

Beyond Home and School

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INTRODUCTION

In the tradition of American Law Institute (ALI) restatement projects, the Restatement of Children and the Law¹ aspires to describe and unify the wide array of laws governing children in the United States. This ambitious project is a bold and welcome affirmation that the law governing children is more than a bundle of disparate doctrines but a substantial field in its own right. And the Restatement of Children and the Law lives up to its promise: the reporters have given us a comprehensive and richly detailed compendium of laws touching upon the lives of children in the United States.

Restatement projects deliberately do not aim to break new ground.² Instead, restatements aim to describe the world as it is, and the Restatement of Children and the Law is no exception. In the first three parts of the Restatement, the reporters have adopted the traditional three-part framework for organizing laws governing children: parental rights and responsibilities,³ schools' educational aims and authority,⁴ and the workings of the juvenile justice system.⁵ In each of these three domains, the Restatement focuses on drawing the classic lines of authority between parents and the state. The Restatement's adoption of this three-part

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¹ Note that this Essay cites prior drafts of the Restatement of Children and the Law. The section numbers of the Restatement have been updated since the time of publication.

² As the ALI explained, the organization “has limited competence and no special authority to make major innovations in matters of public policy.” AM. L. INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 6 (rev. ed. 2015). Rather, restatements “aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court.” *Id.* at 4.

³ RESTATEMENT OF THE LAW, CHILDREN AND THE LAW pt. 1 (AM. L. INST, Tentative Draft No. 5, 2023) [hereinafter RESTATEMENT Draft No. 5].

⁴ *Id.* pt. 2.

⁵ *Id.* pt. 3.

schema—family, school, and juvenile justice—reflects an organizational structure long familiar to scholars and teachers of children and law. Moreover, that the Restatement begins with the children in the family highlights the primacy of the parent-child relationship, and in particular the importance of parental rights within existing law.

Yet, restatement projects are not devoid of all normative content,⁶ and Part 4 of the Restatement of Children and the Law in fact steers us in a new and exciting direction. Entitled “Children in Society,” this final section addresses a diverse range of doctrines: children’s medical decision-making, sexual activity, expressive activities outside school, curfews, and tort and contract liability.⁷ The Introduction to Part 4 suggests that children’s decision-making autonomy is an important thread that ties many of these doctrines together.⁸ As the Introduction to Part 4 states, these doctrines relate to children “mostly as they increasingly engage with the wider world as adolescents.” At that point, the reporters tell us, the “traditional paternalistic assumptions” no longer serve children’s interests as persons capable of exercising greater control over their own lives.⁹

The Restatement’s focus on children in society encourages us to move beyond a merely descriptive project toward a new way of envisioning children’s place in law as full persons in the present. In our view, Part 4 does much more than identify the situations where the law does or should treat children like adult decision-makers. Instead, Part 4 illuminates the possibilities for a new law of the child that understands children as developing persons deeply connected to but also distinct from the adults in their lives. We focus on § 18.11—“Minors’ Right to Gain Access to Information and Other Expressive Content”—to illustrate how the subtle transformation in Part 4 of the Restatement points toward potentially pathbreaking changes for the law of children generally.

The invitation to comment upon Part 4 has given us a welcome opportunity to reflect upon work that we have done in this area, both separately and together. In her article *Between Home*

⁶ Indeed, the ALI defines restatement projects as embodying “two impulses”: “the impulse to recapitulate the law as it presently exists and the impulse to reformulate it, thereby rendering it clearer and more coherent while subtly transforming it in the process.” AM. L. INST., *supra* note 2, at 4.

⁷ See RESTATEMENT Draft No. 5 pt. 4, intro. note.

⁸ See *id.*

⁹ Elizabeth Scott, *Comment on Part 4 Essays: Goodwin and Dailey and Rosenbury*, 91 U. CHI. L. REV. 633, 635–46 (2024).

and School, President Laura Rosenbury examines the law's failure to address the "fundamental reality" that "[m]uch of childhood takes place in spaces between home and school," such as playgrounds, parks, religious sites, after-school programs, and, significantly, the internet.¹⁰ In exploring what it would mean for law to take account of these spaces where children interact with a variety of people who are neither their parents nor teachers, Rosenbury invites family law to recognize children's interests in exposure to diverse ways of life.¹¹ In a recent article entitled *In Loco Reipublicae*, Professor Anne Dailey offers a new framework in constitutional law that identifies and furthers children's distinct rights as developing citizens, most importantly their right to access the world of ideas outside the home.¹² And together, we have called for a new law of the child that fosters children's agency within dependency by acknowledging the ways in which children are full persons in their own right even as they are dependent on their parents and others for caregiving and guidance.¹³

This Essay draws upon our prior work in order to illuminate the major contributions—but also shortcomings—of Part 4 of the Restatement of Children and Law. In the first Part of this Essay, we examine the Restatement's focus on children's interests in accessing ideas and the Restatement's endorsement of parental authority to control that access. We applaud the Restatement's important discussion of the background and rationale for recognizing children's right to access information and expressive materials. Yet we note that the Restatement undermines its own commitment to children's free speech interests by expressly endorsing parents' broad authority to limit children's access to ideas. In the second Part, we explore what it would mean to respect children's right to access ideas on their own, free from parental control. We focus on the example of social media because of its importance in children's lives today and note that broad parental authority to limit this access, as set forth in the Restatement and in recent legislation in Utah and Arkansas, potentially harms children's interests. The third Part proposes alternative black-letter law designed to better promote children's interests in accessing ideas.

¹⁰ Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 834 (2007).

¹¹ *See id.* at 894–95.

¹² *See* Anne C. Dailey, *In Loco Reipublicae*, 133 YALE L.J. 419, 447–48 (2023).

¹³ *See* Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1451–52 (2018) [hereinafter Dailey & Rosenbury, *New Law*].

We conclude this Essay with a provocation: What would a project on Children and Law look like if it began with Part 4? A legal regime governing children centered around the idea that children are persons in society and developing citizens with important interests beyond home and school would likely strengthen both our democracy and parent-child relationships. The Restatement provides a powerful starting point for reimagining a new framework that begins rather than ends with children as full members of the social order. We urge scholars to take up our call for a new vision that draws from but moves beyond the ALI's immensely important description of the law as it is today to build a new law of the child encompassing the realm of the social beyond home and school.

I. CHILDREN'S RIGHT TO ACCESS IDEAS

The Restatement's Part 4 takes a new and promising turn. The preceding three Restatement parts—addressing children at home, at school, and in the juvenile justice system—conceive of children as always under the authority of either parents or the state. This framework reflects law's traditional presumption that parents generally act to further the best interests of children and that the state steps in only when parents are unable or unwilling to care for their children.¹⁴ In Part 4, however, the Restatement directs its attention to situations where children possess some independent decision-making authority as persons in their own right. The Introductory Note to Part 4 emphasizes its coverage of areas where “the authority exercised by parents and the state is relaxed and children are given substantial control over decision-making and expression.”¹⁵ This theme of children's autonomy gives rise to black-letter law on medical decision-making,¹⁶ sexual activity,¹⁷ and freedom of expression.¹⁸ In these areas, the Restatement treats older children as similar to, if not equal to, adults.

We commend the Restatement's effort to focus attention on the spaces between home and school where children may operate free from parental or state restrictions. Acknowledging the

¹⁴ See *id.* at 1457–60.

¹⁵ RESTATEMENT Draft No. 5 pt. 4, intro. note.

¹⁶ *Id.* § 16.01 (detailing situations where a mature minor can consent to medical procedures without parental notification or permission).

¹⁷ *Id.* ch. 17.

¹⁸ *Id.* § 18.10 (explaining that children have the “right to engage in speech, religious exercise, and political participation”).

importance of these spaces better reflects the reality of children's lives, which extend well beyond encounters at home or school.¹⁹ Part 4 also addresses laws that paternalistically deny children's independence.²⁰ For example, while Part 4 contains black-letter law that allows children to make certain medical decisions without parental consent, the Restatement recognizes that maturity is not always the determining factor in these situations. Children may sometimes obtain medical care without parental consent regardless of maturity, as is the case with mental health care, substance abuse treatment, and contraceptives.²¹ Prior to the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*,²² a child could also sometimes obtain an abortion without parental consent.²³ Existing law allows children to access these medical services out of concern that deference to parental control in these contexts may not further children's interests or well-being. Nevertheless, emerging autonomy is the dominant theme of Part 4.

In our view, the focus on children in society has much more to offer than respect for children's emerging autonomy. As we have explained in previous work, autonomy should not be the only demarcation of children's independent interests.²⁴ Instead, children, including young children, possess agency within dependency.²⁵ They are both dependent on loving caregivers and enjoy interests as developing persons in their own right. If we broaden our focus beyond autonomy, Part 4 points us toward a more comprehensive and nuanced way of seeing children as developing persons with interests and rights that are particularly salient in the societal spaces beyond home, school, and the juvenile justice system.

Indeed, if we take seriously the notion of children's place in society, we should start with children's diverse opportunities for engaging with society instead of their emerging autonomy. This broader starting point has the potential to recognize children as

¹⁹ See Rosenbury, *supra* note 10, at 840–41.

²⁰ See RESTATEMENT Draft No. 5 pt. 4, intro. note (noting that, in some situations, “the law’s traditional paternalistic assumptions may undermine their wellbeing as developing persons and citizens”); Scott, *supra* note 9, at 567–68.

²¹ RESTATEMENT Draft No. 5 § 16.01 cmt. g.

²² 142 S. Ct. 2228 (2022).

²³ RESTATEMENT Draft No. 5 § 16.02(d).

²⁴ See Dailey & Rosenbury, *New Law*, *supra* note 13, at 1476–77.

²⁵ See *id.* at 1476; Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 100–01 (2021) [hereinafter Dailey & Rosenbury, *The New Parental Rights*].

persons in their own right, with interests in the present in addition to their interests as future adults, even as children remain dependent on adults. In the following sections, we build upon the Restatement's focus on children's engagement in the discourse of society in order to illustrate the benefits of a more nuanced approach to children's independent rights and interests. Our analysis also highlights the importance of protecting children's rights and interests from parental and state authority when children are engaging with society outside of the traditional spheres of home and school.

A. The Importance of Children's Engagement in the Discourse of Society

We have previously argued that children's exposure to the world of ideas outside the family is vitally important to children's development and experiences as full persons and citizens in a pluralistic democratic society.²⁶ The Restatement is not blind to the law's existing recognition of children's expressive freedoms in this context. Part 4 importantly affirms that children, as developing persons and citizens, have a First Amendment²⁷ right to be exposed to ideas outside the home.

Specifically, two black-letter provisions on children's First Amendment rights—§§ 18.10²⁸ and 18.11²⁹—give powerful expression to the importance of children's rights to both speak and hear. Section 18.10 presents black-letter law on “Minor's Right to Engage in Speech, Religious Exercise, and Political Participation,” with Comment (a) to this section explaining that children's engagement in “matters of public concern . . . can play an important role in developing their knowledge and abilities, preparing them for adult roles as participants in our government, economy, and society.”³⁰ With respect to children's right to hear, § 18.11, entitled “Minors' Right to Gain Access to Information and Other Expressive Content,” emphasizes the close connection between the right of access to ideas and democratic development. As Comment (a) to § 18.11 explains, “[a]lthough children, under most

²⁶ Dailey, *supra* note 12, at 461–79; Dailey & Rosenbury, *New Law*, *supra* note 13, at 1493–96; *see also* Rosenbury, *supra* note 10, at 837 (calling for “an alternative normative approach to childrearing between home and school, one that supports parental prerogatives yet also calls on states to ensure that children are exposed to diverse ways of life in these spaces.”).

²⁷ U.S. CONST. amend. I.

²⁸ RESTATEMENT Draft No. 5 § 18.10.

²⁹ *Id.* § 18.11.

³⁰ *Id.* § 18.10 cmt. a.

circumstances, are not yet voting participants in the democracy . . . [t]heir access to information improves their ability to participate as minors and helps prepare them to exercise their right to vote responsibly when they reach adulthood.”³¹

Together, these two sections of the Restatement concerning children’s free speech rights provide a promising starting point for thinking anew about children’s place in society. Unlike the Restatement, however, we do not simply mean children’s place as future adults whose emerging autonomy confers legal rights. Instead, a focus on children’s place in society enables us to consider children as persons with interests and rights separate from their custodial caregivers. Children have interests *as children*, including their interests as developing persons and citizens in a pluralistic, democratic society. Although the Restatement currently posits a tight connection between children’s First Amendment rights and their emergent autonomy, this connection is misleading. The dependency-autonomy polarity does not capture the important ways in which children’s access to ideas is critical to their lives as developing persons even before they become mature decision-makers.

When reframed in this manner, children’s right of access to ideas is the conceptual heart of Part 4 and even, we would suggest, of the entire Restatement. As already noted, the reporters do in fact recognize the critical role of children’s access to ideas in securing their place as full democratic citizens. Section 18.11 expressly affirms the connection between children’s First Amendment right to access ideas and their place as developing citizens in a democracy. It provides that “the government’s authority to limit minors’ access to expressive material is no greater than its authority to limit adults’ access to this material,” with the exception that “[t]he government can impose additional constraints on minors to prevent them from gaining access to sexually explicit material deemed harmful to minors.”³² Comment (a) to § 18.11 further elaborates that “[a]lthough children, under most circumstances, are not yet voting participants in the democracy . . . [t]heir access to information improves their ability to participate as minors and helps prepare them to exercise their right to vote responsibly when they reach adulthood.”³³ The reporters explain

³¹ *Id.* § 18.11 cmt. a.

³² *Id.* § 18.11(b)(1)–(2).

³³ RESTATEMENT Draft No. 5 § 18.11 cmt. a.

that children's right to access ideas helps children to develop the skills of social and political engagement.³⁴

Yet the Restatement's current approach does not fully affirm and protect the ability of children to access a diverse range of ideas free from parental control. When the focus is broadened, as set forth below, children's engagement in the discourse of society may be fostered and defended more robustly.

B. Affirming Children's Access to Ideas

In her recent article, Anne Dailey presents a new framework for understanding and affirming the importance of children's access to ideas.³⁵ In brief, the framework illuminates how children's right of access to ideas ensures that they acquire the information and skills necessary for their own identity formation, including the development of their own values and beliefs, along with the skills of critical thinking and rational deliberation that enable individuals to participate in democratic life.³⁶ This Section draws from that work to emphasize why children's access to ideas is so critical to their roles in society.

As Dailey explains, in a democratic society, children have a right to know about ideas different from those learned in the home.³⁷ Especially for young children, exposure to diverse views ensures that children acquire the most basic factual information needed to understand that the way of life in which they are raised is not the *only* way of life.³⁸ Children's access to diverse ideas thus lays the groundwork for choice: without knowing that alternative belief and value systems exist, choice is largely meaningless. Access to ideas furthers children's socialization as independent individuals and citizens, furthering their capacities for personal autonomy and political engagement—that is, furthering children's eventual freedom to choose how to live their lives both personally and collectively.³⁹

³⁴ *Id.*

³⁵ Dailey, *supra* note 12, at 461–78.

³⁶ *Id.*

³⁷ *See id.*

³⁸ *See* AMY GUTMANN, DEMOCRATIC EDUCATION 30 (1987) (arguing that children must be equipped “with the intellectual skills necessary to evaluate ways of life different from that of their parents”).

³⁹ *See* BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 162 (1980) (“[A] liberal education requires toleration—indeed, encouragement—of such doubts. It is only by questioning the seeming certainties of [their] early moral environment that the child can begin to glimpse the larger world of value that may be [theirs] for the asking.”); Anne Alstott,

Exposure to ideas presumes that children have some access to people, places, and activities outside the home. For example, relationships with persons outside the family are particularly important for exposing children to ideas different from their parents. In previous work, Laura Rosenbury emphasizes that the realm of life between home and school includes persons other than parents and teachers involved in the process of socializing children through exposure to diverse views.⁴⁰ Places like public libraries and schools are also central sites of socialization.⁴¹ In fact, the most well-known case upholding a child's First Amendment right to access information and ideas, *Board of Education, Island Trees Union Free School District No. 26 v. Pico*,⁴² involved the removal of books from a public school library.⁴³ In that case, a plurality of the Supreme Court affirmed the important precept that "in a variety of contexts 'the Constitution protects the right to receive information and ideas,'" especially for children.⁴⁴

Dailey describes how children's exposure to ideas outside the home opens their minds and teaches them that alternative beliefs and ways of life exist.⁴⁵ Access to ideas different from those of their parents prevents children from becoming, in the words of *Tinker v. Des Moines Independent Community School District*,⁴⁶ "closed-circuit recipients" of parental views.⁴⁷ Exposure equips children with the psychological tools needed for choosing their own ways of life. By showing children that their parents' world view is not the only world view, the right of access to ideas lays the groundwork for choosing—when the time comes—how to live their own lives. Exposure opens children's minds to alternative ways of being and thus preserves children's right to an open future.⁴⁸ Exposure

Is the Family at Odds with Equality? The Legal Implications of Equality for Children, 82 S. CAL. L. REV. 1, 7–8 (2008) (arguing that a liberal education should "foster the capacity to reason and provide cultural opportunities that differ from the child's family background"); *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1068 (6th Cir. 1987).

⁴⁰ Rosenbury, *supra* note 10, at 892.

⁴¹ *See id.* at 842.

⁴² 457 U.S. 853 (1982).

⁴³ *Id.* at 858.

⁴⁴ *Id.* at 867 (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

⁴⁵ *See* Dailey, *supra* note 12, at 463.

⁴⁶ 393 U.S. 503 (1969).

⁴⁷ *Id.* at 511. For an exploration of the ways in which children can grow up to be different from their parents, see generally ANDREW SOLOMON, *FAR FROM THE TREE: PARENTS, CHILDREN, AND THE SEARCH FOR IDENTITY* (2012).

⁴⁸ *See* Joel Feinberg, *The Child's Right to an Open Future*, in *WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER* 136 (William Aiken & Hugh LaFollette eds., 1980).

at an early age thus ensures that children acquire the basic knowledge and skills needed in a democratic society.

Dailey's framework rests on the idea that a democratic society sustains itself by socializing children in certain ways of reasoned thinking and deliberation.⁴⁹ Thus, as Dailey shows, freedom of thought is not the only value protected by a right of access to ideas. The Supreme Court affirmed in *Pico* that "access [to ideas] prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."⁵⁰ It is through the socialization of children in the ways of deliberative debate and exchange that a democratic society sustains itself. Dailey writes that cultivating these skills through early exposure to ideas outside the home is an essential part of civic education, ensuring that the child will be prepared to engage in adult democratic life and that the democratic community will flourish.⁵¹

Respecting children's right of access to ideas additionally teaches children the basic values of a liberal democratic polity: tolerance, pluralism, and equality. Dailey describes how a marketplace of ideas by definition models tolerance for competing viewpoints, as all speakers, no matter the content, have the right to speak and hear.⁵² Although any one speaker might be intolerant, the marketplace itself is structured around acceptance of divergent viewpoints. The value of pluralism, too, is on display in a system that allows diverse views to be expressed. Finally, in an ideal marketplace, all speakers are equal: no speaker has better access to the marketplace or the right to drown out the voices of others. Although far from the reality of our public sphere, a well-functioning marketplace gives room to all speakers and listeners, including children.

Under Dailey's framework, a further dimension of protecting children's right of access to ideas is respect for children forming their own identities.⁵³ It is well established that, for adults, freedom of "expression is an integral part of the development of ideas,

⁴⁹ See Dailey, *supra* note 12, at 465; John H. Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 341–42 (1979); GUTMANN, *supra* note 38, at 30–31; STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM 268–69 (1990); Alstott, *supra* note 39, at 19.

⁵⁰ *Pico*, 457 U.S. at 868.

⁵¹ Dailey, *supra* note 12, at 465.

⁵² *Id.* at 466 (explaining that "a marketplace of idea models three values associated with democratic life: tolerance, pluralism, and equality").

⁵³ See *id.* at 467–69; see also Dailey & Rosenbury, *New Law*, *supra* note 13, at 1496–1500.

of mental exploration and of the affirmation of self.”⁵⁴ Yet the same identity-enhancing effects of expressive freedoms also hold true for children.⁵⁵ As Professor Colin Macleod has argued, “[t]he claim each child has to develop and exercise the moral powers that ultimately shape each person’s distinct and independent moral personality gives rise to interests that children *qua* children have to information and to conditions conducive to independent reflection and deliberation.”⁵⁶ Dailey argues that access to a diversity of beliefs helps this developmental process along by allowing children to explore their personal identities as they develop greater powers of independent thinking and autonomy.⁵⁷

Children’s right of access to ideas thus governs children’s lives *in society*; the right does not intrude on parents’ authority over their children in the home. As Dailey explains, parents have no obligation to allow their children free expression around the dinner table or to themselves instill democratic values in their children.⁵⁸ Their obligations extend only to ensuring children have access to the world outside the home. For example, parents should not have the authority to control school curriculum or to unilaterally withdraw their children from core classes. Similarly, homeschooling must be closely regulated to ensure children are not isolated from the world of ideas outside the home. Importantly, the Restatement does recognize that the state has a duty to provide children with a sound basic education which includes providing children with the opportunity to engage in the marketplace of ideas in the classroom and with peers. Yet as this Essay emphasizes, parents also have duties to allow their children access to important persons, spaces, and activities outside the home.

C. Challenging Broad Parental Authority over Children’s Access to Ideas

Part 4 of the Restatement is openly at war with itself. At the same time that it recognizes the importance of children’s access

⁵⁴ See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963).

⁵⁵ See Garvey, *supra* note 49, at 345 (discussing the “close connection between free expression and individual autonomy and self-realization”).

⁵⁶ Colin M. Macleod, *The Liberal Theory of Freedom of Expression for Children*, 79 CHI.-KENT L. REV. 55, 57 (2004).

⁵⁷ See Dailey, *supra* note 12, at 468.

⁵⁸ See *id.* at 426.

to ideas to their place as full persons and citizens, Part 4 also unequivocally affirms parents' right to control or even prohibit that access. As § 18.11 expressly affirms, the right of access to information "constrains government actors' power to restrict minors' access to speech and other expressive material but does not prevent parents from exercising their authority to prevent their children's access to such material."⁵⁹ The Restatement's Introductory Note to this Part doubles down on parental authority in declaring: "Most significantly, parents' and guardians' authority to impose constraints on their children's speech, access to information, and engagement in political and religious activities extends beyond home and school to other aspects of children's lives."⁶⁰

This express affirmation of parental control over children's access to ideas is of a piece with the Restatement's broad commitment to near-absolute parental authority over children's lives. The Restatement begins with a clear statement that near-absolute parental rights are the best means for ensuring children's welfare: "Parents have long enjoyed strong protection of the right to raise their children as they see fit without undue interference from the state."⁶¹ The beginning theme of broad parental control over children carries straight through to the end of Part 4, ironically the section of the Restatement most concerned with children's emerging autonomy.

The Restatement's affirmation of near-absolute parental authority over children's access to ideas deals a significant blow to children's place in society and their rights as developing persons in a pluralistic democracy.⁶² The affirmation of broad parental rights is of special concern today given the efforts by some parents to limit their children's exposure to race and gender identity issues in school; to opt their children out of sex education and other

⁵⁹ RESTATEMENT Draft No. 5 § 18.11(a).

⁶⁰ *Id.* ch. 18, intro. note. This position is directly at odds with that articulated in Rosenbury, *supra* note 10, at 897. The Restatement's position is aligned, however, with Justice Clarence Thomas's dissenting opinion in *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 821 (2011) (Thomas, J., dissenting). He argued that "the freedom of speech, as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians." *Id.* He asserted that "the founding generation believed parents had absolute authority over their minor children and expected parents to use that authority to direct the proper development of their children." *Id.* at 822.

⁶¹ RESTATEMENT OF THE LAW, CHILDREN AND THE LAW ch. 1, intro. note (AM. L. INST., Tentative Draft No. 1, 2018).

⁶² For more discussion of the harms of expansive parental rights, see Dailey & Rosenbury, *The New Parental Rights*, *supra* note 25, at 96–110.

learning about reproductive issues and justice; to remove books addressing racial and LGBTQ equality from library shelves; and to install a system of parental surveillance over children whereby teachers become mandatory reporters of children's gender identity and sexual orientation.⁶³ We emphasize here how parents' unrestricted authority to control children's access to ideas sets real constraints on children's opportunity for engagement in the world outside the home.

We do not advocate that the Restatement do away with parental rights, far from it. But we would strongly urge scholars and courts to adopt a more nuanced view of the competing interests of parents, state, and children. We would advocate for viewing protection for the parent-child relationship primarily as a matter of children's rights rather than parents' rights. While both may possess rights in a relationship with the other, there are benefits to highlighting children's fundamental right to a custodial relationship with their parents that can be disrupted only for the most compelling reasons. A close, loving, stable relationship with parents is critical to children's overall emotional, physical, social, and even political well-being. Supporting and protecting the parent-child relationship from disruption by the state promotes children's development into healthy and independent adults. Reconceiving protection for the parent-child relationship in terms of children's interests and rights would allow for a more nuanced balancing of children's interests in preserving that custodial relationship and their independent interest in exposure to ideas outside the home. As Dailey has argued, it is possible to preserve the custodial relationship *and* recognize parents' duties to expose children to the world of ideas.⁶⁴

⁶³ See, e.g., The Conversation, *Tracking the Attack on Critical Race Theory in Education*, U.S. NEWS & WORLD REP. (Apr. 11, 2023), <https://www.usnews.com/opinion/articles/2023-04-11/tracking-the-attack-on-critical-race-theory-in-education>; Kiara Alfonseca, *So-Called "Don't Say Gay" Rules Expanded Through 12th Grade in Florida*, ABC NEWS (Apr. 19, 2023), <https://perma.cc/984M-EXGT>; Zainab Chaudry, *Montgomery Parents Want an Opt-Out on Sexuality, Gender Education Restored*, WASH. POST (July 17, 2023), <https://www.washingtonpost.com/opinions/2023/07/17/montgomery-parents-want-opt-out-sexuality-education/>; Elizabeth A. Harris & Alexandra Alter, *Book Bans Are Rising Sharply in Public Libraries*, N.Y. TIMES (Sept. 21, 2023), <https://www.nytimes.com/2023/09/21/books/book-ban-rise-libraries.html>; Eesha Penharkar, *Parents Are Suing Schools over Pronoun Policies. Here's What You Need to Know*, EDUC. WK. (May 12, 2023), <https://perma.cc/AZ5D-KQYN>; see also LaToya Baldwin Clark, *The Critical Racialization of Parents' Rights*, 132 YALE L.J. 2139, 2195 (2023) (describing the racial dimension in claims to parental rights).

⁶⁴ Dailey, *supra* note 12, at 460.

The family regulation system is often cited as an example of a place where parental rights serve to protect children's well-being, in particular to protect children from the trauma of family separation, and—while we would style the rights in question as *children's rights*—we agree.⁶⁵ But strict protection of children's rights to this fundamental relationship does not mean endorsing near-absolute parental authority over all aspects of their children's lives.⁶⁶ Moreover, broad parental rights are no solution to the underlying causes of family separation—a toxic combination of systemic racial inequality and privatized family care—which combine to punish Black parents for their poverty.⁶⁷

Some may be tempted to affirm broad parental rights because they believe that parents are better situated than the state to determine children's interests. Of course, most parents do, much of the time, make good decisions for their children. But not always. As we have argued elsewhere, parents sometimes have beliefs or wishes that conflict with their children's welfare or development in important ways.⁶⁸ For example, parental rights can leave children unprotected from parents who deny them gender-affirming care or parents who seek to limit their children's exposure to sex education, or contraceptives, or abortion, or anything other than abstinence. Or parents who want their children to work in order to bring in money for the family. Or parents who wish to homeschool their children in isolation from other children, adults, and activities. Part 4 of the Restatement indeed recognizes the fact that parents' wishes may conflict with children's interests. As noted above, it includes black-letter law giving mature minors the right to consent to certain kinds of medical treatment without parental consent or notification, including reproductive health treatment and mental health counseling.

Children's right of access to ideas captures in a concrete way why broad parental authority threatens children's welfare and their development into adult persons and democratic citizens, the very values Part 4 aims to uphold. In our view, children should have the right to access ideas on their own, and the state should not have the authority to endorse parental control over children's access to ideas outside the home absent serious developmental harm. The following Part uses the example of social media to

⁶⁵ See Dailey & Rosenbury, *The New Parental Rights*, *supra* note 25, at 154–62.

⁶⁶ See *id.* at 79.

⁶⁷ See *id.* at 102.

⁶⁸ See *id.* at 82.

illustrate the threat that the Restatement's broad protection for parental authority poses to children place as full persons in society.

II. CHILDREN AND SOCIAL MEDIA: A CASE STUDY

Our concern in this Part is with parents who seek to limit children's access to ideas outside the home and on state laws that endorse that aim. We focus here on children's right to access ideas through social media because social media has transformed the ways in which ideas are conveyed to children. Social media is a major site for children's deep engagement in the social world. It gives children access to a diversity of views vital to their well-being and their ability to participate in a pluralistic, democratic society. Social media does not have a fixed location; children may access social media from virtually anywhere, transcending the traditional boundaries reflected in the organizational structure of the Restatement's first three parts. Social media upends many of the guiding principles of the entire Restatement project while also providing the foundation for alternative principles that build upon the Restatement's strengths and address its shortcomings.

In today's world, children's primary access to ideas is often through social media. Indeed, many children have a deeper exposure to diverse ideas online than at school, particularly if they are enrolled in a private school or are homeschooled. From 2019–2021, total entertainment screen time increased for children ages 13–18 to over eight hours daily.⁶⁹ Although low-income children are less likely to have computers at home or access to reliable Wi-Fi, a fact that severely disadvantaged them during the pandemic's closure of schools, these children are more likely to have smartphones and, like more privileged children, have high average daily entertainment screen use.⁷⁰ In 2021, 62% of children between 13–18 years old spent time on social media every day.⁷¹

Yet, given these statistics, it is surprising that the Restatement barely mentions the internet or social media. The omission is particularly striking in Part 4, which focuses on children in society. Neither the comments nor the reporters' notes for § 18.11 discuss children's access to ideas through the internet in any significant way, and what little discussion there is draws from now-

⁶⁹ See VICTORIA RIDEOUT, ALANNA PEEBLES, SUPREET MANN & MICHAEL B. ROBB, *THE COMMON SENSE CENSUS: MEDIA USE BY TWEENS AND TEENS*, 2021, at 6 (2022).

⁷⁰ *Id.* at 23.

⁷¹ *Id.* at 11.

outdated sources.⁷² Of the four law review articles cited in the Restatement, one heartily embraces government censorship of online media,⁷³ another focuses on the government's interest in restricting speech,⁷⁴ and the other two give tentative and cautious acknowledgement that minors possess First Amendment rights in some cases but limit their analysis mainly to a discussion of mature minors.⁷⁵ No article cited explores the rights of children generally on the modern internet.

The surprising omission of social media from Part 4 may be due to the challenge social media poses to the Restatement's three-part divide of school, home, and juvenile justice, for social media is a space that escapes this classic division of children's lives. In particular, the virtual world blurs the traditional legal boundaries separating home and school and provides its own space—and world of ideas—between and beyond those locations. Moreover, to our discussion here, the absence of social media in Part 4 may reflect the fact that social media presents new and challenging issues regarding parental authority over children's lives.

The remainder of this Part focuses on the way social media defies the Restatement's traditional framing of home and school as the main centers of children's upbringing and the parent-state binary that underlies it. Attention to social media brings children's engagement in society to the forefront of analysis. This Part then examines recent social media legislation and the empirical research showing the harms to children, and to the parent-child relationship, arising from parental censorship. These laws provide a powerful example of the harms to children that may follow from the Restatement's endorsement of broad parental rights to limit children's access to ideas.

⁷² RESTATEMENT Draft No. 5 § 18.11 reporters' notes.

⁷³ See generally Martin Guggenheim, *Violent Video Games and the Rights of Children and Parents: A Critique of Brown v. Entertainment Merchants Association*, 41 HASTINGS L.Q. 707 (2014).

⁷⁴ See generally Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565 (2005).

⁷⁵ See generally Catherine Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427 (2000); Catherine Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223 (1999).

A. Social Media as a Challenge to the Restatement's Traditional Framework

The Restatement's failure to address in any significant way the internet, and social media in particular, at a time of children's exploding online activity is a major shortcoming, for it puts in question the Restatement's relevance to a large part of children's lives. But it also reflects a deeper problem with the Restatement's struggle to recognize in Part 4 a realm of society outside the classic locations of home and school.

As already noted, children's development as persons and democratic citizens is dependent on their engagement with ideas at even very young ages. Laura Rosenbury has shown how this engagement takes place in spaces beyond home and school such as youth groups, neighborhood parks, libraries, religious communities, and in relationships with peers, coaches, counselors, clergy, doctors, and other persons important in children's lives.⁷⁶ Rosenbury observes that the Supreme Court as well as commentators have long attempted to fit these spaces into the categories of either home or school.⁷⁷ In Rosenbury's terms, the Restatement follows suit by affirming parental rights over children's access to ideas, thus expanding the reach of parental authority outside the home. The Restatement's affirmation of parental rights locates the internet, and social media, within the confines of the private family rather than as a realm of social life intersecting with but transcending home and school.

The Restatement is not alone in its failure to confront the challenges posed by social media. The Supreme Court, too, has opted to treat social media as a realm of private family control. In its recent decision in *Mahanoy Area School District v. B.L. ex rel. Levy*,⁷⁸ the Supreme Court addressed the question of whether the *Tinker* doctrine—the rule that schools can limit children's speech on campus where the speech would substantially disrupt the learning environment or invade the rights of others—applies to off-campus speech as well.⁷⁹ More specifically, the issue was whether schools can restrict student off-campus social media posts when the posts concern school matters and are viewed by classmates.⁸⁰

⁷⁶ See Rosenbury, *supra* note 10, at 834.

⁷⁷ See *id.* at 851.

⁷⁸ 141 S. Ct. 2038 (2021).

⁷⁹ *Id.* at 2044. For an extended discussion of *Mahanoy*, see Dailey, *supra* note 12, at 443.

⁸⁰ *Mahanoy*, 141 S. Ct. at 2042–43.

The *Mahanoy* case involved a high school student, identified by her initials B.L., who had failed to make the varsity cheerleading team. After learning of her rejection, B.L. posted on a social media site a photo of herself and a friend displaying their middle fingers above the caption “Fuck school fuck softball fuck cheer fuck everything.”⁸¹ In affirming that the “vulgarity” of her speech was irrelevant,⁸² the Court cited several decisions involving adults expressing themselves in such terms.⁸³ The difference here was that B.L. was a minor enrolled in public school. While *Tinker* had held that students have robust First Amendment rights,⁸⁴ in all three cases involving children’s free speech rights in school decided since *Tinker*, the Court had sided with school authorities.⁸⁵ Yet, the Court instead upheld B.L.’s right to post her school-related frustrations on social media.⁸⁶

In a discussion of the *Mahanoy* case, Dailey notes that, on its face, the decision reaffirmed *Tinker*’s fundamental protection for the free speech rights of children even when off campus. In that regard, it was a major win for children’s free speech rights, the first in over fifty years.⁸⁷ But a closer look at the Court’s reasoning, she argues, reveals the dominant role that parental authority played in this case. Justice Stephen Breyer made the doctrine of *in loco parentis* a centerpiece of the Court’s reasoning.⁸⁸ He explained that schools have authority to discipline children for speech because they stand in place of the parents who have presumably delegated their private power to the schools.⁸⁹ However, schools “rarely stand *in loco parentis*” when students are off

⁸¹ *Id.* at 2043.

⁸² *Id.* at 2046–47.

⁸³ See *Mahanoy*, 141 S. Ct. at 2046–47 (citing *Cohen v. California*, 403 U.S. 15, 19–20 (1971)).

⁸⁴ *Tinker*, 393 U.S. at 506.

⁸⁵ See *Morse v. Frederick*, 551 U.S. 393, 410 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

⁸⁶ The Court declined to set forth a broad standard governing a school’s authority to regulate “off campus” speech, but instead highlighted three features of off-campus speech that “diminished” the strength of the governmental interest: (1) a school rarely stands *in loco parentis* when regulating off-campus speech; (2) a school’s authority to regulate off-campus speech would mean students would never be free to express themselves free from school supervision; and (3) a school’s broad power to regulate “unpopular” speech is in tension with the school’s interest in training students to become democratic citizens. See *Mahanoy*, 141 S. Ct. at 2046.

⁸⁷ See Dailey, *supra* note 12, at 444.

⁸⁸ *Mahanoy*, 141 S. Ct. at 2046.

⁸⁹ *Id.*

campus.⁹⁰ Instead, “[g]eographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility.”⁹¹ In B.L.’s case, Justice Breyer concluded that “B.L. spoke under circumstances where the school did not stand *in loco parentis*” and “there is no reason to believe B.L.’s parents had delegated to school officials their own control of B.L.’s behavior.”⁹²

Properly understood, Dailey concludes, *Mahanoy* may be better described as a parental rights case rather than a children’s rights case.⁹³ The Supreme Court made clear that parents control their children’s speech except when they have delegated that authority to the public schools.⁹⁴ This perspective was succinctly expressed in an amicus brief filed in the case which emphasized that “[t]he Constitution entrusts parents or guardians, not school officials, with the primary duty to oversee student cyberspeech and take appropriate corrective action in response.”⁹⁵ At oral argument, the lawyer for B.L. took the position that school regulation of off campus speech would infringe parental rights.⁹⁶ The *Mahanoy* case can thus be read in the context of the age-old battle between parents and the state over who will control the children. In *Mahanoy*, the parents won, reaffirming the parent-state binary that supports parents’ broad power over children’s exercise of their First Amendment rights.

B. Balancing the Benefits and Harms of Parental Control

Part 4 of the Restatement resonates with *Mahanoy*’s endorsement of parents’ authority over what their children say and hear

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 2047.

⁹³ See Dailey, *supra* note 12, at 444; see also Mary-Rose Papandrea, *The Great Unfulfilled Promise of Tinker*, 105 VA. L. REV. ONLINE 159 (2019) (“One possible way of viewing *Tinker* is that it was cabined in the State’s ability to interfere with parental choices, not that it was defending the rights of children themselves.”).

⁹⁴ *Mahanoy*, 141 S. Ct. at 2046–47.

⁹⁵ See Brief of First Amendment and Education Law Scholars as Amici Curiae Supporting Petitioner at 18, *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038 (2021) (No. 20-255); see also Brief for Parents Defending Education as Amici Curiae Supporting Respondents at 18, *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038 (2021) (No. 20-255) (explaining that the school’s actions exceeded the “traditional bounds of *in loco parentis*”).

⁹⁶ See Transcript of Oral Argument at 62, *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038 (2021) (No. 20-255) (“It would also directly interfere with parents’ fundamental rights to raise their children.”).

outside of school. Of course, parents do have an important role to play in ensuring that children are protected against serious harms on social media sites such as bullying, harassment, and unwanted sexual advances. We recognize that social media can pose special harms to developing children.⁹⁷ Studies show the ways in which children are uniquely vulnerable to discriminatory, harassing, and bullying behavior on social media, and that this vulnerability can lead to mental health problems and self-destructive behavior.⁹⁸ Both parents and state have a duty to guide and educate children in managing safe internet use.

However, in providing this guidance and education, parents should not be empowered to deny their children meaningful access to ideas outside the home. Not all laws that endorse or expand parental control over children's use of social media are beneficial to children. Instead, laws that recognize parental authority should reflect a more nuanced perspective on children's use of the internet. Parents' unrestricted control over children's social media use puts in question the very idea of children in society.

Ensuring children's online safety does not require granting parents absolute control over children's use of social media. While empirical studies on parental control over social media are difficult to find, social scientists have evaluated the impact of parental monitoring devices on teenagers' cell phones. These findings suggest "that parental control apps may be detrimental to families, a teens' developmental growth, and the goal of keeping teens safe from online risks."⁹⁹ In particular, teenagers found such monitoring and censorship "overly restrictive and privacy invasive to the point that the teens felt the apps harmed their relationship with their parents."¹⁰⁰ Such censorship may also increase the chance that children will be harmed online. These studies have

⁹⁷ See Barbara Abney & Zenaida Kotala, *Apps to Keep Children Safe Online May Be Counterproductive*, UCF TODAY (Apr. 2, 2018), <https://perma.cc/PX5X-DF55> (reporting that 23% of youth have experienced accidental exposure to online pornography, 11% have been victims of online harassment, and 9% have received unwanted sexual solicitations online).

⁹⁸ See Elena Savoia, Nigel Walsh Harriman, Max Su, Tyler Cote & Neil Shortland, *Adolescents' Exposure to Online Risks: Gender Disparities and Vulnerabilities Related to Online Behaviors*, 18 INT'L J. ENVTL. RSCH. & PUB. HEALTH 1, 2, 7 (2021); Charisse L. Nixon, *Current Perspectives: The Impact of Cyberbullying on Adolescent Health*, 5 ADOLESCENT HEALTH, MED. & THERAPEUTICS 143, 144 (2014).

⁹⁹ See Arup Kumar Ghosh, Charles E. Hughes & Pamela J. Wisniewski, Circle of Trust: A New Approach to Mobile Online Safety for Families 2 (Apr. 2020) (CHI paper) (on file with author).

¹⁰⁰ *Id.*

found that parenting styles that grant children low amounts of autonomy when it comes to cell phone and internet usage are “associated with increased teen peer problems and online victimization,” concluding that there is “little evidence to suggest that use of parental control apps protect teens from experiencing online risks.”¹⁰¹ By endorsing parents’ sole ability to determine what is harmful speech for children, even when that speech extends beyond the home, the Restatement does more than put at risk children’s access to ideas. This research suggests that parental censorship can also harm the quality of parent-child relationships.¹⁰²

We encourage scholars and courts to recognize social media as a critical social space for children’s right of access to ideas independent of their parents. Weighing in a nuanced way both the benefits and harms of parental control over children’s activity in this social space is vital to children’s place as persons in society and their development as future participants in a pluralistic, democratic polity.

C. Laws That Endorse Near-Absolute Parental Control

The Restatement’s black-letter law on children’s First Amendment freedoms would seem ill-equipped to respond to a strengthened parental rights movement seeking to limit children’s access to ideas. States have recently begun passing laws that specifically endorse and expand parental authority over children’s access to and use of social media.

The state of Utah recently enacted a law that requires social media companies to verify the age of all their account holders who are Utah residents.¹⁰³ The law provides that companies obtain the express consent of a parent or guardian before allowing residents under 18 years of age to open an account.¹⁰⁴ The law also mandates that social media companies give parents or guardians access to accounts held by their children under the age of 18, including access to all their children’s interactions with other social media

¹⁰¹ Arup Kumar Ghosh, Karla Badillo-Urquiola, Mary Beth Rosson, Heng Xu, John M. Carroll & Pamela J. Wisniewski, *A Matter of Control or Safety? Examining Parental Use of Technical Monitoring Apps on Teens’ Mobile Devices* 9 (Apr. 2018) (CHI paper) (on file with author); *cf.* *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75 (1976) (“It is difficult [] to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient’s pregnancy will serve to strengthen the family unit.”).

¹⁰² *See* Ghosh, *supra* note 99, at 2.

¹⁰³ Utah Social Media Regulation Act, UTAH CODE § 13-63-102(3)(a) (2023).

¹⁰⁴ *Id.* § 13-63-102(1).

accounts.¹⁰⁵ Arkansas passed a similar law, and similar legislation has been introduced in New Jersey, Connecticut, Ohio, California, Florida, Iowa, Louisiana, Maryland, Minnesota, and South Carolina.¹⁰⁶ Republican State Senator Tyler Dees, the Arkansas bill's sponsor, said the new law "sends a clear message that we want to partner with parents and empower them to protect our children."¹⁰⁷

The Utah and Arkansas laws are consistent with § 18.11's unqualified affirmation of parents' right "to prevent their children's access to such material."¹⁰⁸ Yet these laws also highlight the shortcomings of this aspect of the Restatement's approach.

As the Restatement emphasizes, the constitutional rights of children are not coextensive with the constitutional rights of adults, largely because of children's immaturity and their need for guidance from adults when making high stakes decisions, such as those involving surgery and other life-altering medical care. Yet the need for such guidance has less force in the context of free speech, as accessing or expressing ideas normally enhances rather than threatens children's well-being.¹⁰⁹ As discussed above, children *are* uniquely vulnerable to harmful speech on the internet. But the solution to harmful speech in this context is not to grant parents the unilateral authority to censor all speech directed to children.

For example, in *Ginsberg v. New York*,¹¹⁰ the Supreme Court recognized that some sexually explicit speech may be more harmful to minors than to adults and therefore permitted states to impose more restrictions on such speech for minors than would be permitted for adults.¹¹¹ But the Supreme Court has not extended this rationale to other speech, including violent video games, holding that children's free speech rights should prevail in the

¹⁰⁵ *Id.* § 13-63-104.

¹⁰⁶ Federica De Santis & Jacqueline Klosek, *States Race After Utah on Minors' Privacy Despite Legal Threats*, BLOOMBERG L. (Apr. 14, 2023), <https://perma.cc/RS32-YY48>.

¹⁰⁷ Andrew Demillo, *Arkansas Governor Signs Law Requiring Kids to Get Their Parents' Permission Before Getting a New Social Media Account*, FORTUNE (Apr. 13, 2023), <https://perma.cc/J6MD-NKWU>.

¹⁰⁸ RESTATEMENT Draft No. 5 § 18.11(a).

¹⁰⁹ This has led at least one First Amendment scholar, Professor Caroline Corbin, to conclude that with respect to children's speech outside of school, "minors enjoy the same level of protection as adults." Caroline Mala Corbin, *The Pledge of Allegiance and Compelled Speech Revisited: Requiring Parental Consent*, 97 IND. L.J. 967, 975 (2022).

¹¹⁰ 390 U.S. 629 (1968).

¹¹¹ *See id.* 390 U.S. at 637.

absence of concrete proof of harm.¹¹² In striking down a state law requiring parental consent to a minor child's abortion, the Supreme Court clearly affirmed that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision."¹¹³ The same, more nuanced view of children's access to ideas should govern in the area of free speech rights.

The Supreme Court has never expressly permitted states to delegate the question of what is harmful speech solely to parents. Yet that is the implication of the Restatement's endorsement of parents' authority to censor their children and to limit their access to ideas. Utah and Arkansas, in the spirit of the Restatement, have now put their states' power behind parents' authority to solely and unilaterally define what is harmful to children. The Supreme Court rejected this authority in *Brown v. Entertainment Merchants Ass'n*, a case involving a state law prohibiting the sale of violent video games to children.¹¹⁴ In responding to Justice Clarence Thomas's dissenting view that no one has the right to speak to children without the consent of parents, Justice Antonin Scalia emphasized that the state does not have the power "to prevent children from hearing or saying anything *without their parents' prior consent*."¹¹⁵

Laws conferring full power on parents to control their children's use of social media will be challenged on First Amendment grounds, and it will be up to the courts to determine the scope of parental rights in the context of free speech that extends beyond the boundaries of the home. When considering laws of this sort, we hope courts will recognize the harms that could flow to children if states fully delegate the task of defining the parameters of harmful speech to parents.

III. A BLACK-LETTER PROPOSAL

We offer alternative black-letter law here that aims to better balance children's right to access ideas with the interest of states and parents to protect children's welfare. Most importantly, this alternative approach does not position children as always subject to the authority of parents or the state. Instead, this language

¹¹² See *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799–800 (2011).

¹¹³ *Danforth*, 428 U.S. at 74.

¹¹⁴ See *Ent. Merchs. Ass'n*, 564 U.S. at 789.

¹¹⁵ *Ent. Merchs. Ass'n*, 564 U.S. at 795 n.3.

seeks to protect children's independent interests in accessing ideas, free from censorship by the state or parents. At the same time, this proposed language recognizes that children should not simply be treated like adults in this context. As the Supreme Court recognized in *Ginsberg* and *Tinker*, the state may restrict children's speech and access to ideas in certain narrow contexts even when the state could not similarly restrict adults' speech.

This alternative black-letter law is a first step in the direction of rethinking the law governing children's access to ideas and, more broadly, children's place in society. It is intended to spark a conversation and does not constitute our definitive position on children's right of access to ideas. With that caveat in mind, our alternative language is as follows:

PROPOSED SECTION 18.11 Children's Right of Access to Ideas

- (a) Children have a right to access ideas so that they acquire the information needed for participation as developing individuals in a pluralistic, democratic society.
- (b) The state's duty to provide a sound, basic education includes ensuring children's access to ideas.
- (c) Children's right to access ideas includes the right to access information on their own.
- (d) With the exception described in (e), states may not limit children's right to access information on their own or empower parents to limit this right.
- (e) The state may act to protect children from serious developmental harm arising from their exposure to ideas so long as that action protects children's access to ideas, including children's right to access information on their own.
 - (1) For purposes of this section, developmental harm means harm that arises by virtue of children's status as children.
 - (2) The state may restrict children's access to ideas in order to protect children from serious developmental harm in two ways:
 - (i) Ensuring children do not have access to speech or content that is unprotected by the First Amendment; and
 - (ii) Protecting children from discrimination, harassment, bullying, and exploitation.

(3) The state may affirmatively act to promote children's safe access to ideas, including by engaging in the following:

- (i) Promoting children's safe exposure to speech, including their use of social media, through education and learning;
- (ii) Providing and supporting alternative content to counter speech that may be developmentally harmful to children;
- (iii) Providing families with material support designed to strengthen relationships of trust between parental caregivers and children so that children are better protected from content that may be developmentally harmful, including content on social media;
- (iv) Requiring social media companies to establish and post clear guidelines and rating systems that inform children and parents about potential developmental harm; and
- (v) Providing support for children who experience developmental harm as a result of exposure to speech, including content on social media.

Our proposed black-letter law thus acknowledges the duty of parents and the state to protect children from harm but emphasizes that such protection may not take the form of state-supported parental censorship outside the home. Consistent with existing doctrine, the state may regulate ideas that pose a serious, substantial risk of developmental harm to children, but the state may not empower parents to limit children's rights to access speech that is otherwise protected by the First Amendment.

Parents remain free to exercise control over their children in the home, but we have long challenged the idea that parents presumptively control children's lives in the spaces beyond home and school,¹¹⁶ and we continue to reject the parent-state binary that leads to an all-or-nothing standoff between parents and state. Instead, as we have argued elsewhere, the law governing children in society should take account of shared authority over and responsibilities to children, attempting to balance in a more nuanced way the roles of parents, state actors, and other important persons in children's lives.¹¹⁷

¹¹⁶ See Rosenbury, *supra* note 10, at 840–41.

¹¹⁷ See Dailey & Rosenbury, *New Law*, *supra* note 13, at 1521.

CONCLUSION

A provocation: What would a restatement project on Children and Law look like if we *began* with Part 4? In other words, if the Restatement began with children in society rather than, as it currently does, with children in the family? This reordering would alter the fundamental framework of the Restatement by structuring the field of children and law around the idea that children are persons in society at the same time that they are persons within the family and in school. Perhaps this reordering would suggest that, even as children develop, they are seen, first and foremost, as independent members of society.

In our newly restructured Restatement, “Children in Society” would come first. This new Part 1 would be expanded beyond the doctrines in the existing Part 4 to encompass all the laws that relate to children’s lives outside either the family or school: laws relating to what children can say and hear, of course, but also child labor laws, curfew laws, laws governing torts and contracts, religious rights, the mature minor doctrine, laws relating to reproduction and sexual activity, children’s political status, emancipation, and perhaps more. With that reordering, the Restatement would truly capture and affirm children’s place in a social world beyond home and school.