning we provide. First Amendment jurisprudence routinely defers to parental decisions, in contrast to emerging case law. Second, existing legislation fails to leverage family law to bypass First Amendment barriers. Lawmakers should refocus on legislating to empower parents to supervise their children meaningfully on social media, instead of focusing on harmful content itself. In the real world, parents enjoy nearly unlimited authority to decide how much privacy to afford a minor, what ideas may reach them, and who may contact them. The law supports parents in these efforts, and it can do so in the social media context as well. But it is essential for the state to identify this as the interest behind regulation in order to survive First Amendment challenges. We conclude by proposing a Parental Decision-Making Registry that could reduce the enormous power of social media companies in the lives of minors while resting securely on law of the parent-child relationship.

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[*] Professor of Law and The Honorable Frank R. Kenison Distinguished Scholar in Law, Boston University School of Law. Prior work by this author similarly builds an institutional analysis of family law by considering the way legal fields outside of family law digest, rely upon, and mistake family law. *See generally* Katharine Silbaugh, *The Legal Design for Parenting Concussion Risk*, 53 U.C. DAVIS L. REV. 197 (2019); Katharine Silbaugh, *More Than the Vote: 16-Year-Old Voting and The Risks of Legal Adulthood*, 100 B.U. L. REV. 1689 (2020); Katharine Silbaugh, *Medical Cannabis and the Age of Majority*, 101 B.U. L. REV. 1155 (2021); Katharine Silbaugh, *Distinguishing Households from Families*, 43 FORDHAM URB. L.J. 1071 (2016); Katharine Silbaugh, *Women's Place: Urban Planning, Housing Design, and Work-Family Balance*, 76 FORDHAM L. REV. 1797 (2007). The authors wish to thank Emily Buss, Danielle Citron, Steve Dean, Stacey Dogan, Clare Huntington, Gary Lawson, Ngozi Okidegbe, Jessica Silbey, Dan Solove, Jay Wexler, and participants in the GW Law Faculty workshop and the BU Law faculty workshop for helpful comments on an earlier draft.

[**] B.Sc. MIT 2016, JD anticipated BU Law 2025.

INTRODUCTION

Nearly every teenager in America uses social media, and yet we do not have enough evidence to conclude that it is sufficiently safe for them.

—U.S. Surgeon General, 2023[1]

Can we regulate against the harms inflicted by social media within the bounds of the Constitution? Eleven states passed laws to protect minors from social media harms in 2023, with legislation pending in many more, while an additional seven states have passed laws in 2024 to date.[2] Federal courts in Arkansas, California, Texas, Ohio, Utah, and Mississippi have already stayed these laws for violating the First Amendment.[3] Both the cases and the legislation fail to address the constitutional and common law of the family, and consequently, they offer an incoherent and dangerous understanding of the First Amendment jurisprudence. By adding family law to First Amendment analysis, we demonstrate that legislatures have latitude to act that can reverse the trend of unfavorable court rulings. We urge legislatures to develop better-designed content-neutral interventions that harness the existing legal authority of parents to supervise children's access to speech online. At the same time, we ask courts to incorporate well-established family law into their

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1. U.S. DEP'T HEALTH & HUM. SERVS., SOCIAL MEDIA AND YOUTH MENTAL HEALTH: THE U.S. SURGEON GENERAL'S ADVISORY 11 (2023), https://www.hhs.gov/sites/default/files/sg-youth-mental-health-social-media-advisory.pdf [https://perma.cc/4BNZ-BQB7] [hereinafter SURGEON GENERAL'S ADVISORY].

2. *Social Media and Children 2023 Legislation*, NAT'L CONF. STATE LEGISLATURES (updated Aug. 10, 2023), https://www.ncsl.org/technology-and-communication/social-media-and-children-2023-legislation [https://perma.cc/JSA9-J9CV]; *Social Media and Children 2024 Legislation*, NAT'L CONF. STATE LEGISLATURES (updated June 14, 2024), https://www.ncsl.org/technology-and-communication/social-media-and-children-2024-legislation [https://perma.cc/KSJ3-QTA5]. These numbers do not take into account executive orders. *E.g.*, N.H. Exec. Order 2023-04 (2023) ("Directing a Statewide Response to the Impact of Social Media Platforms on New Hampshire's Youth"). As this article was in production, state legislators, the Federal Trade Commission (FTC), and Congress remained active in working to regulate social media, and we anticipate continued action. *See* Maya C. Miller, *Senate Passes Child Online Safety Bill, Sending It to an Uncertain House Fate*, N.Y. TIMES (July 30, 2024), https://www.nytimes.com/2024/07/30/us/politics/senate-child-online-safety-bill-house.html [https://perma.cc/C96L-ZSJ6]; FTC, A LOOK BEHIND THE SCREENS: EXAMINING THE DATA PRACTICES OF SOCIAL MEDIA AND VIDEO STREAMING SERVICES i (2024) (reporting that many tech companies engaged in mass data collection of their users, failed to implement adequate safeguards against privacy risks, used data to keep users "hooked," and that "these practices pose unique risks to children and teens," and concluding that "the status quo is unacceptable" and "self-regulation is not the answer"). For very recent legislation, see CAL. HEALTH & SAFETY CODE §§ 27000-27007 (Deering 2024); COLO. REV. STAT. § 6-1-1601 (2024); GA. CODE ANN. §§ 39-6-1 to -5 (2024); MD. CODE ANN., COM. LAW §§ 14-4801 to -4813 (West 2024); MISS. CODE ANN. §§ 45-38-1 to -13 (2024); N.Y. GEN. BUS. LAW §§ 1500–1508 (Consol. 2024).

3. NetChoice, LLC v. Griffin, No. 5:23-CV-05105, 2023 U.S. Dist. LEXIS 154571 (W.D. Ark. Aug. 31, 2023); NetChoice, LLC v. Bonta, 692 F. Supp. 3d 924 (N.D. Cal. 2023); NetChoice, LLC v. Yost, No. 2:24-cv-00047, 2024 U.S. Dist. LEXIS 6349 (S.D. Ohio Jan. 9, 2024) (granting temporary restraining order); NetChoice, LLC v. Yost, No. 2:24-cv-00047, 2024 U.S. Dist. LEXIS 24129 (S.D. Ohio Feb. 12, 2024) (granting preliminary injunction); Free Speech Coal. v. Colmenero, 689 F. Supp. 3d 373 (W.D. Tex. 2023), *rev'd* Free Speech Coal. v. Paxton, 95 F.4th 263 (5th Cir. 2024); NetChoice, LLC v. Fitch, No. 1:24-cv-170, 2024 U.S. Dist. LEXIS 115368 (S.D. Miss. July 1, 2024); NetChoice, LLC v. Reyes, No. 2:23-cv-00911, 2024 U.S. Dist. LEXIS 163294 (D. Utah Sept. 10, 2024).

evaluation of First Amendment challenges. A better understanding of legal childhood compels the conclusion that social media companies currently enjoy an unjustifiable and anomalous access to minors.[4] This article seeks to loosen the ground around regulatory experiments that have been choked by a belief that the Constitution protects what social media companies do. Parental authority established within family and constitutional law includes latent regulatory power. If that power is more carefully deployed, it can counteract First Amendment limitations on social media regulation.

When evaluating regulatory proposals, legal actors sometimes compare minors to adults, asking whether childhood justifies a specific differential treatment. This article proposes that we focus less on the comparison of children's liberties with those of adults and focus instead on comparing legal frameworks governing minors on social media with legal frameworks governing minors in real life. Legal actors outside of the family law fields may not appreciate how different legal childhood is from legal adulthood. The public discourse about social media does not need to create the adult-to-child comparison anew for this context because an entire body of law has evolved to address the structural issues that complicate legal childhood. The result is necessarily imperfect, yet coherent and useful.

In 2023, the United States Surgeon General issued its first advisory warning about urgent public health effects of social media on youth mental health.[5] According to the Surgeon General, "the current body of evidence indicates that while social media may have benefits for some children and adolescents, there are ample indicators that social media can also have a profound risk of harm to the mental health and well-being of children and adolescents."[6] The report canvasses research that shows a stark increase in anxiety and depression with adolescent social media usage, along with cyberbullying-related depression, body image and disordered eating behaviors, and poor sleep quality.[7] Almost 60% of adolescent girls have been contacted by a stranger online in a way that made them uncomfortable,[8] and one-third of girls aged eleven to fifteen years report feeling "addicted" to a

4. We use the term "minors" to denote anyone who is not a legal adult, ordinarily meaning anyone under eighteen. We think it is important to underscore the difference between a legal term and a cultural term. The legal terms "child," "juvenile," and "infant" also refer to anyone under the age of eighteen. The terms "teenager," "adolescent," and "youth" have no independent legal meaning. Children's Online Privacy Protection Act (COPPA) distorted age discussions by creating special protections for those under the age of 13. COPPA 15 U.S.C. §§ 6501–6506, implemented by the FTC as 16 C.F.R. § 312.2. Thirteen has no significance in the common law or Constitutional law of the family. Parents retain decision-making authority over minors until they turn eighteen. *See generally* Katharine Silbaugh, *More Than the Vote: 16-Year-Old Voting and The Risks of Legal Adulthood*, 100 B.U. L. REV. 1689 (2020).

5. SURGEON GENERAL'S ADVISORY, *supra* note 1.

6. *Id.* at 4; Zara Abrams, *Why Young Brains are Especially Vulnerable to Social Media*, AM. PSYCH. ASS'N (updated Aug. 3, 2023), https://www.apa.org/news/apa/2022/social-media-children-teens [https://perma.cc/95JR-J9UH] (discussing science behind different impact of apps like TikTok, Instagram, and Snapchat on child vs. adult brains).

7. SURGEON GENERAL'S ADVISORY, *supra* note 1, at 6–7.

8. *Id.* at 9.

social media platform.[9] One in three teens report using screens until midnight or later on a typical weeknight,[10] and the related sleep interruption is linked to altered neurological development in adolescent brains, depression, and suicidal thoughts and behaviors.[11] The American Whistleblower testimony supported by internal files from Meta[12] report what many have come to believe: These features are known within the industry yet subordinated to the profit-oriented mission of design that keeps adolescents online.[13]

Parents want help from the government as they endeavor to supervise their children online.[14] Hundreds of parents have initiated personal injury litigation against social media companies alleging that these companies defectively designed their platforms to induce harmful, compulsive use by children and seeking to recover for the pathological and sometimes fatal consequences of these practices.[15] This litigation spotlights the "deficient tools for parents that create the illusion of control" while frustrating the actual ability of parents to intervene effectively.[16] Understanding why unfettered access to minors by social media companies is anomalous within family law will support regulation that enables parents to play their conventional role under common and constitutional law.

New legislation in Ohio, Louisiana, Texas, Utah, Arkansas, Georgia, Tennessee, New York, California, and Mississippi seeks to require parental consent, sometimes called parental "opt-in," to participate in social media, attempting to leverage parental authority to reduce harm to minors.[17] Tech companies have

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9. *Id.*

10. *Id.* at 10.

11. *Id.*

12. *See generally The Facebook Files*, WALL ST. J. (Sept.–Dec. 2021), https://www.wsj.com/articles/the-facebook-files-11631713039 [https://perma.cc/NM8C-A9V5].

13. *Hearing on "Holding Big Tech Accountable: Targeted Reforms to Tech's Legal Immunity" Before Subcomm. on Consumer Prot., Prod. Safety, & Data Sec. of the U.S. S. Comm. on Com., Sci. & Transp.*, 117th Cong. (2021) (statement of Frances Haugen) https://www.commerce.senate.gov/services/files/FC8A558E-824E-4914-BEDB-3A7B1190BD49 [https://perma.cc/M27B-75BL].

14. *Parents Want Stricter Legislation to Protect Kids on Social Media*, SECURITY.ORG (June 27, 2023), https://www.security.org/digital-safety/parents-react-to-social-media-legislation/ [https://perma.cc/A2KL-LSKD] (89% of parents want a parental opt-in, and 98% believe social media is dangerous to their children); *see also* Jennifer Berg, *About Eight in Ten Parents with Children Under 18 on 'Traditional' Social Media Apps Worry About Their Children Using Video/Image-Sharing Apps*, IPSOS (Sept. 14, 2023), https://www.ipsos.com/en-us/about-eight-ten-parents-children-under-18-traditional-social-media-apps-worry-about-their-children [https://perma.cc/XW4T-LE74]; For an in-depth look at the research on harms, which this article takes as a given for purposes of argument, see generally Jonathan Haidt, THE ANXIOUS GENERATION: HOW THE GREAT REWIRING OF CHILDHOOD IS CAUSING AN EPIDEMIC OF MENTAL ILLNESS *passim* (2024).

15. *See* Amended Master Complaint at ¶¶ 3, 141, In re: Social Media Adolescent Addiction/ Personal Injury Products Liability Litigation, No. 22-MD-3047 (N.D. Cal. Apr. 14, 2023).

16. Parental control tools are limited and typically require that a minor affirmatively opt-in where parents may not even be aware of the social media use. *Id.*

17. *See infra* Part IV.B. We include legal guardian within the meaning of the term parent, recognizing that the legal formality in the relationship of either parent or guardian does not capture the network of adults that raise children; *see* Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 405–09 (2008).

responded to this legislation by waging what has been described as an "all fronts war" against reforms.[18] A number of federal courts set the stage for highly consequential appeals in 2024 and 2025 by invalidating these laws.[19] We explore how NetChoice, the industry litigation shop for Meta, Google, TikTok, Twitter/X, and Amazon, mischaracterizes the speech rights of minors and how lower courts are taking up this mischaracterization without acknowledging its disruptive implications for family law.[20] Federal lower court opinions seem to echo NetChoice's extreme approach to First Amendment jurisprudence involving minors and fail to reflect the legal context of parental decision-making.

These cases ignore the routine use of opt-in parental consent frameworks in the law covering expressive activities where the First Amendment has never been seen to be implicated.[21] The law of tattoos exemplifies the discrepancy in imagined regulatory scenes between First Amendment scholars and family law scholars. Tattoos can contain the highest value political speech[22] and are protected by the First Amendment.[23] Yet minors can only be tattooed with parental consent if at all.[24] An entire medium of expression for minors is permitted only with "opt in"

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18. Rebecca Kern, *Big Tech Carves Loopholes out of State Kids' Safety Laws*, POLITICO (May 18, 2023, 11:20 AM), https://www.politico.com/news/2023/05/18/tech-lobbyists-score-wins-in-state-kids-safety-laws-00096301 [https://perma.cc/F5UV-GMPJ].

19. *See* NetChoice, LLC v. Yost, No. 2:24-cv-00047, 2024 U.S. Dist. LEXIS 6349 (S.D. Ohio Jan. 9, 2024); NetChoice, LLC v. Griffin, No. 5:23-CV-051052023, 2023 U.S. Dist. LEXIS 154571 (W.D. Ark. Aug. 31, 2023).

20. See *infra* Part IV. In addition to First Amendment objections, NetChoice also challenges these statutes under the dormant commerce clause. Courts have generally not felt the need to respond to these claims, and the state's traditional function regulating families may help to insulate our proposal from dormant commerce clause claims. Complaint for Declaratory and Injunctive Relief at ¶¶ 64–71, NetChoice, LLC v. Griffin, No. 5:23-cv-05105, 2023 U.S. Dist. LEXIS 154571 (W.D. Ark. Aug. 31, 2023); NetChoice, LLC v. Griffin, No. 5:23-CV-051052023, 2023 U.S. Dist. LEXIS 154571 (W.D. Ark. Aug. 31, 2023). In the context of noneconomic injuries, a Utah district court has explained that a general impediment to online distribution of information will not give rise to an injury sufficiently concrete and particularized to confer standing under the commerce clause to most members of the public. Zoulek v. Hass, No. 2:24-cv-00031, 2024 U.S. Dist. LEXIS 138675, at *15–16 (D. Utah, Aug. 5, 2024).

21. A few examples of routine opt-in parental consent laws even where a minor's personal expression is at stake include enrolling in school, being tattooed, or performing in a film or theater production. *See infra* notes 25-29, 39-44. COPPA also requires parental consent when a child is under age thirteen. Anita Allen, *Minor Distractions: Children, Privacy and E-Commerce*, 38 HOUS. L. REV. 751, 761–64 (2001).

22. *See, e.g.*, B.V. Olguín, *Tattoos, Abjection, and the Political Unconscious: Toward a Semiotics of the Pinto Visual Vernacular*, 37 CULTURAL CRITIQUE 159 (1997); Alli Joseph, *Ink for the Ages: Why Women are Getting Political Tattoos in Droves since the Election*, SALON (Jan. 25, 2017, 1:00 AM), https://www.salon.com/2017/01/25/watch-ink-for-the-ages-why-women-are-getting-political-tattoos-in-droves-since-the-election/ [https://perma.cc/2HDE-G9TT].

23. Tattoos have in recent years been increasingly accepted as first-amendment-protected expressive activity. *See* Buehrle v. City of Key West, 813 F.3d 973 (11th Cir. 2015) ("We join the Ninth Circuit in holding that the act of tattooing is sheltered by the First Amendment, in large part because we find tattooing to be virtually indistinguishable from other protected forms of artistic expression . . . ."); Anderson v. City of Hermosa Beach, 621 F.3d 1051 (9th Cir. 2010); Coleman v. City of Mesa, 265 P.3d 422 (Ariz. 2012); Lanphear v. Commonwealth, No. 99-1896-B, 2000 Mass. Super. LEXIS 711 (Oct. 20, 2000).

24. *Tattooing and Body Piercing: State Laws, Statutes, and Regulations*, NAT'L CONF. STATE LEGISLATURES (Mar. 26, 2015), https://web.archive.org/web/20150706052103/http://www.ncsl.org/research/health/tattooing-and-body-piercing.aspx.

parental approval. The need for parental consent is not conditioned on the First Amendment value of the message conveyed by the tattoo, whether it is visual art or an anarchist, pacifist, or religious symbol. *This* is the imagined regulatory scene of family law: What is right for a child is placed within the family's decision-making practices and legally expressed through the exercise of required parental consent. State law supports that decision-making by regulating the way third parties interact with minors, even where speech is involved. The regulatory constraint on tattooing effectively prohibits the minor from expressing her views through her tattoo.[25] This is an ordinary reflection of the legal authority of parents to make decisions about their child's speech rights in the world.[26] This article seeks to draw the attention of courts and social media scholars to the family law regulatory scene, understanding that social media can generate data, psychological, and emotional consequences for a minor as lasting as tattoos.

We uncover aspects of social media regulation that should engage with and rely upon family law. Family law both supports parental authority and creates a protective framework against commercial and other third-party exploitation of minors. This alternative source of law could provide support for regulations limiting the exploitation of youth immaturity and inexperience by anchoring social media regulation in traditional legal principles embedded in the common law of the family. The legal authority of parents does not work well for every child in every instance; it is manifestly fallible. Yet the framework giving parents decision-making authority is nonetheless well-considered for the promotion of child welfare,[27] and it must apply to social media just as it does in real world settings.

After exploring regulation-supportive family law doctrine, we then offer a new evaluation of the First Amendment cases through their conception of the parental role in managing children's experience of speech. What we call the *First Amendment of the family* shows that the cases are quite supportive of parental decision-making. Notably, at times they explicitly require parental monitoring as the best option for harm prevention, labeling parental supervision the "least restrictive alternative" in First Amendment doctrinal analysis.[28] The analysis is designed to counteract the industry's First Amendment challenges by pointing out the problems with the industry's characterization of children's First Amendment rights.

We argue that courts and regulators often deploy an episodic understanding of family law, rather than one that perceives the fabric of common law doctrines that combine to create a child welfare architecture. We examine children's speech and privacy rights, parental responsibility for decision-making, including decisions about a minor's contact with any third party, and the infancy doctrine in contract law. When courts view each of these in isolation, they are cast in the weakest

25. *Id.*

26. *See infra* Part II.B.

27. *See* RESTATEMENT OF CHILDREN AND THE LAW § Introduction (AM. L. INST., Tentative Draft No. 1, 2018) [hereinafter RESTATEMENT CHILDREN NO. 1].

28. *See infra* Part III.E.3.

possible light. When seen as a part of a framework designed to protect and raise minors, their best meaning in each individual application is easier to recognize. Individually and together these doctrines can reduce social media influence in the lives of minors.

We conclude by proposing a Parental Decision-Making Registry that leverages the insights of this article. We believe that this content-neutral, state-mandated, state-created Registry that allows parents to *opt-out* of social media platforms for their child altogether should easily survive First Amendment scrutiny.[29] State legislatures could require social media companies to consult a single, government-designed, easy "opt-out" platform that lets parents communicate to the social media company that it is prohibited from interacting with a particular child as identified by that child at the device level.[30] This reform fits well within parental authority.[31] That same opt-out platform could allow parents to establish tech-enforced social media curfews.[32] Echoing the structure of common parental consent laws for minors to obtain an abortion, we propose a judicial bypass proceeding that would allow minors the opportunity to petition a judge for bypass of parental consent upon a showing of substantial risk of serious harm to the minor from a parent's decision to limit social media.

We distinguish a mandated Registry from the burgeoning parental controls designed by the companies themselves.[33] Most of those industry parental controls require the continued consent of the minor, meaning that social media companies invert the legal authority in the parent-child relationship.[34] Each company has

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29. *But see infra* discussion accompanying notes 448–52; Neil Richards & Woodrow Hartzog, *The Pathologies of Digital Consent*, 96 WASH. U. L. REV. 1461 (2019); Woodrow Hartzog, *The Case Against Idealising Control*, 4 EUR. DATA PROT. L. REV. 423 (2018) (data privacy harms are not well-addressed by consent, as distinct from harms we discuss).

30. *See* UTAH CODE ANN. § 78B-6-2201–06 (West 2023) may eventually require that all tablets and smartphones sold in Utah come equipped with enabled-by-default filtering software capable of blocking material harmful to minors. Utah's law is not content-neutral and attached liability to manufacturers, but its technological approach could be adapted to enable a parent-driven assessment of content; *see infra* Part V.

31. *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 795 n.3 (2011) (striking content-based opt-in parental consent for minors but approving opt-out parental authority). The statute in *Brown* created a new content-specific speech burden with a difficult-to-operate definition. *See* CAL. CIV. CODE ANN. § 1746(d)(1) (West 2009).

32. *See infra* Part V.

33. In September of 2024, META announced new Instagram teen accounts. *See* Mike Isaac & Natasha Singer, *Instagram, Facing Pressure Over Child Safety Online, Unveils Sweeping Changes*, N.Y. TIMES (Sept. 17, 2024), https://www.nytimes.com/2024/09/17/technology/instagram-teens-safety-privacy-changes.html [https://perma.cc/RKC7-G8L6] ([N][will]automatically be[] put into private mode. . . . Meta said . . . it will also show them less content in the main Instagram feed from people they do not follow and prevent them from being tagged by the accounts of other people with whom they are not connected. False [Instagram is adding] a feature enabling a parent to see the topics of posts their child has chosen to see more of, as well as the accounts of the people their child recently messaged. To protect user privacy, though, parents will not be able to view the content of their children's messages.")

34. Caroline Knorr, *Parents' Ultimate Guide to Parental Controls*, COMMON SENSE MEDIA (Mar. 9, 2021), https://www.commonsensemedia.org/articles/parents-ultimate-guide-to-parental-controls [https://perma.cc/RYB4-2B24] (minors can undo parental controls offered by social media

unique controls, requiring unrealistic amounts of parental fluency to use across platforms. These also require unrealistic levels of content moderation by parents.[35] Our proposal more clearly shifts power from social media companies to parents, thereby more accurately reflecting the common law of the family. To be clear, we do not believe that consent frameworks alone are effective enough to cure most of the challenges of social media. Instead, we demonstrate that the control currently afforded to parents is *less than* what they enjoy in comparable off-line areas and that leveling up consent frameworks to those of conventional family law is consistent with the First Amendment. Indeed, bringing the First Amendment doctrine back in line with past cases and common law doctrine may set the stage for more courageous substantive regulations of social media.

We think that a content-neutral *opt-in* proposal, properly crafted, should survive First Amendment scrutiny, and that lower courts are drastically misreading Supreme Court precedent striking a poorly-justified *content-based* parental opt-in structure.[36] We also believe that regulations such as one recently enacted (and later repealed) in Utah that allow parents to see who their child is communicating with on social media are permissible at common law and under the First Amendment, as distasteful as they may seem as a matter of parental practice.[37] We do not advocate for parents reading their children's communications, but we argue that any legislation that provides for that kind of monitoring has no *constitutional* barrier since minor children enjoy no privacy rights from their parents, even if they enjoy privacy rights from the state and should enjoy privacy rights from corporations. Beliefs or statements to the contrary ignore both family law and constitutional doctrine that protects parents' supervision of their children.[38]

Opt-in legal regimes, meaning legal regimes that allow minors to do something only with parental consent, are routine, arguably ubiquitous. Parental consent is needed for minors to undergo surgical procedures,[39] undergo evaluation to assess special educational needs,[40] enroll in school,[41] apply for a passport,[42] or perform in

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companies themselves); Amended Master Complaint at ¶¶ 3, 141, *In re*: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation, No. 22-MD-3047 (Apr. 14, 2023).

35. *Ibid.*

36. *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786 (2011), discussed *infra* Part III.B. The statute in *Brown* created a new content-specific speech burden with a difficult-to-operate definition. *See* CAL. CIV. CODE ANN. § 1746(d)(1) (West 2009).

37. Utah Code Ann. § 13-63-104 (West 2023) (repealed 2024).

38. *See infra* Part II.C.

39. RESTATEMENT OF CHILDREN AND THE LAW § 19.01 (AM. L. INST., Tentative Draft No. 2, 2019) [hereinafter RESTATEMENT CHILDREN NO. 2]; Beatrice Jessie Hill, Symposium, *Medical Decision Making by and on Behalf of Adolescents: Reconsidering First Principles*, 15 J. HEALTH CARE L. & POL'Y 37, 54 (2012); Kimberly M. Mutcherson, *Whose Body Is it Anyway?: An Updated Model of Healthcare Decision-Making Rights for Adolescents*, 14 CORNELL J.L. & PUB. POL'Y 251 (2005).

40. Individuals With Disabilities in Education Act (IDEA), 34 C.F.R. § 300.322 (2023) (Parent Participation).

41. RESTATEMENT CHILDREN NO. 2, *supra* note 39, § 1.20.

42. *Apply for a Child's U.S. Passport: Apply for a Child Under 16*, U.S. DEP'T OF STATE (last accessed Jan. 20, 2024), https://travel.state.gov/content/travel/en/passports/need-passport/under-1

theater or movie productions.[43] Parental opt-in is legally pervasive, with and without a child's speech interest at stake.[44] Often law requires parental consent to conduct that may involve the exercise of other constitutionally recognized rights. For example, if a parent does not consent to a child crossing state lines, that child may be arrested and requisitioned back to their parents under state and federal law, despite the obvious burden such parental permission places on a minor's constitutional right to interstate travel.[45] The Constitution recognizes a fundamental right to marry, but statutes routinely require parental consent for minor marriages.[46] Parental consent may be effectively required for a child to engage in conduct protected by the free exercise clause.[47] The Constitution used to protect a minor's right to abortion, but statutes could require parental consent with a judicial bypass.[48] The child's constitutional right does not eliminate the constitutionally recognized parental authority expressed through parental consent statutes.

This article proceeds in the following parts. Part I provides an introduction to children and the law. Part II focuses on a few, particular common law doctrines that should inform consideration of social media regulation. These include the infancy doctrine, parental authority to control contact with third parties, parental authority to decide how much privacy to grant a minor (or how much to respect a minor's privacy right protected against state intrusion), and a parent's right to limit a minor child's expression of, and exposure to, even high-value speech. Part III reviews familiar First Amendment cases through a novel examination of their use of parental authority and their reliance on family law. Incorporating this *First Amendment of the family*, Part IV

6.html [https://perma.cc/8P95-NCUA].

43. *Child Entertainment Laws As of January 1, 2023*, U.S. DEP'T LABOR (accessed Jan. 26, 2024), https://www.dol.gov/agencies/whd/state/child-labor/entertainment [https://perma.cc/XV8R-4ULC].

44. For example, enrolling in school, performing in a theater production, and being tattooed all involve First Amendment protected activity and require parental consent.

45. *Rules for Runaways*, INTERSTATE COMM'N FOR JUV., https://juvenilecompact.org/legal/toolkit-for-judges/rules-for-runaways [https://perma.cc/XE7U-VMHP] (last visited Oct. 26, 2024); Christopher Holloway, *Fact Sheet, Interstate Compact on Juveniles*, OJJDP (Sept. 2000), https://ojp.gov [https://perma.cc/2AT8-VE6P]. Even denying a driver's license might burden the right of interstate travel, but a license cannot be obtained without parental consent, *New Driver's License for Teen Drivers*, DMV (accessed Jan. 19, 2024), https://www.dmv.org/articles/parental-permission-for-drivers-permits/ [https://perma.cc/F9NF-UQUB] (most states require parental consent or sponsorship).

46. Loving v. Virginia, 388 U.S. 1 (1967); in many states today, parental consent can also enable the marriage of a minor child, *Understanding State Statutes on Minimum Marriage Age and Exceptions*, TAHIRIH JUST. CTR., https://www.tahirih.org/wp-content/uploads/2016/11/State-Statutory-Compilation_Final_July-2019_Updated.pdf [https://perma.cc/Z6WJ-8LMB]; *e.g.*, Kirkpatrick v. Eighth Jud. Dist. Ct., 64 P.3d 1056 (Nev. 2003) (denying father's challenge to a district court permitting Kirkpatrick's fifteen-year-old daughter to marry a forty-eight-year-old man with the consent of her mother, but without the knowledge of her father).

47. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 115 (2001) ("Because the children cannot attend without their parents' permission, they cannot be coerced into engaging in the Good News Club's religious activities.").

48. The statutory framework chosen by a majority of states allows access to abortion on a parental "opt-in" basis. *Parental Involvement in Minors' Abortions*, GUTTMACHER, (Sept. 1, 2023), https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions [https://perma.cc/TT8N-E3RE].

reviews very recent efforts in State legislatures to address social media risk to minors. Part V concludes with a proposal for a Parental Decision-Making Registry that we think is unlocked by the prior materials as both feasible and constitutionally supportable.

I. CHILDREN AND THE LAW

Legal actors sometimes face the task of importing principles from one area of law to another, from one "imagined regulatory scene" to another.[49] There has been an explosion in scholarship surrounding new technologies. This includes resistance to new data collection practices, capabilities, and harms,[50] and the sexual exploitation that results from nonconsensual pornography,[51] the proliferation of misinformation amplified by new technologies, and a wide range of newly identified psychological harms associated with the use of social media.[52] New state legislative reforms engage parental consent and monitoring features of social media, causing some privacy and technology scholars concern about parental authority because of a belief that parents pose a threat to a privacy interest of their children.[53] In this "imagined regulatory scene" for some privacy and civil liberties scholars, teenagers are at risk of being cut off from life-saving support for their emerging identities by rigid and overly-censorial parents,[54] and parents place their own interests above those of their children.[55]

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49. Jack Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 928 (2006) ("[L]egal principles are intelligible and normatively authoritative only insofar as they presuppose a set of background understandings about the paradigmatic cases, practices, and areas of social life to which they properly apply. A principle always comes with an imagined regulatory scene that makes the meaning of the principle coherent to us.")

50. *E.g.*, Neil Richards & Woody Harzog, *A Duty of Loyalty for Privacy Law*, 99 WASH. U. L. REV. 961 (2021); Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 101 B.U. L. REV. 793 (2022).

51. *E.g.*, Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014).

52. Robert Chesney & Danielle Keats Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CAL. L. REV. 1753, 1773–74 (2019); Matthew B. Lawrence, *Public Health Law's Digital Frontier: Addictive Design, Section 230, and the Freedom of Speech*, J. FREE SPEECH LAW (*forthcoming 2023*) (bringing a public health paradigm to the regulation of addictive design in social media).

53. *E.g.*, Benjamin Shmueli & Ayelet Blecher-Prigat, *Privacy for Children*, 42 COLUM. HUM. RTS. L. REV. 759 (2014) ("[P]arents have always been able to invade their children's privacy by going through their schoolbags, reading their personal diaries and the like . . . ."); Stacey B. Steinberg, *Sharenting: Children's Privacy in the Age of Social Media*, 66 EMORY L.J. 839 (2017). *See* Jason Kelley, *The Law Should Not Require Parental Consent for All Minors to Access Social Media*, ELEC. FRONTIER FOUND. (May 12, 2023), https://www.eff.org/deeplinks/2023/05/law-should-not-require-parental-consent-all-minors-access-socialmedia#:~:text=COPPA%20protects%20the%20privacy%20of,the%20exploitation%20of%20children%27s%20data [https://perma.cc/BB52-ZSKJ].

54. Claire Cain Miller, *For One Group of Teenagers, Social Media Seems a Clear Net Benefit*, N.Y. TIMES (May 24, 2023), https://www.nytimes.com/2023/05/24/upshot/social-media-lgbtq-benefits.html [https://perma.cc/V3T8-4KK6].

55. Steinberg, *supra* note 53.

Surely this concern is not hypothetical.[56] Yet it belies no awareness of the legal understanding of childhood, one that addresses developmental needs and questions of care, pluralism, and dependence. Problems of navigating child and youth development are not new with the emergence of the internet but are instead pervasively addressed within family law, constitutional law, and other common law fields. Difficult debates in a range of difficult scenarios lead to a reasonably robust legal responsibility set upon parents, along with authority to perform their role.[57] Despite the recognized flaws of parental decision-making, there are enormous obstacles to any regime that does not empower parents to regulate contact with and about their children. It is not possible to perform the legal obligation of parenting without the legal authority parents enjoy.[58] This explains the resulting well-established family law doctrine that resolves conflicts between the state, third parties, and parents in favor of parents.[59] In other words, the "imagined regulatory scene" to a family law scholar is remarkably different than it might be to a First Amendment or technology scholar.

In the law regulating the family, parents have nearly unlimited legal authority to monitor a child's activities and to make unpopular decisions to prohibit a child's activity or contact with either personal or commercial interests.[60] The prospect of an imperfect, ignorant, or selfish parent is already fully imagined within the family law regime that nonetheless allocates authority to them for reasons of greater weight than the risk of flawed parenting.[61] The recently approved ALI Children and the Law describes historical and ongoing rationales for the broad protection of parental authority to make decisions about children:

> The contemporary rationale for strong parental rights . . . is grounded . . . in the conviction that the principle of family liberty, the goal of promoting child welfare, the limited ability of the state to intervene effectively, and the value of pluralism in our society all support substantial deference to parents' decisions about important issues, including education, discipline, medical treatment, and religious upbringing.[62]

For each of these values or rationales—liberty, child welfare, the inefficacy (and often harm) of state intervention, and pluralism—there is a substantial body

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56. Jessica Fish et al., *"I'm Kinda Stuck at Home with Unsupportive Parents Right Now": LGBTQ Youths' Experiences with COVID-19 and the Importance of Online Support*, 67 J. ADOLESC. HEALTH 450 (2020).

57. *See* RESTATEMENT CHILDREN NO. 1, *supra* note 27, § Introduction.

58. *Id.*

59. *Id.*; *The Legal Design for Parenting Concussion Risk*, 53 U.C. DAVIS L. REV. 197 (2019) [hereinafter Silbaugh, *Parenting Concussion Risk*].

60. RESTATEMENT CHILDREN NO. 1, *supra* note 27, § Introduction; Anne C. Dailey, *In Loco Reipublicae*, 133 YALE L.J. 419, 438–40 (2023); Clare Ryan, *The Law of Emerging Adults*, 97 WASH. U. L. REV. 1131, 1142–45 (2020); Joanna L. Grossman, *Constitutional Parentage*, 32 CONST. COMMENT. 307, 309–11 (2017).

61. *But see* Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75 (2021) (advocating change in law that would allow children access to courts to contest parental decisions).

62. RESTATEMENT CHILDREN NO. 1, *supra* note 27, Introduction.

of law and scholarly literature elaborating the right and practice of parental authority to make decisions.

Parents have expertise in their own children arising out of the exercise of their child-rearing responsibility and the proximity it affords to a child's development.[63] They have overwhelming emotional commitment to their children.[64] No matter how flawed a parent may be, they are also the most motivated emotionally and psychologically to invest in their child's welfare.[65] The perspective shift we seek from social media and privacy advocates is the understanding that parental authority is not defended in the abstract within the common law or by family law scholars as an ideal unto itself. It is defended when compared to state authority. It is also protected by the common law when compared to the authority of third-party private actors, whether they are individuals, institutions, or commercial entities, such as social media companies.[66]

Some privacy and internet scholars may be surprised to hear of the authority parents can exercise in the correlated "real world." Parents may search their child's room or backpack without permission and may limit their ability to interact with any person.[67] Parents may restrict a minor's access to speech and expression that is otherwise protected by the First Amendment.[68] Once again, when viewed episodically, this authority can sound quirky or even wrong. When viewed within the framework of family law, which imposes upon parents the wrap-around responsibility for a child's development, care, and well-being, this authority is revealed as the latitude needed to adapt to the individualized day-to-day needs and challenges that a particular child experiences. We urge the tech discourse to compare the treatment of minors on the internet with the treatment of minors in the correlated real-world spaces of home, family, school, community, and commercial space.

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63. *Id.*

64. Parham v. J.R., 442 U.S. 584, 602 (1979); Edgar Page, *Parental Rights*, 1 J. APP. PHIL. 187, 200–01 (1984).

65. DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 55, 93–95, 202–03 (2022) [hereinafter ROBERTS, TORN APART].

66. For a full discussion of the scope of parental rights, see Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371 (2020) (Huntington and Scott were two of the Reporters on the ALI Children and the Law Restatement that wrapped up in 2023) [hereinafter Huntington & Scott, *Conceptualizing Legal Childhood*]; DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 20–25 (2002); MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 35–39 (2005); Emily Buss, *Adrift in the Middle: Parental Rights After* Troxel v. Granville, 2000 Sup. Ct. Rev. 279, 286–90 (2000) [hereinafter Buss, *Adrift in the Middle*]; Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995). For a critique of the legal authority of parents and proposal for slight modification, see Dailey & Rosenbury, *supra* note 61.

67. RESTATEMENT CHILDREN NO. 2, *supra* note 39, § 1.80 cmt. a.

68. RESTATEMENT OF CHILDREN AND THE LAW § 18.11(a) (AM. L. INST., Tentative Draft No. 5, 2023) [hereinafter RESTATEMENT CHILDREN NO. 5]; *but see* Caroline Mala Corbin, *The Pledge of Allegiance and Compelled Speech Revisited: Requiring Parental Consent*, 97 IND. L.J. 967, 995–96 (2022) (characterizing parental authority as limited to "life-altering decisions" based on a set of high-profile litigated examples).

A. Parental Authority

Parental authority is the legal capacity to perform the legal mandate of child-rearing.[69] Parents make the choices about the community and the building in which a child resides, a child's schooling, a child's contact with all outsiders to the household, a child's use of time, a child's exposure to ideas, what a child eats, what a child wears, a child's mental and physical health care, a child's religious practices, a child's legal claims, a child's travel, and a child's ability to engage in commerce.[70] This legal standing is coercive of a child, yet it is counterbalanced by a legal obligation placed on the parent to do each of these things.[71] The latitude to make decisions about a child is necessary to carry out a parent's affirmative legal obligation to care for and raise that child. Family members are highly motivated to care for each other as well as possible as judged within that family's capacity, resources, and values. Minors have powers of discussion and persuasion with parents, and parents have a desire to build independent capacity in children. These are the safeguards on the right and responsibility of parents to raise children respectfully. Most parents are flawed, and yet repeat experience shows them to be the least flawed among the state, commercial actors, and themselves.[72] Parental authority to make decisions on behalf of children is substantial at common law and protected by courts in a wide array of difficult situations. To discharge the all-encompassing legal obligations parents have to children in the absence of parental authority would make already difficult work impossible. It makes no sense to mount a case for a right of privacy possessed by children against their parents without also unraveling all of the other rights children hold against the state but not against their parents.

The first fundamental right declared by the Supreme Court was the right of parents to direct the education of their children.[73] In the 1920s, when the United States Supreme Court articulated a fundamental right of parents to make decisions about child-rearing without state interference, it did so in clear recognition that these parental rights are entwined with parental obligation. In *Meyer v. Nebraska*, the Court said, "Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life . . . ."[74] Two years later in *Pierce v. Society of Sisters*, the Court again paired the concepts of parental rights and parental obligations, declaring, "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."[75]

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69. MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 35–36 (2005).

70. Huntington & Scott, *Conceptualizing Legal Childhood*, *supra* note 66; RESTATEMENT CHILDREN NO. 5, *supra* note 68, § Introduction; Scott & Scott, *supra* note 66.

71. RESTATEMENT CHILDREN NO. 1, *supra* note 27, § 2.10(a).

72. Martin Guggenheim, *The (Not So) New Law of the Child*, 127 YALE L.J.F. 942, 948–51 (2018).

73. Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972).

74. *Meyer*, 262 U.S. at 400.

75. *Pierce*, 268 U.S. at 535.

The Supreme Court often reaffirms the parental authority framework. In 1979, it offered two additional rationales to the rights/duties interplay:

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.[76]

It is common to mistake children's rights for children's independent agency. While children are legally entitled to their parents' economic support and their supervision, their parents are afforded decision-making by law. Children's agency, then, is limited to what they may persuade their parents to afford them. The Supreme Court explains this peculiar legal situation:

> [J]uveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae.* [citations omitted][77]

The choice among a public school, a Montessori school, a religious school, or home school are both well-defended in law and easily understood culturally.[78] Decisions over whether to medicate a child for ADHD or straighten a child's teeth for cosmetic reasons are similarly accepted.[79]

The defense of parental authority to make decisions, though, extends into more difficult circumstances. Indeed, it is argued that more vulnerable parents are *more* in need of clear parental rights because they may be less equipped financially or personally to withstand a state challenge to their decision-making.[80] Emily Buss, one of the ALI Reporters of Children and the Law, argues:

> [A]ffording parents great freedom in making child-rearing

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76. Parham v. J.R. 442 U.S. 584, 602 (1979).

77. Schall v. Martin, 467 U.S. 253, 265 (1984); *see also* Reno v. Flores, 507 U.S. 292, 302 (1993) ("The 'freedom from physical restraint' invoked by respondents is not at issue in this case. Surely not in the sense of shackles, chains, or barred cells, given the Juvenile Care Agreement. Nor even in the sense of a right to come and go at will, since, as we have said elsewhere, 'juveniles, unlike adults, are always in some form of custody.'")

78. *E.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

79. Parents are similarly able to opt their children out of a state's school vaccine mandates. *E.g.*, IDAHO CODE § 39-4802(2) (2016) ("Any minor child whose parent or guardian has submitted a signed statement to school officials stating their objections on religious or other grounds shall be exempt from the provisions of this chapter."); *see* RESTATEMENT CHILDREN NO. 1, *supra* note 27, § 2.30, Statutory Note Compulsory Vaccination.

80. Buss, *Adrift in the Middle*, *supra* note 66, at 292 ("While all parents may benefit from being given a greater freedom in child-rearing, we can expect the worst parents to be least equipped to accommodate disruptive intrusions."); *see also* Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523, 1574–78 (1998) (a parent's possessive sense supports their parenting); ROBERTS, TORN APART, *supra* note 65.

> choices, regardless of how good the particular choices are, may facilitate parenting that is, in fact, especially good for children. We might shield parents from an assessment of the choices they make, not because these choices do not matter, but because we conclude that the way to produce the best parenting overall is to avoid state scrutiny and intervention.[81]

B. The Rivalry for Decision-Making

Family law does not make many decisions for children on the merits.[82] Instead, it commits to a decision-making structure. On the other side of each dispute over decision-making about a child is another person or entity that might seek to compete for a role in the child's life. The decision to give decision-making to parents is an institutional arrangement that does not depend on the unique circumstances of each case or each child or each third party seeking to rival the parent for influence in that child's life. Otherwise, there could always be another party claiming something superior: a person who wants to contact or visit with a child,[83] a company wanting to sell to a child or harvest their data,[84] or a government wanting to interfere with parental decision-making[85] or legislate child decision-making rights.

The fallibility of the parent-child alignment and bond is sometimes posited as justifying intervention.[86] This is where family law experts understand that fallibility is not the end of the inquiry. The inquiry continues as follows: Does the commercial entity have the child's best interest in mind, such that it should be trusted where the parent is not? Does the state? Does the Boy Scout leader or Southboro Baptist church? If there are to be balancing tests, does the very risk of that inquiry, of courts adjudicating disputes between children and parents or parents and commercial entities, weaken the everyday authority of parents to make decisions that are at times at odds with a child's wishes?[87]

At the same time, it would be a mistake to conceive of parental authority over

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81. Buss, *Adrift in the Middle*, *supra* note 66, at 292.

82. The legal system does intervene in a few discrete and problematic areas: The criminal justice system adjudicates charges against minors, *see* CARA H. DRINAN, THE WAR ON KIDS (2017); and the child welfare system adjudicates removal from parental custody, *see* ROBERTS, TORN APART, *supra* note 65.

83. Troxel v. Granville, 537 U.S. 57, 68 (2000).

84. *See, e.g.*, *Children's Privacy*, EPIC, https://epic.org/issues/data-protection/childrens-privacy/ [https://perma.cc/K5SH-LDMA] (last visited Oct. 26, 2024); *Effects of Social Media*, SOCIAL MEDIA VICTIMS LAW CENTER, https://socialmediavictims.org/effects-of-social-media/ [https://perma.cc/7KH6-RE8Z] (last visited Oct. 26, 2024); Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–6505; *see infra* Part II.D (discussion of infancy doctrine).

85. *See generally* ROBERTS, TORN APART, *supra* note 65.

86. Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. L. & POL'Y REV. 217, 224 (2022) [hereinafter Gupta-Kagan, *Confronting Indeterminacy*]; ROBERTS, TORN APART, *supra* note 65, at 163; Cynthia Godsoe, *Disrupting Carceral Logic in Family Policing*, 121 MICH. L. REV. 939, 944 (2023) [hereinafter Godsoe, *Disrupting Carceral Logic*].

87. *See generally* Emily Buss, *Parental Rights*, 88 VA. L. REV. 635 (2002) [hereinafter Buss, *Parental Rights*].

children in the lay sense, as a mere exercise of coercion by parent over child. Some may imagine this coercive version of parental authority and therefore approach the issue with some skepticism. Instead, parental authority posits that between the parent, the developing child, the government, and private actors, the best decision-maker is the parent.[88] This is not a claim that parents are excellent decision-makers. It is instead a recognized principle of law that they are more likely to be motivated by the best interest of their child than either government or private third parties, that they have better information about their child than government or third parties, that they witness fine-grained changes on a daily basis and recognize expression of patterns over time, and that they are more likely to make a mature decision than children themselves.[89] The delegation to the parent is always a response to the question, Who decides? There is a child who is inexperienced and immature and in need of a trusted adult provider, a private sector that may wish to exploit a child's immaturity for commercial gain, and a state whose actors have limited visibility into childhood and a history of damaging intervention into families. The delegation of decision-making to parents does not arise in a vacuum, where parental decision-making quality is assessed against a theoretical ideal. The delegation is also not individualized to variations in a child's maturity or a parent's capacities, because any process to perform that individuation would undermine the benefits of the institutional delegation of authority to parents.[90]

For many adults, the only significant coercive authority they experienced in childhood was from their parents. This may make some adults particularly skeptical of parental authority. Arguably, when a person's worst experience of authority as a child came from their parents but was not abusive, that is an instance of good fortune, or of a system working well, in place of an experience of negative interactions with school or police authority or the authority of commercial entities.

Assuming parents are superior to the state or commercial actors, are they superior to the child themselves? Could the child themselves appeal directly to a court to override parental decision-making?[91] This begs the question whether a given individual child is mature enough to make their own decisions, and who would make that determination. Who will help them to marshal evidence? A teacher? Social worker? Corporate counsel? An appointed counsel? Courts have limited tools to choose appropriate values or gather information about a particular child that is superior to the parent's information, and courts know their own limitations in this

88. Clare Huntington & Elizabeth Scott, *The Enduring Importance of Parental Rights*, 90 FORDHAM L. REV. 2529, 2533–34 (2022) [hereinafter Huntington & Scott, *Enduring Importance of Parental Rights*].

89. RESTATEMENT CHILDREN NO. 1, *supra* note 27, § Introduction; Huntington & Scott, *Enduring Importance of Parental Rights*, *supra* note 88.

90. *See generally* Clare Huntington, *The Institutions of Family Law*, 102 B.U. L. REV. 393, 413–18 (2022).

91. Dailey & Rosenbury, *New Parental Rights*, *supra* note 61; Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448 (2018); Huntington & Scott, *Enduring Importance of Parental Rights*, *supra* note 88.

regard from ample experience.[92] The legal assumption that parents have the best access to this information about the child also protects the parent from the damage that comes from challenges to a parent's decision-making.[93]

The evidence about state and court intervention into family decision-making points strongly to real harm arising both from fear of state intervention and state intervention itself.[94] Further, social science supports the significance of stable parental relations to child development. The highly influential work in the family law system of Joseph Goldstein, Anna Freud, and Albert Solnit concludes:

> Psychoanalytic theory [&] developmental studies of other orientations [demonstrate] the need of every child for unbroken continuity of affection and stimulating relationships with an adult . . . . To safeguard the right of parents to raise their children as they see fit, free of government intrusion, except in cases of neglect and abandonment, is to safeguard each child's need for continuity. The preference for minimum state intervention and for leaving well enough alone is reinforced by our recognition that law is incapable of effectively managing, except in a very gross sense, so delicate and complex a relationship as that between parent and child.[95]

Pairing the affirmative benefit of a stable parent-child relationship with the indeterminacy risk of circulating child welfare decisions among episodic advocates for the child supports the framework of delegating decision-making to parents.

Parental authority is also viewed as a correlate to the pluralism that is not just tolerated but is protected under federal and state constitutions. Religion, association, and privacy rights are examples of the larger liberty interest in pursuit of a life that conforms or does not conform to common culture within a wide range. It is difficult to make sense of a value that rejects social standardization or conformity without authorizing pluralism in child-rearing practices and decisions.[96] Indeed, the protection of family pluralism is considered an important asset in protecting pluralism against state or social pressure to conformity, and in shaping good citizens.[97] As it was establishing that parental right to direct a child's upbringing is a constitutionally protected fundamental liberty interest, the Supreme Court explicitly invoked this rationale, explaining that "*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."[98] State

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92. Gupta-Kagan, *Confronting Indeterminacy*, *supra* note 86, at 228.

93. *Id.*; ROBERTS, TORN APART, *supra* note 65, at 56–62; Godsoe, *Disrupting Carceral Logic*, *supra* note 86, at 953.

94. *Ibid.*

95. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 6–8 (1973); *see also* ERIK ERIKSON, CHILDHOOD AND SOCIETY 219–31 (2d ed. 1993).

96. *See*, *e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

97. LINDA MCCLAIN, THE PLACE OF FAMILIES 50–84 (2006).

98. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (emphasis added).

judgment about an individual's parenting decisions has a long history of incorporating dangerous racial and wealth stereotyping.

Legislation in all states affords a child welfare system the power to intervene in families when in its view the child is in real danger due to their parents' neglect or abuse.[99] The child welfare system is sometimes referred to as the "Family Policing" system as it disproportionately monitors and acts to separate children from parents within low-income communities, communities of color, and among parents with disabilities.[100] Substantial criticism is mounting of that system precisely because it fails to respect parental authority as it breaks apart families. Critics argue that the child welfare system polices Black and Brown communities in the same way that the carceral system does.[101] Notably, the Supreme Court in *Santosky v. Kramer* recognizes a heightened standard of proof before a State may use this system to declare a parent unfit to make decisions about and retain custody of their minor child:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.[102]

Technology scholars must shift their imagination away from disputes between parents and children and toward disputes between parents and the state and parents and third-party corporations or individuals. The child welfare system at issue in *Santosky* sets up a contest between a parent's notion of how much supervision or discipline is appropriate, and the ideas of the state. Legal intervention is only permissible in the case of serious danger to a child, of a sort that is completely foreign to a discussion of social media restriction.[103] Even where there is serious

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99. RESTATEMENT CHILDREN NO. 1, *supra* note 27, § 3, State Intervention for Abuse and Neglect, Introductory Note.

100. ROBERTS, TORN APART, *supra* note 65, at 38–43; Godsoe, *Disrupting Carceral Logic*, *supra* note 86, at 940–41; Gupta-Kagan, *Confronting Indeterminacy*, *supra* note 86, at 231–33; ALAN DETTLAFF ET AL., HOW WE ENDUP: A FUTURE WITHOUT FAMILY POLICING (2021), https://upendmovement.org/wp-content/uploads/2021/06/How-We-endUP-6.18.21.pdf [https://perma.cc/6GR9-NTCW]; Sarah H. Lorr, *Unaccommodated: How the ADA Fails Parents*, 110 CALIF. L. REV. 1315, 1318–21 (2022).

101. DETTLAFF ET AL., *supra* note 100, at 3 ("The child welfare system is predicated on the subjugation, surveillance, control, and punishment of mostly Black and Native communities experiencing significant poverty. We more accurately refer to this as the family-policing system.").

102. Santosky v. Kramer, 455 U.S. 745, 752–54 (1982).

103. In an abundance of caution, our proposal offers minors the ability to seek judicial bypass to circumvent the possibility of a harmful parent. *See infra* Part V.A.

danger to a child, states have a legal obligation to attempt reunification of child and parent. Removal of children from their families causes harm to them.[104] Children want to return to parents even when the system judges those parents to be dangerous.[105]

Beyond setting a limitation on the child welfare system, there are ample other contexts where parental authority *protects a child from the state*. One example may help to illustrate the point. In 2021, the Arkansas legislature passed a law forbidding physicians from providing gender-affirming care to minors.[106] In striking down the statute, a federal court held that the provision interfered with a parent's constitutional right to make medical decisions for their child.[107] The Court rested its conclusion that the statute violates the due process clause on the observation that "the Parent Plaintiffs have a fundamental right to seek medical care for their children and, in conjunction with their adolescent child's consent and their doctor's recommendation, make a judgment that medical care is necessary."[108] The state interfered with that parental authority.[109]

These are recognized as difficult decisions. The delegation to parents maintains the pluralism around which choice is appropriate, rather than perfecting any one decision, while protecting both parent and child from intervention from more powerful public or private entities. Our legal system of child well-being expressly relies upon parents.

C. The Presumption that Parents Act in Their Child's Best Interest

There is a presumption in law that parents act in their child's best interest.[110] Only where two legal parents disagree *with each other*, as in the case of a custody dispute, does an older child's view enjoy even a procedural right to enter a court's determination of the child's best interest.[111] The court's routine entry into best interest determinations in custody disputes arises from a dispute between two holders of parental rights. Attention is again paid to allocating decision-making

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104. DETLAFF ET AL., *supra* note 100, at 7; Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 527–35 (2019); Michele Goodwin & Naomi Duke, *Parent Civil Unions: Rethinking the Nature of Family*, 2013 U. ILL. L. REV. 1337, 1360–65 (2013).

105. Trivedi, *supra* note 104, at 527–35.

106. Act 626, ARK. CODE ANN. §§ 20-9-1501 to -1504, 23-79-164 (West 2023).

107. Brandt v. Rutledge, No. 4:21CV00450, 2023 U.S. Dist. LEXIS 106517 (E.D. Ark. Jun. 20, 2023). *But see* L.W. v. Skrmetti, 73 F.4th 408 (6th Cir. 2023) (criticizing *Brandt v. Rutledge*'s interpretation of parental authority and granting stay of preliminary injunction against Tennessee's Prohibition on Medical Procedures Performed on Minors Related to Sexual Identity Act).

108. *Brandt*, 2023 U.S. Dist. LEXIS 106517, at *75.

109. This is not to say that all parents are safe for trans children, it is only to suggest that the parent who lives with a trans child is more likely to emerge as an advocate for them than the state with a political project.

110. Troxel v. Granville, 537 U.S. 57, 68 (2000); Parham v. J.R., 442 U.S. 584, 602 (1979). *But see* Catherine Smith, *"Children's Equality Law" in the Age of Parents' Rights*, 71 KAN. L. REV. 533, 538–39 (2023) ("There are times when parents do not possess the requisite political power to protect their children.").

111. Melissa Kucinski, *Why and How to Account for the Child's Views in Custody Cases*, 43-SPG FAM. ADVOC. 28, 29 (2021); Elizabeth R. Ellis, *Whose Role Is It Anyway? Deciphering the Role, Functions, and Responsibilities of Representing Children in Custody Matters*, 31 J. AM. ACAD. MATRIM. LAW 533 (2019).

authority, as courts endeavor to choose a decision-making structure between competing parents and then delegate decisions within that structure.[112] Custody-related best interest jurisdiction does not undermine the legal presumption that parents act in a child's best interest where the dispute is between family and the state, child and parent, or third party and parent or family. It is a judicial intervention where two parental rights holders disagree.

The presumption that parents act in their child's best interest denies children a right to come to court in the overwhelming majority of disputes that they might have with parents. Surely the complete absence of litigation over parent-child disputes short of emancipation actions illustrates how firm the rule is, *not how rare it is for children and parents to disagree*.

D. What Makes Childhood Different

The status of minors differs substantially from that of adults. Four particular attributes of that difference inform common law doctrines within family law and across a range of other common law subjects. These characteristics of legal childhood are restated constantly across a wide variety of legal doctrines, from child support to contract law, tort immunity to custody and visitation.

1. Dependency

Childhood presents perhaps the most visible instance of human vulnerability[113] and inevitable dependency.[114] Unlike the precarity[115] that is produced by exclusionary economic systems,[116] the vulnerability and dependency of childhood are foundational to the human condition. This vulnerable condition has given rise to a substantial if at times invisible legal infrastructure. Foremost, law imposes on parents substantial affirmative obligations formed in recognition of the demands and complexity of these basic conditions.[117] In all states, parents have a legal obligation to support their minor children economically at least as long as they

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112. *See* Kimberly C. Emery & Robert E. Emery, *Who Knows What Is Best for Children? Honoring Agreements and Contracts Between Parents Who Live Apart*, 77 L. & CONTEMP. PROBS. 151 (2014); Robert Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226 (1975).

113. *See* Martha A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 8–15 (2008).

114. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 161 (1995); MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY *passim* (2004).

115. JUDITH BUTLER, PRECARIOUS LIFE (2004).

116. Sharryn Kasmir, *Precarity*, ANTHROENCYCLOPEDIA (Mar. 13, 2018), https://www.anthroencyclopedia.com/entry/precarity [https://perma.cc/B57A-J7AT].

117. RESTATEMENT CHILDREN NO. 1, *supra* note 27, § 2.10(a) ("Parents must provide reasonable economic support to their minor children."); RESTATEMENT CHILDREN NO. 5, *supra* note 68, §§ 1.40–41 (parental duty to protect children from harm); *Termination of Child Support*, NAT'L CONF. STATE LEGISLATURES (Apr. 29, 2020), https://www.ncsl.org/research/human-services/terminationof-child-support-age-of-majority.aspx [https://perma.cc/3WVQ-XJM3].

are enrolled in high school and at least until the age of eighteen if they are not.[118]

2. Immaturity

As the Supreme Court noted in *Roper v. Simmons*[119] when it precluded the death penalty for juvenile offenders, developmental science confirms that adolescents are more prone than adults to be impulsive, reckless, vulnerable to peer pressure, and in possession of more transitory personality traits.[120] Decades of work on juvenile sentencing and transfer to adult court preceded the Supreme Court's explicit reference to developmental science. The consensus emerging from this research is that the adolescent brain is quite different from the adult brain, and although it gradually matures at different rates for different people, it does not complete adolescence until around age twenty-five or twenty-six.[121] The age of majority in the United States was twenty-one until the 1970s.[122] The lowering of the age of majority to eighteen in the United States had nothing to do with an updated, improved, or even different understanding of maturity. It was instead a direct

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118. RESTATEMENT CHILDREN NO. 1, *supra* note 27, § 2.10(a) cmt. a.

119. Roper v. Simmons, 543 U.S. 551, 572–73 (2005) (juvenile offenders are "too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability"); *see also* Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. 460, 472 (2012) (holding juvenile life without parole violates the Constitution, relying on science that "both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed").

120. Indeed, the Massachusetts Supreme Judicial Court in 2024 became the first to hold that juvenile life without parole is unconstitutional for eighteen-, nineteen-, and twenty-year-olds as well as minors. Commonwealth v. Mattis, 224 N.E.3d 410 (Mass. 2024).

121. NAT'L ACADS. OF SCI., ENG'G & MED., THE PROMISE OF ADOLESCENCE: REALIZING OPPORTUNITY FOR ALL YOUTH (2019) (adolescence is a critical period of development during which key areas of the brain mature, beginning at the onset of puberty and ending in the mid-twenties); Lydia Denworth, *Adolescent Brains Are Wired to Want Status and Respect: That's an Opportunity for Teachers and Parents*, SCI. AM. (May 1, 2021), https://www.scientificamerican.com/article/adolescent-brains-are-wired-to-want-status-and-respect-thats-an-opportunity-for-teachers-and-parents/ [https://perma.cc/6F39-TM2L] ("[A]dolescence . . . brings alarming increases in rates of accidents, suicide, homicide, depression, alcohol and substance use, violence, reckless behaviors, eating disorders, obesity and sexually transmitted disease compared with the rates for younger children. . . . Neuroscientists showed that puberty ushers in a period of exuberant neuronal growth followed by a pruning of neural connections that is second only to the similar process that occurs in the first three years of life. They also showed that the maturation of the adolescent brain is not linear. The limbic system, a collection of brain areas that are sensitive to emotion, reward, novelty, threat and peer expectations, undergoes a growth spurt while the brain areas responsible for reasoning, judgment and executive function continue their slow, steady march toward adulthood. The resulting imbalance in the developmental forces helps to explain adolescent impulsivity, risk taking, and sensitivity to social reward and learning."). Under Roman Law, the age of majority was twenty-five. T.E. James, *The Age of Majority*, 4 AM. J. LEGAL HIST. 22, 33 (1960). By 1215 in England, the age of majority was twenty-one. *Id.* at 26.

122. *See* Silbaugh, *More than the Vote*; Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55, 64–65 (2016) ("Once eighteen had become the age of conscription and of the franchise, it began to replace twenty-one across a range of contexts and has been adopted as the near universal age of majority. Forty-four states have adopted eighteen as the presumptive age of legal majority."). In Mississippi, it remains twenty-one, and it is nineteen in five other states. *Termination of Child Support*, NAT'L CONF. STATE LEGISLATURES (Apr. 29, 2020), https://www.ncsl.org/research/human-services/terminationof-child-support-age-of-majority.aspx [https://perma.cc/3WVQ-XJM3].

response to lowering the age of draft to eighteen combined with the expansion of the draft in a controversial war in Vietnam.[123] The draft age was lowered for expedient reasons during World War II to increase the pool of eligible soldiers, and to draft from a pool less likely to be married and have dependent children, meaning a *less* mature pool.[124]

Higher legal ages track what we have come to learn about adolescent development.[125] Brain structure and function continue to mature into the early twenties, with "profound implications for decision-making, self-control and emotional processing."[126] Peer involvement intensifies these effects, such that social media is a particularly bad place for adolescents to exercise unsupervised judgment.[127]

Legal decision-makers digesting recent scientific and social science research have begun to parse findings that indicate when adolescents are capable of making good decisions and when they make poor decisions.[128] Adolescents achieve the cognitive capability to reason through decisions as an adult would significantly earlier than they achieve the emotional and social maturity to handle decision-making in pressured, threatening, or novel circumstances and in circumstances where social reward is present.[129] Judgment and self-control are not developed even though reasoning is, and thus adolescents are impulsive and make risky decisions in emotionally charged circumstances. The presence of peers greatly exacerbates poor decision-making of adolescents.[130] We believe that social media offers precisely the

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123. Silbaugh, *More than the Vote*, at 1719–1721; Jenny Diamond Cheng, *The Unintended Consequences of Eighteen-Year-Old Voting*, 2 MOD. AM. HIST. 397 (2019).

124. Cheng, *supra* note 123.

125. David L. Faigman et al., *G2i Knowledge Brief: A Knowledge Brief of the MacArthur Foundation Research Network on Law and Neuroscience* (MacArthur Found. Rsrch. Network on L. & Neurosci., 2017, Working Paper June 2017), https://scholarship.law.columbia.edu/faculty_scholarship/2017 [https://perma.cc/U6WK-VYTF].

126. CATHERINE INSEL & STEPHANIE TABASHNECK ET AL., CTR. FOR L., BRAIN & BEHAV., WHITE PAPER ON THE SCIENCE OF LATE ADOLESCENCE: A GUIDE FOR JUDGES, ATTORNEYS, AND POLICY MAKERS 2–3 (2022). *See also* Alexandra O. Cohen, Kaitlyn Breiner, Laurence Steinberg, Richard J. Bonnie, Elizabeth S. Scott, Kim A. Taylor-Thompson, Marc D. Rudolph, Jason Chein, Jennifer A. Richeson, Aaron S. Heller, Melani R. Silverman, Danielle V. Dellarco, Damien A. Fair, Adriana Galvan & B.J. Casey, *When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 PSYCH. SCI. 549 (2016); Marc D. Rudolph, Oscar Miranda-Dominguez, Alexandria O. Cohen, Kaitlyn Breiner, Laurence Steinberg, Richard J. Bonnie, Elizabeth S. Scott, Kim Taylor-Thompson, Jason Chein, Karla C. Fettich, Jennifer A. Richeson, Danielle V. Dellarco, Adriana Galvan, B.J. Casey & Damien A. Fair, *At Risk of Being Risky: The Relationship Between "Brain Age" Under Emotional States and Risk Preference*, 24 DEVELOP. COG. NEUROSCI. 93, 93–106 (2017); B.J. Casey, Aaron S. Heller, Dylan G. Gee & Alexandria O. Cohen, *Development of the Emotional Brain*, 29 NEUROSCI. LETTERS 693 (2019).

127. INSEL & TABASHNECK ET AL., *supra* note 126, at 2–3.

128. *E.g.*, *Commonwealth v. Mattis*, 224 N.E.3d at 418 ("[E]merging adults are 'less able to control their impulses' and that 'their reactions in [emotionally arousing] situations are more similar to those of [sixteen and seventeen year olds] than they are to those [twenty-one to twenty-two] and older.'").

129. Faigman et al., *supra* note 125.

130. *Id.*; Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 64 AM. PSYCH. 583, 583–592 (2009); Dustin Albert, Jason Chein & Laurence Steinberg, *The Teenage Brain: Peer Influences on*

kind of emotionally charged environment dominated by peer influence and social rewards that is known to impair adolescent decision-making.

While adolescence lasts through the mid-twenties, one noteworthy issue raised by neuroscience and developmental science is the variation among individuals—the "group to individual" conundrum.[131] This issue engages the core of the rationale when allocating decision-making around minors: Children are immature *and different from one another*. Since development is a moving target, the party best situated to assess growth is the parent who has both superior knowledge and information inputs about their child. Adolescents increasingly gain the ability to make effective decisions, and the parental role evolves in practice against a backdrop of legal authority that remains consistent. The legal system avoids fine-tuning those maturing interactions, humble about its capacity to improve upon the parent.

3. Legal Obligation of Parents to Their Children

Both at common law and by statute, parents have substantial, indeed nearly all-encompassing affirmative obligations to their children, an unimaginable departure from the common law or constitutional norms of other relationships. We cannot understand the secondary questions of parental authority without an appreciation of the legal, not merely cultural, commitments required of parents. Parental obligation is enormous; parental authority is in service of those affirmative obligations. Parents are obligated to support their children economically,[132] including through the provision of housing, medical care,[133] food, and education. Parents have substantial discretion in how to discharge these obligations, but they are subject to legal enforcement. The two primary mechanisms to enforce the support obligation are court orders of child support or legal actions for nonsupport, and the child welfare system, which includes a substantial infrastructure that polices neglect of a parent's legal obligations to a child.

In order to execute on the legal duties unique to the parent-child relationship, parents are afforded wide latitude.[134] The absence of parental rights would increase the legal risks associated with the legal obligation of parenthood.

Adolescent Decision-Making, 22 CURRENT DIRECTIONS PSYCH. SCI. 114 (2013); INSEL & TABASHNECK ET AL., *supra* note 126, at 17–19.

131. INSEL & TABASHNECK ET AL., *supra* note 126, at 3.

132. RESTATEMENT CHILDREN NO. 1, *supra* note 27, § 2.10; *Termination of Child Support*, NAT'L CONF. STATE LEGISLATURES (Apr. 29, 2020), https://www.ncsl.org/research/human-services/terminationof-child-support-age-of-majority.aspx [https://perma.cc/3WVQ-XJM3].

133. RESTATEMENT CHILDREN NO. 1, *supra* note 27, § 2.30.

134. This also allows parents to define a good life for themselves as well as their children, and in that sense it cultivates the pluralism that characterizes our system. In the words of Charles Fried, "[T]he right to form one's child's values, one's child's life plan and the right to lavish attention on that child are extensions of the basic right not to be interfered with in doing these things for oneself." CHARLES FRIED, RIGHT AND WRONG 150–52 (1978). However, the correlated legal responsibility of child-rearing is distinct from the parent's own interests in it. Kaiponanea T. Matsumara, *Breaking Down Status*, 98 WASH. U. L. REV 671, 684 (2017) ("It is only possible to speak of wives or parents and for those concepts to be legally intelligible because all members of those categories are subject to the same legal duties.")

For example, in *Wisconsin v Yoder*,[135] the Supreme Court upheld the right of parents to discontinue sending their children to even their own religious school after 8th grade. The Court explained:

> It is the parents who are subject to prosecution here for failing to cause their children to attend school, and it is their right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent . . . . [T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children.[136]

In deciding that the parents retained the right to make this decision, the Court sees the relationship between the affirmative educational obligation tied to parenting and legal risks to parents.

Similarly, a child may not sue their parent for negligent injury resulting from an act involving an exercise of parental authority or discretion with respect to the provision of healthcare, food, clothing, housing, and other care.[137] Thus parents are immune from negligent torts that occur while they are doing the things the law obligates them to do. This tort immunity shows the common law making space for flawed parental decisions that fall within the purview of their 24/7 legal responsibility to care for a child.[138]

The parent-child relationship is completely unique in its legal structure due to the imposition on parents of an all-encompassing legal obligation for the care of children. It is not possible to understand parental authority without understanding how unusual this affirmative obligation is within the law.

4. Exploitation

The debate over the maturity and neuroscience of adolescents is not the only factor in comprehending the legal age of majority. Neuroscience debates can overshadow another key aspect of age-based legal status: For every question of adolescent capacity, there is an institution—corporation, school, juvenile court, religious organization—limited in its actions towards minors. We do not make teenagers bear the full consequences of influences imposed by external bodies including corporations, even if they have some capacity to do so.[139] Allowing our largest corporations to contract with minors makes those minors accessible targets for manipulative tactics. Viewing legal protections for minors through the lens of safeguarding them from exploitation enriches the institutional analysis of the age of

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135. Wisconsin v. Yoder, 406 U.S. 205 (1972).

136. *Id.* at 230–31.

137. *E.g.*, Goller v. White, 122 N.W. 2d 193, 197 (Wis. 1963).

138. Taylor v. Trimble, 13 Cal. App. 5th 934, 940–941 (2017) ("[It is] the duty of a parent or other adult having primary supervisory control over the child to see to it that a child would not be going into a place of obvious danger.").

139. See *infra* Part II.D.

majority, without demanding a fine-tuning of one child's pace of development.[140] This perspective clarifies why laws involving adolescents are designed to protect them in their interactions with adults.

For example, the common law always policed contracts with minors, originally up to the age of twenty-one but now eighteen, in order to protect those minors from exploitation arising from their immaturity or inexperience.[141] The infancy doctrine, for example, does not simply prohibit contracts with minors. Instead, it permits minors to disaffirm contracts they have made as long as they are a minor and within a reasonable time afterwards. A minor has "the capacity to incur only voidable contractual duties."[142] However, the other side of the contract has no power to disaffirm, if the young adult remains happy with the contract she made as a minor.[143] It is often said, then, that businesses contract with a minor "at their own peril."[144] Exploitation is repeatedly highlighted by courts as they continue to re-affirm this doctrine by protecting a minor both "against himself and his indiscretions and immaturity as well as against the machinations of other people and to discourage adults from contracting with an infant."[145] Similarly, laws protect minors from military recruitment if a parent objects,[146] and govern the contracts of child entertainers by requiring court supervision.[147] The Federal Trade Commission (FTC) prohibits the advertising of tobacco products to minors,[148] and the Fair Labor Standards Act (FLSA) and state laws restrict the ability of employers to put minors in particular jobs and at particular hours.[149] Even laws governing the age of consent to sexual activities

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140. Silbaugh, *More Than the Vote*, at 1698–1703.

141. RESTATEMENT CHILDREN NO. 5, *supra* note 68, § 20.20 cmt. a; RESTATEMENT (SECOND) OF CONTRACTS § 14 (AM. L. INST. 1981) ("Infants: Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person's eighteenth birthday.").

142. RESTATEMENT CHILDREN NO. 5, *supra* note 68, § 20.20; Natalie Banta & Naomi Cahn, *Digital Asset Planning for Minors*, 33 PROBATE & PROPERTY 44, 45–46 (2019).

143. RESTATEMENT CHILDREN NO. 5, *supra* note 68, § 20.20; Banta & Cahn, *supra* note 142, at 45–46.

144. *E.g.*, *In re* Ferguson's Guardianship, 41 N.Y.S.2d 862 (Coyne, J., in chambers 1943).

145. I.B. *ex rel.* Fife v. Facebook, Inc., 905 F. Supp. 2d 989 (N.D. Cal. 2012); *see also* Berg v. Traylor, 148 Cal. App. 4th 809, 816, 818 (Ct. App. 2007) ("[O]ne who provides a minor with goods and services does so at her own risk. . . . [T]he right to avoid contracts is conferred by law upon a minor 'for his protection against his own improvidence and the designs of others.").

146. 20 U.S.C. § 7908(a)(2) (2018); 72 FR 952 (parental opt-out from JAMRS database); *see also* Lila A. Hollman, *Children's Rights and Military Recruitment on High School Campuses*, 13 U.C. DAVIS J. INT'L L. & POL'Y 217, 232 (2007); Damien Cave, *Growing Problem for Military Recruiters: Parents*, N.Y. TIMES, June 3, 2005, at A1; *Parents, Teens and Military Recruiting*, NPR (July 5, 2005, 12:00 AM), https://www.npr.org/templates/transcript/transcript.php?storyId=4730222 [https://perma.cc/342T-Q3LH].

147. Marina A. Masterson, Comment, *When Play Becomes Work: Child Labor Laws in the Era of "Kidfluencers"*, 169 U. PA. L. REV. 577 (2021); John H. Shannon & Richard J. Hunter Jr., *Principles of Contract Law Applied to Entertainment and Sports Contracts: A Model for Balancing the Rights of the Industry with Protecting the Interests of Minors*, 48 LOY. L.A. L. REV. 1171 (2015).

148. *See Misleadingly Labeled E-Liquids that Appeal to Youth*, FDA (July 20, 2020), https://www.fda.gov/tobacco-products/ctp-newsroom/misleadingly-labeled-e-liquids-appeal-youth#:~:text=In%20Summer%202018%2C%20FDA%20and,boxes%2C%20candies%2C%20and%20cookies [https://perma.cc/TF6N-4G5V].

149. Under the Fair Labor Standards Act, it is illegal to employ a minor under the age of

often emphasize the difference in the ages of the minor and the adult in question, suggesting exploitation is the primary concern.[150] These protective patterns are set not to limit minors but to limit third parties in their interaction with minors, out of a concern that those third parties may seek to exploit their childhood.

E. Moms for Liberty: What Parental Authority is Not

A group called "Moms for Liberty" has become a force in local and state politics. The group aims to restrict curriculum and discussion in public schools of LGBTQIA identity or rights, race, or discrimination.[151] Despite their use of the term "parental rights," there is not any recognized version of parental rights that permits parents to control a public school curriculum, or information that children other than a parent's own children will receive.[152] Instead, parents who are concerned about information coming to their children have an established constitutional right to remove their children from the public schools and enroll them in a private school with their preferred curriculum or to home school them.[153]

The parental right to direct a child's education gives parents no control over public school curriculum for a municipality's children as a whole.[154] The ALI explains, "[P]arents who elect to send their children to public school do not have a constitutional right to selectively avoid aspects of required school programming or to insert themselves into the teaching process."[155] This group uses political and electoral power, not their common law or constitutional rights as parents.

Moms for Liberty has marshaled the substantial electoral power to influence curriculum across the political or ideological spectrum, and mislabeled it as emanating from parental authority or parental rights.[156] There is no conception of parental rights

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eighteen in a long list of positions, including in forestries, bakeries, or meat-packing facilities; in the manufacture of brick and tile; and in occupations using power tools or involving driving, roofing, or excavation, to name a few. 29 C.F.R. §§ 570.50–.68 (2019). In a majority of states, labor law further protects sixteen- and seventeen-year-olds from nighttime work or imposes maximum hour restrictions through age eighteen. *Selected State Child Labor Standards Affecting Minors Under 18 in Non-Farm Employment as of January 1, 2020*, U.S. DEP'T OF LABOR (2020), https://www.dol.gov/agencies/whd/state/child-labor [https://perma.cc/SW73-EXYN].

150. Sandra Norman-Eady, Christopher Reinhart & Peter Martino, *Statutory Rape Laws by State*, CONN. OFF. LEG. RSRCH., tbl.1 (Apr. 14, 2003), https://www.cga.ct.gov/2003/olrdata/jud/rpt/2003-r-0376.htm [https://perma.cc/DSS7-26X6].

151. Tim Craig, *Moms for Liberty has Turned 'Parental Rights' into a Rallying Cry for Conservative Parents*, WASH. POST (Oct. 15, 2021, 6:00 AM), https://www.washingtonpost.com/national/moms-for-liberty-parents-rights/2021/10/14/bf3d9ccc-286a-11ec-8831-a31e7b3de188_story.html [https://perma.cc/UX5N-38WW].

152. RESTATEMENT CHILDREN NO. 2, *supra* note 39, § 1.20 cmt. d ("[P]arents who elect to send their children to public school do not have a constitutional right to selectively avoid aspects of required school programming or to insert themselves into the teaching process. . . . [S]chools are not required to tailor programming to satisfy every parent's preferences.").

153. *Id.*

154. *See* Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972).

155. RESTATEMENT CHILDREN NO. 2, *supra* note 39, § 1.20 cmt. d.

156. *See generally* Mary Ziegler, Maxine Eichner & Naomi Cahn, *The New Law and Politics of*

in the legal sense that matches this political use of the term "parental rights."

II. COMMON LAW DOCTRINES RELEVANT TO SOCIAL MEDIA REGULATION

To improve evaluation of how parental authority can be utilized in social media regulation, it is essential to understand the framework of parental decision-making in its constitutional, common law, and statutory sense. No single doctrine sits in isolation from the broad framework that mandates parental care, provides parental decision-making authority, and protects families from third party interference by state or private actors. Within that fabric of law, we believe four particular doctrines around children influence the understanding of social media regulation. These areas are the right of parents to (1) restrict contact between a minor and any third party; (2) restrict a minor's access to First Amendment protected expression; (3) decide how much privacy to grant to a minor; and (4) act on behalf of their children in repudiating contracts. We look at each below.

A. Parental Authority to Limit the Contact of Minor's with Third Parties

Parents may limit or entirely prohibit any third-party contact with their child, and those decisions will be presumed to be in the child's best interest.[157] The ALI characterizes the history as follows: "Under the common law, a third party had no legal right of visitation with a child."[158] The Supreme Court articulated this established common law rule as a constitutional liberty interest in *Troxel v. Granville*, affirming "the interest of parents in the care, custody and control of their children," and describing it as "perhaps the oldest of the fundamental liberty interests recognized by this Court . . . ."[159] The Supreme Court determined that the state court could not interfere with a parent's right to limit grandparent visitation pursuant to her parental authority over the child's associations simply because that court disagreed with the parent's assessment.[160] It is within a parent's discretion whether to allow a grandparent, neighbor, friend, coach, religious leader, political candidate, or social media company to have contact with a child.[161]

A limited category of third parties—those who have been in a *parent-like*

Parental Rights, 123 MICH. L. REV (forthcoming 2024); Latoya Baldwin Clark, *The Critical Racialization of Parents' Rights*, 132 YALE L. J. 3000, 3040–3043 (2023).

157. RESTATEMENT CHILDREN NO. 2, *supra* note 39, § 1.80 ("A parent's decision about a child's contact with a third party is presumed to be in the child's best interest."); Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference after* Troxel v. Granville, 88 IOWA L. REV. 865, 921–22 (2003).

158. RESTATEMENT CHILDREN NO. 2, *supra* note 39, § 1.80 cmt. a.

159. Troxel v. Granville, 530 U.S. 57, 65 (2000).

160. *Id.* at 67–68.

161. *See generally* Buss, *Adrift in the Middle*, *supra* note 66. Glueckert v. Glueckert, 347 P.3d 1216, 1218 (Mont. 2015) (denying petition for extended contact with the child because grandparents failed to "overcome the express preference in favor of a fit parent's wishes by clear and convincing evidence"); Hiller v. Fausey, 904 A.2d 875, 890 (Pa. 2006) (applying strict scrutiny to third party visitation claim); RESTATEMENT CHILDREN NO. 2, *supra* note 39, § 1.82.

relationship with a child—now have the legal ability to seek contact with that child through the court system, but the high standards they must meet reinforce rather than undermine the general rule.[162] According to the Restatement, a court can only grant third party contact upon a multipart showing by clear and convincing evidence of a substantial existing relationship and a "substantial risk of serious harm to the child's health or well-being."[163]

This ability of parents to decide who will make contact with their child, then, has *both* constitutional protection and well-articulated common law roots. In everyday life, exercise of this parental authority hardly draws notice *because it is so ubiquitous*. Parents may decide what activities to support, whether those parents are keeping a child's contacts within a religious or values-based residential group,[164] are preventing extremist groups from interacting with their children,[165] or are simply setting and enforcing curfews and supervision of a child's interactions to promote development of positive social influences.[166]

Children are not passive in choosing their associations; they have an enormous practical role in curating their contacts. It is only to say those are negotiated with their parents, who retain the authority to enable, mediate, limit, and prohibit contact. The American Psychological Association recommends that parents engage with adolescents in their social media use, including monitoring, setting limits, and discussion.[167] Indeed, when a child's associations are very problematic and become dangerous to themselves or to others, everyone will ask why the parents permitted particular associations and failed to monitor their children's activities more closely.[168]

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162. *See generally* Buss, *Adrift in the Middle*, *supra* note 66; RESTATEMENT CHILDREN NO. 2, *supra* note 39, § 1.80 cmt. a.

163. RESTATEMENT CHILDREN NO. 2, *supra* note 39, § 1.80; Examples include a former step-parent, a "de facto" parent who has lived with the child and acted as a parent, or a grandparent with whom the child has lived or whose own child is deceased. *E.g.*, N.M. STAT. ANN. § 40-9-2 (2021) (grandparents may seek visitation where the child's parent is deceased or the child resided with the grandparent).

164. Wisconsin v. Yoder, 406 U.S. 205 (1972); Erik Reece, *Utopia Now*, ATLANTIC (Aug. 9, 2016), https://www.theatlantic.com/business/archive/2016/08/utopia-erik-reece/494741/ [https://perma.cc/92XV-8F69]; Kelsey Ogletree, *Hutterites: The Small Religious Colonies Entwined With Montana's Haute Cuisine*, NPR (July 17, 2018, 3:37 PM), https://www.npr.org/sections/thesalt/2018/07/17/626543100/hutterites-the-small-religious-colonies-entwined-with-montanas-haute-cuisine [https://perma.cc/2DG5-J6F2]; Jay Root, *How Public Money Goes to Support a Hasidic Village's Private Schools*, N.Y. TIMES (Feb. 20, 2023), https://www.nytimes.com/2023/02/20/nyregion/kiryas-joel-hasidic-school-district.html [https://perma.cc/6FSJ-77DR].

165. *What Happened After My 13-Year-Old Son Joined the Alt-Right*, WASHINGTONIAN (May 5, 2019), https://www.washingtonian.com/2019/05/05/what-happened-after-my-13-year-old-son-joined-the-alt-right/ [https://perma.cc/N7TY-6LWK].

166. *3 Ways to Help Steer Kids to Positive Influences*, NATURAL HIGH (Dec. 5, 2023), https://www.naturalhigh.org/3-ways-to-help-steer-kids-to-positive-influences/ [https://perma.cc/D2SW-AXN8].

167. AM. PSYCH. ASS'N, HEALTH ADVISORY ON SOCIAL MEDIA USE IN ADOLESCENCE 1, 5 (May 2023), https://www.apa.org/topics/social-media-internet/health-advisory-adolescent-social-media-use.pdf [https://perma.cc/QZ3N-PLLP].

168. *E.g.*, Raising a School Shooter (Frida Barkfors & Lasse Barkfors, dir., Amazon Prime Video 2021) (examining parents of school shooters, interviewing some parents and considering their role in monitoring their child); Mitch Smith, Jack Healy, Frances Robles & Shalia Dewan, *After Another Mass Shooting, Questions Loom About the Role of Parents*, N.Y. TIMES (July 10, 2022), https://www.n

Monitoring and supervision of contacts becomes one aspect of observing the well-being of one's child and deciding when to intervene. Indeed, parents have an affirmative duty to protect their children from harm, including harm inflicted by third parties.[169]

B. Children's Right to Expression and to Hear Speech

Children's speech and expression rights do not exceed a parent's reach. A parent has broad common law authority to limit or prevent a minor's speech. The Restatement of Children and the Law, Section 18.10 characterizes the law about speech, religion, and political participation as follows:

> (a) Minors have a right to engage in speech, religious exercise, and political participation. This right constrains government actors' power to limit or punish minors' exercise of these rights but does not prevent parents or guardians from exercising their authority to prevent their children from exercising these rights.[170]

Perhaps even more salient to social media regulation, the Restatement Section 18.11 has a separate provision on children's right to *receive* expressive information:

> (a) Minors have a right to gain access to information and other expressive content. This right constrains government actors' power to restrict minors' access to speech and other expressive material *but does not prevent parents from exercising their authority to prevent their children's access to such material.* [emphasis added][171]

The comment to this section removes all doubt:

> As part of this authority over children's upbringing, parents can impose rules concerning children's access to information, opinions, and artistic expression, both in and outside the home. This authority extends to control over their access to reading material, movies, video games, and music, including online resources, and includes the ability to impose appropriate discipline for violations of parents' rules.[172]

Even without direct government leverage, this authority is very influential in

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ytimes.com/2022/07/10/us/highland-park-shooting-parents.html#:~:text=As%20more%20of%20the%20country's,or%20provide%20guns%20to%20their [https://perma.cc/PF6M-F87Z] (following the Highland Park, Illinois mass shooting, "[m]illions of American parents now worry about their children becoming victims of a mass shooting. But a different nightmare exists for the tiny but growing cluster of parents whose children, nearly always sons, pull the trigger."); Rich McKay, *Parents of Michigan Teen School Shooter to Face Trial*, REUTERS (Oct. 3, 2023, 10:28 AM), https://www.reuters.com/world/us/parents-michigan-teen-school-shooter-face-trial-2023-10-03/ [https://perma.cc/J57J-L7KR] (parents of fifteen-year-old Michigan school shooter charged with manslaughter).

169. RESTATEMENT CHILDREN NO. 5, *supra* note 68, § 1.41(a) ("A parent, guardian, or custodian has a duty to provide a child with adequate supervision to protect the child from harm.").

170. *Id.* at § 18.10(a).

171. *Id.* at § 18.11(a).

172. *Id.* at § 18.11 cmt. c.

the everyday lives of minors. This filtering function is simply the table set by family law. Where a parent-enabling regulation is content-neutral and not pretextual, it is assisting parents in their authority and *responsibility* to curate speech, thereby avoiding the problem of state-favored and disfavored speech.

If we are not careful to understand this framework, it becomes difficult to understand how it is prohibited for the state to engage in content-specific regulations to protect minors (e.g., laws prohibiting or limiting exposure to violent content), yet it is fine for parents, sometimes with the help of state law (e.g., state laws requiring parental consent to tattoo minors), to enforce far wider or complete prohibitions on children's speech. If a state supports or enables the latter parental authority, it can seem to a lay person like a more sweeping and therefore suspect rule than a narrow content-specific law. Yet the parent-enabling regulation removes the state from the constitutional morass of discerning disfavored content, while narrow content specific laws involve the state directly in choosing superior and inferior content.[173] Social media companies pretend the distinction between enabling parental authority and direct government curation does not exist. For example, a federal judge said of the Ohio parental consent law, that "[f]oreclosing minors under sixteen from accessing all content on websites that the Act purports to cover, absent affirmative parental consent, is a breathtakingly blunt instrument for reducing social media's harm to children."[174] Arguably NetChoice is prompting federal courts to be heedless of the difference between state authority and parental authority to foreclose content. But that essential distinction allows us to see why their arguments have been in conflict with established family law.

The parent's legal right to limit a child's ability to receive speech from third parties works in an integrated way with the parent's right to limit contact with third parties altogether. Judgments about what is appropriate for a minor to hear and who is appropriate for a minor to be with are socially contested, but the delegation of that decision-making to parents is well-settled as an attribute of parental care.

C. Parental Right to Set Limitations on Child Privacy

Parents generally make decisions about their child's privacy under privacy statutes and have access to private information about their child. For example, under the Family Educational Rights and Privacy Act (FERPA), minors are afforded privacy rights, but parents exercise those privacy rights with respect to their children's educational records. The exercise of those rights transfers to the student when she turns eighteen.[175] Parents may take possession of their minor child's mail

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173. *See infra* Part III.

174. NetChoice, LLC v. Yost, No. 2:24-cv-00047, 2024 U.S. Dist. LEXIS 24129 (S.D. Ohio Feb. 12, 2024); Julie Carr Smyth, *A Judge Has Temporarily Halted Enforcement of an Ohio Law Limiting Kids' Use Of Social Media*, AP NEWS (Jan. 9, 2024, 4:28 PM), https://apnews.com/article/ohio-social-media-apps-children-parental-consent-9f8c25602d0c9c8e1df06d83ace6c503 [https://perma.cc/H5A8-6M9X].

175. 20 U.S.C. § 1232(g); 34 C.F.R. § 99 (2023).

received through the U.S. Postal Service.[176] Parents generally act on behalf of their minor children's privacy under HIPAA and may access their medical records.[177] These statutes simply track the common law authority of parents with respect to their children's privacy: Children are afforded privacy from the state and from corporations, but generally not from their parents.

Privacy advocates may bristle when legislatures consider statutes authorizing parents to read their child's private electronic messages.[178] This ability, though, fits well into the generally coercive attribute of parental authority. Parents are never required to invade their children's privacy. One assumes they usually don't. But a parent could read a child's written diary or letters.[179] A child may exercise personal agency in defending her privacy by persuasion. Many teenagers will find all parental check-ins to be invasive. Most parents will balance that interest against their responsibility for the teen's welfare. Parenting advice and common sense would caution a parent to respect a child's privacy.[180] This good advice is not fit for every circumstance and not legally compelled. Who decides when circumstances warrant intrusion? Family law finds the state, corporations, or advocacy organizations to be worse answers than the parent.

Parents who suspect that their child is engaged in unsafe or unhealthy behaviors are advised to search their child's backpack, room, or social media accounts if conversation with the child is unfruitful.[181] Some government entities even advise that parents engage in preventative drug testing of teenagers. One sheriff's office makes test kits available to parents free of charge.[182] This discretion

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176. Domestic Mail Manual (DMM), USPS (updated Nov. 11, 2023), https://pe.usps.com/DMM300 [https://perma.cc/8DGD-Z3D4]; 39 C.F.R. § 111.1 (2024) (incorporating the DMM by reference). *See, e.g.*, DMM at § 508.1.1.8(e) (mail for minors may be delivered to parents); *id.* at § 508.1.4.2 (parents "may control delivery of mail addressed to the minor"); *id.* at § 508.4.2.1(a)(4) (parents may prevent their minors from establishing PO Boxes).

177. *Does the HIPAA Privacy Rule Allow Parents the Right to See Their Children's Medical Records?*, U.S. DEP'T HEALTH & HUM. SERVS., https://www.hhs.gov/hipaa/for-professionals/faq/227/can-i-access-medical-record-if-i-have-power-of-attorney/index.html [https://perma.cc/3AFA-9WJC] (last visited Oct. 26, 2024).

178. *See infra* Part IV.B.

179. Shmueli & Blecher-Prigat, *supra* note 53.

180. Amy Williams, *Teens and Privacy: Balance Is Key*, CTR. FOR PARENTING EDUC., https://centerforparentingeducation.org/library-of-articles/riding-the-waves-of-the-teen-years/teens-privacy-balance-key/ [https://perma.cc/BL9T-W72V] (last visited Oct. 29, 2024).

181. Montgomery County posts an educational resource for parents on how to search a teenager's room to look for evidence of substance use. *Searching Your Child's Room*, MONTGOMERY CNTY. MD., https://www.montgomerycountymd.gov/ABS/resources/files/education/kis/abs-kis-searching-your-child-room.pdf [https://perma.cc/DVQ5-E4B6] (last visited Oct. 29, 2024). The Mayo Clinic advises parents to keep an eye on their child's social media accounts. *Teen Suicide: What Parents Need to Know*, MAYO CLINIC, https://www.mayoclinic.org/healthy-lifestyle/tween-and-teen-health/in-depth/teen-suicide/art-20044308 [https://perma.cc/YT8D-9RF6] (last visited Oct. 29, 2024) ("Monitor and talk about social media use. Keep an eye on your teen's social media accounts."). *See also* Kelly Wallace, *After Mass Shootings, Do Parents Shoulder Some of the Blame?*, CNN (Oct. 7, 2015, 5:58 PM), https://www.cnn.com/2015/10/07/health/oregon-shooting-parents-blame/index.html [https://perma.cc/TWH8-XA3Y]; Williams, *supra* note 180.

182. The Lee County Sheriff's Office in Florida runs a juvenile assessment center that

is designed to protect pluralism in parenting values and approaches, and family law has worked it out over time as superior to creating a minor's right that could be litigated against a parent's intrusion. When things go terribly wrong and a teenager becomes a perpetrator of violence or dies by suicide, parents are routinely blamed for failing to have monitored, searched, and otherwise surveilled their child.[183]

The range of parental advice and expectation by situation reflects perfectly the challenges of exercising the authority delegated to parents to raise a child. Parents ideally observe boundaries while monitoring their child's safety. The right decision is a mix of context, the particular child, and the family's values, none of which are susceptible to easy categories that legal authorities can administer. We do not advocate for searching teen backpacks, social media, or bedrooms, or drug testing teenagers. We simply recognize the prudence of allocating the authority to parents. A parent who is concerned that their child is being coerced or abused, is entertaining thoughts of self-harm, is interested in eating disorder communities, or is seeking dangerous items from narcotics to firearms, has difficult decisions in addressing their child's safety and well-being—agonizing assessments that *parents make every day*.

As a growing chorus of mainstream child health sources encourage parents to "monitor" their child's social media use,[184] privacy implications remain within each parent's discretion. According to the Pew Research Center, the vast majority of parents attempt to monitor online activity of their minor children, a datapoint that might reset abstract judgment over intrusion on children's privacy.[185]

"provides free drug test kits to Lee County parents to use as a drug prevention tool with their youth." *Using Drug Test Kits as a Prevention Tool*, JUV. ASSESSMENT CTR. OF LEE CNTY. FLA., https://jac.sheriffleefl.org/drugtestkits/ [https://perma.cc/4B4L-4SEV] (last visited Oct. 29, 2024).

183. Charles Raison, *Warning Signs of Violence: What To Do*, CNN (July 26, 2012, 7:30 AM), https://www.cnn.com/2012/07/25/health/raison-violence-signs/index.html [https://perma.cc/37NK-YZMW] ("A quick look through the belongings of any of recent psychotic shooters a day or two before their killing sprees may have found ample evidence of impending mayhem."); *see also* Wallace, *supra* note 181; Mayo Clinic, *supra* note 181; Williams, *supra* note 180 ("If your concern is over one or two text messages rather than a pattern, it's probably best to ask your teen about it directly. He may not be happy that you had looked at his phone, but a bad attitude is preferable to overlooking a potentially dangerous situation. However, if your child seems to be lying or these suspicious patterns persist, don't hesitate to take more extreme measures. For example, if you end up with reason to suspect your child may be skipping school—maybe you have found suspiciously coded text messages on his phone—you will have to make a judgment call about whether to read his diary if he has one, look through his backpack, search his room, and/or contact the school.").

184. *Keeping Teens Safe on Social Media: What Parents Should Know to Protect Their Kids*, AM. PSYCH. ASS'N (May 9, 2023), https://www.apa.org/topics/social-media-internet/social-media-parent-tips [https://perma.cc/7JQX-SDPU].

185. BROOKE AUXIER ET AL., PEW RSRCH. CTR., PARENTING CHILDREN IN THE AGE OF SCREENS (July 28, 2020), https://www.pewresearch.org/internet/2020/07/28/parenting-approaches-and-concerns-related-to-digital-devices/ [https://perma.cc/7GPG-M3T2]; AMANDA LENHART, MONICA ANDERSON, ANDREW PERRIN & ERICA TURNER, PEW RSRCH. CTR., TEENS, KINDNESS AND CRUELTY ON SOCIAL NETWORK SITES (Nov. 9, 2011), https://www.pewresearch.org/internet/2011/11/09/teens-kindness-and-cruelty-on-social-network-sites/ [https://perma.cc/ASC3-CDWV]; MARY MADDEN, SANDRA CORTESI, URS GASSER, AMANDA LENHART & MAEVE DUGGAN, PEW RSRCH. CTR., PARENTS, TEENS, AND ONLINE PRIVACY (Nov. 20, 2012), https://www.pewresearch.org/internet/2012/11/20/parents-teens-and-online-privacy/ [https://perma.cc/4EAW-W4YM].

D. Children's Right to Repudiate Contracts

The infancy doctrine allows a minor to disaffirm a contract when they become an adult.[186] They may also disaffirm a contract before they become an adult, and a parent can also disaffirm on behalf of that minor.[187] The ALI characterizes it this way, drawing on a parent suit to disavow loot box purchases in Pokémon Go: "A minor can disaffirm a contract, or a parent, guardian, or guardian ad litem can disaffirm on behalf of the minor."[188] If a contract disaffirmance does require a court proceeding while the child is still a minor, a parent must participate in disaffirmance, because children lack the capacity to pursue legal action on their own.[189]

The infancy doctrine as expressed in cases, treatises, and in the Restatements reflects two interdependent reasons for parents' fundamental liberty interest in making decisions for minors. First, we view minors as immature and inexperienced, hence the concern about their capacity.[190] As much, we are concerned about exploitation of these characteristics by third parties—that adults and institutions will seek to extract value or commitments from minors as a result of their immaturity and inexperience.[191] We worry that children become a mark for adults. Thus, parties contract with minors at their own peril. They may be bound to their side of the agreement if that is what the minor wants, but the contract may be repudiated by the minor any time up to and just after the minor reaches adult legal status.

Many states are currently exploring laws that require social media companies to obtain parental consent before allowing a minor to create an account.[192] Some of these laws further empower parents to delete a minor child's account at the parent's

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186. E. ALLAN FARNSWORTH, CONTRACTS § 4.4 (4th ed. 2004); *see also* Cheryl B. Preston & Brandon T. Crowther, *Infancy Doctrine Inquiries*, 52 SANTA CLARA L. REV. 47, 52–53 (2012).

187. Betz v. Farm Bureau Mut. Ins. Agency of Kansas, 8 P.3d 756 (Kan. 2000). *E.g.*, A.F. v. Jeffrey F., 90 Cal. App. 5th 671 (2023); Raskin v. Dall. Indep. Sch. Dist., 69 F.4th 280, 286 (5th Cir. 2023) (permitting parents in some cases to pursue litigation for their children pro se, noting, "[w]hen counsel is unavailable, the absolute bar [against pro se parents representing their children in an action] 'undermines a child's interest in having claims pursued for him or her . . . .'").

188. Reeves v. Niantic, Inc., No. 21-cv-05883, 2022 WL 1769119 at *1 (N.D. Cal. May 31, 2022); RESTATEMENT CHILDREN NO. 5, *supra* note 68, § 20.20.

189. *E.g.*, A.F. v. Jeffrey F., 90 Cal. App. 5th 671 (2023); Raskin v. Dall. Indep. Sch. Dist., 69 F.4th 280 (5th Cir. 2023).

190. RESTATEMENT CHILDREN NO. 5, *supra* note 68, § 20.20; *cf.* RESTATEMENT (SECOND) OF CONTRACTS §§ 12, 14 (AM. L. INST. 1981); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 16, 33 (AM. L. INST. 2011); Nancy S. Kim, *Relative Consent and Contract Law*, 18 NEV. L.J. 165, 193–195 (2017).

191. Waiver of liability in tort is another example of contract law limitation around children arising from concern over third-party overreach. Courts traditionally hold that a parent may not waive the right of a child to sue. *E.g.*, Santiago v. Philly Trampoline Park, LLC, 291 A.3d 1213 (Pa. Super. Ct. 2023). These cases don't really involve disagreement between parent and child, because it is recreational operations that seek enforcement of these agreements, not parents. *See* Silbaugh, *Parenting Concussion Risk*, *supra* note 59. *See also* Zahra Takhshid, *Children's Digital Privacy and the Case Against Parental Consent*, 101 TEX. L. REV. 1417 (2023).

192. *See infra* Part IV.

own discretion,[193] or to access or delete the child's personal information.[194] Some states also define reasonable timeframes for a provider to take action in deleting data.[195] These laws are entirely consistent with the infancy doctrine, explicitly authorizing work that is already permitted at common law.

One construction of consideration may cast social media contracts as sole licensing agreements. The rights at stake are the use of personal information.[196] Licensing agreements for minors in other arenas, especially the entertainment industry, have a fraught past. Most states, through what are termed "Coogan Laws," now require parents to petition courts for judicial approval of a minor's entertainment contract.[197] Prior to Coogan Laws, the infancy doctrine applied in the domain of entertainment licensing contracts.[198] Just as in the preregulation entertainment-industry, the infancy doctrine likely controls these minor-company relationships.[199] And while COPPA re-set the age from eighteen to thirteen, the infancy doctrine applies to all minors through age eighteen.[200]

Disaffirmance pursuant to the infancy doctrine compels the social media company to cease profiting from the user's personal information. "[T]he infant's act of disaffirmance requires no special form"[201]: Sending written notice to the social media company is adequate, and we argue a Uniform Parental Decision-Making Registry suffices as well.[202] The company should *immediately* forfeit its right to profit from the minor's personal information under the infancy doctrine.[203] The infancy doctrine in effect supports an immediate "erasure' button.

A parent has a broad right to disaffirm a contract on behalf of a minor, even

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193. *See* OHIO REV. CODE ANN. § 1349.09(F) (LexisNexis 2023); 2023 Conn. Acts 23–56 §§ 7 (a)–(b) (Reg. Sess.); *see also* Protecting Kids on Social Media Act, S. 1291, 188th Cong. §§ 5(c)–(d) (2023).

194. *See* 2023 Conn. Acts 23–56 §§ 4(a)–(b) (Reg. Sess.); *see also* Children's Online Privacy Protection Act (COPPA) 2.0, S. 1418, 118th Cong. (2023) (creating an eraser button).

195. *See* 2023 Conn. Acts 23–56 § 4(6) (Reg. Sess.).

196. Cemre Bedir, *Contract Law in the Age of Big Data*, 16 EURO. REV. CONT. L. 347, 353–54 (2020).

197. *See, e.g.*, California: CAL. FAM. CODE §§ 6750–6753 (2023); New York: N.Y. ARTS & CULT. AFF. LAW § 35.03 (LexisNexis 2023); Massachusetts: MASS. GEN. LAWS ch. 231, § 85P1/2 (2023). *See generally Child Entertainment Laws as of January 1, 2023*, *supra* note 43.

198. Peter M. Christiano, *Saving Shirley Temple: An Attempt to Secure Financial Futures for Child Performers*, 31 MCGEORGE L. REV. 201, 201–05 (2000).

199. In the case of personal information, the company may not need to share its profits from its in-house use of the data. *See* N.Y. C.P.L.R. § 3004 (Consol. 2023); I.C. *ex rel.* Solovsky v. Delta Galil USA, 135 F. Supp. 3d 196 (S.D.N.Y. 2015) (finding minor should not be able to use disaffirmance to put self in a position superior to if contract had not been entered). Third parties who purchase information may be in a better position. RICHARD A. LORD, 5 WILLISTON ON CONTRACTS § 9:15 (4th Ed. 2010) [hereinafter WILLISTON] ("[I]f the adult purchaser from an infant seller has parted with the property, selling it to a good-faith purchaser, the good-faith purchaser will be held to have acquired good title, and the infant cannot recover back what was sold, though the infant may recover its value.").

200. WILLISTON, *supra* note 199.

201. *Id.* at § 9:12.

202. *See infra* Part V.

203. WILLISTON, *supra* note 199 ("When a minor exercises the power of disaffirmance by rescinding a purchase of personal property that is still in the infant's possession, the title and right to the goods are restored to the original status as if no sale had taken place.").

against the minor's wishes.[204] The existence of this right is particularly clear in the context of social media contracts, where the disaffirmance is inextricably related to a parental decision to prevent a commercial third party and other platform users from establishing or maintaining contact with their minor child.[205] The risk of contracting with a minor can be reduced by contracting with the parent instead, as courts accommodate adults who secure parental approval for their contracts with children.[206] We argue below that state legislatures can and should pass enabling legislation that leverages the infancy doctrine.[207]

We have excavated in Part I some of the complexity of the common law, statutory law, and constitutional law of the family in an effort to make visible the cumulative legal fabric and framework of childhood. In Part II we have focused on four particular attributes of family law that should inform thinking about social media regulation: parental right to circumscribe contact with a minor child, parental right to circumscribe speech rights of a minor child, parental right to decide how much privacy to extend to a child, and the infancy doctrine within contract law relieving minors of bargains with third parties that they choose to disavow. In Part III, we review First Amendment doctrine, highlighting the way child, parent, state, and third parties are discussed, and the particular conceptions of the parental role lurking in these cases.

III. THE FIRST AMENDMENT OF THE FAMILY

In this section, we discuss familiar First Amendment jurisprudence, but with a particular focus on how the cases conceive of the role of parents in monitoring minors' exposure to speech. Generally, the Supreme Court is kind to content-neutral regulation.[208] By contrast, much of the law seeking to regulate for the protection of minors is content-based, designed expressly to protect minors from indecent, sexually explicit, obscene, or violent content, for example.[209] Yet when parents worry that addictive design keeps their minor children locked into social media, they may not be focusing on one particular kind of content per se; algorithms feed different minors different materials. A parent's desire to curfew or prohibit

204. *See* RESTATEMENT CHILDREN NO. 2, *supra* note 39, § 1.80(a) ("A fit parent's decision about a child's contact with a third party is presumed to be in the child's best interest . . . ."); *id.* at §1.80(b)(1) (instructing that a court will not override a parent's decision about commercial third-party contact).

205. RESTATEMENT CHILDREN NO. 2, *supra* note 39, § 1.80(a), (b)(1).

206. *See, e.g.*, Shields v. Gross, 448 N.E.2d 108 (N.Y. 1983) (finding Brooke Shields could not disaffirm contract allowing defendant photographer to use nude photographs he had taken of her, where Shields's mother had provided unrestricted consent for the contract).

207. *See* Cheryl B. Preston & Brandon T. Crowther, *Minor Restrictions: Adolescence Across Legal Disciplines, the Infancy Doctrine, and the Restatement (Third) of Restitution and Unjust Enrichment*, 61 KANSAS L. REV. 343, 374–75 (2012) (arguing that changes to the infancy doctrine are properly within the province of state legislatures, and not the courts).

208. *See* discussion *infra* Part III.A.

209. *E.g.*, United States v. Playboy Ent. Grp., 529 U.S. 803 (2000) (cable television blocking technology); Ashcroft v. ACLU, 542 U.S. 656 (2004) (internet filtering and blocking sexually explicit material); Brown v. Ent. Merchs. Ass'n, 64 U.S. 786 (2011) (regulating violent video games).

altogether a minor's interaction with social media platforms can be content-neutral, so long as the legal definition of social media platforms itself is content-neutral.[210] But a *parent's* curation does not need to be content-neutral, so long as it is genuinely the parent's and not the state's content judgment.[211] Throughout First Amendment jurisprudence, parents are both authorized and actively encouraged to apply their own content judgments.[212] When the government's asserted interest is in supporting pluralistic parental authority, then each parents' individual content-specific reasons for wanting to rein in algorithmic feeds will not render facially content-neutral regulation de facto content-based.[213]

A. First Amendment Scrutiny

When government regulations discriminate against speech based on its content—that is, the message the speech conveys—courts first ask whether there is a categorical basis[214] for affording the speech less protection.[215] Some categories of "low value" speech—like libel, obscene or profane speech, and "fighting words"—are afforded no protection, while other lesser-valued categories—most famously commercial speech—are afforded a diminished protection.[216] If no categorical

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210. We do not enter the current debate over the history or appropriateness of the Supreme Court's focus on content-neutrality. *See, e.g.*, Jud Campbell, *The Emergence of Neutrality*, 131 Yale L.J. 861 (2022); Genevieve Lakier, *A Counter-History of First Amendment Neutrality*, 131 Yale L.J. F. 873 (2022); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 Stan. L. Rev. 113, 121 (1981). Nor do we enter other pressing First Amendment debates. *See, e.g.*, Robert Post and Amanda Shanor, *Adam Smith's First Amendment*, 128 Harv. L. Rev. F. 165, 182 (2015) (discussing the evolving "Lochnerism" of the First Amendment); Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. Chi. L. Rev. 1241 (2020) (discussing a history of economic power analysis in the First Amendment cases); John C. Coates IV, *Corporate Speech & The First Amendment: History*, *Data, and Implications*, 30 Const. Comment. 223 (2015) (describing a corporate takeover of the First Amendment); MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION (2019).

211. *See infra* Part III.E.2.

212. *E.g.*, Rowan v. United States Post Off. Dep't, 397 U.S. 728, 740 (1970) (upholding mail prohibitory orders enabling parental discretion to prevent commercial mailings from reaching children); United States v. Playboy Ent. Grp, 529 U.S. 803, 825–26 (2000) (endorsing parental opt-out regime to protect children from sexually explicit cable signal bleed); Ashcroft, 542 U.S. 656, 658 (endorsing parent-initiated filtering regime to protect children from harmful material on the internet).

213. *E.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791–92 (1989) (principal inquiry in determining content-neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys).

214. For a discussion of "categorical" or "definitional" "balancing" see, for example, MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.03 (1984); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 296–305 (1981).

215. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 (1987) [hereinafter Stone, *Content-Neutral Restrictions*].

216. For a recent historical overview, see Genevieve Lakier, *The Invention of Low-Value Speech,* 128 HARV. L. REV. 2166*,* 2182-96 (2015). Commercial speech that is not "low value" is subjected to a form of intermediate scrutiny under the *Central Hudson* test, independent of its content. Central Hudson Gas v. Pub. Serv. Comm'n, 447 U.S. 557, 573 (1980) (Brennan, J., concurring). However, recent case law has somewhat obfuscated the commercial distinction. Riley v. Nat'l Fed'n of Blind, 487 U.S. 781, 796 (1988) (speech ceases to be commercial when it is "inextricably intertwined with . . . fully protected speech").

modifications apply, courts examine speech regulations under strict scrutiny.[217]

Strict scrutiny is an extraordinarily high bar for a regulation to pass. Representative formulations of the test involve statements that "content-based law[s] . . . are presumptively unconstitutional,"[218] that the government bears the burden of proving these regulations are "narrowly tailored to serve compelling state interests,"[219] and that the "restriction must be the 'least restrictive means among available, effective alternatives.'"[220]

The concept of least restrictive alternatives has proved to be especially pertinent to speech restrictions with respect to minors,[221] so we elaborate on the meaning of "available" and "effective." Available alternatives that courts consider frequently rely on market-based solutions.[222] In the content-based context, where strict scrutiny may demand the government adopt *the* least restrictive alternative, these solutions may fade in and out of constitutionality as new technologies emerge.[223] Courts evaluate the efficacy of proposed less-restrictive alternatives based on the assumptions that the public has been adequately notified,[224] that informed parents will act when enabled to do so,[225] and that parties will comply with the law.[226] When a court endorses an alternative solution as effective and less restrictive than a legislature's proposal, future courts tend to take the endorsement extremely seriously. The legislature is effectively bound to either implement the alternative, disprove the prior court, or come up with a new demonstrably superior alternative before it can regulate in that area again.[227]

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217. Stone, *Content-Neutral Restrictions*, *supra* note 215, at 47.

218. *E.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015). *See* Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1266 n.9 (2014) (describing the Roberts Court's enthusiastic embrace of the principle that content-based laws are presumptively unconstitutional).

219. Reed, 576 U.S. at 163.

220. United States v. Alvarez, 567 U.S. 709, 711 (2023) (quoting Ashcroft v. ACLU, 542 U.S. 656 (2004)).

221. *See* Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629, 665 (1998) ("[W]hen kids are at stake, the only relevant question is whether there is some less burdensome way to achieve the same censoring end.").

222. *See generally* Sable Commc'ns v. FCC, 492 U.S. 115 (1989) (telecommunications descrambling and credit card screening); United States v. Playboy Ent. Grp., 529 U.S. 803 (2000) (cable television blocking technology); Ashcroft, 542 U.S. 656 (internet filtering and blocking); Brown v. Ent. Merchs. Ass'n, 64 U.S. 786, 803 (2011) (ESRB voluntary rating system).

223. *See* Sable Commc'ns, 492 U.S. at 122 (discussing Carlin Commc'ns, Inc., v. FCC, 837 F.2d 546, 555 (1989)). Or, for example, in *Brown*, if the ESRB dissolved, then the analysis would need to completely change. *See* Brown, 64 U.S. at 803 (discussing ESRB).

224. Playboy, 529 U.S. at 818–19.

225. *Id.* at 824 (regulation's efficacy was not undermined just because it "requires a consumer to take action, or may be inconvenient, or may not go perfectly every time . . . a court should not presume parents, given full information, will fail to act"); Ashcroft, 542 U.S. at 670.

226. Playboy, 529 U.S. at 824.

227. *See* Sable, 492 U.S. at 126 (striking down ban on dial-a-porn where Congress failed to take into account the less-restrictive opt-in regime endorsed by the Second Circuit in *Carlin Commc'ns, Inc., v. FCC*, 837 F.2d 546, 555 (1988)). Numerous courts have struck down online age-gating laws in deference to *Ashcroft*'s endorsement of filtering as a less-restrictive alternative in *Ashcroft v. ACLU*

Content-neutral regulations—those that limit expression without regard for its content—fare comparatively better in courts,[228] so long as the court does not decipher a pretextual content-based governmental purpose lurking behind the regulation.[229] Historically, courts have most often reviewed content-neutral speech regulations with a high degree of deference, applying a rational basis standard.[230] However, in some instances courts will apply intermediate scrutiny (or very occasionally, even strict scrutiny) to content-neutral laws.[231] The intermediate scrutiny that courts apply has stabilized in recent years to inquiring whether the law is "narrowly tailored to serve a significant government interest."[232] At least in the case of time, place, and manner regulations—the quintessential content-neutral laws—the court has made it explicit that the narrow tailoring analysis should ask whether the regulation "leaves open ample alternative channels of communication," but that "least-restrictive-alternative analysis is wholly out of place."[233]

B. Understanding Brown v. Entertainment Merchants Association

As states continue to enact parental opt-in laws for social media access, one Supreme Court case becomes central to court discussions.[234] In 2011 the Court struck down a law that required advanced parental consent for the purchase of violent video games in a case central to the way scholars and lower courts misconstrue barriers to regulation of the speech rights of minors.[235] California's content-based statute would have prohibited the sale or rental of "violent video

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(Ashcroft II), 542 U.S. 656 (2004). *See* Free Speech Coal. v. Colmenero, No. 1:23-CV-917, 2023 U.S. Dist. LEXIS 154065 (W.D. Tex. Aug. 31, 2023); Garden Dist. Book Shop, Inc. v. Stewart, 184 F. Supp. 3d 331, 338 (La. M.D. 2016) (holding filtering a less-restrictive alternative to an age-self attestation system); ACLU v. Mukasey, 534 F.3d 181, 204 (3d. Cir. 2008) (holding unconstitutional the affirmative age-verification defenses in § 231 of the Child Online Protection Act (COPA) under *Ashcroft II* due to the availability of less restrictive filtering technology); ACLU v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007).

228. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L REV. 413, 443 (1996) ("The distinction between content-based and content-neutral regulations of speech serves as the keystone of First Amendment law. Content-neutral restrictions on speech . . . usually are subject to a fairly loose balancing test.").

229. *See* City of Austin v. Reagan Nat'l Advert., 596 U.S. 61, 76 (2022) ("If there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction, for instance, that restriction may be content based.") (citing Reed v. Town of Gilbert, 576 U.S. 155, 164 (2015)).

230. Stone, *Content-Neutral Restrictions*, *supra* note 215, at 50.

231. *Id.* at 52–53.

232. *See, e.g.*, Reagan Nat'l Advert., 596 U.S. at 76; Packingham v. North Carolina, 582 U.S. 98, 106 (2017).

233. Ward v. Rock Against Racism, 491 U.S. 781, 798 n.6 (1989); McCullen v. Coakley, 573 U.S. 464, 486 (2014) ("[A] content-neutral time, place, or manner regulation . . . 'need not be the least restrictive or least intrusive means of' serving the government's interests.") (quoting Ward, 491 U.S. at 798).

234. *See* NetChoice, LLC v. Griffin, No. 5:23-CV-051052023, 2023 U.S. Dist. LEXIS 154571 at *52–53 (W.D. Ark. Aug. 31, 2023); NetChoice, LLC v. Yost, No. 2:24-cv-00047, 2024 U.S. Dist. LEXIS 6349 at *22 (S.D. Ohio Jan. 9, 2024); *see also* NetChoice, LLC v. Bonta, No. 22-cv-08861, 2023 U.S. Dist. LEXIS 165369 at *57 (N.D. Cal. Sept. 18, 2023).

235. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 794–95 (2011) ("[M]inors are entitled to a significant measure of First Amendment protection and only in narrow and well-defined circumstances can the government bar public dissemination of protected materials to them.").

games" to minors and required that their packaging be labeled "18."[236] A "violent video game" under the Act gives players agency to exert severe physical harm upon human characters within the game in a manner that runs afoul of a Miller-test for obscenity relative to minors, but adapted to a new content category of violence.[237] The statute explicitly permitted the minor's parents to purchase games on their behalf, and is therefore characterized by many as a parental "opt-in."[238] Thus, the statute in *Brown* was similar to the constitutionally acceptable one in *Ginsberg v. New York*, with violence substituted for sex.[239]

The recurring theme that undergirds the *Brown* decision is the Court's tremendous skepticism that the government can legitimately regulate content based on violence.[240] Scalia begins by clarifying that "speech about violence is not obscene,"[241] distinguishing it from the landmark case of *Ginsberg v. New York*.[242] The *Ginsberg* statute adapts a category of unprotected speech (obscenity) to minors, whereas the California statute does not draw on any existing category of unprotected speech.[243] Therefore, any resemblance between the two statutes is superficial.[244] Scalia would require "that [the] novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription."[245] He argues that there is no tradition of regulating violent literature with respect to children or adults, positing that school reading lists are replete with time-honored violent content and that, overall, Congress and the Supreme Court have both staunchly rejected censorship of violent content.[246]

The *Brown* court thus advances a principle that content-based regulations of constitutionally protected speech for minors must rely on "longstanding tradition[s]" of protection.[247] This part of the *Brown* decision, strictly speaking,

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236. CAL. CIV. CODE §§ 1746–1746.5 (West 2009).

237. The test was whether a "reasonable person, considering the game as a whole," would find that the depiction of violence (1) "appeals to a deviant or morbid interest of minors;" (2) is "patently offensive to prevailing standards in the community as to what is suitable for minors;" and (3) "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." Brown, 564 U.S. at 789; CAL. CIV. CODE § 1746(d)(1)(A) (West 2009).

238. CAL. CIV. CODE § 1746(d)(1)(A) (West 2009).

239. *Cf.* Ginsberg v. New York, 390 U.S. 629 (1968); CAL. CIV. CODE § 1746.4 (West 2009); Brown, 564 U.S. at 802. It should be noted, however, that *Ginsberg* was essentially decided under an outmoded "rational basis" scrutiny, so that the logic of its holding cannot map perfectly onto any modern case involving content-based restrictions. Ginsberg, 390 U.S. at 639, 641, 643.

240. In *United States v. Stevens*, 559 U.S. 460 (2010), decided the previous term, the Court held that depictions of "animal cruelty" were entitled to full First Amendment protection.

241. Brown, 564 U.S. at 802.

242. *Id.* at 794.

243. *Id.* at 793–94 ("[California's statute] does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children . . . . [It] wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children.").

244. *Id.* at 793.

245. *Id.* at 792.

246. *Id.* at 795–97.

247. *Id.* at 793–95.

served only to establish that strict scrutiny was the proper standard of review.[248] However, the Court's doubts about the permissibility of regulating violence pervade the rest of the opinion, and transfer clearly to its next inquiry: whether the state has identified an "actual problem" in need of solving.[249] Without identifying such a problem, the law would be doomed to fail narrow tailoring.

To illustrate his skepticism that violent content is dangerous, Scalia argued that the statute was "wildly underinclusive." He relied on the testimony of one doctor, in a different lawsuit, who said that cartoons, pictures of guns, and E-rated[250] video games could induce a specific feeling of aggression comparable to an effect from violent video games.[251] Therefore, Scalia reasoned, California needed to restrict all these forms of media, too.[252]

Scalia then analyzed the parental consent mechanism implemented to further the *government's* independent *parens patriae* interest in protecting children. Parental consent is not the problem. Using parental consent to effectuate the government's disapproval of specific content is. This is why we argue that enabling parental authority needs to be the singular and clearly articulated governmental interest in a parental consent statute. Scalia's grievance in *Brown* comes from trying to reconcile the government's independent interest in protecting youth from a purportedly objective harm with the parental ability to override the law. A compelling government interest independent of parents would need to be justified by a very serious social harm.[253] But if video games are really so "dangerous [and] mind-altering," Scalia reasons, how does the material become innocuous just because a parent OKs it?[254] Thus, if parental opt-in is an appropriate antidote for a direct social harm to children, then the magnitude of that harm must have been relatively mild, within the realm where reasonable parents can disagree.[255] For Scalia, this undermines the legitimacy of the *government's independent interest* in protecting youth.[256] The analysis is entirely dependent on the content-based attributes of the statute.

Finally, Scalia analyzes the statute in terms of the government's interest in supporting parental authority. The primary issue for the court was that the status

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248. *Id.* The first part of the *Brown* opinion, establishing strict scrutiny as the applicable standard of review, may seem superfluous in light of previous Supreme Court decisions. In *Ashcroft v. ACLU* (*Ashcroft II*), 542 U.S. 656, 676 (2004), eight out of nine justices agreed that the sex-version of the harmful to minors test in COPA warranted strict or "most exacting" scrutiny, as a content-based restriction on nonobscene speech. But Scalia, in dissent, claimed that COPA should not have been subjected to strict scrutiny. *See Ashcroft II*, 542 U.S. at 676 (Scalia, J., dissenting).

249. Brown, 564 U.S. at 799.

250. "E" is for "Everyone."

251. Brown, 564 U.S. at 801–02.

252. *Id.*

253. *Id.* at 802.

254. *Id.* at 803.

255. *Id.*; *see also id.* at 804 ("[C]oncerns [about violent video games] may and doubtless do prompt a good deal of parental oversight," yet not all children "have parents who *care* whether they purchase violent video games.") (emphasis in original).

256. *Id.* at 803.

quo ability to exercise parental authority in the video game context was good, thus parents didn't need government support to enable the exercise of their filtering responsibilities. The existence of the Entertainment Software Rating Board (ESRB), a self-regulatory content-rating organization sufficiently shielded minors in practice. The plaintiff Association in *Brown* already encouraged its retailers to require parental consent for the sale of "Mature"-rated video games, and most did.[257] Moreover, parents could see the physical game box brought into the home and censor it at that point. The social media landscape is very different from that of a physical video game box that represented technology of that time. Social media is vast, ephemeral, and physically private by comparison. Parents are frustrated by their inability to use existing parental controls for social media effectively to achieve their own goals for parenting social media usage.[258]

In addition, the law in *Brown* was not narrowly tailored to supporting parental authority, Scalia argued, because many parents do not care whether their children purchase or play violent video games. Thus the law was a reflection not of what parents do want but what "the State thinks parents ought to want."[259] What's more, he writes, the law "abridges the First Amendment rights of young people whose parents . . . think violent video games are a harmless pastime."[260] By contrast, almost all parents believe social media is dangerous to their children and want greater ability to control their children's social media access.[261]

C. Criticisms of Brown

1. Brown *Ignores Jurisprudence on Parental Authority*

Brown fails to engage with key jurisprudence on parental authority in the First Amendment and with well-established parental consent frameworks in family law. Justice Scalia's idea that enabling parental authority creates a speech issue for "young people whose parents . . . think video games are a harmless pastime"[262] is irreconcilable with the *Ginsberg* and *Reno v. ACLU* courts' examined stance on parental consent.[263] Scalia makes his conclusory statements without engaging any of the preceding rich First Amendment jurisprudence about parental authority. Though he discusses *Ginsberg* in order to compare its "harmful to minors" standard with the California statute's violence standard, he omits any discussion of the vital role that parental authority played in the *Ginsberg* decision.[264] Both *Ginsberg* and

257. The FTC report on actual access suggested little issue. *Id.* at 804 n.9.

258. *See* Plaintiffs' Amended Master Complaint (Personal Injury) at 1, 40, *In re* Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig., No. 22-MD-3047, 2023 U.S. Dist. LEXIS 203926 (N.D. Cal. Nov. 14, 2023), MDL No. 3047.

259. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 804 (2011).

260. *Id.* at 805.

261. *Supra* note 14.

262. Brown, 564 U.S. at 805.

263. Ginsberg v. New York, 390 U.S. 629, 639 (1968); Reno v. ACLU, 521 U.S. 844, 865 (1997).

264. *See* Brown, 564 U.S. at 815 (Alito, J., concurring) ("If parents want their child to have a

Reno viewed parental consent provisions not as a burden on minors (or parents) but conversely as a positive feature of regulations, saving them from the impermissibility of a total ban.[265] Recognizing that "parental control or guidance cannot always be provided"[266] in the absence of regulation, parental consent mechanisms, like security checkpoints, provide parents with a guaranteed opportunity to take charge of child rearing. Where parents want their children to have access to restricted material, courts have seen the burden as incidental.

It is a familiar notion that even impositions on adults from having to ask for access to speech is often a nominal burden. For example, it is acceptable to require an adult to ask a librarian to disable the library's filtering software,[267] or to ask a worker at a retail store for access to sexually explicit material which a state requires to be kept behind the counter.[268] Indeed, courts have found "constitutional defect[s]" in laws that deprive parents of the opportunity to assess potentially objectionable material because such opportunities are beneficial to parental decision making.[269] Information about a potential hazard to children may also help parents to adjust their level of supervision, even if parents choose not to completely deprive their children of access.[270] *Brown* ignores all of this First Amendment jurisprudence. For that reason alone, its input on parental consent laws must be treated carefully. As between concluding that Scalia summarily overruled an entire body of law and instead concluding that the heart of *Brown* is the difficulty of defining violence in a content-based regulation, the latter is at least the better reading.

Additionally, Scalia's argument is completely incoherent with respect to well-established parental consent frameworks in family law. From tattoo parlors to gender-affirming medical care to field trips to the state house, parents spend an enormous amount of time providing legally compelled written consent for the speech-adjacent activities of minor children.[271] Depending on the size of the artistic or medical pursuit, this compelled consent may entail many hours of parental commitment spanning multiple days, far more significant than the trip to the local GameStop which so distressed Scalia in *Brown*. And yet, we doubt anyone would seriously contend that a child's free speech rights were burdened when they had to

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violent video game, the California law does not interfere with that parental prerogative.").

265. Ginsberg, 390 U.S. at 639; Reno v. ACLU, 521 U.S. at 865.

266. Ginsberg, 390 U.S. at 640.

267. United States v. Am. Lib. Ass'n, 539 U.S. 194, 209 (2003) ("[T]he Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment.").

268. NAT'L DIST. ATT'YS ASS'N, OBSCENITY LAWS (2010), https://ndaa.org/wp-content/uploads/Obscenity-Statutes-6-2010.pdf [https://perma.cc/ZV6M-63XE].

269. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74–75 (1983) (finding total ban on contraceptive mail ads impermissibly restrictive in part because parental decision-making around child's birth control would benefit from viewing material at least once).

270. *See* United States v. Playboy Ent. Grp., 529 U.S. 803, 825–26 (imagined regulatory alternative of publicized § 504 would provide parents with opportunity for "active supervision").

271. Moreover, as is the case with tattoo laws, the parent's in-person presence is often required. *Tattoo Laws by State 2024*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/tattoo-laws-by-state [https://perma.cc/YC3Y-L95V] (last visited Oct. 29, 2024).

convince a parent to attend a tattooing procedure.

Finally, Scalia's opinion in *Brown* itself noted that the case would be different were it an opt-out parental consent system instead of an opt-in system, addressing the dissent's assertion that parental authority extends to the law in *Brown.* Scalia is introducing a weak distinction between opt-in and opt-out parental consent for minor's speech*:*

> Most of [the] dissent is devoted to the proposition that parents have traditionally had the power to control what their children hear and say. *This is true enough.* And it perhaps follows from this that *the state has the power to enforce parental prohibitions—to require, for example, that the promoters of a rock concert exclude those minors whose parents have advised* the promoters that their children are forbidden to attend. But it does not follow that the state has the power to prevent children from hearing or saying anything without their parents' prior consent. [emphasis added.][272]

Obviously, rock concerts include both artistic and political expression protected by the First Amendment. It is central to this article's argument to understand that the question answered by *Brown* is narrow with respect to parents and a child's First Amendment rights.

2. Brown *Aggrandizes the First Amendment Rights of Minors*

In support of *Brown's* principle that content-based regulations of constitutionally protected speech for minors must rely on "longstanding tradition[s]" of protection, Scalia writes, in what is perhaps the most influential part of the opinion[273]:

> "[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." [citing *Erznoznik v. Jacksonville*] 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. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[274]

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272. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 795 n.3 (2011). Over time, Justice Scalia showed greater skepticism of constitutional parental rights than most of the Court. Kerry Abrams, *The Rights of Marriage: Obergefell, Din, and the Future of Constitutional Family Law*, 103 CORNELL L. REV. 501, 528–32 (2018).

273. *See* discussion of state laws *infra* Part IV.

274. Brown, 564 U.S. at 794 (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 212–14, 214 n.11

We unpack the legal force of this portion of *Brown* in the hope of preventing it from being further misused.

First, Scalia's quotation of *Erznoznik* is misleading because he omits the source's introductory sentence: "It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults. Nevertheless, minors are entitled . . . ."[275] Prior to *Brown*, courts quoted *Erznoznik* with roughly the same frequency for either of the propositions that states may regulate[276] or that minors have significant rights.[277]

Second, this part of *Brown* must be understood narrowly and in context. Scalia invoked minors' rights only to argue that California could not use violence to define a "wholly new category of content-based regulation that is permissible only for speech directed at children"[278] because violent content is neither "obscene as to youths nor subject to some other legitimate proscription."[279] Of course, this begs the question: *What is legitimate proscription*? And we submit that this inquiry is the only substance of the above-quoted passage.

Third, and mostly importantly, Scalia's surrounding discussion supplies the meaning of "legitimate proscription" as a "long tradition of proscription."[280] But it completely omits to mention that *Erznoznik* already offered substantial input on "legitimate proscriptions" just after the quoted passage. Indeed, the *Erznoznik* court recalls that the rights of minors are not "co-extensive with those of adults" and adopts a framework—originating in Stewart's concurrence in *Ginsberg v. New York*—for assessing permissibility of speech-restrictive regulations based on *minors' limited capacity* to choose what speech to be exposed to.[281] *Erznoznik* suggests a broad category of situations where the government may permissibly regulate speech in order to enable parental decision making on behalf of minors—a category which *Brown* altogether ignores, but which was highly significant to the development of the "captive audience" doctrine. We return to a discussion of this *infra* at Part III.E.

D. Parents Under Brown

We properly understand *Brown* by putting Scalia's concerns about California's weak government interests in dialogue with his response, in Footnote 3, to Justice

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(1975)) (noting that the First Amendment rights of minors are not "co-extensive with those of adults" and adopting Stewart's *Ginsberg*-concurrence framework of assessing permissibility of regulations for the protection of minors based on the minors' limited capacity to choose what speech to be exposed to).

275. Erznoznik, 422 U.S. at 212–13.

276. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 757 (1978) (Powell, J., concurring)

277. *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 n.30 (1983).

278. Brown, 564 U.S. at 794.

279. *Id.* at 795 (citing Erznoznik, 422 U.S. at 213–14).

280. *Id.* at 793. For a specific critique of this aspect of *Brown* (and of *United States v. Stevens*, 559 U.S. 460 (2010)), see Genevieve Laker, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015).

281. Erznoznik v. Jacksonville, 422 U.S. 205, 212–14, 214 n.11 (1975) (Stewart identifies the retail scene as one where minor's capacity to exercise First Amendment choices may be compromised, at least where sexually explicit material was available).

Thomas' dissent. There Scalia concedes that "parents have traditionally had the power to control what their children hear and say" and that the government should be able to enforce parental opt-out laws that empower a parent to forbid a third party from admitting their child to an event even where protected First Amendment content will be shared.[282] But Scalia disapproves of laws that, instead of "enforc[ing] parental authority over children's speech . . . impose governmental authority, subject only to a parental veto," where the reasons are suspicious and content-based.[283] He believes the violent video game law reflects the content-based will of the government, and not the will of parents.

Brown says more about the constitutionality of parental opt-in laws than the formula "opt-out=good, opt-in=bad" that some courts reviewing opt-in systems governing social media have apparently taken away from the opinion.[284] Rather, *Brown* stands for two principles about the interaction between parental opt-in and the dual *Ginsberg* interests of (1) helping *parents* to screen content, and (2) serving the government's *parens patriae* interest in protecting minors. First, parental opt-in is unlikely to be narrowly tailored to a government interest in protecting minors if that government interest is truly independent of supporting parental authority.[285] Second, for parental opt-in to further the government's interest in supporting parental authority, the government must demonstrate that the law adequately reflects and amplifies the will of parents, and is not, in fact, an imposition of content-specific government authority.[286] This would be possible with stronger empirical evidence of parental concern than the scant amount available in the *Brown* litigation, and it would certainly be possible for content-neutral opt-in systems designed to let parents limit the time spent on social media platforms or to select which platforms are acceptable.[287]

Brown does not stand for the proposition that children have First Amendment rights that exceed a parent's reach. If courts come to understand *Brown* as prohibiting even content-neutral opt-in parental consent, it would upend an enormous body of law that is premised on opt-in parental consent, including statutes relating to expressive activities such as performing in a movie[288] and enrolling in school.[289] Indeed, in an era where the Court's definition of a speech question is expanding, a speech issue could be found in a range of otherwise routine parental authority. Such an interpretation would also challenge the Constitutional

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282. Brown, 564 U.S. at 795 n.3; *see supra* text accompanying note 272.

283. Brown, 564 U.S. at 795.

284. *See* NetChoice, LLC v. Yost, No. 2:24-cv-00047, 2024 U.S. Dist. LEXIS 6349 (S.D. Ohio Jan. 9, 2024); *but see* Caroline Mala Corbin, *The Pledge of Allegiance and Compelled Speech Revisited: Requiring Parental Consent*, 97 IND. L.J. 967, 997 (2022) (summarizing *Brown* as concluding "minors' speech rights prevailed over parental ones").

285. *See infra* Part III.E.2.

286. *Id.*

287. *Supra* note 14.

288. *Child Entertainment Laws as of January 1, 2023*, *supra* note 43.

289. *See supra* notes 21–26, 39–44.

law that allows parents to prohibit third party contact[290] and the common law allowing parents to disavow a child's contracts.[291]

The truth about *Brown* is that the government interest in helping parents was neither well-articulated nor well-proved, because there was a rating system for video games that worked well, and the physical game comes home and is visible to the parent for on-site curation. The government interest relied too much on the state's *parens patriae* interest in protecting children and not enough on enabling parents.

We think it is essential for regulators to understand the parameters of *Brown* within First Amendment doctrine to prevent social media companies from being able to use *Brown* for *any* proposition around parental authority in a *content-neutral* setting. In the following parts, we discuss three fundamental principles of parenting under the First Amendment that emerge from a careful consideration of case law.[292] Taken together, they establish parental authority to limit access to speech as a normal feature of First Amendment law. Furthermore, courts often *rely* on parents as a less restrictive alternative to content-specific regulations. Placing *Brown* in its proper limited context is essential to understanding the power dynamics between social media companies and families.

E. Three Principles of Parental Authority Under the First Amendment

1. The "Captive Audience" Doctrine as Hidden Family Law

When constitutional law recognizes an individual's right to choose what they hear or a parent's right to choose what their child hears, the government has wide latitude to regulate speech that threatens that individual right.[293] The doctrine depends circumstantially on the strength of both the party's right to avoid speech

290. Buss, *Adrift in the Middle*, *supra* note 66, at 292.

291. RESTATEMENT CHILDREN NO. 5, *supra* note 68, § 20.20.

292. *See generally* Martin Guggenheim, *Violent Video Games and the Rights of Children and Parents: A Critique of* Brown v. Entertainment Merchants Association, 41 HASTINGS CONST. L.Q. 707 (2014) (elaborating a four-part taxonomy of First Amendment child protection cases to argue that the *Brown* majority relies on the wrong types of cases). We focus instead on the *First Amendment of families* that emerges from these cases taken as a whole. *Id.* at 748.

293. *See* Frisby v. Schultz, 487 U.S. 474, 488 (1988) (upholding residential picketing ban because picketing encroached on rights of family in the home); FCC v. Pacifica Found., 438 U.S. 726, 749–50 (1978) (upholding FCC's regulation of broadcast indecency because radio was uniquely pervasive and accessible to children and not generally susceptible to parental supervision); Rowan v. U.S. Post Off. Dep't, 397 U.S. 728, 738 (1970) (upholding Congress' empowering of householders to issue prohibitory mail orders); United States v. Playboy Ent. Grp., 529 U.S. 803, 815 (2000) (no captive audience problem where parents have an alternative means to prevent the speech from entering their homes, like voluntary blocking); Sable Commc'ns v. FCC, 492 U.S. 115, 128 (1989) (no captive audience problem where consumers have to take sufficiently specific affirmative steps to access the speech); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74–75 (1983) (where government interest is in supporting parents to prevent offensive but potentially valuable mail from reaching children, captive audience consideration justifies parental power to prohibit mailings retroactively but does not justify a blanket ban); FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978) (outside the home, listeners have the obligation of turning away from undesired speech (citing Erznoznik v. Jacksonville, 422 U.S. 205, 210–11 (1975))).

and the speech's encroachment on this right.[294] To extend Justice Stevens' metaphor in *FCC v. Pacifica*, about a "pig in the parlor room": There is no issue with the pig, per se, but rather with the pig's presence in contravention of a right to privacy or to the exercise of uninterrupted parental authority.[295] Abridgement of "captive audience" speech triggers a lesser level of judicial scrutiny, probably nearer to intermediate than strict.[296]

If there is any environment in which this right can be safeguarded, then surely all signs point to the "home." The meaning of "home" transcends architecture and should be understood in relation to a particular collection of people and set of expectations of personal and familial autonomy.[297] The party unable to avoid unwelcome speech is often referred to as a "captive audience,"[298] but we heed the admonitions of scholars[299] and courts[300] that the doctrine historically has been

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294. *See generally* Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85 (1991).

295. *See* Pacifica Found., 438 U.S. at 750.

296. *See* Playboy Ent. Grp., 529 U.S. at 815; Reno v. ACLU, 521 U.S. 844, 867 (1997). This may answer scholars who criticize *Pacifica* on the grounds that broadcast regulations broadly burden adult speech and, therefore, can never be narrowly enough tailored to the government's interest in protecting children or supporting parents. *See, e.g.*, Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 4 SUP. CT. REV. 141, 182–83 (1997). One can embrace the captive audience doctrine but still be critical of its application to *Pacifica*'s facts. *Cf.* Playboy Ent. Grp., 529 U.S. at 815 (declining to apply *Pacifica*'s rationales to cable signal bleed). Or one may doubt that the FCCs' regulations reflected parental will—indeed, only one parent complained to the FCC about the "Filthy Words" broadcast. *See* FCC v. Pacifica Found., 438 U.S. 726, 728 (1978).

297. Justice Harlan explained, "Certainly the safeguarding of the home does not follow merely from the property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right." Poe v. Ullman, 367 US 497, 551–52 (1961) (Harlan, dissenting). In terms of the right to avoid speech, "home" is not without established contours. It accounts for environments where a person's expectation of filtering particular speech is so strong as to be comparable to the physical home. For example, it may include the environment of a private car, where a parent has a strong expectation that they can control the radio to their satisfaction, or the street outside one's home, where a parent may have a strong expectation that picketers will not accost their children regarding sensitive subject matters. *See* FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978); Frisby v. Schultz, 487 U.S. 474 (1988). It may even include children's email addresses or other media accounts. *See* Free Speech Coal., v. Shurtleff, No. 2:05-cv-00949, 2007 U.S. Dist. LEXIS 21556, at *41 (D. Utah Mar. 23, 2007).

298. *See* Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting) (originating the term "captive audience" in context of public streetcar passengers subjected to radio broadcast).

299. *See, e.g.*, Strauss *supra* note 294, at 95 (the captive audience doctrine outside the home is "riddled with confusion and inconsistency," whereas the main problem in the context of the home has been parsing whether the court will silence the speaker or impose some minimal burden on the unwilling recipient); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1833 (1992) (terming the captive audience doctrine a doctrine of privacy of the home); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1 SUP. CT. REV. 1, 18–19 (1994).

300. *See* Snyder v. Phelps, 562 U.S. 443, 459 (2011) ("We have applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech."). The Roberts Court gave *Rowa*n and *Frisby* as its only examples of legitimate applications of the doctrine. *Id.* It declined to apply the captive audience doctrine to the case before it, involving the Westboro Baptist Church's egregious picketing of a funeral, suggesting that outside the home, *Erznoznik* and *Cohen* were dispositive, placing

limited to audiences that are captive in the "home." To scholars who would prefer to take the "home" out of the "captive audience" doctrine in order to extend it to other contexts—like workplace harassment, university hate speech, or cyberhate—we argue, without passing normative judgment on these projects, that they underestimate the significance of family and "home" in the captive audience doctrine as actually treated by courts.[301]

The captive audience principle first finds its legs in *Rowan v. U.S. Post Office*.[302] Congress pursued the objective of protecting children from harmful material by empowering parents to forbid third parties from communicating with their children via mail.[303] Whereas a blanket content-based ban on certain unsolicited mail communications would likely run afoul of the First Amendment,[304] the *Rowan* court unequivocally embraces the prohibitory mail orders as supporting parental discretion to prevent material from reaching their minor children notwithstanding the First Amendment rights of third parties to communicate freely. Justice Burger's opinion for the majority proclaims, "In today's complex society, we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail."[305]

The *Rowan* decision notably offered emphatic input on parental rights. In his final opinion Burger writes, "Nor should the householder have to risk that offensive material come into the hands of his children before it can be stopped."[306] But in fact, this statement was a step back from an earlier draft of the opinion in which Burger had written that parents have an "absolute" right to control the reading of their children in the home.[307] In a letter to Burger, Brennan wrote that he would join Burger's opinion

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the burden on the audience to avoid speech. *See also* Elmbrook Sch. Dist. v. Doe, 573 U.S. 922, 922 (2014) (Scalia, J., dissenting) ("I too am especially annoyed when the intrusion upon my inner peace occurs while I am part of a captive audience, as on a municipal bus or in the waiting room of a public agency. [But] my own aversion cannot be imposed by law because of the First Amendment."), *denying cert. to sub nom.* Doe v. Elmbrook Sch. Dist., 687 F.3d 840 (7th Cir. 2012). Thus, Douglas' controversial conception of passengers of public transportation as captive audiences eliciting special protection is now a relic. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 305–07 (1974) (Douglas, J., concurring).

301. *See* Jack M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2311–12 (1999) (arguing that the captive audience doctrine is well-suited to protect employees from workplace harassment and should not depend on "place" because "[t]here is nothing talismanic about the home for purposes of captivity"); Melissa Weberman, Student Article, *University Hate Speech Policies and the Captive Audience Doctrine*, 36 OHIO N. UNIV. L. REV. 553 (2010); Alexander Brown, *Averting Your Eyes in the Information Age: Online Hate Speech and the Captive Audience Doctrine*, 12 CHARLESTON L. REV. 1 (2017).

302. Rowan v. U.S. Post Off. Dep't, 397 U.S. 728 (1978).

303. *Id.* at 736; *see also* Mainstream Mktng. Servs. v. FTC, 358 F.3d 1228, 1237 (10th Cir. 2004) (summarizing *Rowan* as upholding "the right of a homeowner to restrict material that could be mailed to his or her house").

304. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) and discussion *infra* Part III.E.3.

305. Rowan, 397 U.S. at 736.

306. *Id.* at 738.

307. *See* Letter from John Marshall Harlan, Former Associate Justice of the Supreme Court of the United States, to Warren E. Burger, Former Chief Justice of the Supreme Court of the United States, Re: No. 399 - Rowan v. U.S. Post Office Department (Apr. 23, 1970) ("Your statement . . . to the effect that parents have an 'absolute' right to control the reading of their children in the home makes

on the condition that Burger removed from the final opinion, altogether, the sentence about citizens not having to wait for offensive material to come into the hands of children. But Burger flatly refused, stating, "I think it is essential to the opinion and if the holding doesn't mean that, then it doesn't mean anything."[308]

The next year, Burger articulated the negative of the "captive audience"-at-home principle in *Cohen v. California*: that "captive auditor[s]" in public settings typically have the burden of avoiding unwanted speech, and that even a person's "privacy interest when walking through a courthouse corridor" pales in comparison to "the interest in being free from unwanted expression in the confines of one's own home."[309]

In *FCC v. Pacifica*, the "captive audience" doctrine fully emerges when the majority adds speech that subversively intrudes the home to the classical list of less-protected categories of speech alongside commercial speech, private libel, "fighting words," and obscenity.[310]

Powell's *Pacifica* concurrence provides a complementary justification for the special status of the "home" in First Amendment jurisprudence in terms of parental authority and the limited capacity of minors to make choices.[311] Because minors lack the capacity to exercise First Amendment rights, parents inherit stewardship of

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me a little gun-shy. I have a distaste for absolutes . . . ."), http://supremecourtopinions.wustl.edu/index.php?rt=pdfarchive/details/109 [https://perma.cc/XJ5T-XGF8] (available in the Supreme Court Opinion Writing Database document archives); *see also* TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 220 (1992).

308. *See* Letter from William J. Brennan, Former Associate Justice of the Supreme Court of the United States, to Warren E. Burger, Former Chief Justice of the Supreme Court of the United States, Re: No. 399 - Rowan v. U.S. Post Office Department (Apr. 28, 1970), http://supremecourtopinions.wustl.edu/index.php?rt=pdfarchive/details/109 [https://perma.cc/XJ5T-XGF8] (available in the Supreme Court Opinion Writing Database document archives); Letter from Warren E. Burger, Former Chief Justice of the Supreme Court of the United States, to William J. Brennan, Former Associate Justice of the Supreme Court of the United States, Re: No. 399 - Rowan v. U.S. Post Office Department (Apr. 28, 1970), http://supremecourtopinions.wustl.edu/index.php?rt=pdfarchive/details/109 [https://perma.cc/XJ5T-XGF8] (available in the Supreme Court Opinion Writing Database document archives).

309. Cohen v. California, 403 U.S. 15, 21–22 (1971).

310. FCC v. Pacifica Found., 438 U.S. 726, 745 (1978). The court analyzes whether the "circumstances . . . create a clear and present danger that [the words] will bring about the substantive evils that Congress has a right to prevent," such that the speech merits lesser protection as a class. *Id.* at 744–45 (quoting Schenck v. United States, 249 U.S. 47, 52 (1919)).

311. *Pacifica Found.*, 438 U.S. at 757–58 (Powell, J., concurring in part and concurring in the judgment). Powell relies on Stewart's concurrence in *Ginsberg*, where Stewart asserts that the child, "like someone in a captive audience," is often not "possessed of that full capacity of choice which is the presupposition of First Amendment guarantees." Ginsberg v. New York, 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring). Because a child is sometimes not competent to exercise the First Amendment right of choosing whether or not to access certain speech—just as a child is considered not competent to marry or vote—Stewart concluded that the state could intervene to protect children by depriving them of speech in a manner that would be "constitutionally intolerable for adults." *Id.* Powell qualifies this intervention as one that supports parental authority. Pacifica Found., 438 U.S. at 757–58. Stewart's argument was influential to future Courts for the proposition that neither minors' rights nor punishments should be coextensive with those of adults. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 214 n.11 (1975); Bellotti v. Baird, 443 U.S. 622, 635 n.13 (1979); Thompson v. Oklahoma, 487 U.S. 815, 824–25 n.23 (1988).

minors' speech rights in the regular course of their parental obligations, and the government may act "to prevent the general dissemination of such speech to children, leaving to parents the decision as to what speech of this kind their children shall hear and repeat."[312] Once again, if parents can anywhere be supported in the discharge of this authority, then surely they can in the "home."

In *Frisby v. Schultz*,[313] the capstone of captive audience cases, the Supreme Court upheld an ordinance banning all residential picketing. The majority explained, "The target of the focused picketing banned by the Brookfield ordinance is just such a 'captive.' The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech."[314] A close reading of *Frisby* once again demonstrates the inextricability of the family and the captive audience doctrine.

The underlying facts in *Frisby* connect the "captive audience" problem to the disruption of family autonomy. Justice Stevens described the picketers' "sole purpose" as "imposing psychological harm on a family in the shelter of their home."[315] The anti-abortion picketers took nonconsensual pictures of a doctor's sixteen-year-old son inside the home, shouted at him, and prevented him from exiting; they barred the doctor's wife from entering the home and published photos of the family's backyard. Unrelated five- and six-year-old neighbors became frightened when the picketers told them that the doctor was a "baby killer."[316] One family complained this interaction had forced them to explain abortion to their child.[317]

The *Frisby* court's opinion was influenced by the dissent in a prior case, *Carey v. Brown*, that had struck down an earlier law about home-picketing.[318] The language that was brought forward into the *Frisby* majority from *Carey* is, taken by itself, highly resonant with family law, but all the more so when viewed in its original context, a Wisconsin Supreme Court opinion[319]:

> Tranquility and privacy are fragile enough flowers, particularly in a home setting. Home is where . . . both husband and wife come, after the day's work, to relax and put aside the cares of the outside world. . . . Home is where the children come not only to eat and sleep, but also to do their homework and to go out in the yard and play with the youngsters in the neighborhood.[320] Home is many things, most of them intangibles, not just a house and shelter . . . *To those inside . . . the home becomes something less than a*

312. *Pacifica Found.*, 438 U.S. at 757–58.
313. Frisby v. Schultz, 487 U.S. 474 (1988).
314. *Id.* at 482.
315. *Id.* at 498 (Stevens, J., dissenting).
316. *Id.* at 494 (majority opinion).
317. Schultz v. Frisby, 807 F.2d 1339, 1341 (7th Cir. 1986).
318. Carey v. Brown, 447 U.S. 455 (1988).
319. Wauwatosa v. King, 182 N.W.2d 530, 537 (Wis. 1971).
320. In *Schultz v. Frisby*, both the yard and the surrounding neighborhood were sites of family disruption. Schultz v. Frisby, 807 F.2d 1339, 1341 (7th Cir. 1986).

> *home when and while the picketing . . . [continues] . . . . [The] tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility.* [emphasis added.][321]

This is the concept of home embedded in *Frisby*. Home as an imagined scene of family practices, more than just a residence, that can be isolated and protected through regulation of speech.

2. The Government's Interest in Supporting Parents is Better Suited to Speech Regulation than its Interest Parens Patriae

When the government asserts an independent interest in protecting children from harm, the analysis is oriented toward objectivity: The government has the burden of demonstrating that "the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[322]

But when the government asserts an interest in supporting parents in the exercise of their child-rearing authority, the analysis is oriented toward enabling the subjective perception of parents.[323] The question is now whether *parents perceive* that a harm exists which they are unable to control, and whether the regulation will actually enable parents to alleviate their perceived harm in a material way.[324]

The opposite nature of these interests is especially pronounced where the proposed solution is the enabling of parental authority. In this case, the former analysis asks whether parental action supports the government, whereas the latter analysis asks whether government action supports parents.[325]

Ginsberg introduces both of these interests as compelling.[326] First, the court famously writes:

> [C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. "It is cardinal with us that the custody, care and nurture of the

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321. The italicized language is the quotation in *Frisby v. Schultz*, which the court prefaces, "The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt." Frisby v. Schultz, 487 U.S. 474, 486 (1988).

322. Turner Broad. Sys. v. FCC, 512 U.S. 622, 664 (1994); *see also* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011).

323. *See, e.g.*, Ashcroft v. ACLU, 542 U.S. 656, 670 (2004) (analyzing COPA with respect to the problem of "frustrat[ion of] parental supervision or control"). In a recent case striking down a social media parental consent statute, a federal court in Utah misses this distinction. *See* NetChoice, LLC v. Reyes, No. 2:23-cv-00911, 2024 U.S. Dist. LEXIS 163294 at *27–31 (D. Utah Sept. 10, 2024).

324. *Id.*

325. *See, e.g.*, NetChoice, LLC v. Griffin, No. 5:23-cv-05105, 2023 U.S. Dist. LEXIS 154571 at *60–61 (W.D. Ark. Aug. 31, 2023). The government argued that the law will protect children from social media harms because "parents will have to be involved in their profile creation." *Id.*

326. Ginsberg v. New York, 390 U.S. 629 (1968). *But see* Corbin, *supra* note 284, at 996–1000 (treating the assessment of harm as the decisive factor in *Ginsberg* rather than the government's interest in supporting parents).

> child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's wellbeing are entitled to the support of laws designed to aid discharge of that responsibility.[327]

Second, the court acknowledges the government's "independent interest in the well-being of its youth." This interest, too, draws on family law. The *Ginsberg* majority opinion indicated that the government's role as *parens patriae* in regulating protected speech for the benefit of minors was only justified to the extent that it emulated reasonable parental will in situations where parents could not be relied on.[328] Consequently, the *parens patriae* interest in *Ginsberg* is properly understood as subordinate to its interest in supporting parents.[329] Other scholars agree on this point.[330]

The treatment of these interests by later courts reinforces this thesis. Although some courts after *Ginsberg* made conclusory endorsements of the government's interest in protecting children without distinguishing the dual *Ginsberg* dimensions,[331] most recent courts doubt the legitimacy of the independent interest or are careful to qualify it.[332] This includes the three most recent landmark decisions

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327. Ginsberg, 390 U.S. at 639 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

328. *Id.* (implying that parents (and others such as teachers), and not legislatures, have the primary responsibility for children); *id.* (asserting that the "community" standard in the New York law "expressly recognizes the parental role in assessing sex-related material"); *id.* (asserting that the law supports parental authority because it "does not bar parents who so desire from purchasing the magazines for their children"); *id.* at 640 ("While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them.") (citation omitted); *id.* at 640–41(deriving the state's "independent interest" in part from *Prince v. Massachusetts*'s assertion of a *parens patriae* interest "to see that [children] are 'safeguarded from abuses,'" where "abuse" was instance of young child working in violation of child labor laws with approval of a legal guardian.).

329. David Archard explains that the state's interest in acting as *parens patriae* is limited to parenting "in the last instance": "The state only takes parental responsibilities on itself when . . . when there is a clear failure of parenthood . . . 'in the first instance.' In our societies, such responsibilities in the first instance are accorded to the child's natural parents, or to [appropriate legal] guardians." David Archard, *Free Speech and Children's Interests*, 79 CHI.-KENT L. REV. 83, 85 (2004).

330. Ashutosh Bhagwat shows that the interest in supporting parents not only enjoys constitutional privilege but also eclipses the *parens patriae* interest in practice, because the latter can only substantially increase government regulatory power in the presence of widespread parental "inertia, indifference or distraction." Ashutosh Bhagwat, *What if I Want My Kids to Watch Pornography?: Protecting Children from "Indecent" Speech*, 11 WM. & MARY BILL RTS. J. 671, 692, 719–20 (2003). *See also* Catherine Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial*, 53 VAND. L. REV. 427, 435 (2000) ("Constitutionally recognized principles of autonomy and family privacy limit the State's authority to make moral or developmental choices for minors in areas traditionally reserved for their parents or guardians.").

331. *See, e.g.*, Sable Commc'ns v. FCC, 492 U.S. 115, 126 (1989).

332. *See, e.g.*, United States v. Playboy Ent. Grp., 529 U.S. 803, 814 (2000) ("[N]o one suggests the government must be indifferent to unwanted, indecent speech that comes into the home *without parental consent*.") (emphasis added). The D.C. Court of Appeals has explicitly addressed the compatibility of the two *Ginsberg* interests. It claimed they were "complementary objectives," but, in fact, clarified

to address the issue. In *United States v. Playboy*, in response to the government's argument "that society's independent interests will be unserved if parents fail to act," the court expresses doubt that the "government has an interest in substituting itself for informed and empowered parents."[333] In *Ashcroft (II) v. ACLU*, Kennedy's majority opinion analyzes COPA in terms of its purpose to prevent "opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control."[334] Meanwhile, Justice Stevens (joined by Ginsburg) wrote in concurrence: "I must confess to a growing sense of unease when the interest in protecting children from prurient materials is invoked as a justification for using criminal regulation of speech as a substitute for, or a simple backup to, adult oversight of children's viewing habits."[335] In *Brown*, the court argues that the government may regulate to bolster parental authority where there is an actual parental demand for government assistance, but the government may not impose its own authority to regulate protected speech for minors unless the harm to children is so great as to justify completely overriding parents.[336]

Scholars and courts in practice agree that the interest in supporting parents is more compelling. Because the interests implicate wholly different legal analyses, and because courts consistently emphasize the extraordinarily high bar for proving the existence of objective harms, policymakers are advised to take this point seriously. Legislation burdening protected speech for the benefit of children may be far more likely to withstand First Amendment challenge when it is tailored to support parents instead of to prevent allegedly objective harms.

3. Parenting as the Least Restrictive Alternative

This section furthers the analysis in the preceding section by describing cases in which the Supreme Court has struck down regulation protecting children from protected speech because of the availability of an as effective and less restrictive alternative that *relies on parents to act*. These cases embody the principle that, where parents *can* play a role in advancing the law's objective through the exercise of parental authority, then the government *must* limit its intervention to enabling this exercise of authority. This principle is an instance of least restrictive alternative factor of First Amendment scrutiny.[337] But it is remarkable that the Supreme Court

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the government's "independent interest in the well-being of its youth" as a qualified interest "in shielding minors from being exposed to indecent speech *by persons other than a parent*." (emphasis added). Action for Child.'s Television v. FCC, 58 F.3d 654, 663 (D.C. Cir. 1995). *See also* Friends of Georges, Inc. v. Mulroy, 675 F. Supp. 3d 831, 872 (W.D. Tenn. 2023) ("This bold assertion [that 'the state's interest in protecting children is independent of the parents'] may collide with the Supreme Court's holding in *Ginsberg.*"), *rev'd*, 108 F.4th 431 (6th Cir. 2024) (finding lack of standing).

333. Playboy Ent. Grp., 529 U.S. at 825.

334. Ashcroft v. ACLU, 542 U.S. 656, 670 (2004).

335. *Id.* at 675 (Stevens, J., concurring).

336. *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 795 n.3, 804 (2011).

337. *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 711 (2012) ("[W]hen the Government seeks to regulate protected speech, the restriction must be the 'least restrictive means among available,

has considered alternatives that fundamentally depend on parental action to be "available" and "effective"—to be viable policy solutions—with the power to render regulations on speech unconstitutional.[338] These cases demonstrate a judicial disagreement with the conception of "parental rights" conjured by organizations like the Electronic Frontier Foundation.[339] The Supreme Court has not hesitated, in the First Amendment context, to make bold assumptions about the level of authority that parents do or should exercise.

The template situation is this: The government identifies a harm to minors, regulation of which burdens protected speech; the court compares two solutions to the problem. The first solution purports to support parents by enabling them to prevent the harm themselves. The second solution purports to support parents by direct prevention of harm. The government, in defending the second solution's permissibility, argues that the first solution is less effective because it depends on specific parental action.

In *Brown*, the court considered the current voluntary ESRB rating system as a status-quo alternative to a state-implemented opt-in consent system.[340] Under the ESRB system, most participating retailers would already require parental consent before selling a "mature"-rated game to a minor.[341] The *Brown* court rejected the proposition that ESRB noncompliance undermined its effectiveness, because the rating system ensured that "parents who care about the matter can readily evaluate the games their children bring home."[342] The court assumes that, regardless of consent, *parents will oversee their children's use of video games* in the home and utilize the rating system to parent effectively. The court concludes that the State does not have a compelling interest in aiding parents beyond the support the ESRB already afforded them.[343] *Brown*, then, might have come out differently if there were not an easy and effective way for parents to act without the legislation, both due to the rating system, and due to a video game coming into the home in a physical form. Social media, by contrast, is not easily inspected by a parent under the status quo, and so enabling legislation is the only method of achieving the parental decision-making that courts prefer.

In *Playboy* and *Ashcroft II*, the court is clear that the effectiveness of a solution must be judged on the premise that informed parents will act when they have *the ability* to do so. Thus, a voluntary blocking scheme in the CDA was a less-restrictive alternative to the problem of pornographic signal bleed than a mandatory blocking or time-channeling scheme, even though the former scheme depended on parents

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effective alternatives."") (quoting Ashcroft, 542 U.S. at 666).

338. *See id.*

339. *See* Kelley, *supra* note 53 ("Parental Consent Laws for Social Media Deprive Parents of their Right to Raise Children Without Governmental Interference"); discussion of Moms for Liberty, *supra* Part II.E.

340. Brown, 564 U.S. at 803.

341. *Id.*

342. *Id.*

343. *Id.*

to act.[344] A parent-controlled content-filtering regime was a less-restrictive and more-effective alternative to the CDA's age-gating regime.[345]

In the wake of *Sable Communications v. FCC*,[346] the Third Circuit considered a parent-initiated voluntary blocking regime for dial-a-porn against a law that would have required operators to utilize age-gated access codes.[347] The court theorized that a parent's decision about whether to unblock a dial-a-porn service from the home phone is comparable to a decision about whether to keep porn on a bookshelf at home, concluding that "[n]o constitutional principle is implicated. The responsibility for making such choices is where our society has traditionally placed it—on the shoulders of the parent."[348] Of course the bookshelf and phone are not really analogous, in the sense that every phone (pursuant to voluntary blocking), but not every bookshelf, comes equipped with porn. But conflating the two was easy where the court was content to assume that parents do or should exert a certain amount of control of the home telephone.

A final example comes from *Bolger v. Youngs Drug Products*.[349] *Bolger* concerned a prohibition, contained in 39 U.S.C. § 3001(e)(2), on the mailing of unsolicited contraceptive advertisements. *Bolger* is a direct counterpart to *Rowan*. Where *Rowan* upheld the mechanism of § 3008 that had parents empowering householders to forbid mailers from companies the householder chooses from sending unsolicited advertisements in the future, *Bolger* struck down a blanket ban on advertisements specifically relating to contraception. The *Bolger* court believed the status quo system upheld in *Rowan*—helmed by parents who were enabled by law to prohibit mailers—was already well-suited to support the government's interest in "aid[ing] parents' efforts to control the manner in which their children become informed about [birth control]."[350] The blanket ban on contraceptive mailings was impermissibly restrictive under the assumption that parents "exercise substantial control" over the mailbox.[351] This is not only to say that parents have the *ability* to control the mailbox, but that they actually *do* or *should* control it.

In each case, the assumption that parents do and should exert a certain amount of control or oversight over certain aspects of family life—the mailbox, the home phone or computer, the TV, which videogames their children play—is highly significant. Some parents would no doubt prefer to grant their children autonomy, if they were secure in the knowledge that there is no risk their child will encounter inappropriate material. Outright bans would support that path. But the court does not engage with these less controlling parents, nor does it fashion a "parental right"

344. United States v. Playboy Ent. Grp., 529 U.S. 803 (2000).
345. Ashcroft v. ACLU, 542 U.S. 656, 670 (2004) (citations omitted).
346. Sable Commc'ns v. FCC, 492 U.S. 115 (1989) (striking down federal dial-a-porn ban).
347. Fabulous Assocs. v. Pa. Pub. Util. Comm'n, 896 F.2d 780 (3d Cir. 1990).
348. *Id.* at 788.
349. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).
350. *Id.* at 73.
351. *Id.*

to maintain limited control. Rather, each court crystallizes what could be a legal fiction about the appropriate exercise of parental authority.

In each of the five examples given, the level of the government's support for parents in the proposed less-restrictive alternative is commensurate with court-assessed parental need, meaning that government intervention minimally compensates for the parent's inability to handle the problem alone. This ranges from no intervention in *Brown* (where oversight of video game usage is within parental ability[352]) to after-the-fact mail prohibition in *Rowan* (where parental oversight of a mailbox benefits from minimal government assistance) to a full-on parental opt-out from dial-a-porn access (where the phone is hard to control without government intervention). Because it is ephemeral, dynamic, and private, social media is exceptionally difficult for parents to monitor without some enabling support, and there is substantial evidence that parents would like to be able to better monitor its use.[353]

Thus, where the government has an interest in supporting parents to accomplish an objective, the government may be unable to employ any speech-restrictive means to further that interest if parents themselves would be capable of accomplishing that objective by resorting to a reasonable exercise of parental authority. The availability of this reasonable exercise of parental authority as a policy solution manifests as an insuperably unrestrictive alternative. This result is in harmony with family law. Where the parents are well-equipped to handle a problem (perhaps with minimal government assistance) by adjusting their exercise of parental authority, the court recognizes parents as best suited to solve the problem. Surely, then, where the terrain is as practically impossible to monitor as social media, the government may support a system that enables better parental intervention and decision-making.

IV. EFFORTS TO REGULATE SOCIAL MEDIA

To date, most state lawmakers have had the wrong mission. We argue that they need to stop defining specific content that is dangerous to minors and focus instead on legislating to empower parents to supervise their children on social media according to their own assessments of family needs. This shift is essential to ensuring the constitutionality of reform efforts. Courts will need to notice and explicitly acknowledge the family law in these cases, but we cannot expect them to do so until the legislation more clearly focuses on supporting parents.

In this section, we discuss what state lawmakers have done, why they are failing to get through court challenges, and which parts of their lawmaking can be rescued. As federal bills failed to finalize in 2023,[354] states were extraordinarily active filling

352. Note that at the time of *Brown*, the imagined regulatory scene still centered around parental oversight of children bringing physical video games (cartridges or discs) into the home.

353. *E.g.*, AUXIER ET AL., *supra* note 185.

354. S. 1418, 118th Cong. (2023); S. 3663, 118th Cong. (2023); S. 1291, 118th Cong. (2023).

the gap, and presumably increasing pressure for a more uniform federal approach.[355] The National Conference of State Legislatures reported in August, 2023 that, considering just child social media protection legislation introduced in 2023, more than half of the states (and Puerto Rico) had pending legislation, and eleven states had already enacted bills or adopted resolutions; 2024 has seen an additional seven state legislative interventions.[356]

Congress enacted the Children's Online Privacy Protection Act (COPPA) in 1998.[357] COPPA creates a protective framework for those under thirteen for data collection.[358] The crux of COPPA is its parental consent and notice requirements.[359] COPPA would probably survive a First Amendment attack. COPPA is facially content-neutral, and it does not burden the adult reception of speech because it at most requires age *self*-attestation.[360]

Arkansas, California, Colorado, Connecticut, Florida, Georgia, Louisiana, Maryland, Mississippi, New York, Ohio, Tennessee, Texas, and Utah passed child protective social media legislation between 2023 and 2024.[361] It is difficult to group much of the content in the statutes, but we perceive some as focusing on specific content or algorithms, and some focusing more on parental consent and controls (with overlap where consent is needed for algorithmic feeds). In Section A, we discuss examples of overtly content-based provisions.[362] In Section B, we discuss examples of provisions that lean into facilitating parental decision-making by creating opt-in parental consent for the creation of social media accounts by minors, allowing parents to see into their child's social media accounts, and/or allowing

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355. *See* Tim Wu, *Why Congress Keeps Failing to Protect Kids Online*, ATL. MAG. (Oct. 30, 2023), https://www.theatlantic.com/technology/archive/2023/10/protect-children-online-social-media-internet/675825/ [https://perma.cc/H6HP-FE9V].

356. *Supra* note 2.

357. *See* 15 U.S.C. §§ 6501–06 and implemented by the FTC as instructed by Congress as 16 C.F.R. § 312. For a brief overview of COPPA's history, see Tracy C. Miller, *Protecting Children Online: Evaluating Possible Reforms in the Law and the Application of COPPA*, MERCATUS CTR. (2023), https://www.mercatus.org/research/policy-briefs/protecting-children-online-evaluating-possible-reforms-law-and-application [https://perma.cc/B58V-58DT]. For a discussion of COPPA as family law, see ANITA ALLEN, UNPOPULAR PRIVACY: WHAT MUST WE HIDE? 173–194 (2011).

358. 64 Fed. Reg. 59888; 16 C.F.R. § 312 (1999).

359. 16 C.F.R. § 312.5(a) (2023); Six examples of acceptable methods for obtaining verifiable parental consent are outlined in § 312.5(b)(2).

360. *See* 16 C.F.R. § 312.1 (2023). Providers can escape regulation by foregoing data collection.

361. ARK. CODE ANN. § 4-88-1401(5) (2023); CAL. HEALTH & SAFETY CODE §§ 27000-27007 (Deering 2024); COL. REV. STAT. § 6-1-1601 (2024); 2023 Conn. Acts 23–56) (Reg. Sess.); FLA. STAT. § 501.1736 (2024)**;** GA. CODE ANN. §§ 39-6-1 to -5 (2024); LA. STAT. ANN. §§ 51:1751–1759 (2023); MD. CODE ANN., COM. LAW §§ 14-4801 to -4813 (West 2024); MISS. CODE ANN. §§ 45-38-1 to -13 (2024); N.Y. GEN. BUS. LAW §§ 1500–1508 (Consol. 2024); OHIO REV. CODE ANN. § 1349.09 (LexisNexis 2023); TENN. CODE. ANN. §§ 47-18-5701 to -5706 (2024); TEX. BUS. & COM. CODE ANN. §§ 509.051–.059 (West 2023); UTAH CODE ANN. §§ 13-71-101 to -102, -201 to -204 (West 2024).

362. We place Addictive Design restrictions in this category though the fit is imperfect. *E.g.*, UTAH CODE ANN. § 13-71-202(5) (West 2023); CAL. CIV. CODE § 1798.99.29 (West 2023). For a more detailed summary of the California AADC, see CHLOE ALTIERI & BAILEY SANCHEZ, POLICY COUNSEL, FUTURE OF PRIVACY FORUM, CALIFORNIA AGE-APPROPRIATE DESIGN CODE ACT 2 (2022).

parents to create curfews for the use of a social media platform.[363] We think this approach is promising, yet poor drafting renders each of these efforts vulnerable to claims that they are in fact content-based. Some provisions also focus on data practices, which are not the subject of this article.

Courts in Arkansas, California, Mississippi, Ohio, and Utah have struck down parts of these statutes as inconsistent with the First Amendment.[364] State legislation has fared poorly in courts to date, with injunctions issuing and opinions setting the stage for important appeals that could enable or curtail the ability of parents to supervise their children's social media activities.[365]

A. Overtly Content-Based Statutes

1. Obscene Materials (Relative to Minors)

One active area of legislation focuses on age verification for obscene content relative to minors, a broader category than what is obscene for adults. At least fourteen states have enacted substantively near-identical laws requiring websites whose content is substantially composed of material that is obscene with respect to minors to implement age-verification gates.[366]

In August 2023, the Free Speech Coalition challenged Texas' age verification for material harmful to minors act, HB1181.[367] A Texas district court enjoined HB1181 upon finding that its age-verification mandate was a content-based regulation on protected speech, and therefore subject to strict scrutiny.[368] The district court's discussion of less restrictive alternatives focused on the complementary roles of technology and parents in the filtering solution.[369] Citing Nicolo Principi et al.'s survey[370] on the effects on minors of porn consumption, the court concluded, "[T]he study highlights the importance of content filtering alongside parental intervention as the most effective method of limiting any harm to minors."[371] Parents, then, were identified as the solution that makes other solutions unconstitutional. We argue that this framing is consistent with the

363. *Infra* Part IV.B.

364. *See* cases listed *supra* note 3.

365. *Id.*

366. For a sample comparison of these laws, see, for example, LA. STAT. ANN. § 9:2800.29 (2023); TEX. CIV. PRAC. & REM. CODE ANN. § 129B.004; UTAH CODE ANN. § 78B-3-1001(5), -1002(5)–(6) (West 2023); VA. CODE ANN. § 8.01–40.5 (2023). For a complete list, consult the National Conference of State Legislature summaries cited *supra* note 2.

367. Complaint, Free Speech Coal. v. Colmenero, No. 1:23-CV-917 (W.D. Tex. Aug. 4, 2023).

368. Free Speech Coal. v. Colmenero, 689 F. Supp. 3d 373, 390 (W.D. Tex. 2023).

369. *Id.* at 402–03.

370. Niccolò Principi, Pietro Magnoni, Ludovico Grimoldi, Davide Carnevali, Laura Cavazzana & Alberto Pellai, *Consumption of Sexually Explicit Internet Material and its Effects on Minors' Health: Latest Evidence from the Literature*, 74 MINERVA PEDIATR. 332 (2022).

371. *Free Speech Coal. v. Colmenero*, 689 F. Supp. 3d at 402. Specifically, the study endorses "active mediation" over "restrictive mediation." *Id.*

Supreme Court's First Amendment of the Family[372] and should strengthen the constitutionality of legislation aimed at making parental action easier.

Even more, the court's description suggested a symbiotic dimension to the parent/filtering relationship. Parents enable filtering software to be maximally tailored to its goals by adjusting settings to reflect, in part, the age-based needs of their children. These needs likely change from ages five to seventeen, but content-based age verification gates are rigid.[373] Conversely, the court says,

> [C]ontent filtering also comports with the notion that parents, not the government, should make key decisions on how to raise their children . . . [It] allows parents to determine the level of access that their children should have, and it encourages those parents to have discussions with their children regarding safe online browsing.[374]

The court actually suggested that the state could support the effort with incentives or by assessing civil penalties for parents refusing to implement filtering.[375] Such a provision would jump right over the step of seriously and effectively enabling parents to filter and moving straight to penalizing them for failure to do so.

In November 2023, the Fifth Circuit stayed the district court's injunction of HB1181 pending appeal.[376] In March 2024, it released an opinion explaining the grounds for the stay, in which the Fifth Circuit takes the position that *Ginsberg v. New York* carved out a narrow exception to heightened First Amendment scrutiny under which "regulation of the distribution *to minors* of speech obscene *for minors* is subject only to rational-basis review."[377] The United States Supreme Court granted certiorari to Free Speech Coalition's appeal in July of 2024, teeing up the first major new consideration of the First Amendment of the Family since the landmark 2011 *Brown* decision.[378]

2. Broader Content Definitions and Algorithmic Concerns

Obscenity is not the only kind of content states attempt to regulate. Texas requires providers to prevent minors' exposure to harmful material including that which promotes self-harm, eating disorders, substance abuse, bullying, and sex trafficking or abuse.[379] This strategy must include deploying filtering technology.[380] The provider must take steps to ensure that use of algorithms to rank or promote material does not interfere with the duty to prevent harm.[381] While understandable, these are the type of content-based restrictions that will have a difficult time in court

372. *See supra* Part III.
373. *Free Speech Coal. v. Colmenero*, 689 F. Supp. 3d at 402.
374. *Id.* at 402–03.
375. *Id.* at 404.
376. Free Speech Coal. v. Paxton, No. 23-50627 (5th Cir. Nov. 14, 2023).
377. Free Speech Coal. v. Paxton, 95 F.4th 263, 270, 276 (5th Cir. 2024).
378. Free Speech Coal. v. Paxton, 144 S. Ct. 2714 (2024).
379. TEX. BUS. & COM. CODE ANN. § 509.053(a) (West 2023).
380. *Id.* § 509.053(b).
381. *Id.* § 509.056(1).

because they rest on a government interest in protecting minors and not on an interest in helping parents to protect their children.

In *Moody v. NetChoice*,[382] the Supreme Court addressed a circuit split between the Fifth Circuit, which had upheld a Texas law prohibiting social media companies from censoring users, and the Eleventh Circuit, which had struck down a similar Florida law. The Court emphasized the First Amendment precept that "presenting a curated and 'edited compilation of [third party] speech' is itself protected speech."[383] Accordingly, it explained that any law which "prevents a platform from compiling the third-party speech it wants in the way it wants, and thus from offering the expressive product that most reflects its own views and priorities . . . , [is] in that specific application . . . unlikely to withstand First Amendment scrutiny."[384] Taken at face value, the Court's language in *Moody* suggests that any compelled filtering provisions[385] may raise substantial First Amendment issues.

Broadly construed, the Court's recognition of the First Amendment prerogative to "offer[] the expressive product that most reflects [a platform's] own views and priorities" could even signal trouble for child protection regulations restricting a company's ability to employ its preferred algorithms in content curation.[386] If all issues of algorithmic curation are covered by the Moody decision, the question would then become the existence of a substantial or compelling government interest in supporting parents or protecting minors that justifies censorship of a company's constitutionally protected right to curate content.[387]

The focus of the Supreme Court's opinion in *Moody*, however, was not the merits of the constitutional challenge. Instead, the opinion focuses on the intensive prerequisites of facial—as opposed to as-applied—constitutional challenges. Plaintiffs seeking facial relief must show that the "law's unconstitutional applications substantially outweigh its constitutional ones," and courts must "evaluate the full scope of the law's coverage" and the constitutional (im)permissibility of *all* of its potential applications before striking any law on its face.[388] This central holding of *Moody* is significant for the litigation of the new wave of child protection regulations, where trade associations like NetChoice and Free Speech Coalition have resorted to regular facial challenges under the First Amendment.[389]

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382. Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024).

383. *Id.* at 2409.

384. *Id.* at 2394.

385. *See, e.g.*, COL. REV. STAT. § 6-1-1601 (2024); MISS. CODE ANN. §§ 45-38-1 to -13 (2024); N.Y. GEN. BUS. LAW §§ 1500–1508 (Consol. 2024); UTAH CODE ANN. §§ 13-71-101 to -102, -201 to -204 (West 2024).

386. *Moody v. NetChoice*, 144 S. Ct. at 2394; *see, e.g.*, New York SAFE Act, California's recent Protecting Our Kids from Social Media Addiction Act (2024),

387. See discussion of dual *Ginsberg* interests *supra* Part III.E.2. *But see* discussion of *Free Speech Coal. v. Paxton*, 95 F.4th 263, 270, 276 (5th Cir. 2024), *supra* note 377.

388. Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2397, 2409 (2024).

389. *See, e.g.*, Free Speech Coal. v. Paxton, 95 F.4th 263 (5th Cir. 2024); NetChoice, LLC v. Bonta, No. 23-2969, 2024 U.S. App. LEXIS 20755, at *7–8 (9th Cir. Aug. 16, 2024).

Several states, including California, have enacted Age Appropriate Design laws that require companies to consider the best interests of children, create a duty to prevent harm to children, or discourage addictive design or specific harmful features like targeted advertising, dark patterns, or unsolicited direct messaging to minors.[390] A California district court in *NetChoice v. Bonta* interpreted the Supreme Court's ruling in *Sorrell v. IMS Health, Inc.*[391] to mean that the California Age Appropriate Design Code's speaker-based restrictions on use and collection of data amounted to regulation of speech, and subsequently ruled that each of the ten challenged major provisions of the act were likely unconstitutional.[392] On appeal, the Ninth Circuit circumvented the *Sorrell* issue by invoking *Moody*'s newly clarified standard for facial First Amendment challenges.[393] With respect to most of the Age-Appropriate Design Code's provisions, the Ninth Circuit found that either the record or the lower court's analysis of the totality of the law's potential applications were too thin to support a facial challenge.[394] However, the court upheld the enjoinder of the Act's Data Protection Impact Assessments on the grounds that it compels speech by requiring companies to create disclosures to the government in which they "opine on potential harms to children"; and in requiring companies to mitigate the risks to children that it identifies, "it deputizes covered businesses into serving as censors for the State" and curtails the company's editorial autonomy.[395]

The *Bonta* opinion focuses on the data protection provisions of California's Age-Appropriate Design Act. In September of 2024, California signed a new measure into law after the Ninth Circuit handed down the *Bonta* decision. The Protecting Our Kids from Social Media Addiction Act prohibits serving addictive feeds (rather than chronological feeds) to minors without parental consent. It also bans notifications (pings) from platforms at night and during the school day without parental consent.[396] It takes the general shape of a New York law addressing the same issues and deploying parental consent that was passed in June 2024.[397]

Because the paradigm of age appropriate design in the first California law reviewed in *Bonta* does not specifically engage parental authority, we are happy to defer to other scholars to wrestle with the specter of *Sorrell* and chart a path through

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390. CAL. CIV. CODE § 1798.99.28 (West 2023). *See also* UTAH CODE ANN. § 13-71-202(1), (5) (West 2023); LA. STAT. ANN. § 51:1753 (2023); TEX. BUS. & COM. CODE ANN. §§ 509.053, 509.056(1) (West 2023); 2023 Conn. Pub. Acts 23–56 § 9; MD. CODE ANN., COM. LAW §§ 14-4801 to -4813 (West 2024); MISS. CODE ANN. § 45-38-11 (2024).

391. Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).

392. NetChoice, LLC v. Bonta, No. 22-cv-08861, 2023 U.S. Dist. LEXIS 165369 (N.D. Cal. Sept. 18, 2023). Some scholars have termed this sort of adjudication under *Sorrell* "digital *Lochnerism.*" *See* Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, 56 WM. & MARY L. REV. 1501, 1530–31 (2015).

393. NetChoice, LLC v. Bonta, No. 23-2969, 2024 U.S. App. LEXIS 20755, at *43–47 (9th Cir. Aug. 16, 2024).

394. *Id.*

395. *Id.* at *28–30.

396. CAL. HEALTH & SAFETY CODE §§ 27000–27007 (Deering 2024).

397. N.Y. GEN. BUS. LAW §§ 1500–1508 (Consol. 2024).

this refractory regulatory landscape.[398] However, we note that, where the government fails to assert supporting parental authority as its primary governmental interest in passing regulation for the protection of children, First Amendment challenges will be more difficult to overcome.[399]

B. Parental Consent and Controls

Between 2023 and 2024, Arkansas, Louisiana, Ohio, Texas, Utah, Tennessee, Georgia, Florida, New York, California, and Mississippi passed what may have aspired to be facially content-neutral statutes requiring opt-in parental consent to create a new social media account for a minor.[400] Louisiana, Florida, Georgia, and Ohio cover minors under the age of sixteen,[401] while Arkansas, California, New York, Texas, and Utah cover minors under the age of eighteen.[402] In each case, the state's definition of social media could be content-neutral, as they characterize social media as allowing social interaction with other users; semi-public profile creation; friends or connections list; and the capacity to create and post content.[403] Yet some then raise a question of content-based regulation because they create special interest exemptions for services spanning interactive gaming to media streaming to traditional news to online shopping.[404] For parental consent legislation to survive, it needs to deploy this genuinely neutral definition of social media and resist special interest exemptions that impair its neutrality. Notably, after Utah's initial Social Media Regulation Act was challenged, it enacted a new version which shed its suspicious content-based distinctions.[405] Legislatures should not fear an opt-in parental consent registry proposal without exceptions even though it covers Yelp or online shopping sites, for example, because parents concerned about typical social media harms are not likely to object to accounts on those platforms. The

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398. *See* Brief for Defendant-Appellant, NetChoice, LLC v. Bonta, No. 23-2969 (9th Cir. Dec. 20, 2023).

399. *E.g.*, Appellant's Opening Brief at 41, NetChoice, LLC v. Bonta, No. 23-2969 (9th Cir. Dec. 13, 2023) (asserting only an interest in protecting the privacy and safety of children).

400. ARK. CODE ANN. § 4-88-1401(5) (2023); CAL. HEALTH & SAFETY CODE §§ 27000-27007 (Deering 2024); FLA. STAT. § 501.1736 (2024); GA. CODE ANN. §§ 39-6-1 to -5 (2024); LA. STAT. ANN. §§ 51:1751–1759 (2023); MD. CODE ANN., COM. LAW §§ 14-4801 to -4813 (West 2024); MISS. CODE ANN. §§ 45-38-1 to -13 (2024); N.Y. GEN. BUS. LAW §§ 1500–1508 (Consol. 2024); OHIO REV. CODE ANN. § 1349.09 (LexisNexis 2023); TENN. CODE. ANN. §§ 47-18-5701 to -5706 (2024); TEX. BUS. & COM. CODE ANN. §§ 509.051–.059 (West 2023); UTAH CODE ANN. §§ 13-71-101 to -102, -201 to -204 (West 2024).

401. LA. STAT. ANN. § 51:1751(9) (2023); FLA. STAT. § 501.1736(3) (2024); GA. CODE ANN. § 39-6-1(3) (2024); OHIO REV. CODE ANN. § 1349.09(A)(2) (LexisNexis 2023)

402. ARK. CODE ANN. § 4-88-1401(5) (2023); CAL. HEALTH & SAFETY CODE §§ 27000-27007 (Deering 2024); MISS. CODE ANN. § 45-38-3(d) (2024); N.Y. GEN. BUS. LAW §§ 1500–1508 (Consol. 2024); TENN. CODE. ANN. § 47-18-5702(4) (2024); TEX. BUS. & COM. CODE ANN. § 509.051(b) (West 2023); UTAH CODE ANN. § 13-71-101(8) (West 2024).

403. *See, e.g.*, OHIO REV. CODE ANN. § 1349.09(A)(2); ARK. CODE ANN. § 4-88-1401(7)(A) (2023).

404. *See, e.g.*, ARK. CODE ANN. §§ 4-88-1401(B), (8)(B) (2023); OHIO REV. CODE ANN. § 1349.09(O) (West 2023); MISS. CODE ANN. § 45-38-5(2)(c)(i) (2024).

405. *Compare* UTAH CODE ANN. § 13-63-101(10)(b) (West 2023) (repealed 2024), *with* UTAH CODE ANN. § 13-71-101(14)(b) (West 2024).

decision to exempt those platforms from parental consent weakens the First Amendment defense of these statutes.

Utah's Minor Protection in Social Media Act requires social media companies to disallow contact between minors and non-friend accounts.[406] Utah also requires companies to provide parents with the power to set time limits for their children's daily social media usage and to schedule mandatory breaks for their children during selected days and times.[407] Parents must also be provided with comprehensive data about their child's social media usage, a list of all the child's connected or blocked accounts, and the child's content and privacy settings.[408] These supervisory controls were in fact a drastic rollback from a previous (repealed) version of the law, which would have granted parents reading access to all content and interactions on their minor child's account.[409] Even this feature would comport with the law of parental authority and should pass constitutional muster as long as it is content-neutral and the age-verification technology does not burden adults, though we do not believe a parent reading a child's messages is good parental practice.

In addition, we believe that giving parents the ability to set curfews for their children's social media usage is good policy, as California, Louisiana, Texas and Utah have done.[410] Utah also prohibits a social media company from using any design or feature that the company should know is addictive to minors.[411] In a separate statute, Utah created a private right of action for children or their parents to sue social media companies for any medically verified "adverse mental health outcome arising, in whole or in part, from the minor's excessive use of the social media company's algorithmically curated social media service."[412] Social media companies are statutorily entitled to affirmative defenses when they limit children's access to algorithmically curated content to at most three hours a day, impose curfews between 10:30PM and 6:30AM, receive consent from the parent to provide algorithmically curated content, and disable "engagement driven designs" for the minor.[413]

In September 2024, a Utah District Court enjoined Utah's parental consent statute.[414] The court framed the First Amendment injury, invoking the Supreme Court's words in *Moody*, as being that the Act's "Central Coverage Definition restricts social media companies' abilities to collage user-generated speech into their

406. UTAH CODE ANN. § 13-71-202(1) (West 2024).

407. *Id.* § 13-71-203(1), (2)(a)–(b).

408. *Id.* § 13-71-203(2)(c).

409. *Id.* § 13-63-104 (West 2023) (repealed 2024).

410. CAL. HEALTH & SAFETY CODE § 27002(b)(1) (Deering 2024). *See also* UTAH CODE ANN. § 13-71-203(1), (2)(a)–(b) (West 2024); LA. STAT. ANN. § 51:1754 (2023); TEX. BUS. & COM. CODE ANN. § 509.054(b)(4).

411. UTAH CODE ANN. § 13-71-202(5) (West 2024). New York and California would require parental consent for such features as well. CAL. HEALTH & SAFETY CODE § 27001 (Deering 2024); N.Y. GEN. BUS. LAW § 1501 (Consol. 2024).

412. UTAH CODE ANN. § 78B-3-1103 (West 2024).

413. *Id.* §§ 78B-3-1103(4), -1104(1).

414. NetChoice, LLC v. Reyes, No. 2:23-cv-00911, 2024 U.S. Dist. LEXIS 163294 (D. Utah Sept. 10, 2024).

'own distinctive compilation[s] of expression.'"[415] Despite Utah's attempt to define social media in a content-neutral way in terms of the structure of digital platform, the court construed the definition as facially distinguishing between "'social' speech and other forms of speech."[416] This understanding, if it is upheld, would make it difficult to achieve content neutral parent enabling legislation. The Utah District Court pointed to *Brown* to conclude that neither of the *Ginsberg* interests—child welfare or supporting parents—were compelling.[417] Addressing the State's interest in remedying the purported objective harm that social media causes to children, the court argued that the Surgeon General Advisory—the State's primary evidence—was too equivocal to establish a clear, causal relationship between social media and negative health impacts for children.[418] Parental consent frameworks should not rely on a court's judgment of the harm where they are enabling parents to assess harmfulness themselves, but the Utah court missed this important feature of the First Amendment of the Family.

In addition, although the Utah court said that it was not interested in the First Amendment rights of minors as the basis for the facial constitutional challenge, it combined *Brown*'s assessment of minors' "significant First Amendment rights" with a completely novel principle of its own. The court determined that the State "may not justify an intrusion on the First Amendment rights of NetChoice's members with, what amounts to, an intrusion on the constitutional rights of its members' users."[419] From that determination, the court concluded that the State could not justify an abridgement of a tech companies' speech with welfare concerns for their minor users.[420] *Ginsberg*'s distinction between child welfare concerns of the state and those of parents were collapsed by the court. In addressing the State's interest in empowering parents, the court found that the State had not demonstrated a "substantial need" from parents for state-mandated consent.[421]

The court also doubted whether Utah's solution was the least-restrictive among as-effective alternatives. In particular, the court wondered whether existing parental controls, if better publicized by the State, could be sufficient to achieve the Act's protective goals.[422] In addition, the court doubted whether the Act's prohibitions on addictive designs would "meaningfully reduce the amount of time" minors spent on the platforms, or ultimately improve mental health outcomes.[423] We liken this to wondering

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415. *Id.* at *27.

416. *Id.* An Ohio court reached a similar conclusion that social media regulation is content-based because social media is just one form of content, NetChoice, LLC v. Yost, No. 2:24-cv-00047, 2024 U.S. Dist. LEXIS 24129 (S.D. Ohio Feb. 12, 2024).

417. *Id.* at *28–33.

418. *Id.* at *29–31.

419. *Id.* at *32.

420. *Id.* at *32.

421. *Id.* at *32–33. See *supra* note 14 (discussing the overwhelming survey data indicating parents want greater parental control over their children's social media).

422. *Id.* at *34.

423. *Id.* at *35.

whether minors would use cigarettes even without the addictive nicotine ingredient: incorrect in its premise that addiction plays no role in use. The court reasoned that the Act was underinclusive because it ultimately preserved a minor's ability to use social media as much as they desire, and to receive addictive content, like notifications and infinite scrolls, from any non-social platforms.[424]

Perhaps the most concerning aspect of the Utah court's decision is its recognition of "social" speech as a category unto itself and as betraying a content-based distinction, making it difficult to set social media apart for regulation.[425] Utah and Ohio are the only Courts since this regulatory project began that have so far considered analogous laws to rule this way, and the Supreme Court did not suggest such an interpretation in *Moody*.[426] It remains to be seen if courts will find that social media companies can be targeted for regulation in a content-neutral manner. But we also emphasize that the Utah Act's combination of some provisions tailored to child welfare and other provisions tailored to supporting parents seemed to confuse the issue for the court. The Act's different provisions needed to be justified by wholly different bodies of evidence, showing, respectively, the objective harms of excessive use caused by algorithmic curation and the subjective, widespread desires of Utah parents to receive state-support in supervising their children's use of social media.[427]

Utah, Louisiana, and Texas provide parents with visibility into and control over their child's account. Utah effectively allows parents to curfew the account,[428] and Louisiana gives parents of minor account holders supervision abilities, including a view of the privacy settings of the account.[429] Parents can set daily time limits for its use, and schedule breaks.[430] In Texas, companies must enable parents to "monitor and limit the amount of time the verified parent's known minor spends using the digital service."[431] Verified parents must have the ability to access any of their minor child's personal identifying information in possession of the provider, and to have this information deleted.[432]

Ohio requires parental consent before contracting with children under the age of sixteen.[433] On January 9, 2024, an Ohio District Court issued a Temporary Restraining Order preventing enforcement of Ohio's social media act.[434] The Ohio court read *Brown*'s footnote 3 in precisely the reductive way that we have cautioned

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424. *Id.* at *36. The court also accused the Act of being overinclusive for failing to restrict its ambit to companies with significant user-bases of minors. *Id.* at *37–38.

425. *Id.* at *16–17.

426. *See* descriptions of other district court decisions, *infra*.

427. *See supra* Part III.E.

428. UTAH CODE ANN. § 13-71-203(1), (2)(a)–(b) (West 2024).

429. LA. STAT. ANN. § 51:1754 (2023).

430. *Id.*

431. TEX. BUS. & COM. CODE ANN. § 509.054(b)(4); §§ 509.052, 509.054(b)(1)–(2) (West 2023).

432. *Id.* § 509.103.

433. OHIO REV. CODE ANN. § 1349.09(A)(2) (West 2023). Contracting includes terms of service, account creation, etc. Verification of parental consent is styled after COPPA. *Compare id.* § 1349.09(B)(1), *with* 16 C.F.R. § 312.5(b)(2) (2023).

434. NetChoice, LLC v. Yost, No. 2:24-cv-00047, 2024 U.S. Dist. LEXIS 6349 (S.D. Ohio Jan. 9, 2024).

against: for the proposition that all parental opt-in mechanisms are unconstitutional, because they "do not enforce parental authority over children's speech and religion; they impose governmental authority, subject only to a parental veto."[435] The law's "speaker-based" coverage, targeting websites "directed to children" and excluding "established and widely recognized" news outlets, arguably betrayed its intent as a "proxy for regulation of content that the government disfavors."[436]

After full briefing from the parties, the Ohio court elaborated on these theories in its decision to grant a preliminary injunction against the State.[437] The Court rejected the State's argument that the law was merely a regulation of minors' capacity to form contracts, instead agreeing with NetChoice's characterization of the Act as "an access law masquerading as a contract law." It reasoned that that the Act (1) "regulates operators' ability to publish and distribute speech *to minors* and speech *by minors*; and (2) it regulates minors' ability to both *produce speech* and *receive speech*."[438] When it came to determining the appropriate level of scrutiny to apply, the court rejected NetChoice's argument that the Act's restriction to providers that "target children" was a content-based regulation, but it reasoned that "the features [of social media] that the Act singles out [in its Coverage definition] are inextricable from the content produced by those features," and concluded that the Act's "distinction on the basis of these functionalities" was content-based**.**[439] It echoed *Brown*'s skepticism about a law that provides for initial parental intervention but does not require parents to continuously monitor children thereafter.[440] And it parroted *Brown*'s concerns about overregulation of unconcerned parents, doubting whether, in light of preexisting protections, parents needed any state support to exert control of children's social media.[441]

The Arkansas statute[442] requires social media companies to verify age and obtain parental consent on new accounts.[443] In August 2023, a federal court agreed with challenger NetChoice that the statute's long list of platform exemptions likely render the law viewpoint and content-based, though the statute likely would have been facially content-neutral without these exceptions.[444] The State, in describing its interest in protecting children from objective social media harms, had pointed to content-specific speech on social media, including discussions of self-harm and dieting or identity-based bullying speech.[445]

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435. *Id.* at *23.

436. *Id.* at 22. *See also* OHIO REV. CODE ANN. §§ 1349.09(C), (O)(1) (West 2023).

437. NetChoice, LLC v. Yost, No. 2:24-cv-00047, 2024 U.S. Dist. LEXIS 24129 (S.D. Ohio Feb. 12, 2024).

438. *Id.* at *16–19.

439. *Id.* at *25, 30.

440. *Id.* at *35.

441. *Id.* at *35.

442. ARK. CODE ANN. §§ 4-88-1101 to -1104 (2023).

443. ARK. CODE ANN. § 4-88-1102(a)–(b) (2023).

444. NetChoice, LLC v. Griffin, No. 5:23-CV-051052023, 2023 U.S. Dist. LEXIS 154571 at *49 (W.D. Ark. Aug. 31, 2023).

445. *Id.* at *47. The reasons the state gives for enacting legislation are significant to evaluating

The court nevertheless applied an intermediate scrutiny analysis. Assuming an important government interest in protecting minors online, the court concluded that the Act is not narrowly tailored,[446] deciding that the law unacceptably burdens constitutionally-protected adult speech because age-verification will likely chill some adults from forming accounts.[447] The court thus unflinchingly adopted the right to anonymity in support of free online speech championed by NetChoice, the Electronic Frontier Foundation, and similar organizations.[448] The Court called the burden on minors' speech obvious under *Brown* because most of the speech on social media platforms is constitutionally protected.[449] We think the court seriously misconstrues *Brown* and the First Amendment jurisprudence on parental authority.

The court evaluated the fit between parental opt-in and the government's *parens patriae* interest. The lack of record evidence "to show that a parent's involvement in account creation signals an intent to be involved in the child's online experiences thereafter" was taken to show that parental opt-in was effectively useless: With or without it parents would still have to be involved in supervising their children to prevent harm.[450] The court claimed that parental consent for account creation with no requirement of future parental supervision is like "dropping their children off at the bar without ever having to pick them up again."[451] Courts often require parental involvement as the least restrictive alternative to protect minors from harmful speech.[452] But here, the Arkansas court identifies parental involvement as risking underinclusion.[453] Were these both correct, it would mean that it is nearly impossible to parent under the First Amendment. Moreover, the plea for ongoing parental supervision comports completely with our Parental Decision-Making Registry proposal which allows both consent to establish an account and the ability for parents to craft a set of permissions and instructions for interacting with their child.

One very significant explanation for the failure of the court to grapple with family law is that the state of Arkansas never asserted a specific government interest in supporting parents, only an interest in "protecting minors."[454] *The Arkansas*

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content-neutrality under *Ward v. Rock Against Racism*, 491 U.S. 781, 791–92 (1989).

446. *Id.* at *50.

447. *Id.* at *51.

448. *See* Brief Amici Curiae of the American Civil Liberties Union, American Civil Liberties Union of Arkansas, & Electronic Frontier Foundation at 11–14, NetChoice, LLC v. Griffin, No. 5:23-CV-051052023, U.S. Dist. LEXIS 154571 (W.D. Ark. Aug. 31, 2023).

449. *Id.* at *52–53 (quoting *Brown*, 564 U.S. 786, 794–95 (2011) as discussed *supra* Part III.C.2).

450. *Id.* at *60–61. The court did not explore the possibility that mandating consent may help parents by notifying them of a need for online supervision.

451. *Id.* at *59.

452. *See* discussion of parenting as the least restrictive alternative, *supra* Part III.E.3.

453. NetChoice, LLC v. Griffin, No. 5:23-CV-051052023, 2023 U.S. Dist. LEXIS 154571 at *60–61 (W.D. Ark. Aug. 31, 2023).

454. The Attorney General's Response to NetChoice's Motion for a Preliminary Injunction at 2, NetChoice v. Griffin, No. 5:23-cv-05105 (W.D. Ark. Aug. 31, 2023).

court's response to this omission should serve as a lesson.[455] The court's opinion only addresses the issue of whether the law's opt-in parental consent requirement was narrowly tailored to the government's independent interest in preventing an alleged objective harm that social media causes to children. *Brown*'s determination of parental consent as the wrong salve for objectively serious harms to minors likely foreclosed the State's chances of succeeding on this argument. But due to the government's failure to state its interest *in supporting parental authority*, an interest recognized in the cases, the court never needed to address, and *hence left open, the question of whether the law might have been narrowly tailored to reinforcing parental authority.*

Mississippi's statute requires social media companies to verify the age of each user when attempting to create a new account and to refrain from entering into an agreement with a known minor until receiving express parental consent.[456] It restricts use and collection of data.[457] And it requires social media companies to make "develop and implement a strategy to prevent or mitigate [a] known minor's exposure" to specific "harmful" material that promotes or facilitates behaviors including self-harm, eating disorders, substance abuse, bullying, stalking, and more.[458] The act creates a limited right of action for parents to seek declaratory or injunctive relief against companies whose violations of the act affect their children.[459]

In *NetChoice v. Fitch*, a Mississippi District Court enjoined enforcement of the Mississippi law.[460] The Court first took issue with the act's carveout for any service that "primarily functions to provide a user with access to news, sports, commerce, online video games or content primarily generated or selected by the digital service provider."[461] The court diagnosed this as a content-based distinction subjecting the law to strict scrutiny, which is understandable given the carve-outs.[462]

The State asserted its own parens patriae "compelling interest in protecting minors from the predatory behavior that is commonplace on the interactive social-media platforms that the Act covers," and maintained that the parental consent provisions were narrowly tailored to achieve this goal.[463] The State did not fully

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455. *See also* Guggenheim, *supra* note 292, at 751 (discussing how California's failure to assert an interest in supporting parents until petition for certiori from Supreme Court likely doomed the statute, because the State's purpose in preventing an objective harm pervaded the legislative record).

456. MISS. CODE ANN. § 45-38-7 (2024).

457. *Id.* § 45-38-9.

458. *Id.* § 45-38-11.

459. *Id.* § 45-38-13.

460. NetChoice, LLC v. Fitch, No. 1:24-cv-170, 2024 U.S. Dist. LEXIS 115368 (S.D. Miss. July 1, 2024); NetChoice, LLC v. Fitch, No. 1:24-cv-170, 2024 U.S. Dist. LEXIS 161119 (S.D. Miss., July 15, 2024) (denying motion to stay injunction). Separate from the relevant First Amendment issues discussed below, the court also held that the law was unconstitutionally vague for its use of the undefined terms "socially interact" and "primarily functions." NetChoice, LLC v. Fitch, No. 1:24-cv-170, 2024 U.S. Dist. LEXIS 115368, at *44–45 (S.D. Miss. July 1, 2024).

461. *Id.* at *25–27 (citing MISS. CODE ANN. § 45-38-5(2)(c)(i) (2024)).

462. *Id.*

463. *Id.* at *30–31. The court apparently granted the State the benefit of the doubt in analyzing the case as if it had asserted a second interest in enabling parental authority. *Id.* at *32–35.

develop a second interest in supporting parental decision-making.

The court affirmed that the interest in protecting minors was compelling, but disagreed that the law was narrowly tailored, highlighting a mismatch between the State's interest in child welfare—preventing a perceived objective harm to children—and the chosen mechanism of employing parents to achieve this end.[464]

The court was also persuaded by NetChoice's argument that "there are a number of supervisory technologies available for parents to monitor their children that the State could publicize" to secure its objective of protecting children, and which would be less burdensome for the First Amendment rights of children and adults than age verification. It seems correct that the State has the burden to show that such solutions—like educating parents generally about social media and preexisting controls for home internet routers—would be less effective than the social-media-specific state-mandated parental consent and supervision model.[465] However, the court seemed to suggest that the parental supervision tools voluntarily introduced by members of NetChoice might work against the state here.[466] It is unquestionably wrong to think that the doctrine of least restrictive alternatives requires that states allow industry to self-regulate, and the court did not discuss the robust evidence that parents want state regulation to enable parental control.

The Mississippi court was also persuaded by some of the elements of *Brown* that we have criticized in our discussion above. For example, it read *Brown* to suggest that the State may be precluded from imposing parental consent requirements where doing so would burden families that don't care about the issue under regulation.[467] And it found parental consent laws inherently underinclusive to the extent that they possess the potential for consent to be given by one guardian in spite of another's dissent.[468] Both cases conflate standards for content-based and content-neutral regulation enabling parental consent.

Legislators continue to act at a steady pace. A new hybrid regulatory model, pioneered by New York in its Stop Addictive Feeds Exploitation (SAFE) Act, combines prohibitions on addictive design with the framework of parental consent. New York and California will prohibit all social media platforms from providing addictive feeds to minors absent express consent from parents, while also curfewing notifications overnight.[469]

In February 2024, the Florida House passed a Bill that requires social media companies to terminate all accounts of known in-state users under sixteen, with no parental bypass to allow access.[470] This provision was surely doomed under the First

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464. *Id.* at *32–33. *See* discussion of *Brown* and the dual *Ginsberg* interests, *supra* Part III.

465. *See* discussion *supra* Part III.

466. *NetChoice, LLC v. Fitch*, 2024 U.S. Dist. LEXIS at *34.

467. *Id.* at *35.

468. *Id.*

469. N.Y. GEN. BUS. LAW § 1501 (Consol. 2024); CAL. HEALTH & SAFETY CODE §§ 27000–27007 (Deering 2024).

470. H.B. 1, 126th Gen. Assemb., Reg. Sess. § 501.1736 (Fla. 2024).

Amendment because it proposed a ban on access to speech for minors but did not leverage parents. The bill's sponsor did tap into the problem of existing parental controls: "[E]ven the most plugged-in parent or attuned teen has a hard time shutting the door against . . . addictive features."[471] Governor Ron DeSantis vetoed that version of the bill but signed a revised version into law because it provided for social media with parental consent for fourteen and fifteen year olds.[472] Florida's statutory definition of "social media" is novel, reaching only platforms that employ user-data-driven algorithms to feed content and possess specific "addictive features."[473]

V. A UNIFORM PARENTAL DECISION-MAKING REGISTRY

We offer an outline of a proposal for a Parental Decision-Making Registry that is justified by this article. The actual details and operation of this proposal should be adapted; it is not either a final design or a comprehensive solution to social media harm to minors. Our intent instead is to illustrate what is enabled by viewing the breadth of the First Amendment cases through their own conception of the parental role, and then tempering the First Amendment cases with the constitutional, statutory, and common law of the parent-child relationship. Because parents can disavow contracts entered into by their children, limit third parties from contacting their children, adjust the level of privacy they feel their child should be afforded, and because parents have an affirmative duty to provide care and education and protect their children from third party harm, states can assist parents by easing the technical and data overload challenges they face in attempting to use their parental authority to moderate social media use. The First Amendment tolerates this intervention if supporting parents is the governmental interest.

States or ideally the federal government can create and maintain one simple, uniform, user-friendly centralized system that allows parents to opt their children out of some or all social media platforms and also allows parents to insist on social media curfews for their children that social media companies must enforce. This kind of content-neutral legislation can form an important part of a social movement to set guardrails on the amount of time minors spend on social media, thereby reducing harm to individual children and creating a virtuous cycle that normalizes tech curfews and reduces the fear of missing out. Singular ease of use in the design of such a registry system is essential to the proposal.

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471. Andrew Atterbury, *Florida's GOP-Controlled House Passes Strict Social Media Restrictions for Minors*, POLITICO (Jan. 24, 2024, 6:29 PM), https://www.politico.com/news/2024/01/24/florida-social-media-restrictions-00137670#:~:text=The%20social%20media%20legislation%2C%20FL,in%20the%20state%20under%2016 [https://perma.cc/BG5F-PW8J] (comments of Rep. Fiona McFarland, a Republican from Sarasota and cosponsor of the legislation).

472. *Florida's DeSantis Signs Law Restricting Social Media for People Under 16*, REUTERS (Mar. 25, 2024), https://www.reuters.com/world/us/floridas-desantis-signs-law-restricting-social-media-people-under-16-2024-03-25/ [https://perma.cc/KV4Y-B2GP]; FLA. STAT. § 501.1736(3) (2024).

473. FLA. STAT. § 501.1736(1)(e) (2024).

Parents would provide the registry an identification token associated with the devices they purchase for their children. These device purchases generally require adult contact — a credit card, an in-person purchase, a service contract — which are each an opportunity for parents to receive a device ID. The parent may use that identification number to register the device as subject to parental-supervision for social media companies who query the state database when a person attempts to download or open their app.[474] Because the core identification is associated with a device that is purchased by a parent, the process would enable parental opt-in registration akin to other in-person consents such as registering a child for school or tattooing a child.

Parents can opt to put their child's device identification on the registry. Parents include with that device whatever limitations that parent wishes to set for the child, from a menu established by serious research into what control features parents are seeking. The registry is securely maintained by the state, which *never shares ID information.* Once a parent registers a device, she may select from a user-friendly well-designed menu of apps to permit or not permit download or use on the device.[475]

When a social media company is asked through an app store to install its social media app on a device, it must first ask the registry whether that device ID has been registered as a "parental supervision" device. The first information that a company can get from the registry is "yes" or "no" to whether this particular device has been registered as "parental supervision."[476] If the device is subject to parental supervision, the social media company should receive back a set of instructions and permissions about how social media may interact with that device.

The system can be made secure with the aid of a one-way hash function or zero-knowledge proof mechanisms,[477] leaving only the low risk that the agency administering the database would be hacked and the hash key discovered. The current state of cryptography should satisfy security concerns where companies must query the database with information already in their possession, rather than the state making such information available.[478] Moreover, it is not necessary for the *state* to be able to

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474. Utah has already passed a statute seeking to support parental decision-making over social media at the device level. *See* UTAH CODE ANN. § 78B-6-2201–06 (West 2023).

475. Law should place the burden of compliance on social media companies rather than ISPs. If a statute endeavors to compel an ISP at the request of a parent to dictate anything about a social media company's content, we create a new compelled speech issue for that ISP provider.

476. *See supra* note 474.

477. *See* Dor Bitan, Ran Canetti, Shafi Goldwasser & Rebecca Wexler, *Using Zero-Knowledge to Reconcile Law Enforcement Secrecy and Fair Trial Rights in Criminal Cases*, COMP. SCI. & L. 9 (2022); *See also* Matthew B. Prince & Patrick A. Shea, *After CAN-SPAM, How States Can Stay Relevant in the Fight Against Unwanted Messages: How a Children's Protection Registry Can Be Effective, and Is Not Preempted, Under the New Federal Anti-Spam Law*, 22 J. MARSHALL J. COMPUTER & INFO. L. 29, 66 n.145 (2003).

478. *Id.* In addition, the database could be designed to disincentivize fishing by charging a nominal fee for queries, as do the Michigan and Utah spam email registries. UTAH CODE ANN. § 13-39-202(1)(a) (West 2023); 2004 Mich. Pub. Acts 241 §§ 1(2), 5(1) (West). Penalties for spoofing or other detectable abuses could reduce anti-competitive and other security risks.

see this identifying information either; cryptography allows for the state to play the role of a blind third-party enforcer using zero-knowledge proofs.[479]

All social media companies will be required to register with the state so that they can query the database legitimately, and parents can use the registry to indicate which social media companies are prohibited from contracting with their children. In contract terms, a parent can record in the registry their intent to disaffirm their minor child's contract with particular social media companies immediately upon formation of the contract.[480] The purpose of the registry is to facilitate a parent's invocation of their contract and parental rights. A parent may place conditions on contracting with a child as well, such as curfews, shutting of direct messaging, or refusing data collection.

Our proposal echoes Utah and Michigan legislation enacted in 2004 prohibiting the sending of advertising for material that a minor cannot purchase to registered contact points.[481] Utah additionally prohibits the sending of certain sexually explicit material that is deemed "harmful to minors" under state law.[482] Both registries remain active. A federal district court upheld the constitutionality of the Utah registry in 2007.[483] The court viewed the child protection registry as advancing the interest of fostering the privacy of the home, protecting minors from harm and "fostering the rights of parents to raise their children in a manner they see fit."[484] Under *Rowan, Pacifica*, and *Frisby*, the court concluded that the registry did not unconstitutionally burden speech.[485] We argue that the privacy of the home is either synonymous with these parental rights or deeply infused with them.

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479. *Id.*

480. In this framework, a parent does not forbid a company from contracting with their child, but merely informs the company that it is legally *impossible* to do so.

481. UTAH CODE ANN. § 13-39-202(1)(a) (West 2023); 2004 Mich. Pub. Acts 241 §§ 1(2), 5(1) (West). Note that it is easy today for minors to be served social media content from social media influencers promoting products that are illegal for a minor to purchase, such as a tobacco product. *See* Emily Dreyfuss, *Our Kids Are Living in a Different Digital World*, N.Y. TIMES (Jan. 12, 2024), https://www.nytimes.com/2024/01/12/opinion/children-nicotine-zyn-social-media.html. *See also* Prince & Shea, *supra* note 477 (laying theoretical groundwork for registries).

482. *See* UTAH CODE ANN. § 13-39-202(1)(b) (West 2023).

483. Free Speech Coal. v. Shurtleff, No. 2:05-cv-00949, 2007 U.S. Dist. LEXIS 21556 (C.D. Utah, Mar. 23, 2007).

484. *Id.* at *47 ("The CPR only inhibits unwanted speech from entering the homes of unwilling participants, and it allows parents the option of participating or not participating.").

485. *Id.* at 45–48. Our proposal also tracks the National Do-Not-Call Registry, implemented in 2003, which in practice allows any person to register any phone number to forbid telemarketers from making contact. *See* 15 U.S.C. § 6101; *FTC Releases Updated Do Not Call Registry Data Book*, FTC (Nov. 21, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-releases-updated-do-not-call-registry-data-book-impersonator-fraud-tops-list-consumer-complaints [https://perma.cc/ND3D-9PJM] (more than 246 million active numbers are registered). The constitutionality of the National Do-Not-Call Registry was upheld in *Mainstream Mktng. Servs. v. FTC*, 358 F.3d 1228, 1237 (10th Cir. 2004) on principles of privacy of the home.

A. Features of a Registry

Some features are essential to the efficacy, safety, or constitutionality of such a system. First, the system must be designed for the governmental purpose of supporting parental authority, not to protect minors from particular content. Moreover, it must employ a content-neutral definition of social media platforms focused on platforms that facilitate posting and reading individual user content and "friending." There must be excellent security around information provided to the state about a minor's device or contact information. The registry should enable lesser content-neutral permissions such as curfews. The design must be easy to use and uniform, rather than platform specific. Enforcement should be serious, including the creation of a private right of action for social media companies who knowingly contact a minor when a parent has acted to assert decision-making authority.[486] An enormous parental education campaign should be tied to the creation of the registry. We discuss each of these features in more detail below.

Age Verification and its Burdens on Adult Speech: Some object to age verification because it could burden the speech of adults wishing to remain anonymous or who lack the means to verify. A registry addresses this objection to age-verification. In fact, the registry can be accomplished such that the state cannot even access the information parents submit. Doing it this way makes enforcement contingent on aggrieved parents coming forward to report noncompliant companies or request private rights of action against them.

The controls: We want to give parents the ability to *actively parent* on social media without straight up blocking if that is their preference. Unlike existing parental control features developed by the social media companies themselves, the minor cannot override these decisions.[487] It would be exceptionally important for the user experience of the registry to be designed to make parental decisions easy, and because it will not be designed by the platforms themselves, it stands a chance of being more user-friendly than existing notice and consent systems. By centralizing the registry, parents will not need to track dozens of communication channels and learn and maintain parental control systems for each. Parents could choose a limited number of apps permitted to contract with the minor, and the rest would receive a message back that your company cannot do business on this device.

Curfew: In addition to allowing an app at all on a device, the registry would allow parents to select curfews for the app. These curfews could control both the time of day an account is viewable (e.g., 7 AM to 9 PM, excluding school hours), and the number of minutes each day the app may be used on the device. Utah's

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486. There are some statutes that create a private right of action for parents against social media companies for particular harms. UTAH CODE ANN. § 78B-3-1103 (West 2024) enables parents to sue for mental health harms to kids arising from social media use. MISS. CODE ANN. § 45-38-13, 45-38-17 (2024) enables parents to seek declaratory or injunctive relief for violations, but no damages.

487. If this kind of power were broadly exercised it could encourage companies to pursue safer features in order to generate a reputation as a favored app. We are well aware that notice and consent is not as effective as direct regulation, but direct regulation has fared poorly to date.

original Social Media Regulation Act had a default curfew that parents could modify,[488] and its current statute still at least allows parents to set curfews in the guise of "mandatory breaks."[489] Utah, however, relies on a direct age-verification system, rather than the opt-out parental consent platform we propose. Both New York and California set overnight modifiable curfews on notifications (pings), if not curfews on the entire platform.[490]

Stranger-messaging: The registry would allow parents to prevent the app from allowing strangers to message or interact with the minor.[491]

Friending permission: The registry would allow parents to opt to screen and approve each friend request if this is a function the parent wishes to perform.

Content-visibility: The registry could allow parents to opt to see the content and communications of their minor child's social media account as a condition of permitting the account. A statute may constitutionally permit this parental access to all content and communications. This feature might be important to parents with a very particular safety concern for their minor child, even if we hope it would be rejected by most parents opting to use the registry. This feature should be transparent to minor children when it is in use. The California law requires such an obvious signal.[492] Utah previously would have authorized this kind of transparency for parents if they chose to exercise it and, along with Texas, still allows parents to monitor the contours of their children's online activity.[493] We note that there may be less interest by parents in monitoring the contents of a child's social media where the registry gives parents confidence that strangers cannot contact the child through the platform.

No opt-out for particular content: Parents may wish to opt-out of advertising, addictive design, or data collection. For the Registry to choose these as features available for parental opt-out could be perceived as content-based: The particular choices available over other possible choices may be perceived as government disfavored categories. While advertising, addictive design, and data collection might survive an attempt to label them as content-based, other features a parent might want would not. So, for example, were a Registry menu to contain and opt-out provision for violent content, content related to eating disorders or suicidality,

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488. UTAH CODE ANN. § 13-63-105 (West 2023) (repealed 2024).

489. *Id.* § 13-71-203(2)(b) (West 2024). *See also* TEX. BUS. & COM. CODE ANN. § 509.054(b)(4) (West 2024) (empowering parents to limit children's time on digital services).

490. CAL. HEALTH & SAFETY CODE §§ 27000–27007 (Deering 2024); N.Y. GEN. BUS. LAW §§ 1500–1508 (Consol. 2024) (California also set a modifiable default ban on pings during the school day).

491. Three states have passed laws restricting strangers' abilities to contact minors, but not by empowering parents. 2023 Conn. Acts 23–56 Reg. Sess. § 9(c)(1)(B) (requiring online services to provide accessible safeguards to prevent unsolicited communications from unconnected adults); LA. STAT. ANN. § 51:1751 (2023) (prohibiting adult non-friend accounts from direct messaging minors); UTAH CODE ANN. § 13-71-202(1) (West 2024) (making minor accounts invisible to all non-friend accounts and preventing all direct messaging between minors and non-friend accounts as default settings, and requiring parental consent to change this).

492. CAL. CIV. CODE § 1798.99.31(a)(8) (West 2023).

493. UTAH CODE ANN. § 13-63-104 (West 2023) (repealed 2024); *id.* § 13-71-203(2) (West 2024); TEX. BUS. & COM. CODE ANN. § 509.054 (West 2024).

NetChoice would argue that the particular content choices show government and not parental priorities. Before adding any opt-outs of particular content, the state would need to clearly establish a high parental interest in that particular content. It is possible a court would find that giving parents visibility into the content of a social media account is a method less likely to offend the First Amendment, if less effective as well. We are hesitant to recommend that a government-mandated Registry contain this sort of content-based decision-making.[494] However, if it became technologically possible for each parent to create their own written content restrictions that could be implemented individually by AI, that would likely reduce First Amendment exposure.

Judicial bypass: Until recently, it was established that minors had a constitutional right to abortion. The majority of states require parental notification or consent when a minor seeks an abortion.[495] The Supreme Court has upheld those notification and consent statutes despite the burden on a minor's ability to exercise a constitutionally protected right, but only where the state allows a minor to seek judicial bypass of the consent statute.[496] A court authorizes the abortion without parental notification where the minor is mature or the decision to have an abortion is in the child's best interest.[497] We think that a Registry statute of the type we describe should allow for a similar judicial bypass where a minor can demonstrate to a judge a showing of substantial risk of serious harm to the minor from a parent's decision to limit social media through the Registry. This bypass proposal prevents parents from having an absolute veto on a minor's exercise of First Amendment protected interests and makes room for minors whose family circumstances isolate them from health and social service organizations or from identity communities that might be essential to that minor's welfare. Similarly, the registry system might choose to recognize an affirmative defense for a company that fails to meet the standards of the registry where a minor's parents have engaged in conduct that would cause them to lose parental authority over that child were it adjudicated. This could apply in the case of serious physical abuse of a child, for example.

The "Most Enterprising and Disobedient Young People": A determined child can use a social media platform on a friend's device, just as a determined minor could

494. In NetChoice, LLC v. Reyes, No. 2:23-cv-00911, 2024 U.S. Dist. LEXIS 163294 at 16–17 (D. Utah Sept. 10, 2024) the court appears to make it difficult to create content-neutral social media regulation by labeling social media speech a content-based subset of "social speech," a conclusion that diverges from other courts except Ohio, NetChoice, LLC v. Yost, No. 2:24-cv-00047, 2024 U.S. Dist. LEXIS 24129 (S.D. Ohio Feb. 12, 2024).

495. *Parental Involvement in Minors' Abortions*, GUTTMACHER INSTITUTE (Sept. 1, 2023) https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions [https://perma.cc/846R-EMD9]. The Supreme Court eliminated the right to abortion in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), and in the absence of an abortion right there is presumably no right to judicial bypass of parental authority.

496. Planned Parenthood v. Danforth, 428 U.S. 52, 74–77 (1976); Bellotti v. Baird, 428 U.S. 132 (1976).

497. Jamin B. Raskin, *The Paradox of Judicial Bypass Proceedings*, 10 AM. U. J. GENDER SOC. POL'Y & L. 281 (2002) (explaining and critiquing the judicial inquiry in these cases).

access physical copies of magazines disapproved by a parent at a friend's house, but not often enough to circumvent a general interest in parental monitoring. Courts consistently refuse to allow a desire to control the "most enterprising and disobedient young people" to justify excessively restrictive regulations on speech.[498] It is in the nature of parental supervision that determined minors evade it in some measure, yet it still has a substantial impact. Arguing the futility of regulation enabling parents to supervise their children's account is akin to arguing that we should have no speed limit simply because speed limits are widely evaded, as though they have no deterrent impact at all.

Educating Parents about the Registry: Florida's law creates a mandatory social media safety curriculum in schools to ensure children understand the risks of using social media.[499] New Hampshire issued an executive order to similar effect.[500] This registry would be an educational opportunity in itself.[501] It may introduce parents to companies that they would not have known about otherwise. The Utah do-not-contact registry site has such materials.[502]

Supporting Parents: The registry can support the emerging social movement among parents to limit or prohibit social media engagement by providing a centralized action that is designed to be easy. A recent study concluded that fully 89% of parents would like social media regulation requiring parental permission to create accounts.[503] The same study finds that 98% of parents feel social media is dangerous to children.[504] These are the types of studies that the First Amendment requires for a law to be narrowly tailored to advancing the government's interest in enabling parents. Our premise is that current parental controls are too complicated and ineffective to become the center of a social movement among parents to place greater guardrails on social media use by minors.

Burden on Speech: The registry only burdens the speech of minors to the extent that it makes it easier for parents to do something that they already have legal authority to do. Without the registry, parents would still have power to disaffirm the contract under the infancy doctrine. It also tracks parents' authority to prevent third parties from contacting their minor children. With respect to adult speech, if a social media company is prohibited by a parent from contacting a child pursuant to the constitutional right of parents to manage all third-party contact, that

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498. Sable Commc'ns v. FCC, 492 U.S. 115, 128, 130 (1989); Fabulous Assocs. v. Pa. Pub. Utility Com., 896 F.2d 780, 788 (3d. Cir. 1990); *see also* Crawford v. Lungren, 96 F.3d 380, 388 (9th Cir. 1996) (upholding ban on sidewalk pornography vending machines where "any youth with a few coins can access the material in question").

499. FLA. STAT. §§ 1003.42(n)(5)(a)–(b) (2023).

500. N.H. Exec. Order 2023-04 (Jun. 7, 2023).

501. For example, Utah's Child Protection Registry displays a prominent link to a free "Online E-Safety Book." *Online Safety Resources*, UTAH CHILD PROTECTION REGISTRY, https://donotcontact.utah.gov/onlinesafety.html [https://perma.cc/BSD2-ALBW] (last visited Oct. 29, 2024).

502. *See id.*

503. *Supra* note 14.

504. *Id.*

company's speech is burdened with respect to that child. However, the burden is no greater than it is on anyone blocked by a parent from speaking to a minor.

Existing parental controls: Large social media companies increased their parental control features following the whistleblower disclosures in the Facebook files and the Congressional hearings about social media safety.[505] In general, these parental controls have at least three separate problems. First, they are difficult to operate. Second, most are expressly designed to be disabled by the minor, thus they require the minor's consent. This feature shifts the entitlement around monitoring from parent to child, thereby disabling the dynamic described in this article.[506] Third, they are designed by the entity, the social media company, least trustworthy with a minor's actual safety, and may therefore be ineffective. Actual control may be as illusory as it is ubiquitous in discussions about social media.[507] Woodrow Hartzog writes, "[O]ur personal agency is required for control to work and, after all, we are only human. The concept of control is far too precious and finite to meaningfully scale. It will never work for personal data mediated by technology."[508]

We agree that "[o]ur mediated perception of control obscures the fact that design funnels behaviour."[509] We do not believe that parental controls or our own parental opt-out system can play more than one part in the larger project of minimizing the power of social media companies in the lives of minors. We do, though, believe that the ability to design a consent structure with respect to social media in particular has been hampered by inflated First Amendment questions.

With most company-provided parental control, the initial legal entitlement is upside-down. They are designed as though control belongs to companies but is provided by those companies to parents, on the companies' terms. Those parental control features purport to give to parents less than what parents already have the right to do.[510] Because social media companies make these features available only with the minor's consent, they rearrange the legal authority within family decision-making.[511] Company-provided parental controls cannot become the least restrictive means for parents to exercise authority where those controls in fact give authority to the minor rather than to the parent. We think regulators must control the behavioral design of the parental opt-out system.

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505. Samantha Murphy Kelly, *A Guide to Parental Controls on Social Media*, CNN (Nov. 16, 2023 10:43 AM), https://www.cnn.com/2022/11/13/tech/social-media-guide-for-parents-ctrp/index.html [https://perma.cc/T2HJ-3NRE].

506. Knorr, *supra* note 34; Natalie Rose Goldberg, *Discord Does About-Face on Parental Controls for Teen Social Media Use*, CNN (July 12, 2023, 9:32 PM), https://www.cnbc.com/2023/07/12/discord-does-about-face-on-parental-controls-for-teen-social-media-use.html [https://perma.cc/CS4V-FCXY].

507. Woodrow Hartzog, *The Case Against Idealising Control*, 4 EUR. DATA PROT. L. REV. 423, 425 (2018).

508. *Id.* at 425–26.

509. *Id.* at 427.

510. *Parenting Tips for Social Media*, META (2024), https://familycenter.meta.com/education/resources/parenting-tips-social-media/ [https://perma.cc/A2QX-V2U3].

511. *Id.*

Existing controls are exhausting. They place the full-time job on parents of operating different controls on different platforms in the manner that each social media platform serves those controls to families. Conversely, removing parental consent places the legal authority with parents and the onus of compliance on the social media company. Controls require perpetual and consistent monitoring, consent does not.[512] Controls shift all of the safety burden from content providers and companies to individual parents. Consent frameworks are one-time assertions of a shift in power from companies to parents. It is of course essential that the design of the consent framework be exceptionally user-friendly. Because the government can create that platform, its incentives to be clear will be greater than a company's own incentives in designing safety controls that amount to the fox guarding the henhouse.

Any parental opt-out system designed by regulators would need a very simple choice architecture that nudges parents to communicate simple instructions to companies to stay away from their minor children. This solution for social media, complete abstinence, will be viewed by some as unrealistic. Evidence is mounting that, while social media benefits some minors in particular circumstances, its overall impact on minors is quite harmful.[513] It *may* become increasingly obvious that social media should be age restricted. It also may not become obvious, due both to the benefits to some adolescents who are isolated from identity communities, and due to the outsized economic power of social media companies.

B. Reclaiming the Power Taken by Social Media

These features need evaluation as policy. Our point is that these content-neutral arrangements are constitutionally valid, and each could play a role in rebalancing the power exercised in a child's life by social media companies. We can require social media platforms to behave the way all other actors do toward minors. We do not need to accept NetChoice's disingenuous interest in expanded speech rights for minors that allow NetChoice's sponsors—the social media companies—a unique ability to bypass parents. If anything, the government is justified in offering more regulatory support to parental choices in the social media context precisely because it is more difficult to monitor social media activity than, say, whether a violent video game has physically entered the house.

We argue that the First Amendment is short-circuiting the normal regulatory conversation that we would otherwise have about this issue. Social media companies have reached further down into the lives of childhood than any other entity harmful

512. Katie McQue & Mei-Ling McNamara, *Meta's New Parental Tools Will Not Protect Vulnerable Children, Experts Say*, GUARDIAN (July 3, 2023, 3:45 PM), https://www.theguardian.com/technology/2023/jul/01/meta-parental-tools-online-safety-children-trafficking [https://perma.cc/4PNS-M6BZ].

513. SURGEON GENERAL'S ADVISORY, *supra* note 1.

to children has been able to do in the contemporary era. We are showing a pathway to unburden the discussion about whether minors should be on social media from First Amendment issues by running the question through family law, and pointing out that this kind of opt-out is explicitly preserved even by the *Brown* opinion.[514] We hope to shift the environment around social media harms away from the defeatism currently surrounding questions of speech. At the same time, we are humble about the appropriate final outcome of such a shift, including whether minors belong on social media, whether meaningful filtering and content-moderation can become normal, and whether withholding consent to data collection in particular is a viable long-term solution to the tech era.

An individual parent may have a different agenda from state legislators. Where legislators have often focused on particularly troublesome content—whether obscene, violent, or encouraging disordered eating—parents may want to be in a position to limit exposure to social media overall. They may be concerned about the large content risks, or smaller or more nebulous risks like atrophy of in-person skills. Their parenting strategy might aim to cultivate moderate and healthier relationships to technology. We argue that legislation may go quite far in supporting the effort by an individual parent to moderate a minor's time spent on social media by requiring parental consent, just as law requires parental consent for teen expression through school enrollment, tattooing, or cosmetic medical procedures. This kind of legislative support could become a foundational tool in what must ultimately be a social movement to take back "attention" within family life from social media companies that have commandeered it from adolescents.

CONCLUSION

On January 30, 2024, the U.S. Senate judiciary committee held a hearing on the harms social media companies cause to minors. Senator Lindsey Graham addressed the companies, telling them, "[Y]ou have blood on your hands."[515]

Social media companies are enormously powerful. Their information advantages enable them to evade efforts to limit their influence. We think regulators under-utilize the full potential of parents' legal authority as a part of their effort to address the power of these companies. This is in part due to an inadequate appreciation of the layered legal characteristics of that parental authority. It is in part due to a lay fear of that authority. It is in part due to the rapid encroachment on that authority that social media companies have already achieved and naturalized. We urge regulators to improve drafting to support parental decision-making and to more effectively enable that decision-making to appropriately rebalance power between companies and families. We also urge states to identify supporting parental

514. See *supra* Part III.B.

515. David Shepardson & Makini Brice, *Tech CEOs Told 'You Have Blood On Your Hands' at US Senate Child Safety Hearing*, REUTERS (Jan. 31, 2024), https://www.reuters.com/technology/meta-tiktok-x-ceos-face-tough-questions-child-safety-us-senate-hearing-2024-01-31/ [https://perma.cc/UER5-247F].

authority as a primary governmental purpose for laws, as this crafting distinguishes those laws that pass First Amendment muster from those that do not.

Problems this big need multimodal intervention. Addictive design, fictionalized notice and consent, data privacy, dark patterns, and democracy-threatening disinformation need to be addressed in multiple ways. Harm to children may be addressed through litigation, as the forty-two Attorneys General suit seeks to do.[516] We argue that enabling parental decision-making is one piece of the project that avoids constitutional constraint. Our solution also depends on a cultural campaign to beat back childhood social media use.

The *Brown* opinion is being dangerously misread by scholars and by lower courts. In an era where the Court is expanding the number of transactions and artifacts that can be called speech under the First Amendment,[517] family law could be upended if we understand *Brown* as limiting the ability of a state to support parental consent solely because that consent touches on speech. In too many recent court opinions, parents seem to drop out of the analysis of *Brown*, leaving behind only the child's speech right. In the real world, parents are routinely asked for opt-in parental consent to activities that touch on speech, and state law often requires that consent. We think it is essential for courts to harmonize parental consent in First Amendment cases with family law, including family law's constitutional dimensions. Our proposal would provide immediate rebalancing of power in a child's life between corporations and parents by simply *enabling* an existing parental authority that has been undermined by the cognitive burdens of platform-provided parental control mechanisms.

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516. Cecilia Kang & Natasha Singer, *Meta Accused by States of Using Features to Lure Children to Instagram and Facebook*, N.Y. TIMES (Oct. 4, 2023), https://www.nytimes.com/2023/10/24/technology/states-lawsuit-children-instagram-facebook.html [https://perma.cc/X2XZ-C7R9].

517. *See generally* Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 182 (2015) (discussing the evolving "Lochnerism" of the First Amendment); Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241 (2020) (discussing a history of economic power analysis in the First Amendment cases); John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223 (2015) (describing a corporate takeover of the First Amendment); Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, 56 WM. & MARY L. REV. 1501, 1530–31 (2015) (discussing the risk of "digital *Lochner*" inherent in the conflation of data and speech).