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Courts Should Affirm First Amendment Rights of Youths in the Digital Age

The Case for a 21st–Century *Tinker*

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In 1965, five students were suspended from school for a silent and nondisruptive protest of the Vietnam War. The legal challenge to this action was decided nearly 55 years ago in *Tinker v. Des Moines Independent Community School District*, with the Supreme Court finding that the students' First Amendment rights had been violated. As the Court famously observed, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1] But today, laws passed in the name of keeping young people safe raise a similar, but different, question: Do minors shed their constitutional rights to freedom of speech or expression at the user login page?

The ways that children and teenagers communicate on any number of topics has changed dramatically in the decades since *Tinker*, and today's young people have often used their voices in ways that could have only been dreamed of by previous generations. The internet, and particularly the online communities formed on platforms, including social media, have been powerful tools for giving many communities previously silenced—including children and teens—ways to be heard and to connect with one another. Now, however, policymakers in state and federal legislatures are considering policy proposals that would eliminate or severely restrict young people's opportunities for online speech in the name of their safety. While many of these laws would impact all internet users' speech and privacy, the courts have largely focused on the impact on adult users, rather than on the young people who are targeted.

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This brief explores the ways that young people have used the internet as a forum for speech and the impact that has had on their expression, as well as the concerns about negative consequences. Legislation designed to keep young people safe may create significant limitations on their rights to free expression and the opportunities such speech can provide. To understand this better, we can first examine existing case law regarding restrictions on young people's speech and access to information in the school setting, and what distinctions there are between a school's ability to act in loco parentis and the state's general laws in the interest of protecting young people. In today's context, this might yield a legal case for a young person whose First Amendment rights are violated by youth online safety laws, and such rights should be considered in addition to the concerns about the impact of such laws on adult users.

WHAT ARE KIDS DOING ONLINE?

In 2022, 95 percent of American teens indicated they have access to a smartphone.[2] Connectivity continues to increase throughout the United States, as well as around the world, but even in the year 2000, 73 percent of teens already reported being online.[3] It is important to understand both the history of online safety concerns as well as what teenagers are actually doing on the internet.

History of Online Safety, Including Early Trends in Online Use

Fears around children's and teenagers' online safety are basically as old as the internet itself. This is not particularly surprising, as new technologies that are quickly adopted by young people often create new fears for parents and adults.[4] Before fears of the internet, any number of technologies and media—from video games and comic books to radio and novels—gave rise to concerns about their impact on the next generation. Over the years, as the internet has evolved, so too have the concerns about the risks that young people may experience online.

Early internet safety concerns were largely related to the amount of pornography and the potential for adult predators to contact children and teenagers. Early internet safety proposals, including the Communications Decency Act, as well as other early attempts to restrict access to adult materials online, such as the Child Online Protection Act (COPA), were largely focused on responding to such concerns. These laws were largely struck down by courts because of their impact on adult users, but some regulations that were more narrowly targeted, such as the installation of filters on public library and school computers, would be upheld.

These concerns still exist, but the majority of current online safety proposals are not based on the chance that a bad actor could use technology to directly or physically harm a child, but rather stem from a belief that the use of the internet or specific internet services, such as social media, are inherently harmful to young and developing minds. Such proposals fail to consider harms that could also result from *limiting* younger users' access to platforms for communication, particularly those in vulnerable situations. Unlike the online safety debates of a few decades ago, today's online safety proposals make presumptions about minors' use of the technology and their experiences with certain content as opposed to concerns about their physical safety.

Understanding How Young People Benefit from Exercising Speech Online

Young people benefit tremendously from online experiences, including socially, politically, and economically. Thus, any proposals must also consider the harms to young people by limiting their access to online media. While much of the conversation about young people online has focused on negatives, for certain communities there have been critical positives of being online. Just as with adult internet users, there is a wide range of experiences. The potential to remove an experience that provides a critical social, political, and economic outlet for young people must be carefully considered. Teen social media prohibitions will inhibit their ability to speak to friends, family, and strangers, regardless of outcome or effects. These prohibitions take away the ability of young people to engage in potential discourse more broadly and would mean that they would once again find their opportunities for speech limited—not by their parents or invested adults—but by the government. This would be particularly harmful in certain communities.

In some cases, the internet may be a lifeline for members of marginalized communities who feel isolated offline. Most notably, many LGBTQ+ youth have found communities online that allow them to feel acceptance when they might otherwise feel isolated.[5] In other cases, the body positive community can provide an alternative image to traditional beauty standards. Various support groups can help young people with disabilities or other medical issues, and their parents, to find people with similar struggles so that they can better understand their own experiences.

Beyond finding ways to connect with peers, young people have utilized their opportunities for online speech in various productive ways. Many have been able to express themselves via creative outlets through user-generated content creation, including art, film, and writing. For some, this is merely a hobby or passion, but other young creators have been able to create significant income streams from such work.[6] Young entrepreneurs may face fewer barriers to launching their products since they no longer need as much capital and do not have the restrictions that opening a brick-and-mortar store would entail and thus they can more easily promote their entrepreneurial ventures to friends, family, and others. In many cases these opportunities are enabled by platforms that host user-generated content. For example, LeiLei Secor was featured in *Entrepreneur* for paying her college tuition with the profits from her jewelry store on the Etsy platform.[7] Similarly, many young artists, including global superstars such as Justin Bieber and Ariana Grande, were initially discovered through posts of their performances on social media as teenagers.[8]

Additionally, teenagers have engaged in political organizing on topics of importance to them or their generation that might otherwise have been overlooked in person. One of the most notable examples is the way teenagers organized against gun violence in the "March for Our Lives" movement following the Marjory Stoneman Douglas High School shooting in Parkland, Florida, in 2018. The use of social media hashtags and direct engagement with survivors provided a unique voice and organizational opportunity for young people beyond the school that was directly impacted, and social media also provided a forum with a greater reach than young people would traditionally have had.[9]

While we often focus on the negatives of young people's social media use, it should not be ignored that there are significant positive and productive uses of social media as well. These forms of expression should be protected and not merely brushed aside in an overabundance of caution.

Just like their adult counterparts, there are a range of social media experiences for young people that can also be negative. Teenagers may encounter problematic content, such as that which glorifies eating disorders, self-harm, and violence. Other concerns about online behavior, such as bullying, echo concerns about the same behavior offline and have far deeper origins or solutions than the internet itself.

Unfortunately, most of the media portrayals and commentary around the use of the internet by young people emphasizes the risks rather than focusing on the potential benefits, such as entrepreneurship and positive examples of the empowering elements of these platforms for young people's speech. Additionally, most of the focus on online speech—even in the context of youth online safety laws—has focused on the impact these laws would have on adult users and not on young people.

PRECEDENTS ON YOUTH SPEECH AND ONLINE FILTERING REQUIREMENTS

The ability of state governments to regulate young people's speech on social media has not been directly addressed by the courts. However, the Court has established precedents that consider both potential government interventions as well as the context of young people's First Amendment rights in other scenarios. Notably, the Court has not clearly dictated what—if any—distinctions exist between young people's speech and the speech of those over age 18 from government intervention, nor would it likely weigh in on the restrictions an individual family or private actor might choose to place on their own speech or that of the children in their care.

Precedents Regarding the First Amendment Speech Rights of Young People

Two leading cases regarding the First Amendment speech rights of young people can be found in the context of school discipline of young people for exercising their First Amendment rights.

Perhaps most famously, in *Tinker v. Des Moines Independent Community School District*, a group of students were suspended for wearing black armbands to protest the Vietnam War, which was in violation of a recently introduced school district policy. The Supreme Court ruled in favor of the students in their challenge that the public school had violated their constitutional rights. As the Court noted, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[10] This decision built on the previously established precedent in *West Virginia State Board of Education v. Barnette* that confirmed students did retain at least some constitutional protections in public schools.[11] The Court did establish that the First Amendment rights of students and teachers in schools were not absolute, but that officials wishing to engage in censorship of constitutionally protected speech must be able to show that such speech would cause substantial disruption.[12]

More recently, the Supreme Court dealt with questions regarding the First Amendment rights of high school students in *Mahanoy Area School District v. B.L.* In this case, a teenager was suspended from the cheerleading squad after expressing frustration that included profane language and gestures in a Snapchat post about their perception that the selection process for the varsity squad was unfair.[13] This case raised questions about the potential distinctions between off-campus and on-campus speech and what ability a school had, if any, to regulate off-campus speech that might cause substantial disruption on campus.[14] The decision did not rule out that a school might never have an interest in the regulation of off-campus speech, but it did establish that nearly any activity outside of a school facility should be considered an off-campus activity. Moreover, the Court found that, in general, the responsibility regarding a minor's speech in such off-campus scenarios falls on a minor's parents, and that schools have a responsibility for protecting unpopular ideas even when they occur off-campus.[15] While *Mahanoy* specifically dealt with this in the context of a social media post, such reasoning is also relevant to prior cases involving students' rights, particularly those in the context of religious activities.

While these cases deal with the context of schools, they do establish that those under age 18 do have constitutional rights under the First Amendment that can be violated. These cases do not fully establish the contours of these rights, but they do affirm, through their decisions, that speech rights are not just for those who have reached the age of majority. Additionally, *Mahanoy* established parents, not the school or the government, as being responsible for decisions around children's behavior when it comes to off-campus speech.

Precedents Regarding the First Amendment and Government-Mandated Parental Controls

The current debate around youth online safety is not new. In fact, similar policies to regulate the internet in the name of safety were tried and challenged in court just over two decades ago. Similarly, states such as California tried to restrict young people's access to certain video games based on concerns of youth safety and mental health. In striking down these restrictions, the courts have focused on the impact on adults' speech rights, but also recognized the value of these new forms of communication and entertainment for constitutionally protected speech.

While many remember the 1997 case *Reno v. ACLU* as the case that upheld Section 230 of the Communications Decency Act of 1996, it is also important to examine the Court's rationale for striking down the numerous restrictions within the act. In its decision, the Court stated that the regulations of the internet contained in the Communications Decency Act lack "the precision that the First Amendment requires when a statute regulates the content of speech" and noted that, while there may be "governmental interest in protecting children from harmful materials," such laws could not be so broad as to impact the speech rights of adults.[16]

Following the Court's decision, Congress tried to pass a revised version of the internet restrictions in the name of protecting children and teens in the Child Online Protection Act. This law was designed to be more tailored in its definition of content that was harmful to minors but it remained much broader than the definition of obscenity, which lacks constitutional protection, and it continued to contain broad definitions such as "community standards" in its terms of what it applied to. Lower courts granted injunctions

against the law again on the grounds that it would hinder constitutionally permissible speech between adults. The Supreme Court upheld these injunctions in the 2004 case *Ashcroft v. ACLU*, finding that Congress's own commission had found available filtering to be a less restrictive option to achieve the goals of protecting children online than the speech implications of COPA.[17] The case was then remanded to the lower courts, which ultimately found the law unconstitutional under the First and Fifth Amendments.

In addition to the internet, governments have also attempted to regulate other media in the name of protecting young people from harmful content that would otherwise account to constitutionally protected speech. In 2005, California passed a law prohibiting the sale of violent video games to minors. This law was passed because of policymakers' concerns that violent video games increased violence among minors and defined "violent video games" using a test modeled after the restrictions on the sale of pornography.[18] The Supreme Court found the law unconstitutional, noting that speech about violence is not obscene and that a number of other works—from *Grimm's Fairytales* to the *Divine Comedy*—could qualify under California's definition of violent speech.[19] In writing for the majority, Justice Scalia wrote that it was not a compelling state interest to balance the speech impact for such restriction with the gap between existing industry standards that provide tools for concerned parents.[20] As with *Ashcroft*, the Court recognized the value in the presence of market response without regulation on speech as a less restrictive means for responding to concerns about the impact of certain speech on youth and the potential of such laws to impact adults' speech rights as well.

In sum, these cases illustrate that while the state may have a legitimate interest in protecting children, it still must meet the hefty burden of proving that such laws restricting speech are the least restrictive means and that they are supported by evidence of a compelling government interest in order to pass constitutional scrutiny. Cases regarding such restrictions in the similar context of earlier internet access and video games show that it is difficult for the state to meet such a burden, given the presence of existing parental controls.

Recently, federal district courts have come to similar decisions, granting preliminary injunctions against both Arkansas's law that restricts young people's social media access as well as the age-appropriate design code passed by California on the premise of protecting children online. In both cases, the courts found that there was significant evidence of First Amendment concerns for adults to grant the preliminary injunction.[21] The California case is currently under appeal to the Ninth Circuit and additional cases have been filed in Utah and Ohio. This indicates that these new laws are facing concerns that mirrors their predecessors in the early 2000s; however, the courts have still not connected such concerns to the rights of the minors impacted by the law as well.

There is one notable scenario where the courts have upheld government requirements regarding online filters. In the 2003 case *U.S. v. American Library Association*, the Supreme Court upheld the Children's Internet Protection Act (CIPA) that conditioned receiving federal funding on the premise that libraries install filtering technology on computers connected to the internet. A plurality of the Court found that because libraries could refuse federal funds, and because the law's provision allowed libraries to disable such filters for adults, that a constitutional violation had not occurred.[22] One key distinction in this law, and the other laws that were struck down, was that the requirements were tied to federal funding, rather than to the public or an industry. But even in such a case, as a concurrence noted, there may still be questions depending on the law's application around access to constitutionally protected speech by adults.[23]

THE MISSING PUZZLE PIECE: CLARIFYING THE FIRST AMENDMENT RIGHTS OF MINORS OUTSIDE THE CLASSROOM

As noted, there are distinct lines of relevant precedents to consider in today's debates over online safety proposals, one concerning the young people's right to free expression and another concerning the impact of online safety mandates on users' speech rights. When faced with online safety laws in the early 2000s, the courts did not connect these two elements. As young people's use of the internet as a tool for expression, entertainment, and entrepreneurship has flourished, the courts should connect these two lines of precedents if they are given the opportunity. While current challenges have been brought by trade associations on behalf of impacted companies, civil society groups should consider

bringing a case on behalf of impacted young people that could provide an opportunity to address this issue more directly.

Existing court precedents, as seen in *Tinker* and *Mahanoy*, clearly recognize that minors do have First Amendment rights and, like adults, even when the government may have additional oversight in some settings such as schools, those rights continue to exist. Clarifying the limitations on government action with regards to these rights would not limit parental authority but, as seen in *Mahanoy*, would further clarify the distinction between parental choice over issues such as access to social media and government mandates. Such distinctions are critical to understanding the impact that such restrictive laws have, not only on innovators' rights, but on the rights of users of all ages.

The exact nature of these rights may vary with a minor's age, but in other scenarios, courts have been able to make such distinctions in ways that recognize both parental rights and a minor's own autonomy while also recognizing the need to restrain the government from violating the young person's underlying rights. For example, courts have established that young people can be competent enough to make their own medical decisions in some scenarios under the "mature minor" doctrine.[24] The court's recognition of young people's own speech rights need not inherently deny parental restrictions on those rights. As seen in the Court's decision in *Mahanoy*, parents—not the school (or in this case the government more generally)—have an interest in young people's actions involving speech outside of the classroom.

Such clarification would connect young people's online speech rights with those offline speech rights established in earlier contexts.

Current and past online safety laws have currently been enjoined under the First Amendment due to their impact on platforms or on adults' speech rights. However, many minors have used their social media accounts not only for connection and consumption of content, but also in ways that create both unique artistic endeavors and entrepreneurial opportunities.

A teenage activist, an influencer, or any other young entrepreneur who wants to continue their online presence with their largely peer-group audience would be implicated by these laws; their situations would provide a unique opportunity to consider the impact of online safety laws on various rights. These young people would lose access to a venue for their speech, not because of private decisions or misbehavior, but because of a government restriction. Notably, this is distinct from any business decisions that might be involved with the ability to enter into contracts or other transactions, as it impacts the young person's ability to choose how to use a platform that would have otherwise been available to them, barring a government restriction on speech. Furthermore, the decision to remove or restrict a young entrepreneurial user's speech comes not from a private actor, such as a platform or shopping center, but in the form of a government restriction on such speech.

CONCLUSION

Almost 60 years ago, the Supreme Court recognized that young people's speech rights could not be abandoned in the schoolroom. Today, many young people are exercising their voices—not only on campuses, but also in online spaces. As the courts consider the regulations that target online speech in the name of protecting children, they should consider more clearly establishing the unconstitutionality of such laws for violating the speech rights of adults, as well as those of young users. While the state may have a legitimate interest in protecting children, it still must meet the hefty burden of proving that such laws are the least restrictive means and are supported as necessary to relieve a burden. When it comes to social media restrictions, policymakers so far have failed to meet these requirements, as prior court cases have illustrated the wide availability of less restrictive means and parental choice around keeping children safe online. Policymakers should focus on ways to provide information about the availability of various tools to respond to the concerns that families and young people may face, rather than placing restrictions that limit the free speech rights of young people and adult users. Policymakers should carefully consider not only what they are trying to protect young people from, but also the many benefits and opportunities those same young people might lose.

NOTES

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11. *Tinker v. Des Moines Independent Community School District*, 393 US 503, 507 (1969).

12. *Tinker v. Des Moines Independent Community School District*, 393 US 503, 514 (1969).

13. *Mahanoy Area School District v. B. L.*, 594 US ___, (2021).

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16. *Reno v. ACLU*, 521 US 844 (1997).

17. *Ashcroft v. ACLU*, 542 US 656 (2004).

18. *Brown et al. v. Entertainment Merchants Association et al.*, 564 US 786 (2011).

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22. *United States v. American Library Association, Inc.*, 539 US 194 (2003).

23. *United States v. American Library Association, Inc.*, 539 US 194, 216–217 (2003).

24. *Grannum v. Berard*, 422 P.2d 812 (Wash. 1967).

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