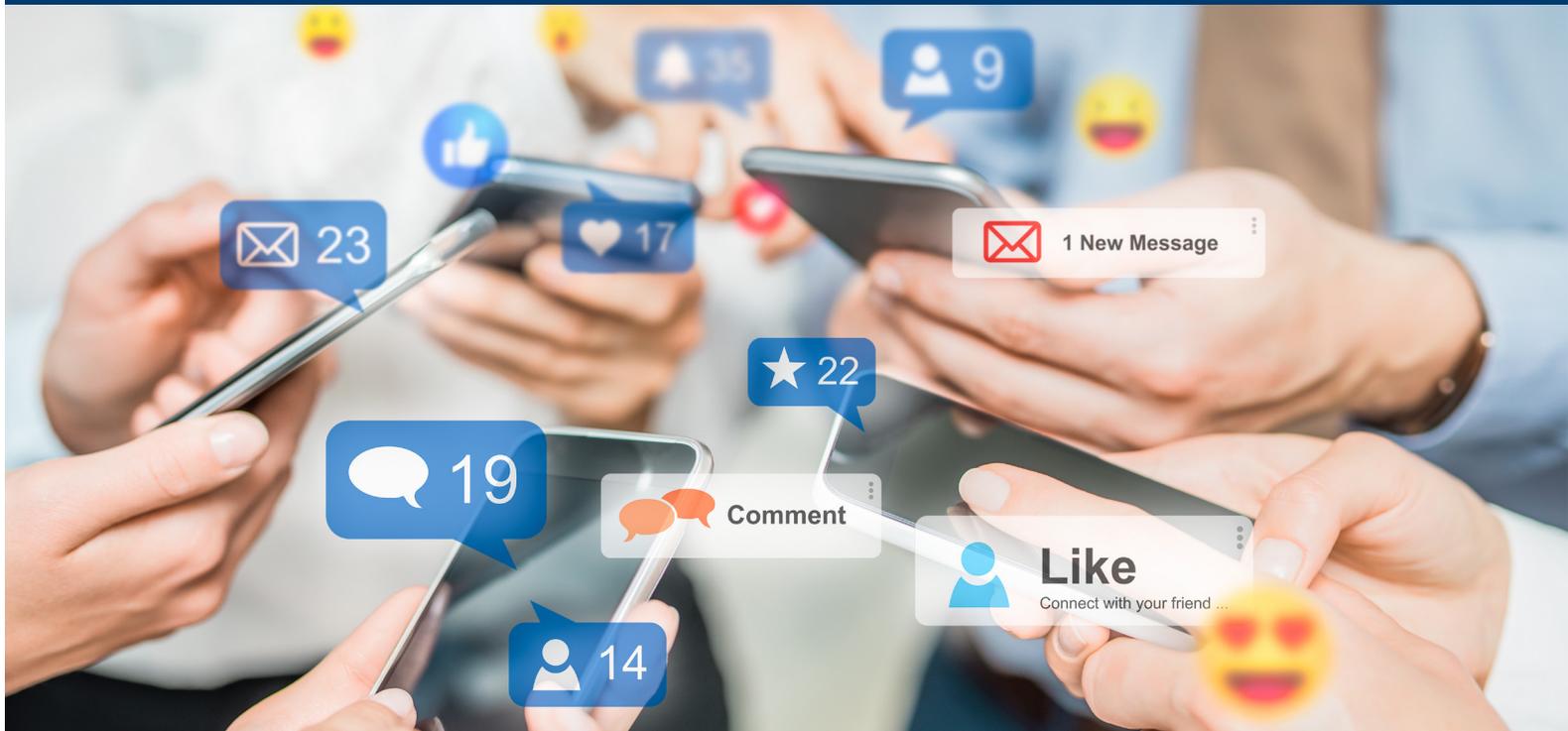


SOCIAL MEDIA IS A HARMFUL PRODUCT:

TEXAS SHOULD PROHIBIT COMPANIES FROM GRANTING ACCESS TO MINORS



by the Honorable Zach Whiting

January 2023



Texas Public Policy
Foundation

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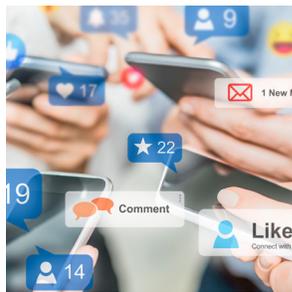


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Social Media Is a Harmful Product: Texas Should Prohibit Companies from Granting Access to Minors

The Honorable Zach Whiting

Executive Summary

Technological innovation and increased online connectivity present unique challenges and dangers to minors online. The ability to connect with anyone, anything, anywhere, and at any time unlocks, at once, amazing potential and great harm to society. It is an example of the ancient Greek concept of *pharmakon*—technology is a tool that can be used as a medicine or a poison. This paper will largely focus on the latter.

While computers have been around for decades, the modern incarnation of social media began in the early 2000s when platforms such as Myspace and Facebook attracted millions of users ([Miami University, 2021](#)). Platforms like Facebook originally connected small social networks—such as students at the same university or high school—before opening to a wider audience. More broadly, mobile phone and social media use are not just the zeitgeist of early 21st-century American teenagers—they have reached a level of international ubiquity with an estimated 5.27 billion mobile phone users (approximately 67%) and 4.48 billion active social media users (approximately 57%) worldwide ([Kemp, 2021](#)).

Within the last decade, researchers have noted that virtually unlimited, boundless online connectivity have social and mental health impacts and are linked to addiction, distraction, violence, criminal activity, child pornography, human trafficking, cyberbullying, cultural divisions, and a broader distrust in individuals and institutions ([Twenge et al., 2022, p. 1](#)). Throughout this paper, we expound on statistical relationships between social media use and these negative outcomes, pulling from extensive literature and research in this area. As will be explored, this case is made in academia, by health professionals and researchers, and even by large social media companies. Furthermore, as discussed in the “First Amendment and Constitutional Considerations” section, policy to protect minors on social media can be viewed not as a content-based regulation, but rather from a secondary effects perspective. That is, it is social media consumption that causes secondary harms, which courts have upheld in other First Amendment cases.

Finally, technology often develops faster than parents or policymakers can keep up. Federal and state privacy and consumer protection laws, which have been around for decades, need to be strengthened to better protect minors online. Accordingly, Texas should treat social media platforms like an age-limited harmful product and prohibit companies from granting access to minors.¹

¹ This paper uses the terms “child,” “children,” and “minors,” occasionally interchangeably. Unless the text or context dictates otherwise, these terms generally mean an individual aged 0–18. Unless the text or context dictates otherwise, the term “minor” as applied to a social media prohibition means an individual aged 13–18.

Key Points

- Increased online connectivity and our “always-on” culture present unique challenges and dangers to minors online.
- The state of consumer protection law federally and in Texas is insufficient to protect minors online.
- Social media platforms are a harmful product, and enhanced state laws will better protect minors online.

Literature Review

How to Define Social Media

As an initial matter, Kuss and Griffiths (2017) note a distinction between social media and social networking sites. While they are used interchangeably in common parlance and even scientific literature, the authors suggest they are not synonymous. In fact, they argue that studies “may also be using the terms interchangeably, suggesting nosological imprecision” (p. 3). Under their definitions, social networking is one of many forms of social media:

Social media refers to the web 2.0 capabilities of producing, sharing, and collaborating on content online (i.e., user-generated content, implying a social element). Accordingly, social media use includes a wide range of social applications, such as collaborative projects, weblogs, content communities, social networking sites, virtual game worlds, and virtual social worlds. (p. 2)

On the other hand, Kuss and Griffiths

have previously defined [social networking sites] as “virtual communities where users can create individual public profiles, interact with real-life friends and meet other people based on shared interests.” Social networking is particularly focused on connecting people, which does not apply to a number of the other social media applications outlined above. (p. 2)

However, they note that “[d]espite social networking being one type of social media use ... the behavior is inherently eclectic because it includes a variety of apps and services that can be engaged in” (p. 3). Because of the ambiguity and even conflicting definitions of the terms in the literature and popular commentary, this paper will use the more colloquial term “social media” unless otherwise indicated.

The Relationship Between Social Media and Well-Being

The definition of well-being varies in the literature. Lenses through which it has been viewed include subjective well-being (e.g., one’s perception of self and emotions), psychological well-being (e.g., mental health and pathologies), pursuit of happiness, pleasurable outcomes, life satisfaction, economic status, and quality of life. Ruggeri et al. (2020) provide a sound, comprehensive definition:

Well-being has been defined as the combination of feeling good and functioning well; the experience of

positive emotions such as happiness and contentment as well as the development of one’s potential, having some control over one’s life, having a sense of purpose, and experiencing positive relationships. It is a sustainable condition that allows the individual or population to develop and thrive. (p. 1)

By the early 2010s, numerous mental health professionals and researchers recognized a marked decrease in well-being and an increase in “rates of depression, anxiety, loneliness, dissatisfaction with life, self-harm, suicide attempts and suicides” (Twenge et al., 2022, p. 1). Keyes et al. (2019, p. 987) studied data from 1991 to 2018 and found that “[a]mong girls, depressive symptoms decreased from 1991 to 2011, then reversed course, peaking in 2018.” Furthermore, the authors found that “[d]epressive symptoms are increasing among teens, especially among girls, consistent with increases in depression and suicide” (p. 987). Patalay and Gage (2019, p. 1651) found a large increase in rates of depression, self-harm, obesity, and sleep problems in data from 2005 to 2015.

Suicide is now the number two leading cause of death in minors from 10 to 18 in the United States. Burstein et al. (2019) reviewed data from 2007 to 2015 and found that emergency room visits for suicide attempts or suicidal ideation doubled, with a median age of 13. A 2019 Centers for Disease Control and Prevention (CDC) study noted that “during 2018 ... approximately 95,000 youths aged 14–18 years visited [emergency departments] for self-harm injuries” (Ivey-Stephenson et al., 2020, p. 47). From 2009 to 2018, “suicide rates among youths aged 14–18 years increased by 61.7%,” and in 2018 alone, 2,039 committed suicide (p. 47).

The reasons for this, the degree of statistical significance, and conclusions drawn therefrom remain up for debate among researchers. Twenge et al. (2022, p. 1) reference “[d]ozens of studies,” experiments, and comparative literature reviews that have found an association between social media use, screen time, and mental health issues, while others have concluded that screen time is no more harmful than eating potatoes (Orben & Przybylski, 2019, p. 173).

Orben and Przybylski’s 2019 study is among the most referenced studies in the literature and popular commentary questioning the relationship between digital technology use and well-being. According to *Forbes*, the study criticized the methodologies and conclusions of previous studies to demonstrate “how complicated it is to process large

datasets and how easy it can be for researchers to cherry-pick results” ([Baron, 2019, para. 7](#)). In a news release on the study, the authors noted:

Of the three datasets we analysed for this study, we found over 600 million possible ways to analyse the data. We calculated a large sample of these and found that - *if you wanted* - [emphasis added] you could come up with a large range of positive or negative associations between technology and wellbeing, or no effect at all. ([University of Oxford, 2019, para. 4](#))

Yet the Orben and Przybylski study still found an inverse relationship between screen time and well-being. “The association we find between digital technology use and adolescent well-being is negative but small, explaining at most 0.4% of the variation in well-being” ([Orben & Przybylski, 2019, p. 173](#)).

Twenge’s and Orben’s teams have since published critical replies to each other’s studies on the association between screen time, social media use, and harm. Twenge et al. ([2022, p. 1](#)) note that while Orben focuses on screen time, controlling for narrower uses of digital technologies— notably, social media—produces a more negative association. As Cal Newport ([2019](#)) notes:

Soon after Orben and Przybylski published their study in *Nature Human Behaviour*, for example, a group of researchers, including Haidt, published a reply in the same journal, arguing, among other things, that the minor negative correlation in the original paper increases significantly when you change the behavior studied from screen time in general to social media use more specifically. ([para. 11](#))

While the degree of association remains debated in the literature, the increase in harms and decrease in well-being are not. A *Wall Street Journal* investigative series called “The Facebook Files” reviewed and reported on numerous internal documents, studies, and reports related to the harms and impacts of Facebook products. One article reported that Facebook’s own internal research found that “people perceived lower well-being and higher problematic use on Facebook compared to any other service” ([Wells et al., 2021b, para. 18](#)).

Researchers and medical professionals see social, emotional, relational, and even physiological manifestations from excessive social media use ([McLean Hospital, 2022](#)). One internal Facebook study found effects on sleep, stress,

work, parenting, relationships, and productivity, among others ([Cheng et al., 2019](#)). Furthermore,

A 2018 British study tied social media use to decreased, disrupted, and delayed sleep, which is associated with depression, memory loss, and poor academic performance. Social media use can affect users’ physical health even more directly. Researchers know the connection between the mind and the gut can turn anxiety and depression into nausea, headaches, muscle tension, and tremors. ([McLean Hospital, 2022, “The Risks for the Reward” section](#)).

The *Wall Street Journal* has reported that addiction-fueled anxiety is causing teens to develop psychosomatic fears that they have multiple-personality disorder ([Jargon, 2021c](#)) and tics ([Jargon, 2021b](#)). The *Wall Street Journal* also reported on internal social media documents that:

Repeatedly, the company’s researchers found that Instagram is harmful for a sizable percentage of [young users], most notably teenage girls.

“We make body image issues worse for one in three teen girls,” said one slide from 2019, summarizing research about teen girls who experience the issues.

“Teens blame Instagram for increases in the rate of anxiety and depression,” said another slide. “This reaction was unprompted and consistent across all groups.”

Among teens who reported suicidal thoughts, 13% of British users and 6% of American users traced the desire to kill themselves to Instagram, one presentation showed. ([Wells et al., 2021a, paras. 6–9](#))

It is also noteworthy that numerous technology executives and creators do not allow their children or family members to use social media products ([Ennis & Whiting, 2022](#)). For example, Chamath Palihapitiya, former Facebook vice president for user growth, said his children “aren’t allowed to use that [stuff]” ([Vincent, 2017](#)).

Addictive Nature of Social Media

The American Psychiatric Association (APA) publishes the Diagnostic and Statistical Manual of Mental Disorders (DSM). The latest comprehensive version, the DSM-5, was released in 2013. DSM-5-TR, released in early 2022, considered proposed updates and made technical fixes to the 2013 version. The DSM-5 provides diagnostic criteria

Forbes reported on a 2021 study which found that Americans spent on average 1,300 hours a year on social media—that is more than 3.5 hours per day—up from 90 minutes a day in 2012.

for mental health professionals to evaluate patients on conditions such as depression, anxiety, addiction, and body dysmorphia, among others. It recommended additional research and included criteria for Internet Gaming Disorder which, along with gambling, is the only non-substance, behavioral addictions in the manual (APA, n.d.). While the DSM-5 did not include social media or digital addiction criteria, the APA considered including Internet Use Disorder, which was not added at the time (Psych Scene Hub, 2022).

There is a broader academic and cultural debate about whether excessive social media use is merely a bad habit or an addiction (Jargon, 2022b). Golbeck (2017) argues that “[a]ddiction is a word thrown around a lot” and that “[t]hese fears are dramatically overstated. Simply spending a few hours a day on social media does not mean there is a problem” (paras. 1-2). However, “the literature already includes the following terms: social network addiction, social media addiction, and social media disorder, along with more specific terminologies of Facebook dependence, Facebook addiction disorder, and Twitter addiction” (Psych Scene Hub, 2022, “Social media and social networking” section). So, the question hinges on how much is too much.

Numerous studies and surveys find dramatically high consumption of social and entertainment media. According to a 2019 Common Sense Media report, 53% of minors under age 11 and 84% of teenagers have a smartphone (p. 5). Reporting on a Common Sense Media study (2015), NBC News said we are “[i]n the age of what some are calling the ‘screenager’—with teens averaging more than 6.5 hours of screen time every day” (Chuck, 2017, para. 8). NPR reports that those aged 8–12 spend five hours a day and teenagers spend more than seven hours a day on their phones (Kamenetz, 2019). The American Academy of Child & Adolescent Psychiatry (2020) notes:

Children and adolescents spend a lot of time watching screens, including smartphones, tablets, gaming consoles, TVs, and computers. On average, children ages 8-12 in the United States spend 4-6 hours a day watching or using screens, and teens spend up to 9 hours. (para. 1)

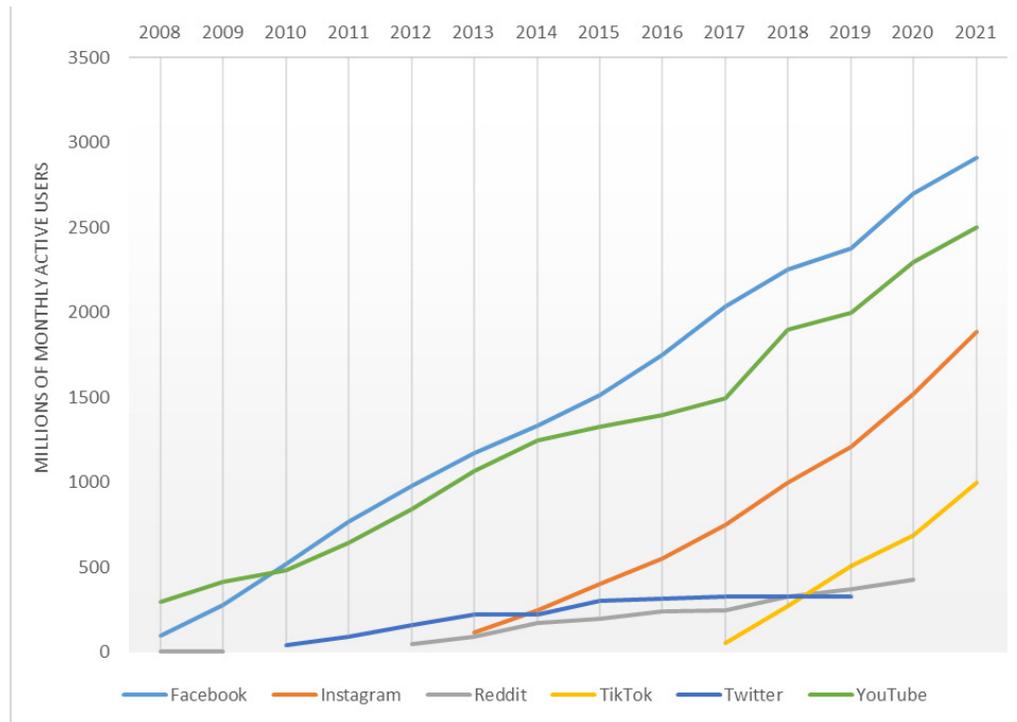
A Kaiser Family Foundation survey (2010) found a dramatic increase in daily media use from 2005 to 2010:

8-18 year-olds devote an average of 7 hours and 38 minutes (7:38) to using entertainment media across a typical day (more than 53 hours a week). And because they spend so much of that time ‘media multitasking’ (using more than one medium at a time), they actually manage to pack a total of 10 hours and 45 minutes (10:45) worth of media content into those 7½ hours. (para. 1)

That “totals 114 full days of media use in a year” (Cha et al., 2018, “Discussion” section). *Forbes* reported on a 2021 study which found that Americans spent on average 1,300 hours a year on social media (Suciu, 2021a)—that is more than 3.5 hours per day—up from 90 minutes a day in 2012 (Hiley, 2021). The *Wall Street Journal* reported that a 22-year-old female told Facebook researchers, “I’m on Facebook every day, every moment. Literally, every moment; just not when I’m in the shower. ... I lose the notion of time” (Wells et al., 2021b, para. 13). That tracks with an August 2022 Pew Research Center poll on teen social media and online use.

This study also explores the frequency with which teens are on each of the top five online platforms: YouTube, TikTok, Instagram, Snapchat and Facebook. *Fully 35% of teens say they are using at least one of them “almost constantly” [emphasis added]. ...* Beyond just online platforms, the new survey finds that the vast majority of teens have access to digital devices, such as smartphones (95%), desktop or laptop computers (90%) and gaming consoles (80%). And the study shows there has been an uptick in daily teen internet users, from 92% in 2014-15 to 97% today. In addition, the *share of teens who say they are online almost constantly has roughly doubled since 2014-15 (46% now and 24% then) [emphasis added]. (Vogels et al., 2022, paras. 4, 8)*

Figure 1
Change in Active Social Media Users by Year



Note. Data from Statista; TNW; C. Booth, and S. Dixon, 2019 (<https://ourworldindata.org/grapher/users-by-social-media-platform>) and author's calculations.

This presents significant opportunity costs ([Unmistakable Creative, n.d.](#)). Rosen (2022) says there is a “daily opportunity cost placed on our children who spend an increasing amount of their time on social media instead of engaged in other social activities” ([para. 11](#)). It also raises legitimate health concerns. While Golbeck (2017, [para. 2](#)) does not define how many “a few hours” is, Cha et al. (2018, “Discussion” section) found that the number of hours of broader media consumption, including the use of internet-connected devices, “were positively associated with unhealthy eating behaviors, nighttime eating, and inadequate sleep.” There are also risks of developmental delays, problems with language and communication skills, poor interpersonal skills, mental health, self-esteem, negative self-talk, and sedentariness, some of which will be discussed below ([Langham, n.d.](#)).

Van den Ejinden et al. (2016) created the Social Media Disorder scale—a 9-point assessment modeled after the DSM-5’s Internet Gaming Disorder criteria—“to distinguish between disordered (i.e. addicted) and high-engaging non-disordered social media users” ([p. 478](#)). An individual gives a “yes” or “no” answer to nine statements.

According to Golbeck (2017),

If you answered “yes” to five or more of these items, you meet the criteria for a formal diagnosis of a “disordered social media user.” While there is no formal diagnosis of Social Media Disorder in the DSM-5, this study closely tracks measurements for Internet Gaming disorder - which is listed as a Condition for Further Study (a “tentative disorder”).

In their study, the researchers who developed the scale found that higher scores on this scale are correlated with higher levels of depression and attention deficit. ([para. 6–7](#))

This scale has been subsequently tested and validated cross-nationally as psychometrically sound and gives researchers an instrument for further research ([Boer et al., 2021](#)). More importantly, it is a tool for psychologists and mental health practitioners to identify disordered or addictive behaviors for appropriate therapeutic intervention.

Figure 2*9-Item Social Media Disorder Scale*

Criterion	During the past year, have you...
Preoccupation	...regularly found that you can't think of anything else but the moment that you will be able to use social media again?
Tolerance	...regularly felt dissatisfied because you wanted to spend more time on social media?
Withdrawal	...often felt bad when you could not use social media?
Persistence	...tried to spend less time on social media, but failed?
Displacement	...regularly neglected other activities (e.g. hobbies, sport) because you wanted to use social media?
Problem	...regularly had arguments with others because of your social media use?
Deception	...regularly lied to your parents or friends about the amount of time you spend on social media?
Escape	...often used social media to escape from negative feelings?
Conflict	...had serious conflict with your parents, brother(s) or sister(s) because of your social media use?

Note. Table reproduced from *The Social Media Disorder Scale*, by Van den Eijnden, et al., 2016 (<https://doi.org/10.1016/j.chb.2016.03.038>).

Furthermore, Kuss and Griffiths (2011) conducted a comprehensive psychological literature review and classified excessive social media use as a behavioral addiction that shares common characteristics with substance abuse.

A behavioral addiction such as SNS [Social Networking Sites] addiction may thus be seen from a biopsychosocial perspective. Just like substance-related addictions, SNS addiction incorporates the experience of the 'classic' addiction symptoms, namely mood modification (*i.e.*, engagement in SNSs leads to a favourable change in emotional states), salience (*i.e.*, behavioral, cognitive, and emotional preoccupation with the SNS usage), tolerance (*i.e.*, ever increasing use of SNSs over time), withdrawal symptoms (*i.e.*, experiencing unpleasant physical and emotional symptoms when SNS use is restricted or stopped), conflict (*i.e.*, interpersonal and intrapsychic problems ensue because of SNS usage), and relapse (*i.e.*, addicts quickly revert back in their excessive SNS usage after an abstinence period). (p. 3530)

Ultimately, they conclude that social media addiction creates a vicious loop that can impact mood, offline relationships with friends and family, academic and job performance, and myriad other emotional harms, which drives further social media use to cope and perpetuates the cycle.

While more time spent on social media has been associated with adverse outcomes for minors, it is not clear that there is a quantifiable tipping point for disordered use or addiction. The National Institute on Drug Abuse (NIDA, n.d.) notes that the line between disordered and addictions varies from individual to individual. That is, “[n]o single factor determines whether a person will become addicted to drugs” (“Do people choose to keep using drugs?” section). Accordingly—by Kuss and Griffiths’ research on social media as a behavioral addiction sharing characteristics with substance abuse—we can extend that biopsychosocial reality to social media addiction.

Max J. Coppes (2019), chair of pediatrics at the University of Nevada, Reno School of Medicine and physician-in-chief at Renown Children’s Hospital, argues, “[a]side from unhealthy use of social media (cyber-bullying, sexting, online users asking for sexual relations, etc., which should be addressed immediately), the use of social media for more than 120 minutes per day should trigger parental concern. (para. 9)

Boers et. al (2019) found that for every additional hour a teenager uses social media, their risk of depression increases 2.3 percentage points. Furthermore, there is an argument to be made that because of the network effect of social media for minors—the idea that social media gains more desirability as more people use it—time spent using the product is not the only time spent focusing on it. For

example, a teenager might not spend four hours physically on Instagram, but in an instance where they post a photo waiting to see who likes and comments on their post, Instagram might occupy their mind as they try and remain focused on other tasks at hand.

Mental Health and Social Impacts

As noted above, researchers highlighted a marked decrease in well-being and increase in rates of depression and anxiety in the early 2010s and have linked this to social media usage ([Twenge et al., 2022](#)). Braghieri et al. (2022) linked the introduction of Facebook on college campuses to increased depression. The *Wall Street Journal* reported on a University of Arkansas study that “found that the amount of social media that a person used was the No. 1 predictor of the variables they measured for who became depressed” ([Wells et al., 2021b, para. 20](#)). Vannucci et al. (2017) found “that more daily social media use was significantly associated with a greater likelihood of ... anxiety disorder” (p. 163).

Social media use is linked with social anxiety ([Cheng et al., 2019](#)) and FOMO—the fear of missing out ([Fioravanti et al., 2021](#)). It is also linked to loneliness and social and relational disconnection ([Nix & Wagner, 2022a](#)), including negative effects on personal and familial relationships ([Christensen, 2018](#)). Counselor Phyllis Alongi says, “They can’t turn it off, nor do they want to or know how to. It’s stunting their coping skills, their communication skills” ([Chuck, 2017, para. 24](#)). A *Wall Street Journal* article noted that college students are detached, socially awkward, and lack confidence to interact in person without first connecting on social media. Concerned about students’ need to relearn how to talk to each other, professors are worried that “their students will be unprepared to enter the workforce” ([Jargon, 2022a, para. 6](#)).

Body Dysmorphia, Self-Harm, and Suicide

Comprehensive literature reviews of research beginning in the 1980s demonstrate a link between the media’s portrayal of the “ideals of beauty” and negative body image ([Spettigue & Henderson, 2004](#)). The authors reviewed studies on the length of time spent consuming and exposure to various forms of media—including print, television, advertisements, and more—and concluded that “[t]he research on the impact of the media on body dissatisfaction, eating pathology, and negative affect indicates that the media is a causal risk factor for the development of eating disorders and negative affect” (p. 17).

Videos rampant on social media about cutting, burning oneself, ingesting dangerous products, and more serve as a gateway or trigger for self-harm.

More recently, researchers have studied and found associations between increased use of social media and negative body image ([Jiotsa et al., 2021](#); [Fardouly & Vartanian, 2015](#)). In general, women suffer more than men from body image issues ([King University, 2019](#)). ScienceDaily reported on a 2011 study by the University of Haifa which found that

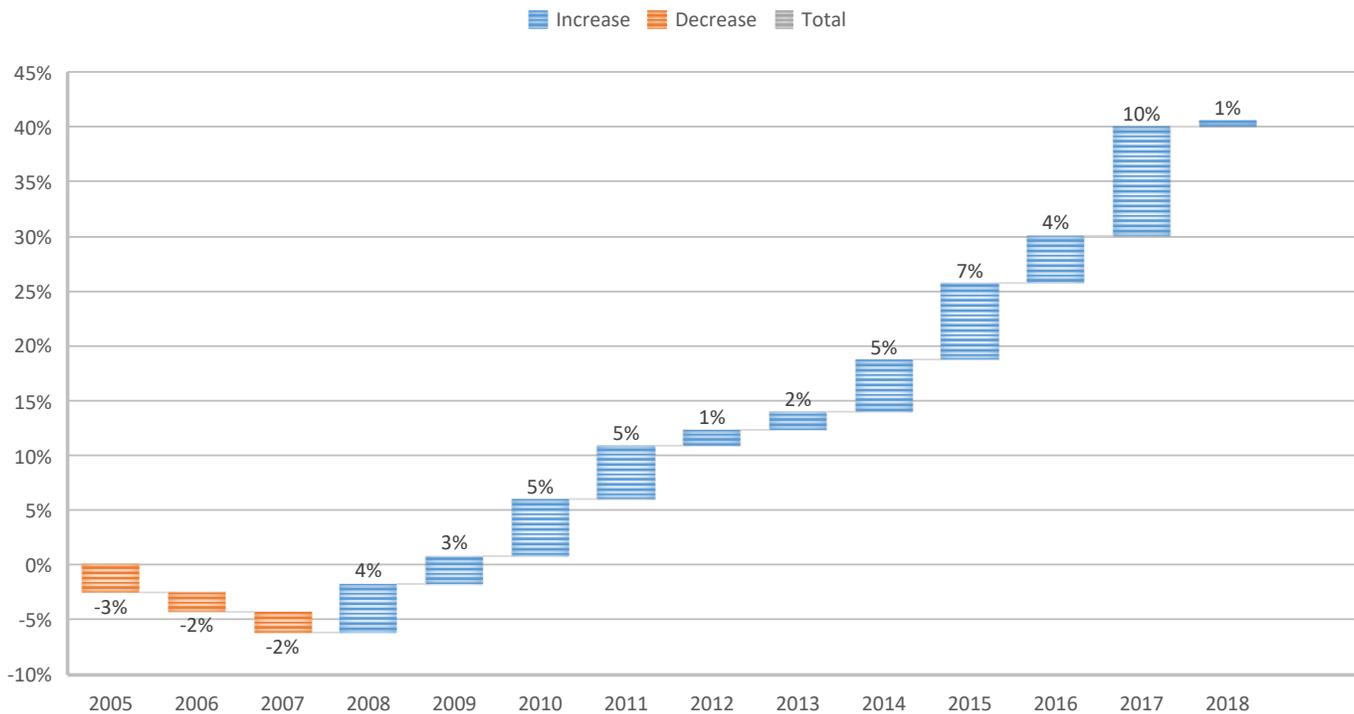
[t]he more time girls spend on Facebook, the more they suffered conditions of bulimia, anorexia, physical dissatisfaction, negative physical self-image, negative approach to eating and more of an urge to be on a weight-loss diet. Extensive online exposure to fashion and music content showed similar tendencies, but manifested in fewer types of eating disorders. ([ScienceDaily, 2011, para. 1](#))

Body image issues are manifesting in minors as young as five years old, and studies report that “[m]ore than 80 percent of 10-year-olds are afraid of being ‘fat’” ([Social Media Victims Law Center, n.d.-a, “Body image development starts early” section](#)). Gallivan (2014) notes that “[o]ver 50% of teen girls and 30% of teen boys use unhealthy weight control behaviors such as skipping meals, fasting, smoking cigarettes, vomiting, and taking laxatives” ([slide 5](#)). A troubling example is a preteen girl named Alexis who spent years addicted to social media, bombarded with body image and self-harm videos, and suffered from anorexia, self-harm, and contemplated suicide ([Cook, 2022](#)).

Videos rampant on social media about cutting, burning oneself, ingesting dangerous products, and more serve as a gateway or trigger for self-harm ([Mitchell, 2017](#)). *US News & World Report* notes clinical psychologist Jamie Howard “believes [the Internet] has helped normalize the behavior” ([Leonard, 2015, para. 13](#)). Howard says, “It’s the kind of thing—even before the Internet—that can happen in groups. ... It’s a logical extension that the internet would exacerbate the problem” ([para. 13](#)). However, “[d]espite efforts of social media sites to curb the amount of disturbing material their users post online, images of self-harm, like ‘cutting,’ continue to surface” ([para. 1](#)):

Figure 3

Percent Increase in Suicide Death Rates by Year (age 10 -24)



Note. Data from Centers for Disease Control and Prevention, by Curtin, S., 2020 (<https://www.cdc.gov/nchs/data/nvsr/nvsr69/NVSR-69-11-508.pdf>) and author's calculations.

The concern experts have about these sites is that they can lead to others engaging in similar behavior. “They found out about [cutting] first through social media, or they heard about it somewhere else and seeing it on social media made it OK to them,” [mental health treatment facility director Jamison] Monroe says. ([para. 7](#))

Some social media challenges go as far as to encourage minors to engage in dangerous behavior, even amplifying that suicide is the outcome of the challenge ([Rodrigues, 2022](#)). Eight-year-old Lalani and nine-year-old Arriani died as the result of the “Blackout Challenge,” which reportedly encourages its users to choke themselves with items like belts, ropes and purse strings until they pass out” ([KVUE, 2022, para. 3](#)). Their families are suing TikTok for wrongful deaths. Because of Section 230 immunity, a federal judge recently dismissed another lawsuit against TikTok for the death of 10-year-old Nylah after she died attempting the Blackout Challenge ([Pierson, 2022](#)).

Indeed, the ultimate harm of social media use is suicide. According to 2020 CDC data, there were nearly 46,000 suicides, with a rate of 14 per 100,000 population ([CDC, n.d.](#)). The Social Media Victims Law Center ([n.d.-b](#)) reports that the suicide rate for minors 12 to 16 years old increased 146% from 2007 to 2018. CDC ([2017](#)) statistics indicate that “the suicide rate for male teens increased 31 percent between 2007 and 2015. Female teen suicides hit a 40-year high in 2015” ([Social Media Victims Law Center, n.d.-c, “Teen suicide prevalence rates: Is social media to blame?” section](#)). “In the longest study to date on the effects of social media on teens, BYU research found a correlation between time spent on social media and suicidality risk among teenage girls” ([Allen, 2021, para. 1](#)). The study, conducted over a 10-year period, “found that while social media use had little effect on boys’ suicidality risk, for girls there was a tipping point” ([para. 4](#)). A tragic example was that of 11-year-old Selena, whose therapist said “she had never seen a patient as addicted to social media” ([Zilber, 2022, para. 4](#)). Selena tragically committed suicide, and her mother is now suing two social media companies in federal court.

Although there is “little effect,” boys are not immune ([Allen, 2021, para. 4](#)). Teenager CJ committed suicide with his phone in his hand, and teenager Ian recorded a Snapchat video of him playing Russian roulette, and his phone was found near his dead body. Lawsuits have also been filed against social media companies for these deaths ([Kelly, 2022](#)).

Cyberbullying

Cyberbullying, especially on social media, only adds fuel to the fire and exacerbates the harms identified above. It takes the problem of bullying to a whole new level of scope and severity. It is even done through anonymous accounts “spilling the tea” at schools, a slang term for gossiping ([Jargon, 2021a, para. 4](#)). Pediatric psychologist Monica Barreto notes, “Overall, cyberbullying occurs on a broader, omnipresent scale compared to traditional bullying, without physical violence, admittedly, but with the capacity to do significant harm to the reputation, emotional well-being, and social relationships of a child or adolescent” ([Suciu, 2021b, para. 7](#)). Fifteen-year-old Sadie was bullied on social media “where classmates would tell her to kill herself” ([Chuck, 2017, para. 5](#)). She ultimately succumbed to the bullying and committed suicide after her freshman year of high school.

A Hamm et al. ([2015](#)) literature review of studies over a 10-year period found varying degrees of association between cyberbullying and anxiety, depression, self-harm, and suicide. Males have a higher propensity for perpetrating cyberbullying ([Kao, 2021](#)), while females are more likely to be victims of cyberbullying ([Hamm et al., 2015](#)). Furthermore, cyberbullying rises ideations of self-harm and suicide for both victims and perpetrators: “Youth who are victims and, to a lesser extent, perpetrators of cyberbullying are at higher risk for both self-harm and suicidal behaviors than those with no cyberbullying involvement” ([Healio, 2018, para. 1](#)).

Child Sexual Abuse Material (CSAM)

Social media is often used to share child sexual abuse material, also known as CSAM. Thorn, a group co-founded by actor Ashton Kutcher, notes that

[c]hild sexual abuse material (legally known as child pornography) refers to any content that depicts sexually explicit activities involving a child. Visual depictions include photographs, videos, digital or computer generated images indistinguishable from an actual minor. ([Thorn, n.d., “Defining child sexual abuse material” section](#))

The explosive increase in CSAM reports—from 3,000 in 1998 to 1 million in 2014 to more than 150 million in 2021—has left law enforcement agencies, technology companies, and victims organizations “ill equipped for the expanding demands.”

The National Center on Sexual Exploitation ([2022](#)) notes that “[t]here is an established link between pornography, CSAM, sexual violence, child-on-child harmful sexual behavior, and child sexual abuse” ([para. 1](#)). The problem is growing worse in the United States which now accounts for 30% of the global share of CSAM, which is up from 21% in 2021 ([Williams, 2022](#)). In the first nine months of 2021, Facebook, Instagram, YouTube, and TikTok removed over 126 million CSAM-related posts ([Bischoff, 2022](#)). The explosive increase in CSAM reports—from 3,000 in 1998 to 1 million in 2014 to more than 150 million in 2021—has left law enforcement agencies, technology companies, and victims organizations “ill equipped for the expanding demands” ([Keller & Dance, 2019, para. 7](#)). Unfortunately, it appears that the more than 150 million reports in 2021 are but a snapshot of the number of actual CSAM cases. As Bischoff ([2022](#)) reports:

US companies are required by law to report child sexual abuse material (CSAM) to the NCMEC [National Center for Missing & Exploited Children] or risk a fine of up to \$300,000. However, how thorough the company is at referring cases to the NCMEC depends on its systems and protocols for detecting such material.

For example, a recent report found that Facebook has a new rule in which ‘images of girls with bare breasts will not be reported to NCMEC. Nor will images of young children in sexually suggestive clothing.’ ...

This suggests that the vast number of content flagged by Facebook may only scratch the surface of the problem. ...

In 2019, Facebook (and Instagram) had 39.4 million pieces of content flagged as child exploitation. It referred 15.9 million (less than half) to the NCMEC. In 2020, 20.3 million pieces of content were referred

to the NCMEC by Facebook—52 percent of its overall total of 38.9 million. ...

Facebook's lower NCMEC reporting rate compared to its content removal rate isn't as significant as some of the other top-reporting ESPs, however.

In 2020, YouTube saw 11.6 million pieces of content flagged as CSAM. Google submitted a total of 188,955 reports to the NCMEC (solely from YouTube) in the same reporting period. That's 1.6 percent of the flagged content that's been referred.

Likewise, TikTok flagged 55.4 million pieces of CSAM content in 2020. It referred 22,692 to NCMEC—0.04 percent of its flagged content. ([“What happens to the content that's removed and the people who've posted it?” section](#))

It is true that double reporting may occur, and not all reports of CSAM prove to be true. As Bischoff (2022) reports, “Facebook did release some statistics in 2021 which suggested 90 percent of the content it reported to NCMEC was ‘the same as or visually similar to previously reported content’” ([“What happens to the content that's removed and the people who've posted it?” section](#)).

Ultimately, without more resources, advanced technologies to detect CSAM, and increased enforcement of the NCMEC reporting requirements, it is difficult to quantify the number of CSAM material that goes unreported.

The ubiquity of smartphone and social media use has made social media a primary driver easing the ability of predators to target minors online ([Child Crime Prevention & Safety Center, n.d.](#)). Thorn (2021) interviewed online safety teams at several major social media platforms and surveyed the “experiences and attitudes of minors aged 9–17,” including the types of inappropriate and harmful interactions on social media (p. 4). The survey found that one third of minors had an online sexual interaction, including being sent or asked to send nude photos or videos, sexually extorted, or sent sexually explicit messages. One quarter reported having a sexual interaction with someone they believed was an adult. Teenage girls are more likely to have a harmful online experience—54% of girls versus 40% of boys.

Human Trafficking

Human trafficking is also a severe problem online and on social media. The Polaris Project (2018) published a comprehensive report on human trafficking, including

how social media is used to recruit, control, and carry out trafficking operations. Victims are often lured by initial online relationships, cyberstalking, fake or deceptive job postings, or promises of making easy money. Victims are then tricked into sex or labor activities such as escort services, illicit massage businesses, sexual servitude, pornography, strip clubs, domestic work, construction, and factory jobs. More than one third of human trafficking victims are minors, with 17% of victims ages 0–11 and 18% ages 12–17 ([Polaris Project, 2018](#)). Minor victims also spend more time being trafficked than adults, with minors subjected to trafficking held captive for an average of more than 2.2 years ([Counter Trafficking Data Collaborative, n.d.](#)).

Social media is also being used by cartels and smugglers to entice teens to drive “load cars”, paying \$2,000–\$3,000 per person transported ([Montañez, 2022](#)). Robert Almonte, a former Texas U.S. Marshal, said, “Cartels are using social media to recruit these young teenagers, and in some cases, authorities have found these smugglers from the United States as young as 13 and 14 years old” ([para. 8](#)). Furthermore, law enforcement is intercepting ads on social media ([Arizona Attorney General, 2022](#)) and has warned of the dangers and criminal consequences, including charges of kidnapping ([12News, 2022](#)).

Crime and Violence

Social media is also used to plan, carry out, and even live stream murder. Thirteen-year-old Olly's murder was “planned on social media and triggered by a dispute in a social media chat group” ([Spring, 2021, para. 5](#)). The shooters in Buffalo, New York, and Uvalde, Texas, used social media platforms to post about their plans ([Nix & Wagner, 2022b](#)). The Buffalo shooter live streamed his attack, and other users have shared the video across other platforms ([Clark, 2022](#)). Fatima used social media to hire another man to murder her boyfriend, Khalid, and she even filmed him on Snapchat while he lay dying on the street ([Britton, 2018](#)). The problem is prevalent enough that a mainstream documentary series called “Social Media Murders” aired in late 2021 ([Apple, n.d.](#)).

Impact on Public Trust

While political scientists have observed and written about political polarization for decades, the 2016 presidential election brought into focus the problems of social media in fueling political and cultural divisions and a rising distrust in individuals and institutions. A November 2021 CNN poll found that 76% of Americans think “Facebook makes American society worse” ([CNN, 2021](#)). Pew (2020) and Quinnipiac (2021) polls also show public opinion

increasingly recognizes the harms social media inflicts on the broader society. Axios reported on Pew research showing a decline in social media use for those 18–29 and 30–49 years old since 2019. Notably, Gen Z users are

rejecting and rebuking the social networks they grew up with ... The social hierarchies created by decades of public “like” counts, and the noise level generated by clickbait posts and engagement lures, have worn on Gen Z. And constant pivots by social media giants have eroded younger users’ trust. ([Fischer, 2022, paras. 1–2](#))

State of the Law

A review of federal and state law adequacy is a necessary precursor to any suggested policy prescriptions. Among the key laws considered in this section are the Children’s Online Privacy Protection Act, Communications Decency Act, Texas Deceptive Trade Practices-Consumer Protection Act, and state age-limited activities laws. Proposed federal and state laws and relevant case law will also be discussed. Ultimately, this paper concludes that federal and state consumer protection laws are insufficient to protect minors online and on social media.

Federal Law

Children’s Online Privacy Protection Act

The Children’s Online Privacy Protection Act (COPPA) was enacted by Congress in 1998, and the Federal Trade Commission is tasked with rulemaking and enforcement. COPPA is a privacy protection measure designed to empower parents and protect minors under 13. The law ([15 U.S.C. §§ 6501–6506](#)) and rule ([16 C.F.R. §§ 312.1–312.13](#)) place requirements around and limitations on the collection, use, and disclosure of personal data by various online commercial operators of websites and services.² Specifically, under [15 U.S.C. 6502\(a\)\(1\)](#):

It is unlawful for an operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting personal information from a child, to collect personal information from a child in a manner that violates the regulations prescribed under subsection (b).

Colloquially, the law “prohibits American companies from collecting personal information from children under

13 without parental consent, or to collect more personal information than they need to operate a service aimed at children under 13” ([Levin, 2022](#)). The FTC provides a step-by-step guide for compliance ([FTC, n.d.-a](#)), noting that parental consent can be obtained in at least seven ways, in addition to the safe harbor provisions³ ([FTC, n.d.-b](#)), some of which will be discussed in the policy recommendation section below.

Personal information is broadly defined in the statute and rule and includes data such as name, address, phone number, image or voice, geolocation, or any other linking identifier. Among the requirements on covered operators are clear and transparent data collection practices, notice to and verifiable consent from parents, right to access and delete, and privacy and security measures.

COPPA applies to personal information collected online by operators of both websites and online services. The term “online service” broadly covers any service available over the Internet, or that connects to the Internet or a wide-area network. Examples of online services include services that allow users to play network-connected games, engage in social networking activities, purchase goods or services online, receive online advertisements, or interact with other online content or services. Mobile applications that connect to the Internet, Internet-enabled gaming platforms, connected toys, smart speakers, voice assistants, voice-over-Internet protocol services, and Internet-enabled location-based services also are online services covered by COPPA. ([FTC, n.d.-b, “7. I know that COPPA doesn’t just apply to websites” section](#))

The standard applied to operators is “actual knowledge,” a legal term of art that is hard to define and requires 38 references and examples in the COPPA Rule. At issue in *Intel Corp. Investment Pol’y Comm. v. Sulyma* ([U.S., 2020](#)) was how to define “actual knowledge” in the Employee Retirement Income Security Act (ERISA). While COPPA and ERISA touch on fundamentally different areas of law, the definition and discussion are constructive and relevant. In order “to have ‘actual knowledge’ of a piece of information, one must in fact be aware of it” ([p. 6](#)). Among the definitions actual knowledge cited in *Sulyma* is one from

² The COPPA Rule and FAQs discuss the exceptions to verifiable parental consent and provide more than 11 scenarios to guide compliance.

³ The safe harbor provision allows businesses or industries to propose a self-regulation plan to the FTC for approval to demonstrate compliance with COPPA ([FTC, n.d.-b](#)).

Black's Law Dictionary: “[d]irect and clear knowledge, as distinguished from constructive knowledge” ([p. 6](#)).

Based on the foregoing, there are several significant flaws in COPPA. First, COPPA is an outdated law and needs to be updated with the times. It was enacted in 1998 with two significant rulemakings in 2000 and 2013. COPPA and the 2000 rulemaking predate the modern incarnation of social media, and the 2013 amendments are contemporaneous with the noted rise in social harms that have since been linked with social media.

Second—and related to the first—the age threshold is arbitrary and too low, reflecting a weak compromise. Then-Rep. Ed Markey wanted a higher age, but intense lobbying and the prevailing political realities watered down COPPA in compromising at age 13: “It was too young and I knew it was too young then. It was the best I could do” (quoted in [Rosen, 2022, para. 5](#)). Now-Sen. Markey remains steadfast in his efforts to fix COPPA legislatively. Given the massive growth and pervasiveness of online and social media use by minors, the age threshold is past due for revision.

Rosen ([2022](#)) notes that “[o]ther countries have stricter rules. In Germany, Ireland, and Switzerland, for example, the age of digital consent is set at 16, with more legal requirements in place for age verification” ([para. 5](#)). Furthermore, COPPA does not limit or prevent access to harmful or inappropriate content by those under 13. While Congress should raise the age threshold from 13 to 18, anything above 13 is better than the status quo.

Third, the actual knowledge threshold does not require any serious inquiry. The FTC’s website admits that the COPPA Rule will not prevent minors from lying about their age:

COPPA covers operators of general audience websites or online services only where such operators have actual knowledge that a child under age 13 is the person providing personal information. The Rule *does not require operators to ask the age of visitors* [emphasis added]. ([FTC, n.d.-b, “12. Will the COPPA Rule prevent children from lying” section](#))

Indeed, it is difficult to see the point of federal law with verifiable parental consent if it is not even necessary for an

operator to ask for a user’s age. Adoption of a constructive knowledge standard would be a step in the right direction.

Fourth, Sens. Markey and Josh Hawley, among others, have criticized the FTC for its “failure now and in recent years to fully enforce COPPA” ([Letter from Sens. Ed Markey and Josh Hawley to FTC Commissioners, 2019, p. 3](#)). The FTC enforces COPPA through legal action, and a civil penalty of up to \$46,517 can be assessed by the court, on a case-by-case basis, based on several factors ([FTC, 2022](#)).⁴ The FTC ([n.d.-a](#)) says, “[i]n some cases, the FTC has elected to seek no civil penalty, while in other cases, the penalties have been millions of dollars” (“[2. What are the penalties for violating the Rule?” section](#)). Furthermore, an operator out of compliance “must stop collecting, disclosing, or using personal information from children under age 13” unless otherwise covered under the safe harbor provisions of the law (“[4. What should I do if my website or app doesn’t comply with the Rule?” section](#)).

Finally, the preemption provision limits the ability of states to protect all minors online and on social media. While the FTC has been criticized for insufficient enforcement, COPPA currently provides for limited civil enforcement actions by state attorneys general. In 2019, the FTC, the New York attorney general, and Google settled alleged COPPA violations on YouTube for a record \$170 million—far eclipsing an earlier \$5.7 million settlement with TikTok—and “[c]ritics denounced the agreement, dismissing the fine as paltry and the required changes as inadequate for protecting children’s privacy” ([Singer & Conger, 2021, para. 2](#)). Using the maximum allowable penalty of \$46,517 per violation, these cases settled for approximately 3,655 alleged YouTube violations and 123 for TikTok—which is likely significantly below the number of actual violations, given more than 40% of minors under 13 use social media platforms.

Indeed, the fact that Congress has not fixed COPPA allows the continued exploitation of and preying on minors online. Improving COPPA and fixing these flaws—notably the preemption provision—will go far to allow states to better protect minors online and on social media. However, absent federal changes to COPPA, the state of Texas is still empowered to act, as will be discussed in the policy solution section below. An enhanced fine structure under

4 According to a JDSupra blog post by the law firm BakerHostetler ([2022](#)):

Since 2016, a statute [the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015] requires the FTC to update yearly its maximum civil penalty pursuant to a specific formula. And it’s not just one number – there are different statutes under the FTC’s authority that are each adjusted. But the number we really care about, which covers violations of Sections 5(l), 5(m)(1)(A) and 5(m)(1)(B) of the FTC Act, increased from \$43,792 to \$46,517. ([para. 4](#))

a Texas law prohibiting social media companies from granting access to minors would provide the attorney general with more resources to rigorously enforce COPPA for violations against minors aged 0–18, broader enforcement powers to allow social media use by minors aged 13–18, and relief to victims harmed by social media.

A Note on COPPA and Preemption

It is a fundamental, constitutional principle that the U.S. Constitution and federal laws generally trump state laws ([U.S. Const. art. VI, cl. 2](#)). However, preemption is not absolute: “Beyond direct conflicts, however, it is entirely up to Congress to decide the extent to which state laws will be permitted to complement the many different aspects of a federal framework” ([Gray, 2021, para. 5](#)). Congress may, for example, expressly preempt state laws or set a federal standard as a floor and allow states to supplement beyond.

COPPA raises two preemption issues based on the text and litigation. COPPA defines “child” as one under 13 years old. [Section 6502\(d\)](#) prohibits imposition of liability that is “inconsistent with the treatment of those activities or actions under this section.” In *Batman v. Facebook*, a federal district court judge ruled that COPPA may “bar any efforts by plaintiffs to use state law to impose a parental consent requirement for minors over the age of 13” (quoted in [FTC brief, 2014, p. 1](#)).

An often-litigated issue in administrative law relates to agency interpretation of a statute or its rules. In this instance, the question generally hinges on the reasonableness of the agency’s interpretation of an otherwise ambiguous statute. On appeal, the FTC submitted an amicus brief arguing that “nothing in COPPA’s language, structure, or legislative history indicates that Congress intended for that law to preempt state law privacy protections for people outside of COPPA’s coverage, including teenagers” ([FTC brief, 2014, p. 1](#)).

Ultimately, neither the district court nor the Ninth Circuit Court of Appeals ruled on the preemption question in *Batman*. In its opinion, the Ninth Circuit found “the district court did not decide whether COPPA actually preempts [a state privacy law]” and that “the issue of COPPA preemption has not been resolved” ([9th Cir., 2016, pp. 9–10](#)). Accordingly, a state may act to apply additional protections for those 13 years old and older—whether in line with or beyond COPPA. This includes the proposed policy to treat social media platforms like a harmful product and prohibit companies from granting access to minors outside of COPPA’s covered class.

Bills Proposed in Congress

Kids Online Safety Act

Sens. Richard Blumenthal and Marsha Blackburn have held five subcommittee hearings, the result of which was the introduction of the Kids Online Safety Act (KOSA) ([S. 3663, 2022](#)). KOSA is a comprehensive bill responsive to the subcommittee’s findings on the social media harms discussed at length in this paper.

The bill defines “minor” at or younger than 16 years old. This is in line with Markey’s original intention with COPPA. It establishes a “best interests of a minor” duty of care to “prevent and mitigate the heightened risks of physical, emotional, developmental, or material harms to minors posed by materials on, or engagement with” a covered platform, as defined in the bill ([S. 3663, 2022, § 3](#)). It provides numerous safeguards for minors such as “easy-to-use safeguards to control their experience and personal data,” “opt out of algorithmic recommendation[s],” restrict access to and sharing of geolocation information, and “limit[ing] time spent by a minor on the covered platform” ([§ 4\(a\)](#)). It also provides numerous tools to parents such as controlling privacy and account settings, restricting purchases, tracking total time on a platform, among others ([§ 4\(b\)](#)). Finally, it provides disclosure and transparency requirements, increased data access for researchers, and an age verification feasibility study, among other things ([§§ 5–10](#)).

KOSA was reported by the U.S. Senate Committee on Commerce, Science, and Transportation by voice vote on July 27, 2022 ([Reuters, 2022](#)).

Markey–Hawley

Sens. Markey and Hawley introduced S. 748 ([2019](#)) “to update children’s online privacy rules for the 21st century” ([Markey, 2019, para. 1](#)). The bill remedies many of the concerns with COPPA discussed above. It increases the age threshold to 16 years old, changes the “actual knowledge” standard to “constructive knowledge,” prohibits targeted advertising, “creates an ‘Eraser Button,’ so parents and minors can delete personal information and a ‘Digital Marketing Bill of Rights for Minors’ that limits the collection of personal information” ([paras. 1, 3](#)). A constructive knowledge standard—defined by *Black’s Law Dictionary* as “[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person”—places a far greater onus on social media companies and drastically improves COPPA (quoted in [Levin, 2016, p. 2](#)).

Markey–Cassidy

Sens. Markey and Cassidy recently introduced S. 1628 (2021), the “Children and Teens’ Online Privacy Protection Act,” which was reported by the U.S. Senate Committee on Commerce, Science, and Transportation by voice vote on July 27, 2022 (Reuters, 2022). Also known as COPPA 2.0, the bill mirrors many of the provisions in Markey–Hawley.

The EARN IT Act

Sens. Graham, Blumenthal, Hawley, and Feinstein reintroduced S. 3538 (2022), the Eliminating Abusive and Rampant Neglect of Interactive Technologies Act (EARN IT Act), to better protect minors online by targeting child sexual abuse material, a more encompassing term than “child pornography” currently in code. CSAM, discussed in a previous section, has exploded as “reports [to the National Center for Missing & Exploited Children] increased from 1.1 million in 2014 to 16.9 million covering 69.1 million photos, videos and files in 2019” (Graham, 2020, “Background on the EARN IT Act” section).

While KOSA, Markey–Hawley, and Markey–Cassidy speak primarily to COPPA, EARN IT further speaks to the liability provisions of Section 230 of the Communications Decency Act. As the name suggests, the bill “allow[s] companies to ‘earn’ their liability protection for violations of laws related to child sexual abuse material” by certifying compliance or falling under a safe harbor (Graham, 2020, “Highlights of the EARN IT Act” section). A 19-member commission established by the bill would provide best practices for certifying compliance. In addition, there is a safe harbor provision for taking other reasonable steps to protect minors. Failing to comply with CSAM protections opens providers to civil liability. In February 2022, the bill was reported favorably by the Committee on the Judiciary without amendment (S. 3538, 2022).

First Amendment and Constitutional Considerations

Social media platform use by a minor is not a constitutionally protected right. Ultimately, this paper argues that this is an issue of protecting minors from a harmful product, not a law that infringes on free speech rights. However, it is important to consider potential First Amendment concerns. Broad protections for free speech and the press are critically important to the dissemination of ideas, particularly ideas that are unpopular. There are “a few narrow categories of speech ... not protected from government restrictions. The main such categories are incitement, defamation, fraud, obscenity, child pornography, fighting words, and threats” (Britannica, n.d., para. 2). While an exhaustive

review of the First Amendment and case law is impractical for this paper, it is important to review several relevant cases and issues related to minors and online content.

As a roadmap, several points are worth emphasizing. First, COPPA has not been found unconstitutional and is a data privacy law, not a law that restricts content creation. Second, courts have long recognized that minors have free-speech rights, but there are limits on those rights. Third, there is conflict on what standard of review for courts to apply in a potential challenge to this law.

First, COPPA has been discussed at length in this paper because it is the most relevant federal law in this space. Importantly, COPPA has not been found unconstitutional. In *Batman*, the Ninth Circuit did not opine on the constitutionality or preemption questions. It is important to note what COPPA is and what COPPA is not. COPPA is an unfair and deceptive trade practice law regarding minors’ data privacy. It is not a law restricting content creation, but it does limit to whom content can be directed. As Collins (2019) notes, COPPA’s “obligations do not dictate the content you can or cannot create. COPPA may make it more difficult to profit from child-directed content, but this does not mean that anyone’s rights have been infringed” (Fact 2).

Second, courts have frequently struck down laws that limit access to speech and content, absent a recognized exception, including cases like *Erznoznik* (movie theaters), *Playboy Entertainment Group, Inc.* (cable television), and *Brown* (violent video games). Yet while courts have long recognized that minors have free-speech rights, there are limits on those rights. In an *Akron Law Review* article, Professor Benjamin A. Holden (2017) provided a lengthy survey of First Amendment case law as applied to minors.

Unlike its decisions in the Student Speech Cases, the Supreme Court, in its analysis under the Child Protection Cases, finds that special circumstances and an exigent interest justifies a lower standard for examining government intrusion into speech that would clearly be protected if directed toward adults. (p. 13)

In *Ginsberg v. New York* (U.S., 1968), the Supreme Court upheld a conviction under a New York statute prohibiting the sale of materials with pictures of nudity or depictions or descriptions of sexual conduct to minors under the age of 17 that would not be considered obscene to adults. Notably, the law did not prohibit the sale of this material to those aged 17 and older (p. 634–635). The Supreme Court recognized a broad police power in which “the State also

has an independent interest in the wellbeing of its youth.” (p. 640). *Ginsberg* quoted Judge Fuld’s concurring opinion in *People v. Kahan* (N.Y., 1965), a state court ruling speaking to the same statute:

It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults. (p. 312)

Ultimately, in *Ginsberg*, the Supreme Court recognized the right of the state to adjust the goalposts to protect minors.

We do not regard New York’s regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors’ constitutionally protected freedoms. Rather § 484-h simply adjusts the definition of obscenity “to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests ...” of such minors. (p. 638)

In *Prince v. Massachusetts* (U.S., 1944), a woman took her sons and niece out to sell Jehovah’s Witnesses brochures in the streets. The Supreme Court upheld Prince’s conviction under a Massachusetts child labor law against First Amendment free exercise and Fourteenth Amendment due process challenges. The Supreme Court again recognized a permissible distinction between a law which applied to minors is valid, whereas applying a similar law to adults would be invalid. The Supreme Court said,

the power of the state to control the conduct of children reaches beyond the scope of its authority over adults, as is true in the case of other freedoms, and the rightful boundary of its power has not been crossed in this case. (p. 170)

In *Erznoznik v. Jacksonville* (U.S., 1975), a theater manager was charged with violating a city “ordinance that prohibits showing films containing nudity by a drive-in movie theater when its screen is visible from a public street or place” (p. 206). As Holden (2017) notes, “the statute ... made arbitrary content-based distinctions between non-obscene films with and without nudity” (p. 14). Accordingly, the Supreme Court in struck down the Jacksonville ordinance, the “effect [of which] is to deter drive-in theaters from showing movies containing any nudity” (p. 211). Quoting another case, the Supreme Court said:

The ordinance seeks only to keep these films from being seen from public streets and places where the offended viewer readily can avert his eyes. In short, the screen of a drive-in theater is not “so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.” (p. 212).

In *Young v. American Mini Theatres, Inc.*, (U.S., 1976) and *City of Renton v. Playtime Theatres, Inc.* (U.S., 1986), the Supreme Court upheld ordinances regulating the location of adult movie theaters. In *American Mini Theaters*, two ordinances prohibited adult theaters from locating within 500 feet of a residential area or within 1000 feet of two other regulated facilities like bars, cabarets, or dance halls. In *Renton*, the ordinance prohibited an adult theater from locating within 1000 feet of a school, church, park, or residential area. The Supreme Court rejected First Amendment challenges in both cases. Referencing the ordinance in *American Mini Theaters*, the Supreme Court said in *Reno v. ACLU* (U.S., 1997):

The ordinance was aimed, not at the content of the films shown in the theaters, but rather at the “secondary effects” - such as crime and deteriorating property values - that these theaters fostered: “It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of “offensive” speech.” (p. 49)

In *Reno v. ACLU* (U.S., 1997), the Supreme Court struck down provisions of the Communications Decency Act as overbroad, vague, and because less restrictive means were available. The statute sought to regulate “indecent” and “patently offensive” speech, which the Supreme Court found to be vague and overbroad. Furthermore, because the statute regulated speech across “the entire universe of cyberspace” (p. 865), it could limit access to speech that is otherwise protected for adults. As the Supreme Court noted,

We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve. (p. 874)

In *Ashcroft v. ACLU* (U.S., 2004), the Supreme Court found a compelling government interest in the Child Online Protection Act (COPA)—not to be confused with COPPA—in protecting minors from harmful obscene content online. Justice Breyer’s dissent captures the acceptance of this compelling interest: “I turn next to the question of ‘compelling interest,’ that of protecting minors from exposure to commercial pornography. No one denies that such an interest is ‘compelling’” (p. 683).

Ultimately, the Supreme Court upheld an injunction against COPA on the grounds that the law was likely unconstitutional because blocking and filtering software were *less restrictive means* of protecting minors from harmful content.

A more recent case is *Brown v. Entertainment Merchants Association* (U.S., 2011), in which the Supreme Court struck down a California law prohibiting the rental and sale of violent video games to minors. According to Holden (2017) Supreme Court rejected the state’s arguments attempting to extend “its obscenity analysis to the area of violence” (p. 15), the latter of which is not an already recognized category of unprotected speech. In a 7–2 majority opinion in *Brown*, Justice Scalia noted:

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.” (p. 794)

The Supreme Court found that the law was unconstitutional because there is no “longstanding tradition in this country of specially restricting children’s access to depictions of violence” (p. 795). However, in dissent, Justice Thomas argued that

the practices and beliefs of the founding generation establish that “the freedom of speech,” as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors’ parents or guardians (p. 821).

The third point is applying this case law to a social media prohibition. As noted earlier, this paper argues this is a consumer protection measure designed to protect minors

from a harmful product. But if this law is challenged on First Amendment grounds, what is the appropriate standard of review for courts to apply? *Ginsberg* applied a rational basis standard—that is, “the statute or ordinance must have a legitimate state interest, and there must be a rational connection between the statute’s/ordinance’s means and goals” (Cornell, n.d.-a, para. 2). More often, courts apply a strict scrutiny standard—that is, “the legislature must have passed the law to further a ‘compelling governmental interest,’ and must have narrowly tailored the law to achieve that interest” (Cornell, n.d.-b, para. 1).

In concurrence, Justice Alito argued that the *Brown* Court went too far in applying strict scrutiny instead of the *Ginsberg* rational basis standard (p. 805). Justice Breyer, in dissent, agreed that a strict scrutiny-like standard was appropriate—but would have taken a more factor-like than elemental approach—and concluded California’s law would survive such a challenge (p. 840).

This paper argues for treating social media as a harmful product and applying rational basis. However, for the reasons outlined below, a court will more likely apply strict scrutiny.

Through the exercise of police powers, states have a legitimate (and often compelling) interest in protecting the health, safety, welfare, and morals of their citizens. For example, harmful products like cigarettes do not enjoy constitutional protection, and challenges to age-restrictions, clean air laws, and advertising restrictions have frequently been upheld by courts (Public Health Law Center, 2019, footnotes 20, 30, 34).

Accordingly, viewing a minor social media prohibition as limiting access to a harmful product, a court reviewing such a law could apply a rational basis test. Under rational basis review, courts consider whether there is a legitimate state interest, rationally connected to the policy goal, and which is neither irrational or arbitrary (*Ginsberg*, 1968, p. 641). The legitimate state interest is protecting minors from the harms of this product, which have been discussed at length in this paper. Placing an age-restriction on access or exposure to a harmful product is not irrational or arbitrary—rather, it is rationally connected to the goal, as in cases like *Ginsberg*, Justice Alito’s dissent in *Brown*, and the cigarette cases.

The social media prohibition proposal fits within *Ginsberg* and *Prince*, which recognize the power of a state to treat the welfare of minors differently than that of adults. As with

Ginsberg's magazines, prohibiting social media companies from granting access to minors does not prohibit social media access for those who have reached majority. Like Massachusetts' child labor law in *Prince*, an unfair trade practices or consumer protection law related to minor social media use can be crafted with a permissible distinction between a law as applied to minors is valid, and a law that would otherwise be invalid as applied to adults. Indeed, that is the goal of this policy proposal.

However, it is more likely a court will step beyond viewing this as a product (such as violent video games in *Brown*) and treat this as a restriction on access to speech. Holden (2017) has persuasively argued that, "in its analysis under the Child Protection Cases, finds that special circumstances and an exigent interest justifies a lower standard [emphasis added] for examining government intrusion into speech that would clearly be protected if directed toward adults" (p. 13). Yet Holden concedes his cyberbullying proposal would unlikely be reviewed under a rational basis standard (p. 47).

That leaves courts with either some less rigidly applied intermediate-like standard—as Justice Breyer's dissent in *Brown* suggested (2011, p. 840)—or strict scrutiny. Based on the case law, it is highly likely courts will opt for the latter. Under this standard of review, the burden shifts to the government to prove a compelling government interest, narrowly tailored by using the least restrictive means (*Playboy Entertainment Group*, 2000, p. 813). The word compelling is conflicting and ill-defined in the case law.⁵ The *Merriam-Webster Dictionary* (n.d.) defines it as "forceful," "demanding attention," and "convincing."

Given the rapid advances in technology, the ubiquitous use of smartphones and social media products, and the ease with which minors are exposed to numerous harms, this paper argues that the state has a compelling interest in enacting a minor social media prohibition. *Ginsberg* (U.S., 1968) recognized the broad police power in which "the State also has an independent interest in the wellbeing of its youth" (p. 640). *Prince* (U.S., 1944) recognized the power of the state to control the conduct of minors reaches beyond the scope of its authority over adults. *American Mini Theaters* (U.S., 1976) and *Renton* (U.S., 1986) recognized a compelling interest to regulate the location of adult

entertainment theaters for their secondary effects, which has been applied to numerous issues beyond land use, including harm to minors ([Hudson, n.d.](#)).

Furthermore, social media is nothing like *Erznoznik's* (U.S., 1975) drive-in movie theater where a passer-by can merely avert their eyes. Rather, social media is available in various mediums readily on or near the person—at home, at work, or in public. Social media is designed to and built on a business model of addictively gluing one's eyes to the screen—this is anything but *Erznoznik's* drive-in movie theater. As demonstrated at length in this paper, because of its pervasiveness, ubiquitous use, and time-consuming and addictive properties, it is, as the Supreme Court said in *Redrup* (U.S., 1967), "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it" (p. 769).

For these reasons, the state has a compelling interest in prohibiting minor use of social media. The well-documented harms of social media to minors indeed demand immediate and forceful attention by policymakers. This proposal can fairly be viewed, not as a content-based regulation, but rather from a secondary effects perspective. The links between social media and mental health problems, depression, anxiety, addiction, self-harm, suicide, crime, violence, human trafficking, sexual predators, CSAM, and more are only intensifying, and those secondary effects are a compelling justification for state action.

Next, the court would consider whether a minor social media prohibition is narrowly tailored using the least restrictive means.

In *Reno* (U.S., 1997), the Supreme Court struck down provisions of the Communications Decency Act, in part, because the statute regulated speech across "the entire universe of cyberspace" (p. 865), it could limit access to speech that is otherwise protected for adults.

In *Playboy Entertainment Group* (U.S., 2000), the Supreme Court struck down a section of the Telecommunications Act which required the full scrambling of cable channels except between 10 p.m. and 6 a.m. when minors are less likely to be watching. The Supreme Court reasoned that allowing cable companies to block content on a

⁵ Professor Robert T. Miller (2018) argues that

the Supreme Court has never given a general account of what makes some ends that government may pursue compelling and others not. This is a surprising omission since, by its terms, strict scrutiny would seem to require, as a first step in its application, a determination of whether the end that the government is pursuing in the challenged action is truly compelling. (p. 1)

household-by-household basis was a less restrictive means of accomplishing the goal.

In *Ashcroft v. ACLU* (U.S., 2004), the Supreme Court upheld an injunction against the Child Online Protection Act (COPA)—a legislative response to the decision in *Reno*—on the grounds that the law was likely unconstitutional because blocking and filtering software were *less restrictive means* of protecting minors from harmful content.

Technology, particularly social media, has changed significantly since the early 2000s. Internet-focused cases from 1997, 2000, and 2004 are hard to apply to the technologies of 2022. They are outdated cases that considered technological questions in an earlier era of the internet and contemporaneous with the launching of the first social media platforms. Accordingly, these cases can be distinguished from a minor social media prohibition.

Reno's concerns of blanket content restrictions are of no moment. A minor social media prohibition does not regulate the “entire universe of cyberspace.” Rather, it is narrowly tailored to one category (social media), for a narrow population (minors), and does not unduly restrict adult access.

Ashcroft's concerns revolved around criminalizing posting certain harmful content and reasoned that a filtering law, for example, was a less restrictive alternative. First, this proposal does not include criminal penalties. While a filtering law is good public policy, the ubiquitous nature of the internet, online connectivity, social media, and ultimately, the significantly increasing harms associated with them no longer make filtering software by itself sufficient—or “at least as effective in achieving the legitimate purpose” as the Supreme Court put it in *Reno* (p. 874). Furthermore, filters are easy to bypass or turn off, even by minors. Along those lines, *Playboy Entertainment Group*'s blocking solution is unworkable. Social media is not accessed through one cable line into one household. With numerous devices that can be taken anywhere, at any time, by anyone, signal blocking will not work to limit minor social media access.

Age verification is another consideration as a less restrictive option. As discussed at length in this paper and elsewhere, age verification is not enough (Whiting, 2022, para. 9). That leaves consideration of a prohibition. This paper argues a prohibition is narrowly tailored and the least restrictive means to accomplish the policy objective.

First, this bill would apply to the use of social media and not all online content (satisfying one concern in *Reno*). The definition of social media must be carefully crafted so as not to be overbroad, which will be discussed in the policy section below (satisfying another concern in *Reno*). Furthermore, it would be targeted at those aged 13 to 18, which fits within the preemption limits of COPPA, while not preventing those who have reached the age of majority from using this product (satisfying *Ginsberg*). Even though the effects of social media remain harmful to adults, the law recognizes the capacity to engage in certain activities at a certain point, and here the age of majority is appropriate.

Importantly, *Renton* (U.S., 1986) noted that “[t]he appropriate inquiry in this case, then, is whether the Renton ordinance is designed to serve a substantial governmental interest and *allows for reasonable alternative avenues of communication* [emphasis added]” (p. 50). The author argues the first prong is satisfied because this measure serves a substantial government interest. One cannot gloss over the importance of the second prong: reasonable alternative avenues of communication. As the author has argued elsewhere:

It is an odd, naïve, and widely accepted sentiment that social media is the only realistic means by which social interaction can happen in the 21st century. All the means of interpersonal communications and social interaction that existed before 2004 still exist today—including contemporary modes such as writing letters, making phone calls, sending emails, instant messages, text messages, and more. Or perhaps the most novel of all in 2022—interacting face-to-face. (Whiting, 2022, para. 5)

Drafting a bill that is precisely written, with tightly defined terms, not focused on content restrictions but narrowly tailored to limit harmful secondary effects on minors, and in line with the extensive case law to show a compelling need to act is not only good public policy, but it is the best way to survive a court challenge. For these reasons, even subjected to strict scrutiny, minor social media prohibition may pass constitutional muster.

Other Considerations in Federal Law

Having produced a defensible argument against a potential First Amendment challenge, a state-based proposal must also fit within federal law. As discussed in “A Note on COPPA and Preemption,” there is ample room under COPPA for state action to better protect minors from the

harms of social media, including treating this as a harmful product and prohibiting companies from granting access to minors.

Another consideration is the Communications Decency Act. According to Section 230, “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider” ([47 U.S.C. 230\(c\)\(1\)](#)). Section 230(c)(2) provides general “Good Samaritan” immunity for “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”

Because all seven categories are readily available online and on social media, the question of immunity here turns on “good faith.” It can be argued that social media operators are not acting in good faith for several reasons.

First, and most importantly, social media companies are aware of the harm their products cause and do little about it, notably the revelations of “The Facebook Files” investigation ([Wells et al., 2021a](#)).

Second, the algorithmically driven nature of content delivery makes it difficult for users to limit or restrict exposure to the enumerated categories of content ([McCluskey, 2022](#)). Indeed, algorithmic promotion is not restriction, but amplification, which is not protected by Section 230(c)(2). It appears some platforms are moving toward more user-driven content delivery, but it is hardly enough.

Third, there are pecuniary interests—that is, data collection and user exploitation produce a significant revenue stream. There is a financial interest in keeping eyeballs glued to screens, regardless of a user’s age or the resulting harms, a point driven home in the 2020 film “The Social Dilemma.” As Chris Griswold ([2022](#)) notes:

Luring children onto social media—and keeping them there—is a top priority for online platforms. This is because, like all social-media users, children are not so much the customer as they are the labor. The platforms induce them to produce the content that engages other children and that, in the cycle of virtual affirmation these companies deliberately engineer, drives them to keep on engaging and producing. The sale of this captured attention to advertisers is

Social media companies have faced numerous lawsuits for harms to minors, including addiction, eating disorders, and suicides. Furthermore, states have proposed various bills to limit harms. How those lawsuits and bills (if enacted) are squared with Section 230 and COPPA will be illuminating.

big business—the industry’s advertising revenue was projected to reach over \$56 billion in 2021. Each platform’s success relies on attracting and retaining a critical mass of such producers. *When it comes to social media’s economic imperatives, nothing could be a more vital strategic priority than recruiting and retaining the youngest users* [emphasis added]. ([para. 6](#))

Fourth, compliance with COPPA is hardly taken seriously. As noted above, while the onus is on platforms to verify age and obtain parental consent, a Thorn ([2021](#)) study found that more than 40% of minors under age 13 use social media platforms daily. According to Griswold ([2022](#)), “a third of children ages seven through nine use social media” ([para. 4](#)). Indeed, there is little incentive to ask for, verify, or seek actual knowledge of a user’s age, especially when COPPA enforcement is weak and rarely costly (except for, perhaps, the 2019 outlier YouTube settlement).

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State Laws and Legislative Proposals

Texas Law: Deceptive Trade Practices, Consumer Protection and Age-Limited Activities

Ultimately, COPPA is part of a broader unfair and deception trade practices regime. The most significant state law is the Deceptive Trade Practices–Consumer Protection Act (DTPA). A deceptive trade practice is defined as “false, misleading, or deceptive acts or practices in the conduct of any trade or commerce” ([DTPA, Tex. Business and Commerce Code § 17.46\(a\)](#)). The act provides an extensive but not exhaustive list of deceptive acts which could well

Social media companies are aware of the harm their products cause and do little about it, notably the revelations of “The Facebook Files” investigation.

capture the actions of social media companies, notably the known harms (§ 17.46(b)(24)). The DTPA is generally enforced by the attorney general and includes a range of penalties from \$5 to \$250,000 or more.

Furthermore, the state places numerous age limitations on behaviors, such as smoking, drinking, gambling, entering an enforceable contract, voting, joining the military, and driving, among others.⁶ This proposal would add social media use to the age-limited list. A social media platform is a harmful product, and there is a legitimate state interest in protecting minors from a harmful product.

Other States

A bipartisan pair of California assembly members introduced two bills to better protect minors online. The California Age-Appropriate Design Code Act would require website owners “to limit the collection of California children’s data, better protect them from other users, curtail addictive interfaces and simplify convoluted privacy settings and agreements” (Deighton, 2022a, para. 2). In March 2022, they introduced the Social Media Platform Duty to Children Act which “would let parents and guardians sue platforms that they believe addicted children in their care through advertising, push notifications and design features that promote compulsive use, particularly the continual consumption of harmful content on issues such as eating disorders and suicide” (Deighton, 2022b, para. 2). In June 2022, the private right of action provision was amended out of the bill, allowing enforcement action by the attorney general and district attorneys (Hoeven, 2022). Ultimately,

the Senate Appropriations Committee did not advance the bill this session (Holden, 2022).

Furthermore, Connecticut legislators recently advanced a bill through committee by unanimous consent that would extend COPPA-like “parental consent for children under the age of 16 to engage in social media” (Moritz, 2022, para. 1).

Ultimately, current federal and state laws to protect minors online are insufficient. Congress should remedy the concerns with COPPA raised above; however, the political realities of anything passing in the 117th Congress are dim. Accordingly, immediate state action can better protect minors from the serious harms of social media. For these reasons, Texas should treat social media platforms like a harmful product and prohibit companies from granting access to minors.

Policy Considerations and Solutions

Introduction

As Christine Rosen (2022) notes, “We cannot turn back the clock and force a generation of children not to grow up online, but neither should we ignore our unease about the world our teenagers and younger children inhabit” (para. 34). So how can we counter this unease and better protect minors from online harms? Rosen (2022), Noonan (2022), and Levin (2022) suggest raising the age limit on social media use by minors to 16 or 18 years old. Connecticut’s bill, for example, would extend COPPA-like verifiable parental consent requirements to those under age 16. Ultimately, this paper argues that Texas should enact a law to treat social media platforms like a harmful product and prohibit companies from granting access to minors.

Basis for and Limitations on State Action

The constitutional doctrine of police powers gives states broad authority to protect their citizens’ health, safety, welfare, and morals. As noted above, states place age limitations on numerous activities such as smoking, drinking alcohol, driving, gambling, voting, joining the military, and entering an enforceable contract, among others. This policy

⁶ Examples of age limitations in Texas:

- Smoking (age 21): Tex. Health and Safety Code § 161.082. <https://statutes.capitol.texas.gov/Docs/HS/htm/HS.161.htm>
- Drinking (age 21): Tex. Alcoholic Beverage Code § 106.01. <https://statutes.capitol.texas.gov/Docs/AL/htm/AL.106.htm>
- Gambling (age 21): The Law Office of Greg Tsioros. (2017, June 14). Gambling laws in Texas: When and where Texans can gamble. <https://www.txcrimdefense.com/gambling-laws-texas-texans-can-gamble/>
- Entering an enforceable contract (age 18): Houston Bar Association. (2022, July 19). Understanding contracts. <https://texaslawhelp.org/article/understanding-contracts-houston-bar-association>
- Voting (age 18): Tex. Const. art. 6, § 1, cl. 1. <https://statutes.capitol.texas.gov/Docs/CN/htm/CN.6.htm>
- Joining the military (age 18): Texas Military Department. (n.d.). Texas state guard enlistment. Retrieved July 25, 2022, from <https://tmd.texas.gov/texas-state-guard-enlistment>.
- Driving (age 16): Tex. Transportation Code. § 521.029. <https://statutes.capitol.texas.gov/Docs/TN/htm/TN.521.htm>

proposal would recognize a social media platform as an age-limited product harmful to minors.

However, as discussed at length in the “Federal Law and Legislative Proposals” section, COPPA is a terribly flawed law. In particular, the preemption provision limits state efforts to protect minors from online harms. Because of COPPA, the Texas Legislature can only prohibit social media companies from granting access to those aged 13–18—but not to those aged 0–13. That means that the verifiable parental consent provisions of COPPA—which are poorly observed and enforced—remain in place, leaving the most vulnerable group of minors open to continued exploitation and preying online. This odd inconsistency is not the fault of the author or a proposed bill—it is the fault of Congress and needs to be fixed. However, this should not deter legislators from taking strong action to protect minors online and on social media.

Defining Social Media

As noted at the outset, defining the term social media is not as easy as one thinks. One cannot merely take Potter Stewart’s approach in concurrence in *Jacobellis* of “I know it when I see it” (U.S., 1964, p. 197). As a matter of common parlance, social media is “the means of interactions among people in which they create, share, and/or exchange information and ideas in virtual communities and networks” (Tufts University, n.d., para. 1). Other sources provide a list of common characteristics of social media platforms (Nations, 2021). Academic literature often distinguishes between terms like social media and social networking. Legislation must use more precise language to pass constitutional muster. For example, Texas HB 20 (2021)⁷ and

California AB 2408 (2022)⁸ provide comprehensive definitions of what is and is not social media.

Either is a suitable definition as applied to entities doing business in Texas. Additionally, the bills, written for different purposes—California’s for the harms and addictive nature and Texas’ to prevent viewpoint censorship—contain definitional thresholds. That is, the term “social media platform” exempts entities with less than \$100 million in gross revenue (California) and 50 million active users (Texas). Such a bill could contain a revenue or user threshold to prevent stifling smaller companies from innovating and growing. On the other hand, a revenue or active user threshold is an odd and contradictory position. If the product itself is harmful, it does not become any more or less harmful based on the size or revenue of the platform.

Age and Identity Verification and Privacy Issues

Under this proposal, social media companies would be prohibited from granting access to minors. The onus is on the provider to verify age and identity and deny access to anyone they cannot verify. Therefore, in order to create and use a social media account, one who has reached age 18 would necessarily have to seek verification of one’s age and identity. This is not uncommon nor unreasonable, yet privacy issues are a concern in the online space. For example, IDs for age or identity verification are required in various contexts: voting, boarding a plane, purchasing an age-limited product, checking into a hotel, opening a bank account, applying for a passport, and starting a job, among others.

⁷ Texas HB 20, 87(2) Legislature, § 120.001, (2021).

(1) “Social media platform” means an Internet website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images. The term does not include:

(A) an Internet service provider as defined by Section 324.005;

(B) electronic mail;

(C) an online service, application, or website:

(i) that consists primarily of news, sports, entertainment, or other information or content that is not user generated but is preselected by the provider; and
(ii) for which any chat, comments, or interactive functionality is incidental to, directly related to, or depended on the provisions of the content described by Subparagraph (i).

(2) “User” means a person who posts, uploads, transmits, shares, or otherwise publishes or receives content through a social media platform. The term includes a person who has a social media platform account that the social media platform has disabled or locked.

⁸ California AB 2408, 2021-2022 Session, § 3, (2022) (as amended by Senate).

(5) “Social media platform” means a public or semipublic internet-based service or application that has users in California and that meets all of the following criteria:

(A) A substantial function of the service or application is to connect users in order to allow users to interact socially with each other within the service or application.

(B) A service or application that provides email or direct messaging services shall not be considered to meet this criterion on the basis of that function alone.

(C) The service or application allows users to do all of the following:

(i) Construct a public or semipublic profile for purposes of signing into and using the service.

(ii) Populate a list of other users with whom an individual shares a social connection within the system.

(iii) Create or post content viewable by other users, including, but not limited to, on message boards, in chat rooms, or through a landing page or main feed that presents the user with content generated by other users.

The FTC has a section on COPPA compliance and lists at least seven methods for verification. Among the more reliable methods suggested on the FTC’s website:

- provide a copy of a form of government issued ID that you check against a database, as long as you delete the identification from your records when you finish the verification process;
- answer a series of knowledge-based challenge questions that would be difficult for someone other than the parent to answer; or
- verify a picture of a driver’s license of [sic] other photo ID submitted by the parent and then comparing that photo to a second photo submitted by the parent, using facial recognition technology. ([n.d.-b, “Step 4: Get parents’ verifiable consent before collecting personal information from their kids” section, para. 2](#))

However, as Chris Griswold ([2022](#)) notes, “uploading a driver’s license, inputting credit-card information, allowing facial-recognition technology to scan photos, or requiring users to participate in a video call not only present privacy concerns, but are also cumbersome” ([para. 6](#)). The practicality concern is not persuasive. However, his solution relies on one data point (age), one method of age verification (one’s social security number), and one method of age-verified access (a two-factor authentication code).

One possibility would be for the SSA to offer a service through which an American could type his [or her] Social Security number into a secure federal website and receive a temporary, anonymized code via email or text, like the dual-authentication methods already in widespread use. Providing this code to an online platform could allow it to confirm instantly with the SSA whether the user exceeds a certain age without further personal data reaching the platform or the government. Whatever the technological details ... a secure, anonymous way to verify age will only become more urgent. ([para. 10](#))

There are two important points to draw from this. First, age and identity verification are not novel in online and social media use. Second, privacy issues are critically important and can be adequately addressed. Personally identifiable information (PII) must be broadly defined and protected. The FTC ([n.d.-a](#)) and the University of Pittsburgh ([n.d.](#)) provide comprehensive examples of PII, including name, social security number, driver’s license number, address,

banking information, phone numbers, biometric data, birthday, and geographic location, among others. And Griswold suggests only one piece of PII is necessary to verify one’s age. Regardless of the type of information proffered to verify age and identity, providers must have clear and transparent data collection practices, any personally identifiable information provided must be used for verification purposes only, cannot be used for pecuniary purposes, and must be deleted upon verification. Violations fall under the enforcement and penalty provisions discussed below.

Finally, there is much discussion on potential ways for minors to get around the law. Yet if one focuses on the potential ways for minors to get around this, one is ignoring the premise that it is addictive and harmful to minors, which is the key point on which to focus. People still speed, drink and drive, use drugs, steal, and murder despite laws to the contrary. Levin ([2022](#)) correctly points out that “some teens would find ways to cheat, and the age requirement would be porous at the margins” ([para. 13](#)). However, a legal prohibition does provide a significant measure of general deterrence. Furthermore, there are already limits on minor’s use of social media (even if they are poorly enforced). Finally, as social media and privacy regulations have been passed in other large states—such as California and Illinois—many providers have worked to ensure compliance at that level, rather than following a patchwork of compliance regimes. An age verification requirement in a state the size of Texas—and/or the adoption of similar laws in other states—could lead industry to adopt uniform practices nationwide.

Mechanics, Enforcement, and Penalties

This measure would put the onus on providers to obtain and verify age and identity. Liability should rest with the provider to prevent minors or unverified individuals from creating or accessing a social media platform. The platform must delete profiles created to skirt the law.

There are several ways to fit this proposal within the current legal framework. First, this could be added to a new or existing relevant code section and explicitly list it as a harmful product and an age-prohibited behavior, as with chapters on tobacco, alcohol, gambling, and motor vehicles. Since COPPA is an unfair and deceptive trade practices law, another solution would be to add this to the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA). Section 17.46 already includes a lengthy list of “false, misleading, or deceptive acts or practices” ([Tex. Business and Commerce Code § 17.46\(a\)-\(b\)](#)). Rather than relying on the “fail[ure] to disclose” or “includes, but

is not limited to” provisions, the Texas Legislature could adopt an idea by Professor Adam Candeub to expressly add the “enticement of children to engage on social media through marketing” to the list ([Morell, 2022a, “2. Unfair or Deceptive Trade Practices Actions” section](#)). Furthermore, the Legislature could “make explicit that it will be considered an unfair trade practice for social media companies to form contracts with minors.”

The DTPA is generally enforced by the Attorney General’s Office. This proposal would provide the attorney general with resources to rigorously enforce current federal law for those aged 0–13 and provide for enforcement and significant penalties for violations against those aged 13–18. Civil penalties under the FTC Act and COPPA are up to \$46,517 per violation. Civil penalties in the DTPA range from \$5 to \$250,000 or more. Accordingly, this bill could prescribe significant civil penalties—including a fine per violation and/or a fine per day out of compliance. The Legislature could allow the Attorney General’s Office to provide notice of alleged noncompliance and give companies a 30-day cure period by which to come back into compliance. If not cured or the practices continue, the attorney general could then bring an enforcement action, seek an injunction, civil penalties, and receive reasonable attorney’s fees, among others. Fines collected could be put into the general fund, an attorney general enforcement fund, and/or a victim’s assistance fund to provide a measure of financial relief for those harmed by social media.

The prospect of a private right of action is dim. California AB 2408 originally included a private right of action, which was stripped out during the committee process. However, it is important for legislators to keep this option on the table.

Conclusion

Federal and state privacy and consumer protection laws, which have been around for decades, need to be updated and strengthened to better protect minors online. Accordingly, Texas should enact a law to prohibit social media companies from granting access to minors. This would recognize a social media platform as an age-limited product harmful to minors. Ultimately, this is an issue of protecting minors from a harmful product, not a law designed to unconstitutionally infringe on free speech rights. This can be viewed not as a content-based regulation, but rather to limit the negative secondary effects of social media use, which courts have upheld in other First Amendment cases.

As discussed at length in this paper, COPPA is a terribly flawed law. In particular, the preemption provision limits state efforts to protect minors from online harms. Because of COPPA, the Texas Legislature can only prohibit social media companies from granting access to those aged 13–18—but not to those aged 0–13. That means that the verifiable parental consent provisions of COPPA—which are poorly observed and enforced—remain in place, leaving the most vulnerable group of minors open to continued exploitation and preying online. This odd inconsistency is not the fault of the author or a proposed state bill—it is the fault of Congress and needs to be fixed. However, this should not deter legislators from taking strong action to better protect minors online and on social media.

Academic research, polling, cultural trends, common sense, and tragic examples demonstrate that the harms of social media far outweigh any purported benefits. Minors do not need social media. As Levin ([2022](#)) notes, “it was a mistake to let kids and teens onto the platforms in the first place” ([para. 17](#)). Furthermore, he writes:

It’s not that social media has no redeeming value, but on the whole, it is no place for kids. If Instagram and TikTok were brick-and-mortar spaces in your neighborhood, you probably would never let even your teenager go to them alone. Parents should have the same say over their children’s presence in these virtual spaces. ([para. 2](#))

Indeed, policy solutions are not the end-all. Parental empowerment and a greater role in enforcing responsible technological use are the keys. Educating parents, minors, teachers, and other mentors on boundaries, habits, and tools is critical ([Morell et al., 2022b](#); Mankarious, 2021). Minors need loving and engaged parents, social interaction with peers, and education and vocational training to become productive and active members of society. It happened for millennia before social media, and it can happen again. ★

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ABOUT THE AUTHOR



The Honorable Zach Whiting is senior fellow of technology policy and policy director for Better Tech for Tomorrow at the Texas Public Policy Foundation.

Prior to joining the Foundation, he served as a state senator in his native state of Iowa. In the senate, Zach championed conservative values, protected personal liberties, and worked to reduce the size and scope of government. He served as assistant majority leader, chair of the Labor and Business Relations Committee, and vice chair of the Administrative Rules Review Committee.

Prior to the senate, Zach worked as a legislative assistant and policy advisor to a member of Congress. He graduated summa cum laude with a B.A. in political science from Stetson University and earned a J.D. from the Regent University School of Law.

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