Developments, Trends, and Forecasts in Social Media Regulation and Liability

First Amendment Lawyers Association, Fall 2024
Ari Cohn, Free Speech Counsel, TechFreedom

Content Moderation: *Moody v. NetChoice*

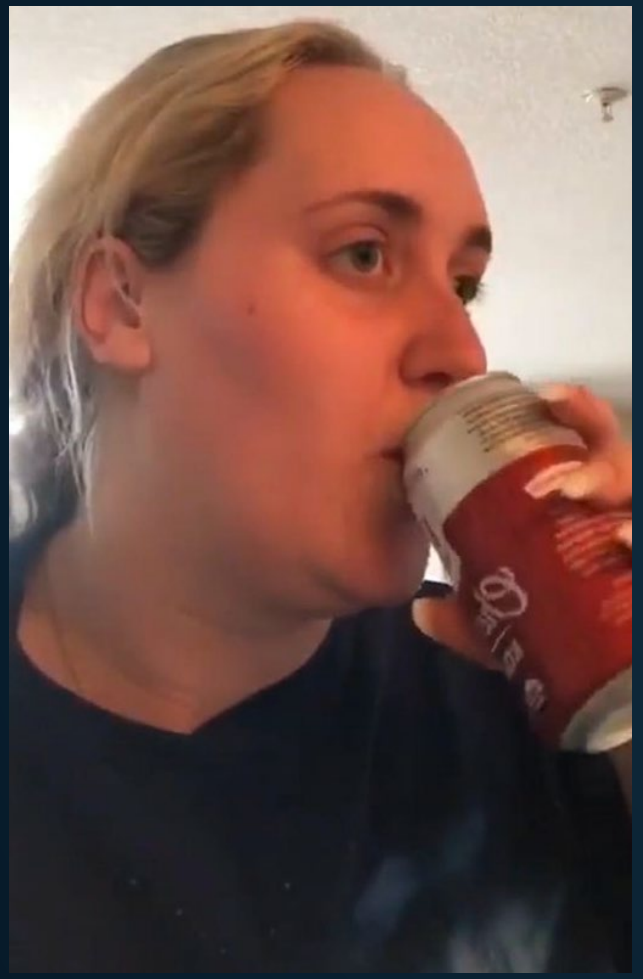
- Vacated and remanded to untangle the facial challenge issues

- But a strong message on how the Court *would* have ruled on the First Amendment issues (at least as to the laws' primary thrust):

  - "The reason Texas is regulating the content-moderation policies that the major platforms use for their feeds is to change the speech that will be displayed there. Texas does not like the way those platforms are selecting and moderating content, and wants them to create a different expressive product, communicating different values and priorities. But under the First Amendment, that is a preference Texas may not impose."

- Will the 5th Circuit take the majority's hint, or Thomas' invitation to reach the same conclusion by declaring "common carrier?"

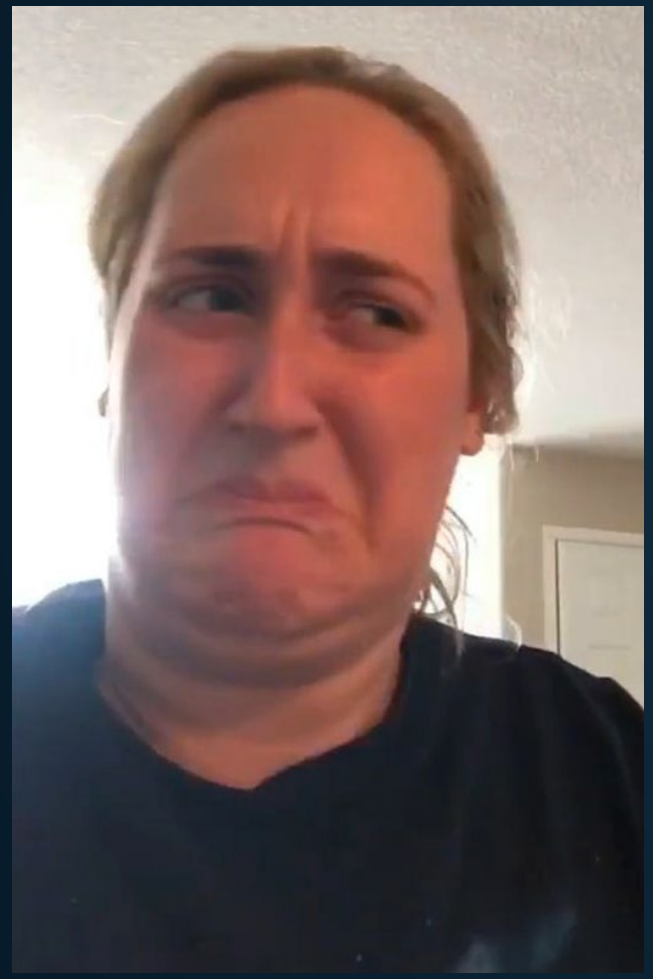
Samuel Alito and the Terrible, Horrible, No Good, Very Bad Dicta



subject that might come to mind. *Supra*, at 104–105. By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide

I cannot join the opinion of the Court, however, because of its undisciplined dicta. The Court is unable to resist musings that seem to equate the entirety of the Internet with public streets and parks. *Ante*, at 104. And this language

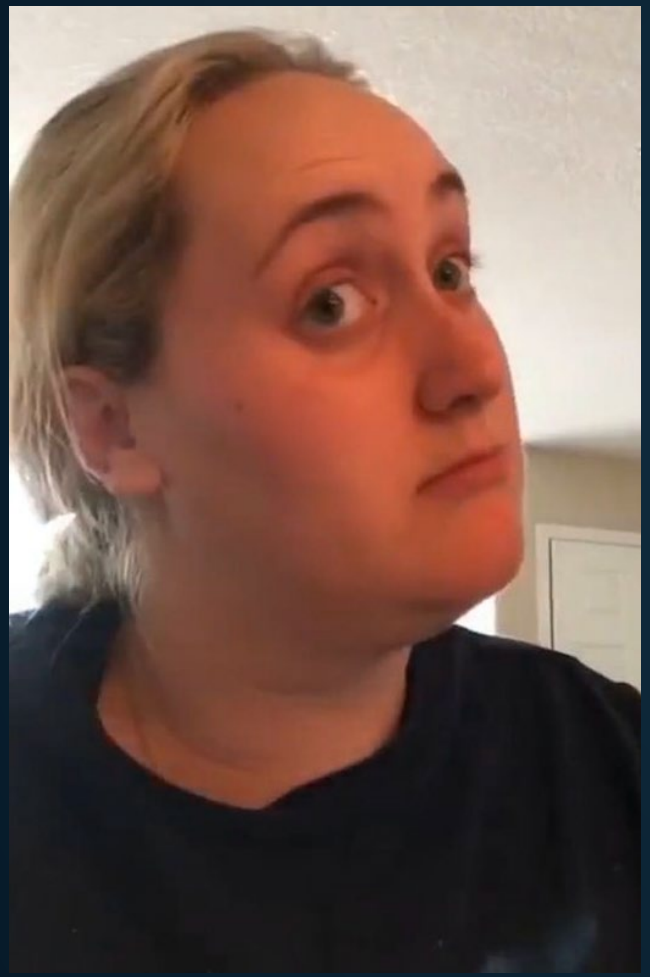
Samuel Alito and the Terrible, Horrible, No Good, Very Bad Dicta



JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE GORSUCH join, concurring in the judgment.

The holding in these cases is narrow: NetChoice failed to prove that the Florida and Texas laws they challenged are facially unconstitutional. Everything else in the opinion of the Court is nonbinding dicta.

Samuel Alito and the Terrible, Horrible, No Good, Very Bad Dicta



I

As the Court has recognized, social-media platforms have become the "modern public square." *Packingham* v. *North Carolina*, 582 U. S. 98, 107 (2017). In just a few years, they have transformed the way in which millions of Americans communicate with family and friends, perform daily chores, conduct business, and learn about and comment on current events. The vast majority of Americans use social media,[1] and the average person spends more than two hours a day on various platforms.[2] Young people now turn primarily to

Now:

Legislation: Federal

- Kids Online Safety Act (KOSA)
  - Only bill that has a chance of passing this Congress
- Social Media Child Protection Act
- Protecting Kids on Social Media Act
- Stop the Scroll Act
- Digital Social Platform Transparency Act

Social Media Child Protection Act (H.R. 821)

(1) may not permit a child to access such social media platform;

(2) may not permit any individual to access such social media platform unless such provider has verified the age of such individual by—

(A) requiring such individual to provide a valid identity document issued by the Federal Government or a State or local government, such as a birth certificate, driver's license, or passport; or

(B) using another reasonable method of verification (taking into consideration available technology); and

(2) CHILD.—The term "child" means an individual under the age of 16.

Protecting Kids on Social Media Act (S. 1291)

SEC. 5. PARENT OR GUARDIAN CONSENT FOR MINORS.

(a) IN GENERAL.—A social media platform shall take reasonable steps beyond merely requiring attestation, taking into account current parent or guardian relationship verification technologies and documentation, to require the affirmative consent of a parent or guardian to create an account for any individual who the social media platform knows or reasonably believes to be a minor according to the age verification process used by the platform.

(4) MINOR.—The term "minor" means an individual who is at least 13 years of age but under 18 years of age.

Protecting Kids on Social Media Act (S. 1291)

SEC. 6. PROHIBITION ON THE USE OF ALGORITHMIC RECOMMENDATION SYSTEMS ON TEENS UNDER 18.

(a) IN GENERAL.—A social media platform shall not use the personal data of an individual in an algorithmic recommendation system unless the platform knows or reasonably believes that the individual is age 18 or older according to the age verification process used by the platform.

Stop the Scroll Act (S. 5150)

(a) IN GENERAL.—A social media platform shall ensure that a mental health warning label (referred to in this section as a "covered label") that complies with the requirements under this section, including the regulations promulgated under subsection (d)—

(1) appears each time a user accesses the social media platform from a server located in the United States; and

(2) only disappears when the user—

(A) exits the social media platform; or

(B) acknowledges the potential for harm and chooses to proceed to the social media platform despite the risk.

(b) CONTENT OF COVERED LABEL.—A covered label shall—

(1) warn the user of potential negative mental health impacts of accessing the social media platform; and

Stop the Scroll Act (S. 5150):

So stupid not even the 5th Circuit would uphold it

We need not determine the outer limits of what establishes "controversy" because Texas has failed to rebut plaintiffs' challenges in such a way that we are comfortably within its boundaries. Thus, *Zauderer* is inapplicable. We supply two of the many examples of the dueling experts and studies[62]: First, Texas cites a study finding a negative correlative relationship between (1) time spent watching porn and (2) gray-matter volume and brain function in 21-to-45-year-old men. Second, the state's experts describe the "host of mental health afflictions" that they link to viewing pornography.

But plaintiffs respond with similarly credentialed and persuasive experts who, on review of "the last several decades of research," find "no generally accepted, peer-reviewed research studies or scientific evidence which indicate that viewing adult-oriented erotic material causes physical,

The health warnings, taken as a whole, might advance the state's stated interests. The warnings declare the potential harm of minors' engaging with pornography, and they do so in a noticeable fashion—in a way likely to discourage minors from using and adults from allowing their children to use the websites. But Texas must meet a higher standard than "might." "[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that . . . its restrictions will in fact alleviate [the harms] to a material degree."[67] Because Texas has not made such a showing, we adopt the approach recently taken by the Ninth Circuit: "[C]ompelling sellers to warn consumers of a potential 'risk' never confirmed by any regulatory body—or of a hazard not 'known' to more than a small subset of the scientific community—does not directly advance" the government's interest. *Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1283 (9th Cir. 2023). Therefore, Texas fails to satisfy the third prong.

Digital Social Platform Transparency Act (H.R. 9126)

“Terms of Service Report” must be submitted to the AG semiannually, including:

- A statement of whether the version of the terms of service in effect on the date of the report defines each of the following categories of content (or any substantially similar categories), and, if so, the definitions of those categories, including any subcategories:
    - Hate speech or racism
    - Extremism or radicalization
    - Disinformation or misinformation
    - Harassment
    - Foreign political interference
- A detailed description of content moderation practices, including the policies intended to address the above categories, how the platform responds to user reports, and the standards, processes, and decision-making systems employed by the platforms
- Information about content flagged as belonging to any of the above categories, including the number of moderated pieces of content, the number of times such content was viewed and shared, the number of user appeals and reversals pursuant to such appeals

Kids Online Safety Act (earlier version)

Sec. 3. Duty of care

(a) Best interests.—

A covered platform shall act in the best interests of a minor that uses the platform's products or services, as described in subsection (b).

(b) Prevention of harm to minors.—

In acting in the best interests of minors, a covered platform shall take reasonable measures in its design and operation of products and services to prevent and mitigate—

(1) mental health disorders or associated behaviors, including the promotion or exacerbation of self-harm, suicide, eating disorders, and substance use disorders;

(2) patterns of use that indicate or encourage addiction-like behaviors;

(3) physical violence, online bullying, and harassment of a minor;

(4) sexual exploitation, including enticement, grooming, sex trafficking, and sexual abuse of minors and trafficking of online child sexual abuse material;

(5) promotion and marketing of narcotic drugs (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), tobacco products, gambling, or alcohol; and

(6) predatory, unfair, or deceptive marketing practices, or other financial harms.

Kids Online Safety Act (earlier version):

Duty of Care

- *Zamora v. CBS* (S.D. Fla. 1979)
  - Reduced to basics, the plaintiffs ask the Court to determine that unspecified "violence" projected periodically over television (presumably in any form) can provide the support for a claim for damages where a susceptible minor has viewed such violence and where he has reacted unlawfully. Indeed, it is implicit in the plaintiffs' demand for a new duty standard, that such a claim should exist for an untoward reaction on the part of any "susceptible" person. The imposition of such a generally undefined and undefinable duty would be an unconstitutional exercise by this Court in any event.

- *Olivia N. v. NBC* (Cal. App. 1981)
  - But the chilling effect of permitting negligence actions for a television broadcast is obvious. . . . Realistically, television networks would become significantly more inhibited in the selection of controversial materials if liability were to be imposed on a simple negligence theory. . . . The deterrent effect of subjecting the television networks to negligence liability because of their programming choices would lead to self-censorship which would dampen the vigor and limit the variety of public debate.

  - Notwithstanding the pervasive effect of the broadcasting media and the unique access afforded children, the effect of the imposition of liability could reduce the U. S. adult population to viewing only what is fit for children. Incitement is the proper test here.

Kids Online Safety Act (earlier version):

Duty of Care

- *Wilson v. Midway Games* (D. Conn. 2002)
  - The First Amendment precludes [plaintiff's] action for damages unless Mortal Kombat's images or messages are 'directed to inciting or producing imminent lawless action and likely to incite to incite or produce such action.'"

- *Watters v. TSR, Inc.* (6th Cir. 1990)
  - The defendant cannot be faulted, obviously, for putting its game on the market without attempting to ascertain the mental condition of each and every prospective player. The only practicable way of insuring the game could never reach a 'mentally fragile' individual would be to refrain from selling it at all.

Kids Online Safety Act (now*ish*)

A covered platform shall exercise reasonable care ***in the creation and implementation of any design feature*** to prevent and mitigate the following harms to minors:

- Consistent with evidence-informed medical information, the following mental health disorders: anxiety, depression, eating disorders, substance use disorders, and suicidal behaviors.
- Patterns of use that indicate or encourage addiction-like behavior by minors
- Physical violence, online bullying, and harassment of the minor
- Sexual exploitation and abuse of minors
- Promotion and marketing of narcotic drugs, tobacco products, gambling or alcohol
- Predatory, unfair or deceptive marketing practices, or other financial harms

Definition of "Design Features":

- Any feature or component of a covered platform that will encourage or increase the frequency, time spent, or activity of minors on the covered platforms, including but not limited to:
  - Infinite scrolling or auto play
  - Rewards for time spent on the platform
  - Notifications
  - Personalized recommendation systems
  - In- game purchases
  - Appearance altering filters

Legislation: State Challenges

- Level of Scrutiny
  - *NetChoice v. Griffin* (Arkansas)
    - "The State points to certain speech-related content on social media that it maintains is harmful for children to view . . . some of [which] . . . though potentially damaging or distressing . . . Is likely protected nonetheless. Examples of this type of speech includes . . . violence of self-harming, information about dieting, so-called "bullying speech," [etc] . . . "
    - "Act 689's definitions and exceptions do seem to indicate that the State has selected a few platforms for regulation while ignoring all the rest"
    - "The Court tends to agree with NetChoice that the restrictions in Acy 689 are subject to strict scrutiny"
      - *But applied intermediate scrutiny anyway*.
  - *NetChoice v. Fitch* (Mississippi)
    - "The law's content-based distinction is inherent in the definition of 'digital service provider,' which is at the core of defining the Act's coverage. . . . In essence, H.B. 1126 treats or classifies digital service providers differently *based upon the nature of the material that is disseminated*, whether it is 'social interaction' as opposed to 'news, sports, commerce [or] online video games.'"
      - "The Court is not persuaded that H.B. 1126 merely regulates non-expressive conduct."

Legislation: State Challenges

- Level of Scrutiny, continued
  - *NetChoice v. Yost* (Ohio)
    - "The exceptions to the Act for product review websites and 'widely recognized' media outlets are easy to categorize as content based. It is noteworthy that the exceptions for media outlets and product review sites do, in part, define exempted speakers by the fact that 'interaction between users is limited to' public comments."
    - "The exceptions as written still distinguish between the subset of websites without private chat features based on their content. For example, a product review website is excepted, but a book or film review website, is presumably not. The State is therefore favoring engagement with certain topics, to the exclusion of others. The is plainly a content-based exception deserving of strict scrutiny."
  - *CCIA v. Paxton* (Texas)
    - "HB 18 regulates [DSPs] that specifically host or broadcast "social" speech, thereby subjecting "social content to heightened regulation. Non-social interactions, such as professional interactions, are not covered . . . DSPs that provide 'content primarily generated or selected by the' provider or primarily 'functions to provide a user with access to news, sports, [or] commerce are exempted . . . This 'singles out specific subject matter for differential treatment' by using the 'function or purpose' or speech as a stand-in for its content.

Legislation: State Challenges

- Level of Scrutiny: Government justification
  - *Brown v. EMA*: "At the outset, [California] acknowledges that it cannot show a direct causal link between violent video games and harm to minors. . . . The State claims that it need not produce such proof because the legislature can make a predictive judgment that such a link exists, based on competing psychological studies. But [*Turner Broadcasting*] **applied *intermediate scrutiny* to a content-neutral regulation. California's burden is much higher, and because it bears the risk of uncertainty, ambiguous proof will not suffice."**
  - *NetChoice v. Reyes* (Utah)
    - "Defendants have not met their burden to articulate a compelling government interest . . . . Defendants must 'specifically identify an actual problem in need of solving.'"
    - "Viewing Defendants' argument through a wide lens, the court understands Defendants' position to be that the State has compelling interests in protecting minors from the mental health- and personal privacy-related harms associated with excessive social media use. But these interests, like California's . . . fall short of the First Amendment's demanding standards."
      - "[A] 2023 United States Surgeon General Advisory titled *Social Media and Youth Mental Health* offers a much more nuanced view of the link between social media use and negative mental health impacts."
      - "A review of Dr. Twenge's Declaration suggests the majority of the reports she cites show only a correlative relationship."

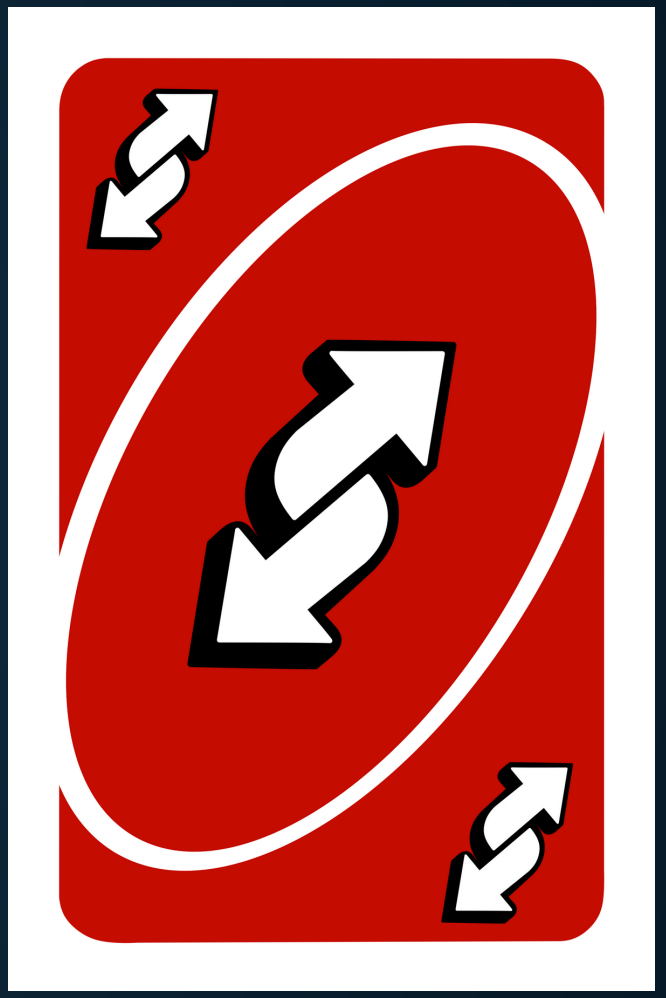
Legislation: State Challenges

- The Chill of Age Verification: Loss of Anonymity
  - *NetChoice v. Griffin*: "Requiring adult users to produce state-approved documentation to prove their age and/or submit to biometric age-verification testing imposes significant burdens on adult access to constitutionally protected speech and 'discourages users from accessing [the regulated] sites. Age-verification schemes like those contemplated by Act 689 are not only an additional hassle, but they also require that website visitors forgo the anonymity otherwise available on the Internet."
- The Chill of Age Verification: Privacy & Security
  - *NetChoice v. Griffin*: "Other courts examining similar regulations have found that requiring Internet users to provide . . . personally identifiable information to access a Web site would significantly tefeter many users from entering the site, because Internet users are concerns about security on the Internet and because Internet users are afraid of fraud and identity theft on the Internet."
    - *And that was the early aughts*.

Legislation: State Challenges

- Ineffective attempts to get around the chill:
  - Arkansas Act 689: "The social media company shall not retain any identifying information of the individual after access to the social media platform has been granted."
  - *Free Speech Coalition v. Paxton* (District Court, reversed but correct):
    - "Defendant . . . [argues] that the chilling effect will be limited by age verification's ease and deletion of information. This argument, however, assumes that consumers will (1) know that their data is required to be deleted and (2) trust that companies will actually delete it. Both premises are dubious, and so the speech will be chilled whether or not the deletion occurs. **In short, it is the deterrence that creates the injury, not the actual retention.**"
    - "While the commercial entities are required to delete the data, that is not true for the data in transmission . . . any intermediary between the commercial websites and third-party veifiers will not be required to delete the identifying data."


Won't somebody please
think of the children
gifs.com



Legislation: State Challenges

That is unprecedented and mistaken. "[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *2736 *Erznoznik v. Jacksonville*, 422 U.S. 205, 212–213, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975) (citation omitted). No doubt a State possesses legitimate power to protect children from harm, *Ginsberg*, *supra*, at 640–641, 88 S.Ct. 1274; *Prince v. Massachusetts*, 321 U.S. 158, 165, 64 S.Ct. 438, 88 L.Ed. 645 (1944), but that does not include a free-floating power to restrict the ideas to which children may be exposed. *795 "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." *Erznoznik*, *supra*, at 213–214, 95 S.Ct. 2268.[3]

Legislation: State Challenges

Justice THOMAS ignores the holding of *Erznoznik,* and denies that persons under 18 have any constitutional right to speak or be spoken to without their parents' consent. He cites no case, state or federal, supporting this view, and to our knowledge there is none. Most of his dissent is devoted to the proposition that parents have traditionally had the power to control what their children hear and say. This is true enough.

And it perhaps follows from this that the state has the power to *enforce* parental prohibitions—to require, for example, that the promoters of a rock concert exclude those minors whose parents have advised the promoters that their children are forbidden to attend. But it does not follow that the state has the power to prevent children from hearing or saying anything *without their parents' prior consent*. . . . Such laws do not enforce *parental* authority over children's speech and religion; they impose *governmental* authority, subject only to a parental veto.

American Amusement Machine Association v. Kendrick (7th Cir. 2001)

Children have First Amendment rights. This is not merely a matter of pressing the First Amendment to a dryly logical extreme. The murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing government to control the access of children to information and opinion. Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech before they turn eighteen, so that their minds are not a blank when they first exercise the franchise.

And since an eighteen-year-old's right to vote is a right personal to him rather than a right that is to be exercised on his behalf by his parents, the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either.

People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.

Legislation: State Challenges

Legislation: State Challenges

- *NetChoice v. Griffin*
  - "Neither the State's experts nor its secondary sources claim that the majority of content available on the social media platforms regulated by Act 689 is damaging, harmful, or obscene as to minors."

- *NetChoice v. Fitch*
  - "The Act also . . . Represents a one-size-fits-all approach to all children from birth to 17 years and 364 days old . . . [and] is thus overinclusive to the extent it is intended as an aid to parental authority."

- *NetChoice v. Yost*
  - "Foreclosing minors under sixteen from accessing all content on websites that the Act purports to cover, absent affirmative parental consent, is a breathtakingly blunt instrument for reducing social media's harm to children. The approach is an untargeted one, as parents must only give one-time approval for the creation of an account, and parents and platforms are otherwise not required to proect against any of the specific dangers that social media might pose."

Legislation: State Challenges

- *CCIA v. Paxton*
  - "As in *Fitch*, Paxton has not shown that the alternative suggested by Plaintiffs, a regime of providing parents additional information or mechanisms needed to engage in active supervision over children's internet access would be insufficient to secure the State's objective of protecting children."
  - "The monitoring-and-filtering requirements exclusively target speech, only a small portion of which falls outside First Amendment coverage."
  - "Websites that primarily produce their own content are exempted, even if they host the same explicitly harmful content such as 'promoting' 'eating disorders' or 'facilitating' 'self-harm.' The most serious problem with HB 18's under-inclusivity is it threatens to censor social discussions of controversial topics."
- *NetChoice v. Reyes*
  - "Like *Brown*, the Act appears underinclusive when judged against the State's interests in protecting minors from the harms associated with social media use because the Act ultimately preserves minors' ability to spend as much time as they want on social media platforms. This outcome does not comport with a core underpinning of Defendants' argument—that excessive social media use harms minors. Similarly, the Act preserves minors' access to the addictive features Defendants express particular concern with on all internet platforms other than social media services."

Beyond Age Verification

- *CCIA v. Paxton*
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Legislation: State Challenges: Transparency Edition

- *X Corp. v. Bonta*
  - "The Content Category Report provisions would require a social media company to convey the company's policy views on intensely debated and politically fraught topics, including hate speech, racism, misinformation, and radicalization, and also convey how the company has applied its policies."
  - "At minimum, the Content Category Report provisions likely fail under strict scrutiny because they are not narrowly tailored. They are more extensive than necessary to serve the State's purported goal of 'requiring social media companies to be transparent about their content-moderation policies and practices so that consumers can make informed decisions about where they consume and disseminate news and information.' Consumers would still be meaningfully informed if, for example, a company disclosed whether it was moderating certain categories of speech without having to define those categories in a public report."

Legislation: Coming Up Next

(c) APP STORE OBLIGATIONS.—

(1) IN GENERAL.—Each covered app store provider shall do the following:

(A) AGE VERIFICATION.—Determine the age category for each individual in the United States that uses the app store of such provider and verify such individual's age using commercially reasonable methods.

(B) PARENTAL OVERSIGHT OF APP STORE USAGE.—Obtain verifiable parental consent prior to allowing a minor to use the app store of such provider, including by providing a mechanism for a parent to block a minor from downloading any app that is not suitable for the age category of the minor.

(C) PARENTAL OVERSIGHT OF APP DOWNLOADS.—Obtain verifiable parental consent, on a download-by-download basis, prior to allowing a minor to download an app from the app store of such provider, including by providing an easily accessible mechanism for a parent to consent to the download of an app.

App Store Age Verification

- "This will *reduce* privacy and security concerns, because app stores already have this information"
  - **WRONG:** App stores have whatever unverified information users give them when signing up for an account
- "This will *reduce* anonymity concerns, because the information isn't linkable to the user"
  - **WRONG:** If the information exists, it is linkable. Adding a step in between does little.
- "This is just about regulating the ability of minors to contract, and doesn't impact the expressive platforms themselves, so the First Amendment is not an issue"
  - **WRONG**
    - *NetChoice v. Yost*
      - "This Court is unaware of a 'contract exception' to the First Amendment. Indeed, neither party references any such authority. Like many of NetChoice's member organizations, a publisher stands to profit from engagement with consumers. That an entity seeks financial benefit from its speech does not vitiate its First Amendment rights."
      - "This Court does not think that a law prohibiting minors from contracting to access a plethora of protected speech can be reduced to a regulation of commercial conduct. In sum, as NetChoice puts it, the Act 'is an access law masquerading as a contract law.'"

App Store Age Verification

- “This is just like brick-and-mortar sales of restricted products: the onus should be on the store to check ID
  - **WRONG:** At best, this is like a grocery store carding everyone who enters because *some* products are age restricted
- “This approach is content-neutral because it applies generally to the app stores and will therefore only be subject to intermediate scrutiny”
  - **MAYBE? But that creates its own tailoring issues:**
    - Overinclusiveness: App store age verification would cover even the most innocuous apps
    - Underinclusiveness: App store age verification entirely fails to serve the government’s interest because it doesn’t reach mobile site versions accessed through web browsers.

Up Next: AI

- **S. 2770: Protect Elections from Deceptive AI Act**
  - Does not only apply to the creators of political deepfakes; it also constrains online platforms where they are posted
  - Provides for injunctive relief barring the distribution of deepfakes, in addition to damages
    - When seeking *damages*, the prevailing party is entitled to attorneys' fees. But *not* in cases seeking injunctive relief.
      - The impossibility of accurate AI detection opens the door to SLAPPS targeting any media that a candidate simply does not like, allowing a motivated candidate to chill political expression through scattershot lawsuits.
- **NO FAKES Act:** Creates a notice-and-takedown regime for "unauthorized digital replicas"
  - Ineffective savings clause: "Doesn't apply to speech protected by the First Amendment"
  - Once content is removed pursuant to a notice, the *only* way it can be restored is if the creator/poster files a suit alleging it is not an "unauthorized digital replica."
    - There is *no* provision for restoring access to content on the basis that it is protected by the First Amendment!

Liability Update: Algorithms

- **Anderson v. TikTok**
  - Arose out of the "blackout challenge," brought by the administrator of a dead child's estate
  - Third Circuit:
    - "Given the Supreme Court's observations that platforms engage in protected first-party speech under the First Amendment when they curate compilations of others' content via their expressive algorithms, it follows that doing so amounts to first-party speech under § 230, too."
      - **Does it *really*?**
        - Inverse of the 5th Circuit's mistake in *NetChoice v. Paxton*: assuming that the First Amendment and Section 230 have no overlap, and that one can modify the other.
        - How could courts distinguish between content provided on the "For You Page" and content that appears in a newsfeed, even chronologically
          - The Supreme Court could not come up with (or drag out of counsel) a workable distinction in *Gonzalez/Taamneh*

Liability Update: Products Liability

- **Trial courts are splitting on whether products liability claims survive Section 230**
  - *A.M. v. Omegle*: Products liability claims survived because the complaint did not allege that Omegle should have altered, removed, or withdrawn any content, but rather that it should have designed its product differently, for example by not matching minors with adults.
  - *Neville v. Snap*: Products liability claims survived because there was not enough information to tell whether Snapchat is a "product" for which strict products liability does or should apply.
  - *V.V. v. Meta*: Recommendation technologies and algorithms are squarely within Section 230's protection and plaintiffs cannot plead around it by bringing products liability claims
    - Distinguished *Lemmon v. Snap*: "The plaintiffs there did not attempt to hold the defendant liable for publication of third-party content. Rather, the case rested solely on an alleged defect in the Snapchat application that did not involve statements made by third parties when using Snapchat."
  - *Bride v. YOLO*: "The negligent design claim faults YOLO for creating an [anonymity-based] app with an 'unreasonable risk of harm.' What is that harm but the harassing and bullying posts of others?"
    - Distinguished *Lemmon:* "The parents sought to hold Snap liable for creating . . . An incentive structure that enticed users to drive at unsafe speeds. . . . We refuse to endorse a theory that would classify anonymity as a per se inherently unreasonable risk to sustain a products liability theory."

Liability Update: Algorithms

- **Anderson v. TikTok**
  - One of the primary claims was for strict products liability!
  - *If algorithms and recommendations are first party speech, how could the claim survive anyway?*
    - *Rodgers v. Christie (3d Cir. 2020)*
      - June Rodgers's son was tragically murdered, allegedly by a man who days before had been granted pretrial release by a New Jersey state court. She brought products liability claims against the foundation responsible for the Public Safety Assessment (PSA), a multifactor risk estimation model that forms part of the state's pretrial release system.
      - "As Rodgers' complaint recognizes, it is an 'algorithm' or 'formula' using various factors to estimate a defendant's risk of absconding or endangering the community."
      - "As the District Court recognized, information, guidance, ideas, and recommendations are not 'product[s]' under the Third Restatement, both as a definitional matter and because extending strict liability to the distribution of ideas would raise serious First Amendment concerns."

Liability Update: Addiction

- **State actors are increasingly filing lawsuits against social media platforms alleging they are "addicting" kids**
  - Typically brought via unfair/deceptive trade practices, misrepresentation, and even nuisance claims
  - Can liability for addicting people to speech products possibly comport with the First Amendment?
    - Posner in *Kendrick*: "All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive."
    - Can the concept of "addictive speech products" actually be separated from the content itself?
      - What would the harm be without consideration of content?