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NOTE

Think of the Children! Unmasking the Rhetoric Behind Internet Censorship in the Digital Age

*Annaleigh Hobbs**

I. INTRODUCTION

The Internet is becoming increasingly interwoven into the fabric of daily life.¹ Now more than ever, Americans are concerned about internet privacy and how personal data is being used, stored, and collected.² Additionally, with information readily available at the click of a mouse or tap on a screen, there is rising concern about the impact of the Internet on both children and teenagers.³ Children's internet use doubled during the COVID-19 pandemic, and a census on media use by teens and tweens in 2021 reported that one in four teenagers use social media "almost constantly."⁴

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¹ Virginia A. M. Talley, *Major Flaws in Minor Laws: Improving Data Privacy Rights and Protections for Children Under the GDPR*, 30 *IND. INT'L. & COMP. L. REV.* 127, 128 (2019).

² *Id.*

³ *Id.*; Bernard Marr, *How Much Data Do We Create Every Day? The Mind-Blowing Stats Everyone Should Read*, *FORBES* (May 21, 2018, 12:42 AM), <https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/?sh=220b4eb360ba> [<https://perma.cc/NT25-LZSA>].

⁴ Matt Richtel, *Children's Screen Time Has Soared in the Pandemic, Alarming Parents and Researchers*, *N.Y. TIMES* (Jan. 17, 2021), https://www.nytimes.com/2021/01/16/health/covid-kids-tech-use.html?login=smartlock&auth=login-smartlock%3B+https%3A%2F%2Fwww.commonssensemedia.org%2Fsites%2Fdefault%2Ffiles%2Fresearch%2FrepFre%2F8-18-census-integrated-report-final-web_0.pdf [<https://perma.cc/3S4S-KPK7>].

Psychologists consider the increase in internet usage a contributing factor to a mental health crisis occurring among American youth.⁵ The American Academy of Pediatrics and the Centers for Disease Control (“CDC”) recently issued reports containing alarming statistics for children’s and teens’ mental health.⁶ According to a CDC analysis of the Youth Risk Behavior Survey, which surveyed health-related behaviors and experiences of high school students in the United States, one in three teenage girls have considered taking their own lives.⁷ Even more alarming, the same report showed that 52% of LGBTQ+ students experience poor mental health, with one in five attempting to commit suicide.⁸ As more and more studies emerge, it is becoming increasingly apparent that there is a connection between children’s mental health and their exposure to the Internet.⁹

In the past year, there has been a rising trend in both federal and state legislation regarding children’s internet usage and data protection.¹⁰ While this legislative trend confronts a significant issue, especially considering that federal internet protection policies for children in the United States have remained primarily unchanged since the early 2000s, one is left wondering: Why now?¹¹ The sudden focus on this issue raises an even more important question: Is the safeguarding of children being manipulated into a pawn to further political agendas and gain increased control over American citizens, their data, and their privacy?

This Note delves into the legislative development surrounding internet protection and data privacy laws for children. It seeks to explain the motivations, implications, and delicate relationship between child protection and online privacy in the ever-evolving digital world. Part II explains the relevant federal laws and state regulations concerning data privacy for both adults and minors. Part III explores state laws and proposed legislation concerning children’s internet usage, privacy, and protection. Part IV discusses the subjectiveness of harmful content for children and the data privacy concerns of age verification laws. Finally, Part V addresses how the

⁵ Zara Abrams, *Kids’ Mental Health is in Crisis. Here’s What Psychologists Are Doing to Help*, APA (Jan. 1, 2023), <https://www.apa.org/monitor/2023/01/trends-improving-youth-mental-health> [<https://perma.cc/SQK9-79BU>].

⁶ *U.S. Teen Girls Experiencing Increased Sadness and Violence*, CDC (Feb. 13, 2023), <https://www.cdc.gov/media/releases/2023/p0213-yrbs.html> [<https://perma.cc/F76M-VV7E>].

⁷ *Id.*

⁸ *Id.*

⁹ Elena Bozzola et al., *The Use of Social Media in Children and Adolescents: Scoping Review on the Potential Risks*, 9960 INT’L. J. ENV’T. RSCH. & PUB. HEALTH 1, 7 (Aug. 12, 2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9407706/pdf/ijer-ph-19-09960.pdf> [<https://perma.cc/E8ML-BQCA>].

¹⁰ Sabine Neschke, *Children’s Federal Online Safety and Privacy: A Tentative Path for Congress*, BIPARTISAN POL’Y CTR. (Aug. 9, 2023), <https://bipartisanpolicy.org/blog/childrens-federal-online-safety-privacy-tentative-path-for-Congress/> [<https://perma.cc/3PFA-A9KS>].

¹¹ Talley, *supra* note 1, at 144.

trend of legislation concerning children's privacy rights and online protections may cause significant harm rather than good.

II. LEGAL BACKGROUND

This Part is an overview of the legal framework surrounding data privacy, primarily within the context of the Fourth Amendment. It examines the legal background of federal laws and state regulations pertaining to data privacy and internet safety for minors.

A. Federal Laws

Neither privacy nor data protection is explicitly referenced or discussed in the United States Constitution.¹² However, courts have determined that the First, Fourth, Fifth, and Fourteenth Amendments provide the basis for privacy rights in the United States.¹³ Moreover, data privacy rights are not solely derived from any one authority. For example, some are found in the Fourth Amendment, while others are established by statute or regulation.¹⁴

Various federal agencies are responsible for managing and upholding data privacy laws within the United States.¹⁵ But due to the extensive influence of federal laws on privacy rights, there lacks a specific federal agency solely responsible for enforcing data protection.¹⁶ Because no one federal agency has been granted such enforcement powers, the Federal Trade Commission ("FTC") has become the *de facto* regulator for data privacy at the federal level.¹⁷ The FTC's authority to oversee privacy and cybersecurity stems from the language of Section 5 of the FTC Act, which authorizes the

¹² Jordan L. Fischer, *Journey to A Federal Privacy Law*, 43 L.A. LAW. 14, 14 (2020).

¹³ *Id.* The United States Supreme Court has upheld the right to privacy in a multitude of cases. See *Griswold v. Connecticut*, 381 U.S. 479, (1965) (discussing that the First, Fourth, Fifth, and Fourteenth Amendments imply a right to privacy); *Katz v. United States*, 389 U.S. 347 (1967) (discussing that parts of the Constitution protect a person's privacy); *United States v. Jones*, 565 U.S. 400 (2012) (discussing the reasonable expectation of privacy test for Fourth Amendment violations).

¹⁴ *Jones*, 565 U.S. at 506; Alec Wheatley, *Do-It-Yourself Privacy: The Need for Comprehensive Federal Privacy Legislation with A Private Right of Action*, 45 GOLDEN GATE U. L. REV. 265, 273 (2015). Congress initially attempted to address data privacy concerns in 1974 by statute. *Id.* The Privacy Act related to the use of social security numbers by government agencies. *Id.*

¹⁵ Fischer, *supra* note 12, at 14.

¹⁶ *Id.* at 14–15 ("The main federal agencies that play a role in shaping a federal privacy policy include, but are not limited to, the Federal Trade Commission (FTC), the Department of Health and Human Services, the Office of Civil Rights, the Federal Reserve, the Department of Homeland Security, the Office of Management and Budget, the Department of Education, and the Securities and Exchange Commission.").

¹⁷ Wheatley, *supra* note 14, at 279.

FTC to manage “unfair or deceptive trade practices.”¹⁸ This effectively grants the FTC somewhat limited authority to proactively mandate and enforce privacy standards within the private sector.¹⁹ Alongside serving as an administrative authority over privacy regulation, the FTC has issued numerous studies and guidance on a variety of privacy issues.²⁰ The FTC has also recommended that Congress pass comprehensive federal privacy legislation several times over the past decade, emphasizing the need for a cohesive and modernized legal framework addressing the evolving challenges of data privacy and protection in the digital age.²¹

Before 1998, the United States did not have any federal restrictions or regulations specifically addressing children’s data or online privacy for children.²² The Children’s Online Privacy Protection Act (“COPPA”) was enacted by Congress to “regulate the collection, use, and disclosure of personal data [belonging to] minors under the age of thirteen.”²³ COPPA defines this data as personal information, encompassing data used for identifying and contacting an individual, such as a child’s name, address, online contact details, telephone number, or social security number.²⁴ In 2013, experts expanded the definition of personal data to encompass persistent identifiers, such as device IDs, cookies, IP addresses, and other similar tracking technologies that can be linked to a user across different websites and services over a period of time.²⁵ COPPA applies to individuals under the age of thirteen, reflecting lawmakers’ recognition that this age group may not fully grasp the safety and privacy implications associated with the online collection of their data.²⁶ This lack of understanding renders minors more vulnerable to intrusive or excessively aggressive marketing tactics.²⁷

The FTC has several roles in the enforcement of COPPA. First, the FTC takes a serious interest in educating and offering guidance to both businesses

¹⁸ *See id.* (“A deceptive business practice may consist of a company sharing user information with third-party advertisers despite stating previously that it would never do so without user notification, or a company illicitly collecting personal information from consumers.”); *see also* Federal Trade Commission Act, 15 U.S.C. §§ 41–58, as amended.

¹⁹ Federal Trade Commission Act, 15 U.S.C. §§ 41–58, as amended.

²⁰ Alexander E. Reicher & Yan Fang, *FTC Privacy and Data Security Enforcement and Guidance Under Section 5*, UCL & PRIVACY SEC. ST. B. CAL. 89, 109 (2016).

²¹ *Id.*

²² Talley, *supra* note 1, at 144; Eldar Haber, *The Internet of Children: Protecting Children’s Privacy in A Hyper-Connected World*, 2020 U. ILL. L. REV. 1209, 1224 (2020).

²³ Talley, *supra* note 1, at 144.

²⁴ *Id.* at 145.

²⁵ *Id.*

²⁶ *Id.* at 144.

²⁷ *Id.*

and parents concerning COPPA and overall child internet safety.²⁸ Second, the FTC has the responsibility to monitor, enforce, and regulate COPPA by investigating potential violations.²⁹ When the FTC uncovers a violation, the FTC will file a lawsuit against the violator.³⁰ The amount of civil penalties sought or assessed by a court or the FTC may vary depending on several factors.³¹ These factors include the severity of the violation, the operator's history of violations, the number of children affected by the violation, the type and amount of personal information collected, the utilization of the information, whether the information was shared with third parties, and the size of the entity.³² Despite the FTC's regulatory authority, COPPA contains an FTC approved safe harbor provision for industry groups to self-regulate their enforcement of COPPA's protections.³³

COPPA applies to websites and online services that are directed toward children, ensuring that third-party users do not misuse or track data obtained from internet usage of minors.³⁴ To accomplish this, COPPA imposes strict requirements and regulatory standards on the operators of websites and online services that target children or knowingly collect data from children.³⁵ When evaluating whether a website or service is directed toward children, the FTC "consider[s] the subject matter, visual content, use of animated characters or child-oriented activities and incentives, music or other audio content, age of models, presence of child celebrities or celebrities who appeal to children, language or other characteristics."³⁶ Additionally, the FTC examines the types of advertising displayed on the website, along with empirical evidence regarding the intended audience.³⁷ The FTC also considers a website to be

²⁸ *Kids' Privacy (COPPA)*, FTC, <https://www.ftc.gov/news-events/topics/protecting-consumer-privacy-security/kids-privacy-coppa> [<https://perma.cc/4CM5-ZWS5>] (last visited Nov 15, 2023).

²⁹ Talley, *supra* note 1, at 146.

³⁰ *Complying with COPPA: Frequently Asked Questions*, FTC, <https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-asked-questions> [<https://perma.cc/XA9U-SNGV>] (last visited June 9, 2024).

³¹ *Id.* ("A court can hold operators who violate the Rule liable for civil penalties of up to \$51,744 per violation.").

³² *Id.*

³³ Talley, *supra* note 1, at 146; Lora A. Lucero, Annotation, *Children's Online Privacy Protection Act*, 15 U.S.C. §§ 6501–6506, 81 A.L.R. Fed. 3d Art. 3, § 12 (2023).

³⁴ Lucero, *supra* note 33; *Kids' Privacy (COPPA)*, *supra* note 28; 178 AM. JUR. *Trials* 1, § 3 (2023); *see* 16 C.F.R. § 312.2 (2013).

³⁵ Talley, *supra* note 1, at 146 ("Typically, sites that must be COPPA compliant fall under one of the following categories: (1) sites directed toward children, (2) sites directed toward general audiences where the operators have actual knowledge that the site collects data from children, or (3) where the operators have actual knowledge that the site collects information directly from users of another site or service that is directed toward children.").

³⁶ 178 AM. JUR. *Trials* 1, § 3 (internal quotations omitted).

³⁷ *Id.*

directed toward children when the content provider or the online service representative has actual knowledge that the website is collecting data from children.³⁸ For websites deemed directed toward children (except those that intentionally target them) the FTC will exempt the website from regulation as long as the website (1) does not gather personal information before knowing the age of a visitor; and (2) contains a requirement for users to obtain verifiable parental consent before the website collects, uses, or discloses a minor's personal information.³⁹ COPPA is a significant milestone in online privacy protection, as it was the first federal law in the United States to specifically address online privacy rights and protections extended to children under the age of thirteen.⁴⁰ Though COPPA made great strides in the data privacy arena, individuals over the age of thirteen have remained largely unprotected at the federal level.

B. State Regulations

Due to the absence of overarching and consistent federal guidance on data privacy for individuals over the age of thirteen, states have taken the initiative to establish their own consumer privacy laws.⁴¹ Some states explicitly recognize a right to privacy in their state constitutions, which provides a strong foundation for privacy protection.⁴² Further, data breach notification laws have been enacted in all fifty states to handle circumstances where personally identifiable information is compromised.⁴³ These laws tend to be reactive in nature, focusing on penalizing companies after a breach has already taken place and failing to encourage proactive privacy measures.⁴⁴

³⁸ *Id.* (“The FTC has indicated that the actual knowledge standard is likely met when ‘(1) a child-directed content provider (who will be strictly liable for any collection) directly communicates the child-directed nature of its content to the other online service; or (2) a representative of the online service recognizes the child-directed nature of the content.’”); *see also* Children’s Online Privacy Protection Rule, 78 Fed. Reg. 3972-01, 3972 (Jan. 17, 2013) (to be codified at 16 C.F.R. pt. 312).

³⁹ Talley, *supra* note 1, at 146; 178 AM. JUR. *Trials* 1, § 3 (2023); *see also* Children’s Online Privacy Protection Rule, 78 Fed. Reg. 3972-01, 4010 (Jan. 17, 2013) (to be codified at 16 C.F.R. pt. 312); 16 C.F.R. § 312.2.

⁴⁰ Talley, *supra* note 1, at 146.

⁴¹ Fischer, *supra* note 12, at 15.

⁴² *Id.* at 15 n.14 (“As of 2018, 11 states explicitly provide a right to privacy within their constitutions.”).

⁴³ *Id.* at 15.

⁴⁴ *Id.*; *see also* Lior Jacob Strahilevitz, *Toward A Positive Theory of Privacy Law*, 126 HARV. L. REV. 2010, 2011–12 (2013) (“The sectoral U.S. approach, which lacks an effective catch-all provision, renders American law both reactive and slow to react. As a result, by the time U.S. regulators seek to challenge an envelope-pushing practice, interest groups supporting the practice have developed, social norms have adjusted to the practice, and a great deal of the sensitive information at issue has already been disclosed by consumers.”).

One of the best examples of state efforts to protect data privacy is the California Consumer Privacy Act of 2018 (“CCPA”).⁴⁵ The CCPA enhances transparency and communication for all Californians regarding the collection and processing of their personal information.⁴⁶ It also serves a distinct role in the United States’ data protection landscape by enabling consumers to opt out of the “sale” of their personal information.⁴⁷ In 2020, an amendment to the CCPA gave consumers further control of their personal information by giving individuals the “right to limit the use and disclosure of sensitive personal information collected about them.”⁴⁸ In response to the CCPA’s adoption, states have begun either adopting legislation closely mirroring the CCPA or crafting their own strategies to empower their residents with greater control and understanding of how companies handle their personal data.⁴⁹ However, states often struggle with limited experience and resources to create effective state regulations for data privacy, raising questions about the potential impact of state-specific privacy protections on a national scale.⁵⁰ As states continue to navigate the complexities of creating and implementing privacy laws, the challenge lies in finding an approach that seamlessly integrates with federal policies that have already been established.

III. RECENT DEVELOPMENTS

A. Proposed Amendments to COPPA

Recently reintroduced legislation seeks to revise and modernize the existing Children’s Online Privacy Protection Act (“COPPA 2.0”).⁵¹ Originally introduced in 2021 by Senators Edward Markey (D-MA) and Bill Cassidy (R-LA), COPPA 2.0 attempts to update the data privacy rules of the 1998 Act.⁵² COPPA 2.0 aspires to modernize COPPA in response to the national decline in children’s and adolescents’ mental health.⁵³

⁴⁵ Fischer, *supra* note 12, at 15; CAL. CIV. CODE. §§ 1798.100–1798.199.100 (2023).

⁴⁶ Fischer, *supra* note 12, at 15.

⁴⁷ *Id.*

⁴⁸ *California Consumer Privacy Act (CCPA)*, CAL. OFFICE ATT’Y GEN (March 13, 2024), <https://oag.ca.gov/privacy/ccpa> [<https://perma.cc/328T-BJWG>].

⁴⁹ Fischer, *supra* note 12, at 15.

⁵⁰ *Id.*

⁵¹ See S. 1418, 118th Cong. (2023).

⁵² *Senators Markey and Cassidy Reintroduce COPPA 2.0, Bipartisan Legislation to Protect Online Privacy of Children and Teens*, ED MARKEY U.S. SEN. FOR MASS. (May 3, 2023), <https://www.markey.senate.gov/news/press-releases/senators-markey-and-cassidy-reintroduce-coppa-20-bipartisan-legislation-to-protect-online-privacy-of-children-and-teens> [<https://perma.cc/6XBY-3CQ5>]; Neschke, *supra* note 10.

⁵³ *Senators Markey and Cassidy Reintroduce COPPA 2.0*, *supra* note 52.

COPPA 2.0 introduces several significant changes to the 1998 COPPA—each aimed to broaden the Act’s protection.⁵⁴ First, COPPA 2.0 prohibits internet companies from collecting information on users who are under the age of sixteen without the user’s explicit consent.⁵⁵ This marks a shift from the original version of COPPA, expanding protections to include a larger number of minors by increasing the age from thirteen to sixteen.⁵⁶ Second, COPPA 2.0 includes provisions to ban targeted advertising toward children and teenagers on the Internet.⁵⁷ This prohibition is designed to address the concerns raised by various groups and organizations regarding the impact of online advertising on the mental health and well-being of young individuals.⁵⁸ As of this Note’s publication, COPPA 2.0 passed in the Senate and is currently stalled in the House of Representatives.⁵⁹

B. *The Kids Online Safety Act*

Introduced by Senators Richard Blumenthal (D-CT) and Marsha Blackburn (R-TN) in February 2022, the Kids Online Safety Act (“KOSA”) is a bipartisan bill that would require all websites, apps, and online platforms to filter and block harmful content in order to protect individuals under the age of seventeen.⁶⁰ These harms include “content [showing or promoting] suicide, eating disorders, substance misuse, sexual exploitation, and age-restricted items like gambling and alcohol.”⁶¹ KOSA designates state attorneys general as the enforcers of the bill.⁶² The attorneys general would be the ultimate decision-makers of what constitutes appropriate online content

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*; Neschke, *supra* note 10.

⁵⁹ Press Release, Senate Overwhelmingly Passes Children’s Online Privacy Legislation (July 30, 2024) [hereinafter Committee on Commerce, Science, & Transportation Press Release], [https://www.commerce.senate.gov/2024/7/senate-overwhelmingly-passes-children-s-online-privacy-legislation#:~:text=Today%2C%20the%20U.S.%20Senate%20overwhelmingly,protect%20children%20and%20teens%20online](https://www.commerce.senate.gov/2024/7/senate-overwhelmingly-passes-children-s-online-privacy-legislation#:~:text=Today%2C%20the%20U.S.%20Senate%20overwhelmingly,protect%20children%20and%20teens%20online.). [<https://perma.cc/4HVX-GK5T>]; Julia Shapero, *Parents Push For Kids’ Online Safety Bill Markup, Vote After It Stalls In The House*, THE HILL (Sept. 12, 2024, 3:59 PM), <https://thehill.com/policy/technology/4876979-kids-online-safety-act-house/> [<https://perma.cc/3XM5-R6RH>].

⁶⁰ See S. 1409, 118th Cong. (2023); Lindsey Tonsager & Madeline Salinas, *U.S. Congress Introduces Kids Online Safety Act*, Covington (Feb. 23, 2022), <https://www.insideprivacy.com/childrens-privacy/u-s-congress-introduces-kids-online-safety-act/> [<https://perma.cc/GA45-YZJ7>].

⁶¹ *Kids Online Safety Act (KOSA)*, PROJECT LIBERTY ACTION NETWORK, <https://projectlibertyaction.com/kosa/> [<https://perma.cc/425R-7SB3>] (last visited June 9, 2023).

⁶² See S. 1409, 118th Cong. (2023).

that is safe for children to be exposed to and they would be authorized to file lawsuits based on content they believe to be harmful.⁶³

There are several ways KOSA could enhance children's online safety.⁶⁴ The bill would hold social media platforms accountable for exposing minors to potentially detrimental and destructive content.⁶⁵ Moreover, KOSA would require platforms to provide minors with options to safeguard their data, disable addictive features, and opt out of algorithm-driven recommendations while prioritizing safety in default settings.⁶⁶ Parents would be given greater control to support their children's online experiences, including a reporting channel dedicated to addressing harm.⁶⁷ Additionally, the bill would place an affirmative "duty on social media platforms to proactively prevent and manage risks to minors," including harmful content.⁶⁸ If and when passed, KOSA would require that platforms undergo annual independent audits to ensure compliance and effectiveness in averting potential harms.⁶⁹ Finally, the enactment of KOSA would allow academic researchers and non-profit organizations access to datasets held by social media platforms, enabling them to conduct research focused on understanding and preventing harm to minors online.⁷⁰

Since its initial proposal and subsequent reintroduction in May 2023, various senators have amended KOSA.⁷¹ Notably, there have been changes pertaining to the duty of care required of platforms by implementing an actual knowledge standard similar to COPPA.⁷² Under the amended version of KOSA, websites, apps, and social media networks would only be "held liable if they actually know there is a [minor] using their service."⁷³ On the other hand, KOSA's initial version exposed any online platform that was used by minors or "reasonably likely to be used" by minors, to liability.⁷⁴ This change would reduce the number of platforms that could face liability while still encouraging overall platform reform.⁷⁵ Other amendments to KOSA include

⁶³ *Id.*

⁶⁴ Richard Blumenthal & Marsha Blackburn, *The Kids Online Safety Act of 2023*, BLUMENTHAL SENATE, https://www.blumenthal.senate.gov/imo/media/doc/kids_online_safety_act_-_one_pager_-_20231.pdf [<https://perma.cc/Q68X-AGGX>] (last visited June 9, 2024).

⁶⁵ *Id.*

⁶⁶ *Kids Online Safety Act (KOSA)*, *supra* note 61.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Neschke, *supra* note 10.

⁷² See S. 1409, 118th Cong. (2023); Neschke, *supra* note 10.

⁷³ Joe Mullin, *Congress Amended KOSA, But It's Still A Censorship Bill*, ELEC. FRONTIER FOUND. (Aug. 10, 2023), <https://www.eff.org/deeplinks/2023/08/Congress-amended-kosa-its-still-censorship-bill> [<https://perma.cc/KLA6-T6Y5>].

⁷⁴ *Id.*

⁷⁵ *Id.*

requirements that companies notify users when their content undergoes filtering through algorithms and provide the user an opt-out choice.⁷⁶ As of this Note's publication, KOSA passed in the Senate and is currently facing a block in the House of Representatives.⁷⁷

C. Age-Gating Internet Bills

Age-gating bills are legislative proposals or laws designed to restrict access to certain content, products, services, or platforms based on the user's age.⁷⁸ These bills are typically aimed at protecting minors from age-inappropriate or harmful content, like explicit material, violent video games, alcohol, drugs, tobacco, and gambling.⁷⁹ Age-gating involves implementing mechanisms such as age verification checks, which requires users to confirm their age before accessing specific online content or services.⁸⁰ The primary goal of such mechanisms is to ensure that age-restricted material is not easily accessible to individuals who do not meet the age required by law.⁸¹

Two common types of age-gating mechanisms found online are soft age verification checks and hard age verification checks.⁸² Soft age verification checks are an extremely popular form of age-gating for businesses.⁸³ This method verifies a user's age by having the user either manually enter their age or affirm that they are above a certain age before granting them access to website's content.⁸⁴ However, soft age verification checks are not bulletproof.⁸⁵ Individuals can easily bypass the age verification system by providing false information about their age.⁸⁶ In contrast, hard age

⁷⁶ Neschke, *supra* note 10. Other amendments of KOSA have exempted VPNs. See S.1409, 118th Cong. (2023).

⁷⁷ Committee on Commerce, Science, & Transportation Press Release, *supra* note 59; Miranda Nazzaro, *Sen. Blackburn Says There's 'Urgent Need' To Pass Kids Online Safety Bill Amid Roadblock In House*, THE HILL (Sept. 16, 2024, 12:41 PM), <https://thehill.com/homenews/senate/4882119-kids-online-safety-act-senator-blackburn/> [<https://perma.cc/QPX7-DFBU>].

⁷⁸ Jay Peters, *New Bill Would Add Mandatory Age Verification to Social Networks*, VERGE (Apr. 26, 2023, 1:56 PM), <https://www.theverge.com/2023/4/26/23699255/senators-bill-age-verification-protecting-kids-on-social-media-act> [<https://perma.cc/J26M-9MRG>].

⁷⁹ Jackie Wheeler, *Age Verification vs. Age Gating: How AI Aids Online Minor Safety*, JUMIO (Feb. 8, 2024), <https://www.jumio.com/age-gating-age-verification/> [<https://perma.cc/K2JN-42B8>].

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*; Marta Morrás, *What is Age Verification and Why is it Essential to Keep Your Business Safe and Compliant*, VERIDAS (May 25, 2023), <https://veridas.com/en/what-is-age-verification/> [<https://perma.cc/52KZ-3R3B>].

⁸⁶ Wheeler, *supra* note 79; Morrás, *supra* note 85.

verification checks involve verifying a user's age for access to age-restricted content, products, or services by authenticating their age through ID verification or cross-referencing third-party data.⁸⁷

1. The Protecting Kids on Social Media Act

The Protecting Kids on Social Media Act (“PKSMA”) places a federal age gate on social media.⁸⁸ This Act, introduced by Senators Chris Murphy (D-CT), Brian Schatz (D-HI), Tom Cotton (R-AR), and Katie Britt (R-AL) in May 2023 is intended to ensure that young users do not develop social media addictions.⁸⁹ PKSMA requires social media platforms to authenticate users' ages, prevent individuals under thirteen years old from joining these platforms, establish distinct data privacy and algorithmic rules for minors ages thirteen and older, and require parental consent for minors over thirteen to make an account on social media platforms.⁹⁰ Any violations will be addressed as breaches of the FTC Act, potentially resulting in severe penalties.⁹¹

Although PKSMA lacks clarity regarding the implementation and enforcement of this policy, it may lead the government to explore the possibility of establishing a voluntary nationwide verification system.⁹² This system, would verify the ages of users online by accessing official records and identification documents.⁹³ Although the legislation does not mandate any particular age verification approach, one provision does stipulate that the Secretary of Commerce is obliged to pilot an age verification program.⁹⁴ Within two years of the Act's enactment, the Secretary of Commerce must establish a pilot initiative that allows individuals to acquire “secure digital identification credential[s]” by either uploading ID copies or verifying their identities against electronic government records.⁹⁵

⁸⁷ Wheeler, *supra* note 79.

⁸⁸ S. 1291, 118th Cong. (2023).

⁸⁹ Murphy, Cotton, Schatz, Britt *Op-Ed in the Washington Post: Why We Need the Protecting Kids on Social Media Act*, CHRIS MURPHY (May 11, 2023), <https://www.murphy.senate.gov/newsroom/press-releases/murphy-cotton-schatz-britt-op-ed-in-the-washington-post-why-we-need-the-protecting-kids-on-social-media-act#:~:text=The%20Protecting%20Kids%20on%20Social%20Media%20Act%20would%20set%20a,under%20the%20age%20of%2018> [https://perma.cc/HH4L-CF6J].

⁹⁰ *Id.*

⁹¹ Peters, *supra* note 78.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

2. State Implemented Age-Gating Restrictions

Many states have already implemented, or are trying to implement, legislation similar to PKSMA.⁹⁶ Such legislation originated in Utah, where the enactment of two laws aimed to hold social media platforms accountable for the harms children are exposed to when using these platforms.⁹⁷ These Utah laws impose a mandatory bedtime policy that prohibits teen access to social media past a certain time and grants parents full authority over their children's online accounts, messages, and passwords.⁹⁸ Other states like Arkansas, Texas, and Louisiana followed Utah's lead by introducing and enacting bills that place age restrictions on social media platforms and require parental or guardian consent for users under the age of eighteen.⁹⁹

The Texas and Arkansas bills designate the state attorneys general as the primary decision-makers for what is considered harmful content, while Utah appoints this task to its Division of Consumer Protection.¹⁰⁰ Louisiana, in contrast, has not specified which office will be responsible for interpreting harms under its age-gating bill.¹⁰¹ The definition of harms also varies significantly among the states' bills.¹⁰² Texas's bill defines harmful material comprehensively, covering explicit content and addressing areas like suicide, self-harm, substance abuse, harassment, and child sexual exploitation.¹⁰³ Utah's bill lacks a specific definition of harm, focusing instead on algorithmically suggested content and addressing addiction as "substantial preoccupation or obsession with the platform."¹⁰⁴ Arkansas's and Louisiana's bills also lack definitions of harm but emphasize restricting minors' access to

⁹⁶ *Tell Congress, Say No to Bad Internet Bills*, BAD INTERNET BILLS, <https://www.badinternetbills.com/#age-gating-bills> [https://perma.cc/WTF9-D89F] (last visited June 9, 2024).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Brian Fung, *Arkansas Governor Signs Sweeping Bill Imposing a Minimum Age Limit For Social Media Usage*, CNN (Apr. 12, 2023, 7:38 PM), <https://www.cnn.com/2023/04/12/tech/arkansas-social-media-age-limit/index.html> [https://perma.cc/VL9U-JMV3]; Daily Report Staff, *State Lawmaker Filing Bill That Restricts Social Media Access For Children*, GREATER BATON ROUGE BUS. REP. (Mar. 30, 2023), <https://www.businessreport.com/politics/state-lawmaker-filing-bill-that-restricts-social-media-access-for-children> [https://perma.cc/AM73-D3XF]; Michael Murney, *Texas Bill Proposes Banning Social Media For All Residents Under 18*, CHRON (Dec. 13, 2022, 9:21 AM), <https://www.chron.com/news/houston-texas/article/texas-social-media-law-17648942.php> [https://perma.cc/72F5-GF9Q].

¹⁰⁰ Kyooeun Jang et al., *The Fragmentation of Online Child Safety Regulations*, BROOKINGS (Aug. 14, 2023), <https://www.brookings.edu/articles/patchwork-protection-of-minors/> [https://perma.cc/6NU3-7TCJ].

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

platforms and holding social media companies accountable for damages.¹⁰⁵ Notably, federal judges have recently placed blocks on the Arkansas and Texas laws due to First Amendment concerns.¹⁰⁶

D. Current Litigation Concerning Children's Online Privacy

The legislative branch is not the sole area in which actions concerning children's online privacy rights are taking place.¹⁰⁷ In October 2023, thirty-three states, including Colorado, California, and Missouri filed a joint lawsuit against Meta—a tech company that owns Facebook, Instagram, and many other social media products and services.¹⁰⁸ The lawsuit centered around claims that the tech giant psychologically manipulates its platforms in a way that causes harm to minors and collects personal data of children without parental consent.¹⁰⁹ This case is unique because several states have formed a unified front to take legal action in a way that has only been seen in cases concerning big pharma and tobacco.¹¹⁰

Another ongoing case regarding children's internet access began in December 2022, when trade association NetChoice filed a lawsuit against California Attorney General Rob Bonta concerning protections for children accessing the Internet under the California Age-Appropriate Design Code Act (“AADA”).¹¹¹ This California Act focuses “on safeguarding minors’ personal data and considers the infringement of privacy rights as a form of harm,” distinguishing it from the age-gating approaches of other states.¹¹² Going

¹⁰⁵ *Id.*

¹⁰⁶ Tonya Riley, *Meta's Dispute Over Addicted Kids Reignites Age-Proofing Fight*, BLOOMBERG LAW (Oct. 26, 2023, 9:00 AM), <https://news.bloomberglaw.com/privacy-and-data-security/metas-dispute-over-addicted-kids-reignites-age-proofing-fight?context=search&index=11%3B%20https%3A%2F%2Fabovethelaw.com%2F2023%2F09%2Fyou-cant-wish-away-the-1st-amendment-to-mandate-age-verification%2F> [https://perma.cc/92XR-E5UU].

¹⁰⁷ See generally Cecilia Kang & Natasha Singer, *Meta Accused by States of Using Features to Lure Children to Instagram and Facebook*, N.Y. TIMES (Oct. 24, 2023), https://www.nytimes.com/2023/10/24/technology/states-lawsuit-children-instagram-facebook.html?campaign_id=9&emc=edit_nn_20231025&instance_id=106046&nl=the-morning®i_id=199906948&segment_id=148238&te=1&user_id=666da8e04d5d808d03ffbdf1a7e1784&login=email&auth=login-email [https://perma.cc/43L7-MQFD].

¹⁰⁸ Complaint For Injunctive and Other Relief, *People v. Meta Platforms, Inc.* (N.D. Cal. 2023) (No. 4:23CV05448) 2023 WL 7002550; *Introducing Meta: A Social Technology Company*, META (Oct. 28, 2021), <https://about.fb.com/news/2021/10/facebook-company-is-now-meta/> [https://perma.cc/FB45-5XVL].

¹⁰⁹ Kang & Singer, *supra* note 107.

¹¹⁰ *Id.*

¹¹¹ *NetChoice v. Bonta*, NETCHOICE (Mar. 21, 2023), <https://netchoice.org/netchoice-v-bonta/> [https://perma.cc/4W6Q-9WH2]; see CAL. CIV. CODE § 1798.99.28 (2023).

¹¹² Jang et al., *supra* note 100.

beyond the age-gating legislation discussed earlier, which merely limits minors' access to social media and video gaming platforms, the AADA is the first state statute to address how these platforms actually treat minors online.¹¹³ This is achieved by requiring websites and online services to design their platforms to minimize children becoming addicted to spending time online and interacting with harmful material.¹¹⁴

The AADA gives the state attorney general the authority to enforce the law and prosecute platforms that do not comply.¹¹⁵ In the ongoing *NetChoice* case, NetChoice claims that the AADA's requirements conflict with COPPA and is unconstitutional under: (1) the First Amendment, by dictating what content websites are allowed to show; (2) the Fourth Amendment, by requiring websites to share private internal communications with the California Attorney General; and (3) the Dormant Commerce Clause, by regulating behavior and activities that occur outside of California.¹¹⁶ In September 2023, the United States District Court granted NetChoice a preliminary injunction, which blocked implementation of this California bill.¹¹⁷

IV. DISCUSSION

The surge in both federal and state legislation surrounding online privacy and data protection for children and teens underscores a notable trend of politicians' increasing concern for the well-being of minors using the Internet and engaging in online communities.¹¹⁸ As lawmakers continue to navigate the complex terrain of online privacy and data protection, it becomes crucial to critically assess the motivations, implications, and possible effects of these legislative initiatives. Balancing the genuine need to protect minors online against political posturing and overreach is a delicate challenge that requires careful consideration and public scrutiny.

The use of protectionist policies to shield a group from potential harm resulting from exposure to a particular topic or demographic is not a novel

¹¹³ Natasha Singer, *California Governor Signs Sweeping Children's Online Safety Bill*, N.Y. TIMES (Sept. 15, 2022), <https://www.nytimes.com/2022/09/15/business/newsom-california-children-online-safety.html> [https://perma.cc/5P7M-QXEH].

¹¹⁴ Natasha Singer, *New Laws on Kids and Social Media Are Stymied by Industry Lawsuits*, N.Y. TIMES (Oct. 12, 2023), <https://www.nytimes.com/2023/10/12/technology/tech-children-kids-laws.html#:~:text=A%20Secretive%20Push-,New%20Laws%20on%20Kids%20and%20Social%20Media%20Are%20Stymied%20by,likely%20violate%20free%20speech%20rights.&text=Natasha%20Singer%20covers%20children's%20online%20privacy%20and%20tech%20regulation> [https://perma.cc/FG6W-UPNR].

¹¹⁵ *Id.*

¹¹⁶ *NetChoice v. Bonta*, *supra* note 111.

¹¹⁷ *Id.*

¹¹⁸ Neschke, *supra* note 10.

concept in the United States.¹¹⁹ Frequently, politicians rely on moral panic to instigate public outrage, using this emotion to generate support for a particular ideal.¹²⁰ Efforts aimed at the safeguarding of children frequently stem from common concerns regarding the future course of society.¹²¹ However, these initiatives may be exacerbated or exploited by individuals with political, moral, or religious objectives that deeply contrast with societal trends or evolving technology.¹²²

The use of the “think of the children” rhetoric is a long-established strategy for advocating for various forms of restrictive legislation.¹²³ This rhetoric has even given rise to what is humorously called “Lovejoy’s Law,” a reference to the character Helen Lovejoy in the television show *The Simpsons*.¹²⁴ In *The Simpsons*, Lovejoy’s use of “think of the children” is an effective parody that highlights the fallacy of employing the concern for the well-being of children as emotional manipulation and moral authority to advocate for censorship and discrimination.¹²⁵ Currently, politicians are utilizing the “think of the children” rhetoric to advocate for internet safety bills, emphasizing the need to protect children as justification for increased online regulation.¹²⁶ However, these otherwise noble concerns stand in tension with underlying motivations behind the regulations and surveillances, resulting in censorship of minority communities.¹²⁷

¹¹⁹ See Robert Corn-Revere, *Moral Panics, the First Amendment, and the Limits of Social Science*, 28 COMM. LAW. 4, 4–5 (2011); Michael McGrady, ‘Lovejoy’s Law’ And Tech Moral Panics, TECHDIRT (Apr. 19, 2023, 12:14 PM), <https://www.techdirt.com/2023/04/19/lovejoys-law-and-tech-moral-panics/> [https://perma.cc/GE2F-UP9L].

¹²⁰ Corn-Revere, *supra* note 119, at 5. Moral panic is defined as when “[a] condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; [and] socially accredited experts pronounce their diagnoses and solutions.” *Id.* See, e.g., *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786 (2011) (holding that a California law restricting the sale of violent video games to minors is unconstitutional under the First Amendment).

¹²¹ Corn-Revere, *supra* note 119, at 5.

¹²² *Id.*

¹²³ McGrady, *supra* note 119; Charles J. Ten Brink, *Gayborhoods: Intersections of Land Use Regulation, Sexual Minorities, and the Creative Class*, 28 GA. ST. U. L. REV. 789, 797 (2012).

¹²⁴ McGrady, *supra* note 119.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Mullin, *supra* note 73.

A. Interpretations of Harms

Determining what should be considered harmful to minors is challenging because the interpretation of the word “harm” is subjective.¹²⁸ Moral, cultural, or personal beliefs can heavily influence a person’s subjective interpretation of what constitutes harmful content for children and teens.¹²⁹ The pressure for online services to excessively moderate potential harm is considerable, particularly when state attorneys general seek to implement certain political viewpoints when dictating what content is appropriate for young people.¹³⁰

Currently, there lacks an overarching and consistent standard for what constitutes harm under the age-gating bills and KOSA.¹³¹ The various definitions of “harm” presented by the different laws raise concern for potential inconsistencies in enforcement and manipulative interpretation by different state authorities.¹³² This creates a poor patchwork of laws that will cause a significant amount of legal circumvention due to the rising popularity of virtual private networks (“VPNs”).¹³³ It also creates uncertainty due to the subjective nature in which they are written and consequently a lack of unified standards across state lines.

The Electronic Frontier Foundation—an organization dedicated to defending civil liberties on the Internet—warns that KOSA places the “tools of censorship in the hands of state attorneys general” and poses a significant risk to the rights and safety of young people online.¹³⁴ Many human rights

¹²⁸ *Id.*

¹²⁹ See generally Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751 (1999); Catherine L. Carpenter, *Panicked Legislation*, 49 J. LEGIS. 1 (2022).

¹³⁰ Evan Greer, *LGBTQ Youth Are Under Attack. Why Are Democrats Pushing a Bill That Hurts Them Even More?*, VICE (Dec. 6, 2022, 8:48 AM), <https://www.vice.com/en/article/g5v9b7/lgbtq-youth-are-under-attack-why-are-democrats-pushing-a-bill-that-hurts-them-even-more> [<https://perma.cc/4RDQ-R58S>].

¹³¹ See *supra* text accompanying notes 61–79.

¹³² See *supra* text accompanying notes 61–79.

¹³³ Chauncey Crail, *VPN Statistics and Trends in 2024*, FORBES ADVISOR (Feb. 29, 2024, 9:52 AM), <https://www.forbes.com/advisor/business/vpn-statistics/> [<https://perma.cc/J7FA-WH8Y>]. “VPNs, or virtual private networks, have become indispensable tools in today’s internet-driven world and internet-fed culture. Used to secure and encrypt your IP address on public networks, VPNs protect your online activity from tracking and exploitation.” *Id.*

¹³⁴ Jason Kelley, *The Kids Online Safety Act is Still A Huge Danger to Our Rights Online*, ELEC. FRONTIER FOUND. (May 2, 2023), <https://www.eff.org/deeplinks/2023/05/kids-online-safety-act-still-huge-danger-our-rights-online> [<https://perma.cc/CVE2-HQ65>]; *About EFF*, ELEC. FRONTIER FOUND., <https://www.eff.org/about> [<https://perma.cc/923Z-8ZJB>] (last visited June 9, 2024). The language in the original KOSA bill, which mandated platforms to “act in the best interests of a user,” has been modified to a duty to “take reasonable measures in the design and operation of any product, service, or feature” in response to these concerns. Neschke, *supra* note 10.

activists similarly worry about the potential consequences of child internet privacy laws, fearing that legislation aimed at protecting children could inadvertently curtail young people's access to vital online resources and supportive communities.¹³⁵ Different state bans on certain internet sites hide more than just explicit media.¹³⁶ These bans also prevent youth from finding communities and content with information concerning gender identity and the LGBTQ+ community.¹³⁷

In particular, KOSA's potential impact on minority groups and LGBTQ+ communities due to its duty of care provisions raises significant concerns.¹³⁸ If enacted, KOSA would introduce a duty of care requirement restricting online services from displaying specific content when they are aware that a portion of their user base comprises of minors.¹³⁹ It effectively instructs platforms to employ broad content filtering to restrict minors' access to certain online content—a practice known for its imprecision.¹⁴⁰ Advocacy groups have expressed reservations about this requirement, fearing it could potentially lead to overly broad content moderation, which in turn could restrict valuable information that supports youth.¹⁴¹ In the past, content filtering curtailed access to crucial knowledge, including sex education and resources for LGBTQ+ youth.¹⁴²

Advocacy organizations argue that overly vague language when referring to harms may also lead to the censorship of LGBTQ+ content under

¹³⁵ *More Than 90 Human Rights and LGBTQ Groups Sign Letter Opposing KOSA*, CTR. DEMOCRACY & TECH. (Nov. 28, 2022), <https://cdt.org/press/more-than-90-human-rights-and-lgbtq-groups-sign-letter-opposing-kosa/> [<https://perma.cc/Q4TV-Z5NA>] [hereinafter *Letter Opposing KOSA*]. Over 90 Advocacy organizations have signed a letter opposing KOSA. *Id.*

¹³⁶ Makena Kelly, *Child Safety Bills are Reshaping the Internet for Everyone*, VERGE (Aug. 29, 2023, 9:00 AM), <https://www.theverge.com/2023/8/29/23849375/kosa-child-safety-free-speech-louisiana-utah-parental-consent> [<https://perma.cc/LP7G-XVQQ>].

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Mullin, *supra* note 73.

¹⁴⁰ *Id.*; Wheeler, *supra* note 79.

¹⁴¹ Letter from Cody Venzke, Senior Policy Counsel, American Civil Liberties Union, to Senate Commerce Committee (July 23, 2023), <https://www.aclu.org/wp-content/uploads/2023/10/2023.07.27-KOSA-Letter.pdf> [<https://perma.cc/TP9GBQXD>].

¹⁴² Kelley, *supra* note 134; *Letter Opposing KOSA*, *supra* note 135. Congress enacted the Children's Internet Protection Act ("CIPA") to address children's access to harmful content on the Internet, imposing internet safety requirements on libraries and schools in order for them to receive discounted communication services and products. See *Children's Internet Protection Act (CIPA)*, FCC (Dec. 30, 2019), <https://www.fcc.gov/consumers/guides/childrens-internet-protection-act> [<https://perma.cc/N4TK-EFBC>].

the pretext of preventing mental health issues in children.¹⁴³ Given that KOSA's supporters include a range of far-right organizations,¹⁴⁴ such as the Heritage Foundation, LGBTQ+ advocacy groups are concerned about the bill's authors' potential intentions.¹⁴⁵ The potential for KOSA to cut off access to information for vulnerable youth is especially troubling when education concerning race discrimination or LGBTQ+ history has been referred to as "dangerous for kids" by one of KOSA's co-authors.¹⁴⁶ Senator Blackburn (R-TN) has publicly stated that politicians should be "protecting minor children from the transgender in this culture," but claims that "KOSA will not – nor was it designed to – target or censor any individual or community."¹⁴⁷ Yet the Heritage Foundation, a notable supporter of KOSA, "announc[ed] that [its] goal for the bill is 'keeping trans content away from children.'"¹⁴⁸

Queer and transgender youth often find refuge in online spaces where they can be themselves and find understanding and support.¹⁴⁹ In a climate where an unprecedented number of anti-LGBTQ+ bills flood state legislatures, the Internet serves as a sanctuary for these vulnerable communities.¹⁵⁰ Older LGBTQ+ teenagers who have not been taught sexual education in school may face inaccessibility to websites that provide important information about reproductive health resources.¹⁵¹ Any legislation that threatens to limit access to any information regarding children's health or

¹⁴³ Janus Rose, *Congress Is Pushing An Online Safety Bill Supported By Anti-LGBTQ Groups*, VICE (Aug. 3, 2023, 2:33 PM), <https://www.vice.com/en/article/qjv3qp/congress-is-pushing-an-online-safety-bill-supported-by-anti-lgbtq-groups> [https://perma.cc/LRL9-M38Z].

¹⁴⁴ Ariel Messman-Rucker, *Anti-LGBTQ+ Groups Back New Kids Online Safety Act: Report*, ADVOCATE (Aug. 7, 2023, 2:11 PM), <https://www.advocate.com/law/kosa-anti-lgbtq-groups#toggle-gdpr> [https://perma.cc/C8P5-4AAQ].

¹⁴⁵ *Id.*

¹⁴⁶ Kelley, *supra* note 134; Rose, *supra* note 143.

¹⁴⁷ Matt Lavietes, *Senator Appeared to Suggest Bipartisan Bill Would Censor Transgender Content Online*, NBC NEWS (Sept. 5, 2023, 3:32 PM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/senator-appears=suggest-bipartisan-bill-will-censor-transgender-content-rcna103479> [https://perma.cc/D55C-S4QA].

¹⁴⁸ Messman-Rucker, *supra* note 144.

¹⁴⁹ Tim Bernard, *Considering KOSA: A Bill to Protect Children from Online Harms*, TECH POLICY PRESS (Dec. 1, 2022), <https://techpolicy.press/considering-kosa-a-bill-to-protect-children-from-online-harms/> [https://perma.cc/A6YA-VRWL].

¹⁵⁰ Annette Choi, *Record Number of Anti-LGBTQ Bills Have Been Introduced This Year*, CNN POLITICS (Apr. 6, 2023, 6:00 AM), <https://www.cnn.com/2023/04/06/politics/anti-lgbtq-plus-state-bill-rights-dg/index.html> [https://perma.cc/7ETB-SB69]; see Bernard, *supra* note 149.

¹⁵¹ Bernard, *supra* note 149; Nadra Nittle, *Many States Don't Require Schools to Teach Sex Ed. A New Bill Hopes to Change That.*, THE 19TH (Aug. 22, 2023, 5:00 AM), <https://19thnews.org/2023/08/sex-ed-schools-nationwide-proposed-bill/> [https://perma.cc/M36P-UQ8Z].

support for vulnerable communities should immediately be a cause for concern for all Americans.

The introduction of specific parental controls and consent requirements in KOSA as well as other state-implemented privacy laws has also sparked debates concerning “the extent of parental surveillance over their children’s internet activities.”¹⁵² While the intention is to protect minors, digital privacy advocacy groups are apprehensive about the potential for intrusive parental oversight that would eliminate autonomy and online privacy for older teens, which could lead to emotional or physical abuse of young people who identify as LGBTQ+.¹⁵³

The impact of bills like KOSA on minority communities is a matter of significant concern. While the primary purpose of child privacy legislation should be to protect young people, collateral damage appears inevitable if children’s online safety is exploited for politicians to have subjective control in determining potential harms. This ultimately raises questions about the appropriateness and true intention of such legislation.

B. Data Privacy Concerns of Age-Gating Bills

Data privacy concerns arise from COPPA 2.0, KOSA, PKSMA, and other state legislation that implement age-gating restrictions.¹⁵⁴ Age verification laws do not only impact minors, as it requires all users of a website or platform to verify their age in order to ensure that certain age groups do not receive access.¹⁵⁵ This widespread impact is coupled with website users’ lack of confidence that the data provided to verify their age or identity will not be retained, utilized, shared, or sold.¹⁵⁶ In an interview concerning the potential consequences of the Utah bill that requires parental

¹⁵² Neschke, *supra* note 10.

¹⁵³ Sam Metz & Barbara Ortutay, *Utah Social Media Law Means Kids Need Approval From Parents*, AP NEWS (Mar. 24, 2023, 12:37 AM), <https://apnews.com/article/social-media-utah-kids-84bd1f6481071726327bce25cf3e7522> [<https://perma.cc/79YH-ZWLW>]. Digital privacy advocacy groups are also concerned that KOSA potentially infringes upon the privacy and First Amendment rights of minors as well. *Id.*

¹⁵⁴ Riley, *supra* note 106. There are also concerns that these laws infringe on minor’s rights to express their First Amendment rights. *Id.* Federal courts have already started indicating the genuineness of this concern by placing injunctions on Arkansas and Texas age-gating bills and California’s AADA law due to First Amendment concerns. *Id.*

¹⁵⁵ Jason Kelley & Adam Schwartz, *Age Verification Mandates Would Undermine Anonymity Online*, ELEC. FRONTIER FOUND. (Mar. 10, 2023), <https://www.eff.org/deeplinks/2023/03/age-verification-mandates-would-und-erminate-anonymity-online#:~:text=Age%20verification%20systems%20are%20surveillance,such%20as%20government%20Dissued%20identification> [<https://perma.cc/S7Q5-RLRT>].

¹⁵⁶ *Id.*

consent,¹⁵⁷ Nicole Saad Bembridge, an associate director at NetChoice, stated that Utah “will soon require online services to collect sensitive information about teens and families, not only to verify ages, but to verify parental relationships, like government-issued IDs and birth certificates, putting their private data at risk of breach.”¹⁵⁸ These age-gating laws place the private data of young individuals and their families at risk of various cyber threats and expose personal information to third party providers who are responsible for verifying ages.¹⁵⁹

Additionally, there are rising concerns that age-gating restrictions may allow prosecutors to charge children with federal crimes if caught lying about their age online.¹⁶⁰ Age-gating mechanisms can be incredibly easy to subvert and are often ineffectively enforced.¹⁶¹ A child could access a website by simply lying to a prompt that requests the user to enter their date of birth.¹⁶² A request to provide an ID could easily be circumvented by a clever teenager slipping into their parent’s room, retrieving their parent’s driver’s license, and gaining access through the age gate. Children, particularly adolescents, often use and contribute to the digital world without fully comprehending the legal and long-term consequences of their behavior.¹⁶³ Lying about age online is a common occurrence driven by various factors, such as peer pressure, curiosity, or even, ironically, the desire for privacy.¹⁶⁴ Prosecuting children for infractions related to age-gating seems counterproductive. The aim of age-gating is to safeguard children—not to penalize them.¹⁶⁵

Instead of creating more data privacy measures, politicians are exploiting the vulnerability of children online as a manipulative tool to gain

¹⁵⁷ See *supra* text accompanying notes 92–99.

¹⁵⁸ See *supra* text accompanying notes 92–99. It is unclear how verification can be made for children with differing surnames from their guardians or children in foster care, which poses a large concern for non-traditional families. See Jason Kelley and Sophia Cope, *The Protecting Kids on Social Media Act is A Terrible Alternative to KOSA*, ELEC. FRONTIER FOUND. (August 28, 2023), <https://www.eff.org/deeplinks/2023/08/protecting-kids-social-media-act-terrible-alternative-kosa> [<https://perma.cc/3GB2-YP6U>].

¹⁵⁹ Kelley & Cope, *supra* note 158.

¹⁶⁰ Shoshana Weissmann, *Regimes That Run Age Verification Through the Government Would Allow Prosecutors to Make Children Federal Criminals If They Lie About Their Age*, RSTREET (Aug. 22, 2023), <https://www.rstreet.org/commentary/regimes-that-run-age-verification-through-the-government-would-allow-prosecutors-to-make-children-federal-criminals-if-they-lie-about-their-age/> [<https://perma.cc/C34R-6HDU>].

¹⁶¹ *Id.*

¹⁶² Wheeler, *supra* note 79. The following is an example of a business website which uses an age gate that requires a user to enter their age in order to access the website content. See, e.g., *Homepage*, THE FRIDGE, <https://fridgeliquor.com/> [<https://perma.cc/K44B-876E>] (last visited Apr. 1, 2024).

¹⁶³ Weissmann, *supra* note 160.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

even more data on the very subjects this legislation was written to protect. This paradoxical and counterproductive legislation ends up perpetuating the very issues it was intended to address and safeguard against.

V. CONCLUSION

The United States is waking up to the profound impact that the Internet and data have made on the lives of children.¹⁶⁶ Therefore, there is a *genuine* need for regulations that protect children's online privacy and wellbeing. But when politicians use a "think of the children" rhetoric as a crutch to address a complex issue that transcends the lackluster and poorly written legislation produced, it could lead to greater harm than good. As politicians continue to navigate the complex terrain of internet privacy law, a potential solution could be legislation protecting the data privacy of not just children but all United States citizens.¹⁶⁷ However, because new legislation is notoriously difficult to pass, the courts could prove to be the best place to combat privacy and mental health concerns while ensuring that electoral influence can be minimized to some degree.¹⁶⁸ Ultimately, for the United States to have privacy laws that will serve the purpose of protecting the American people, politicians must be wary of weaponizing the well-being of children to further political agendas or posturing. Until legislatures can equitably balance First Amendment rights, privacy, and precautionary data handling, the protection of minors online will continue to be a challenge in our digital age.

¹⁶⁶ See *U.S. Teen Girls Experiencing Increased Sadness and Violence*, *supra* note 6; Richtel, *supra* note 4.

¹⁶⁷ See Neschke, *supra* note 10.

¹⁶⁸ See Kang & Singer, *supra* note 107; see *supra* Part III.D.