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The Smartphone Dilemma

On June 29, 2007, a product was released that would drastically change society. On that date Apple released its first iPhone.¹ While it was well received, few people could have predicted the impact that it, and eventually other smartphones, would have on our society in 2020. It has now been thirteen years since that release and many great things have come from it. However, the impact that these smartphones have had on our children has also been detrimental. Teens spend an average of almost eight hours a day looking at a smartphone.² Addiction, cyber bullying, and depression are but a few of the negative impacts that smartphones have on the youth.³ One reason that this is such a major concern is that reports indicate that nearly all (95%) of teenagers have reported they have access to a smartphone.⁴

While still relatively new technology, the whispers have started to grow louder on the detrimental impact that smartphones have on children. In fact, some states have proposed legislation to regulate smartphones. In Colorado, there was a proposal for a measure to be put on the ballot to ban the sale of smart phones for those under thirteen.⁵ More recently in Vermont, State Senator John Rodgers introduced a bill to ban cellphone use and possession to minors under the age of twenty-one.⁶ As of now, minors can breathe a sigh of relief as it does not look like either bill will become law. However, the important question remains: is it constitutional for a

¹ Ben Gilbert, *Apple's First iPhone*, BUSINESS INSIDER (Jan. 29, 2019, 10:55 a.m.), <https://www.businessinsider.com/first-phone-anniversary-2016-12>.

² Kristen Rogers, *US Teens Use Screen Time* (Oct. 29, 2019, 7:07 a.m.), <https://www.cnn.com/2019/10/29/health/common-sense-kids-media-use-report-wellness/index.html>.

³ Sehar Shoukat, *Cell Phone Addiction and Psychological and Physiological Health in Adolescents* (Feb. 4, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6449671/>.

⁴ See Rogers, *supra* note 2.

⁵ Katie Mettler, *Colorado Proposes Nation's First Legal Limits on Smartphones for Children*, DENVER POST (Jun. 18, 2017, 12:43 p.m.), <https://www.denverpost.com/2017/06/18/colorado-voters-may-consider-ban-on-childhood-smartphones/#:~:text=Farnum's%20proposal%2C%20ballot%20initiative%20no,the%20Colorado%20Department%20of%20Revenue>.

⁶ Aaron Holmes, *Vermont Bill to Ban Cellphones for Anyone under 21*, BUSINESS INSIDER (Jan. 10, 2020, 9:52 a.m.), <https://www.businessinsider.com/vermont-bill-cell-phone-ban-mobile-21-2020-1>.

state to ban smartphones for minors under a certain age? While this restriction may seem overly intrusive on parental rights, the precedent of other public health regulations and the dangers of smartphones, especially to children, would likely grant the states the power to regulate.

Much like gambling, alcohol, smoking and pornography, smartphone usage among those under eighteen should be treated like a public health issue. States use their police power to regulate usage by children on these public health issues. While parents have a constitutional right to raise their child, the dangers of smartphones raise a compelling state interest that might constitutionally allow states to regulate smartphones—possibly even permitting an outright ban on the sale of smartphones to minors.

The first section of this paper will examine the rights of parents to raise their children. Specifically, it will look to court cases which have established a parent’s constitutional right to raise children with certain exceptions. Part II of this paper will examine the health issues and government oversight of gambling, alcohol, smoking and pornography. These examples provide a road map for the consideration of smart phone use as a public health issue subject to oversight.” Part III of this paper will look at the health issues created by smartphones and propose ways to limit a minor’s access to smartphones. In total, this paper will argue that limiting the sale of smartphones to minors is constitutional.

I. Parental Rights

A. Fundamental Right

In the recent documentary *Dads*, Actor Will Smith states, “they give you a thousand-page manual for a television but send you home with a baby with nothing.”⁷ While this can be

⁷ DADS (Apple TV+ 2020).

frightening, it highlights that one way of parenting is not necessarily better than another. Parents want to be able to raise their children as they see fit without having interference from outsiders, whether from other people or the state. The Supreme Court has ruled that States cannot interfere with the right to raise a child without a compelling state interest.⁸ In fact, in a series of cases starting in the early twentieth century, the Supreme Court has consistently found a fundamental right to allow parents to make decisions about the care, custody and control of their children.⁹ However, the Supreme Court has carved out limited exceptions that allow a state to interfere with the fundamental parental rights, but only if there is a compelling state interest, such as health consequences or public safety, and the law is narrowly tailored.¹⁰

The right to raise your children was not always considered a fundamental right. In *Meyer v. Nebraska*, the State of Nebraska passed a law banning the teaching of German in public schools.¹¹ The Supreme Court held that a statute forbidding the teaching of the German language was unconstitutional.¹² The Court explained that the Due Process Clause of the Fourteenth Amendment protects liberty, which includes “the right to marry, establish a home, and bring up children.”¹³ Importantly, the Court also declared that liberty also includes the rights of parents to make significant decisions about how to raise their children.¹⁴ This decision created a family “zone of privacy” that gives parents a constitutional right to raise their children without undue state influence.

A couple years later, the Court used the rationale from *Meyer* to allow parents to choose whether they wanted to send their children to private or parochial schools. In *Pierce v. Society of*

⁸ *E.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

⁹ *E.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

¹⁰ *Prince*, 321 U.S. at 170.

¹¹ *Meyer*, 262 U.S. at 396.

¹² *Id.* at 397.

¹³ *Id.*

¹⁴ *Id.* at 399.

Sisters, the Court struck down an Oregon statute requiring children to attend public schools.¹⁵

The Court held that the statute “unreasonably interferes with the liberty of parents and guardians to direct the upbringing . . . of children under their control”¹⁶ and noted that “it had no reasonable relation to some purpose within the competency of the State.”¹⁷

In *Wisconsin v. Yoder*, the Supreme Court held that a Wisconsin law that required all parents to send the children to school until the age of sixteen was unconstitutional.¹⁸ The Court held that the compulsory education law violated families’ rights under the Free Exercise Clause of the First Amendment and liberty interests under the Fourteenth Amendment.¹⁹ The Court stated, “the history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”²⁰

Lastly, in *Troxel v. Granville*, the Court declared unconstitutional a Washington statute that authorized judges to order parents to permit more visitation between children and their grandparents than the parents desired.²¹ The Court reiterated the holdings in *Meyer*, *Pierce*, and *Yoder*: the Due Process Clause of the Fourteenth Amendment protects the parents’ fundamental rights to make decisions concerning the care, custody, and control of their children.²² Moreover, the Due Process Clause does not allow the state to “infringe on the fundamental right of parents

¹⁵ *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 532 (1925).

¹⁶ *Id.* at 534.

¹⁷ *Id.* at 535.

¹⁸ *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

¹⁹ *Id.*

²⁰ *Id.* at 232.

²¹ *Troxel v. Granville*, 530 U.S. 57, 60 (2000).

²² *Id.* at 65.

to make childrearing decisions simply because a state judge believes a ‘better’ decision could be made.”²³

B. The Right of States to Interfere With a Fundamental Right

The Supreme Court has ruled that when a fundamental right is impacted by a law, they will review that law under the strict scrutiny standard, which means that the State cannot infringe on the fundamental right unless the law is narrowly tailored to serve a compelling state interest.²⁴ The Supreme Court upheld the fundamental rights of parents to make decisions concerning the care, custody and control of their child, therefore the State cannot interfere unless they have a compelling State interest.²⁵ An example of a compelling interest that would warrant state intrusion is “in cases in which harm to the physical or mental health of the child or to the public safety, peace, order, or welfare”²⁶

In *Prince v. Massachusetts*, the Court held that parental rights are not unlimited and can be restricted.²⁷ The Court held that while parents are given the right to raise their child, states may prosecute parents when they expose their children to serious harm to their well-being.²⁸ The Court stated, “the family itself is not beyond regulation in the public interest . . . and neither rights of religion nor rights of parenthood are beyond limitation.”²⁹ In addition, the Court explained that:

[P]arents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for

²³ *Id.* at 73.

²⁴ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

²⁵ *Meyer*, 262 U.S. at 399.

²⁶ *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1264 (M.D. Pa. 1975).

²⁷ *Prince*, 321 U.S. at 159.

²⁸ *Id.*

²⁹ *Id.* at 166.

themselves... the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.³⁰

In *Schleifer v. City of Charlottesville*, the town set a curfew for children not to be in or upon any public place in the city after midnight.³¹ The court held that the city and parents share a responsibility to protect children.³² State authority complements parental supervision and sometimes justifies placing narrow limitations on the freedom of minors.³³ The court noted that the city relied on surveys that showed parental approval of the curfew and the support it offers to parents in order to discipline their children.³⁴ This sentiment was echoed in other juvenile curfew cases in which courts have held similarly.³⁵

While fundamental rights, like parenting, invoke a strict scrutiny review, the right of the state to protect children through the exercise of their police power has traditionally been recognized as a limit on parental rights that is sometimes justified.³⁶ The Supreme Court has allowed age restrictions on activities such as smoking and drinking because there was a compelling state interest to protect minors from the significant harm of these activities. When the harm is significant enough, as is the case with smartphones and the other public health issues discussed below, state regulation passes constitutional muster so long as the intervention is narrowly tailored.

³⁰ *Id.* at 170.

³¹ *Schleifer v. City of Charlottesville*, 159 F.3d 843, 845 (4th Cir. 1998).

³² *Id.* at 847.

³³ *See id.* at 848.

³⁴ *Id.* at 849.

³⁵ *See Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1264 (M.D. Pa. 1975) (“The court holds that the curfew ordinance does not impermissibly impinge on the parents’ constitutional right to direct the upbringing of their children.”).

³⁶ *Prince*, 321 U.S. at 158.

II. Public Health Crisis

Parents have the fundamental right for the “the custody, care and nurture of the child . . . whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”³⁷ However, these rights are not beyond limitation by the state.³⁸ The states have the power to restrict activities to protect minors and the general public. The state has an interest in ensuring that minors mature into healthy adults and thus can regulate behavior when there is a serious threat to childhood health. The ongoing physical and emotional development of children is a serious concern for the states. The immaturity of children leads to an inability for them to self-regulate which can lead to serious health implications. While many public health issues are not much regulated among adults, they are heavily regulated among children because of the physical and emotional vulnerabilities of children. In the following public health issues, the state intervened and regulated the activities recognizing the significant harm they pose to minors.

A. Alcohol

i. Alcohol Health Issues

Drinking alcohol under the age of twenty-one has been strongly linked to suicide, violence, school performance problems, changes in brain development, alcohol dependence later in life, and other risky behaviors such as smoking, drug misuse, and sexual behaviors.³⁹ These health concerns are exacerbated by the fact that adolescents are more likely to binge drink, which

³⁷ *Id.* at 166.

³⁸ *See id.* at 159.

³⁹ CDC, *Minimum Legal Drinking Age of 21 Saves Lives*, <https://www.cdc.gov/alcohol/fact-sheets/minimum-legal-drinking-age.htm> (last updated Jan. 3, 2020).

is defined as drinking four or five servings of alcohol in a two-hour period.⁴⁰ A study conducted by the University of Massachusetts and published in the *Journal Neuroscience* in 2014 found that physical damage to neurons and brain structures caused by binge drinking persisted into adulthood.⁴¹ In addition, they found that the changes to prefrontal cortex, which is responsible for planning complex cognitive behavior, personality expression, decision making, and moderating social behavior, caused lasting harm.⁴²

Alcohol kills more teenagers than all other illegal drugs combined.⁴³ Nearly 60% of teens have had at least one alcoholic drink by eighteen and it is estimated that 11% of the alcoholic beverages consumed in the U.S. are by those under twenty-one.⁴⁴ Each year approximately 5,000 people under the age of twenty-one die as result of underage drinking, which includes 1,900 from auto accidents, 1,600 as a result of homicides, 300 from suicides, as well as hundreds from other injuries that lead to death.⁴⁵ In addition to these deaths, there were another 120,000 emergency department visits by people under twenty-one linked to alcohol in 2013.⁴⁶

Not only does underage drinking pose a threat to the individual themselves, it also poses a threat to society. The rate of alcohol-related traffic crashes is greater for drivers ages sixteen to twenty than for drivers age twenty and older.⁴⁷ More than a third of the fatal accidents among

⁴⁰ EDITORIAL STAFF, *Teenage Binge Drinking Effects*, <https://www.alcohol.org/teens/binge-drinking/> (last updated Jan. 15, 2020).

⁴¹ *Id.*

⁴² *Id.*

⁴³ NIAAA, *Underage Drinking: A Major Health Problem* (Apr. 2003), <https://pubs.niaaa.nih.gov/publications/aa59.htm>.

⁴⁴ EDITORIAL STAFF, *Teen Alcohol Abuse and Treatment Guide*, <https://www.alcohol.org/teens/> (last updated June 16, 2020).

⁴⁵ NIAAA, *Underage Drinking: Why Do Adolescents Drink*, (Jan. 2006), [https://pubs.niaaa.nih.gov/publications/AA67/AA67.htm#:~:text=Each%20year%2C%20approximately%205%2C00%20young,drownings%20\(1%E2%80%9335](https://pubs.niaaa.nih.gov/publications/AA67/AA67.htm#:~:text=Each%20year%2C%20approximately%205%2C00%20young,drownings%20(1%E2%80%9335).

⁴⁶ *Id.*

⁴⁷ See NIAAA, *supra* note 43.

people aged 16-20 involved alcohol.⁴⁸ In addition to putting other motorist's and pedestrian's lives at risk, there are high financial burdens with helping underage drinkers face their problems. In fact, it is estimated that over \$7.3 billion is spent annually for alcohol abuse services for underage drinkers.⁴⁹

ii. Alcohol Legislation

The harms that are associated with alcohol have led Congress and the states to pass laws primarily limiting the age to purchase alcohol to help protect minors and the general public. After the Twenty First Amendment was ratified, most states made the drinking age twenty-one as that was the age to vote.⁵⁰ However, after the Twenty Sixth Amendment was passed in 1969, which lowered the voting age to eighteen, many states followed and lowered the drinking age to eighteen.⁵¹ From 1969 to 1976, thirty states lowered the drinking age to eighteen and by 1982 only fourteen states had a drinking age of twenty-one.⁵² Not surprisingly, reports indicated that teenage car accidents increased in states where the minimum drinking age had been lowered from twenty-one, and Congress responded.

In 1984, Congress passed the National Minimum Drinking Age Act of 1984.⁵³ While the Act did not require the drinking age to be raised to twenty-one, it effectively required it by withholding federal highway funds to states who failed to make twenty-one the minimum age for purchasing and publicly possessing alcohol.⁵⁴ As expected, many states increased the drinking age and litigation quickly followed. In *South Dakota v. Dole*, the Supreme Court held that

⁴⁸ STAFF, *The Sobering Statistics of Underage Drunk Driving*, (Feb. 8, 2018), <https://www.scramsystems.com/blog/2018/02/sobering-statistics-underage-drunk-driving/>.

⁴⁹ *Id.*

⁵⁰ See NIAAA, *supra* note 43.

⁵¹ *History of the Legal Drinking Age*, (Oct. 9, 2018), <https://drinkingage.procon.org/history-of-the-minimum-legal-drinking-age/>.

⁵² *Id.*

⁵³ National Minimum Drinking Age Act of 1984, 23 U.S.C. § 158 (2018).

⁵⁴ *Id.*

awarding federal highway funds to a State based on that State's adoption of a uniform minimum drinking age of twenty-one was constitutional.⁵⁵ The Court found that the lack of uniformity in the State's drinking age created an incentive to drink and drive to border States where the drinking age was lower and the actions taken by Congress were reasonably calculated to address this concern.⁵⁶

In *Craig v. Boren*, the Court held that a law that permitted the sale of alcohol to women at eighteen but men at twenty-one, was unconstitutional as it was gender discrimination.⁵⁷ Importantly, the Court stated that the state was within its power to regulate a minimum drinking age as the law was there to protect minors.⁵⁸

In *Republican College Council v. Winner*, there was a challenge to a Pennsylvania statute that denied minors access to alcoholic beverages.⁵⁹ The plaintiffs argued, among other things, that the law impermissibly interfered with parental rights.⁶⁰ However, the court held that they "cannot ignore the argument of the defendants that drinking inside the home can have a considerable effect on events outside, due to the opportunity for minors to drink and drive. At times, even the rights of parents must yield to state regulation."⁶¹

In *Felix v. Milliken*, there was a challenge by individuals under twenty-one to a Michigan drinking age law.⁶² The court reasoned that if the drinking age law infringed on a constitutional right of a parent to serve alcohol to their child, then there could never be a minimum drinking age law as this argument would always be applicable in regards to minimum drinking age laws.⁶³

⁵⁵ *South Dakota v. Dole*, 483 U.S. 203, 205 (1987).

⁵⁶ *Id.* at 209.

⁵⁷ *Craig v. Boren*, 429 U.S. 190, 193 (1976).

⁵⁸ *Id.* at 200.

⁵⁹ *Republican College Council v. Winner*, 357 F. Supp. 739, 741 (E.D. Pa. 1973).

⁶⁰ *Id.* at 743.

⁶¹ *Id.*

⁶² *Felix v. Milliken*, 463 F. Supp. 1360, 1363 (E.D. Mich. 1978).

⁶³ *Id.* at 1385.

The court relied on *Republican College* and held that there was no right of privacy and that at times even a parent's right must yield to the state.⁶⁴

As illustrated in the cases above, the states are well within their right to regulate the minimum drinking age. The takeaway is that the states' compelling interest of protecting minors and the general public outweighs the parents' rights when the regulation is age-based and supported by evidence of the harm to be avoided.

B. Pornography and Obscenity

i. Pornography/Obscene Material Health Issues

In 2016, Utah was the first state to pass a resolution that declared pornography a public health crisis.⁶⁵ Since then, fifteen other states have passed similar measures.⁶⁶ These resolutions highlight the need for education and awareness on the harmful effects of pornography.⁶⁷

The effects of pornography on minors have been found to be more impactful as their brains are still developing.⁶⁸ Alarming, 94% of minors will see pornographic images by age fourteen and 71% stated that they hid their pornography habits from their parents.⁶⁹ In his book, *Your Brain on Porn*, author Gary Wilson stated that children see pornography at a younger age when their brain is still developing and the dopamine rush that porn elicits leads to addiction.⁷⁰

⁶⁴ *Id.*

⁶⁵ Mattie Quinn, *Is Porn a Public Health Crisis? 16 States Say Yes*, (July 19, 2019), <https://www.governing.com/topics/health-human-services/gov-pornography-public-health-crisis-states.html>.

⁶⁶ *Id.*

⁶⁷ STAFF, *These 16 States have Passed Resolutions Recognizing Porn as a Public Health Issue*, (May 09, 2019), <https://fightthenewdrug.org/here-are-the-states-that-have-passed-resolutions/>.

⁶⁸ Carolyn C. Ross, *Overexposed and Under Prepared*, PSYCHOLOGY TODAY (Aug. 13, 2012), <https://www.psychologytoday.com/us/blog/real-healing/201208/overexposed-and-under-prepared-the-effects-early-exposure-sexual-content..>

⁶⁹ COVENANT EYES, *Pornography Statistics*, <https://www.covenanteyes.com/pornstats/>, (last visited July 1, 2020).

⁷⁰ Darcel Rockett, *How Porn is Affecting Our Kids*, CHICAGO TRIBUNE (Apr. 3, 2018, 9:05 a.m.), <https://www.chicagotribune.com/lifestyles/parenting/sc-fam-porn-addiction-in-youth-0417-story.html>.

Studies have shown that the earlier teens were exposed to sexual content in movies the more likely they would have sex at a younger age, and the more likely they would have casual, unprotected sex.⁷¹ In addition to earlier sex, a study conducted by Dr. Jennings Bryant showed that more than 66% of boys and 40% of girls reported wanting to “try” some of the sexual behaviors they saw in the media.⁷² The study also showed that by high school many teens had tried these behaviors, which increases the risk of sexually transmitted diseases and unwanted pregnancies.⁷³

Pornography also has an impact on the mental health of the youth.⁷⁴ Pornography use may contribute to teens’ insecurities about body appearance and/or sexual performance.⁷⁵ It may also undermine attachment functioning which can lead to relationship dysfunction and social isolation.⁷⁶ Cross-sectional surveys have found that viewing pornography can be related to poor mental health and lower quality of life among adults.⁷⁷ Additionally, the surveys showed lower life-satisfaction and self-esteem, and other symptoms of depression among adolescents.⁷⁸

ii. Pornography/Obscenity Legislation

States have used their police powers to pass laws that aim to protect children from the harms of pornography and other obscene material. In 1968, in *Ginsberg v. New York*, a convenience store owner was found guilty of selling adult magazines to persons under seventeen, which violated state law.⁷⁹ The store owner argued that the state did not have the power to limit

⁷¹ Ross, *supra* note 68.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Taylor Kohut, *Is Pornography Use a Risk for Adolescent Well-being?*, (Aug. 10, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6088458/>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Ginsberg v. New York*, 390 U.S. 629, 631 (1968).

his free speech by not allowing him to sell adult magazines to those under seventeen.⁸⁰ The Supreme Court held that it was well within the state's power to protect minors and that even though the material is not classified as "obscene" to adults it may still be regulated with minors.⁸¹ The Court did not find that the law infringed on the parents' fundamental rights to raise their child because the statute supported parents' decisions if the parent did not want their child to have pornography and did not cause any interference to parents who wanted to supply the adult magazine to their own child.⁸² While the Court acknowledged that the supervision of a child is best left to the parent, they held "the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of [obscene] material to them."⁸³

In *Reno v. ACLU*, the parties disputed the Communications Decency Act of 1996 which sought to protect minors from harmful material on the internet.⁸⁴ While the Court stated that states did have the right to regulate minors' access to pornography, but parents still had the right to direct the upbringing of their child in their own household.⁸⁵ The Court held that, unlike *Ginsberg*, parents could not provide material to their kids under the statute which made it too intrusive on parental rights and thus it was deemed unconstitutional.⁸⁶ Congress tried again with other Acts to protect children from access to pornography, with limited success because the Acts were overly broad.⁸⁷

⁸⁰ *Id.* at 637.

⁸¹ *Id.* at 636.

⁸² *Id.* at 639.

⁸³ *Id.* at 640, (quoting *People v. Kahan*, 206 N.E.2d 333 (N.Y. 1965).

⁸⁴ *Reno v. ACLU*, 521 U.S. 844, 849 (1997).

⁸⁵ *Id.* at 865.

⁸⁶ *Id.*

⁸⁷ *See also* Child Online Protection Act 47 U.S.C. § 231(a) (2000). In 2000, Congress passed the Child Online Protection Act to restrict access by minors to material that would be considered harmful on the Internet but held unconstitutional. *Id.* That same year, Congress passed the Children's Internet Protection Act, which was held to be constitutional. Children's Internet Protection Act 47 U.S.C § 254(h) (2000). This law required libraries, in order to

In *FCC v. Pacifica Foundation*, the Court held that the that “the government's interest in the ‘well-being of its youth’ and in supporting ‘parents' claim to authority in their own household’ justified the regulation of otherwise protected expression.”⁸⁸ The Court stated that the language in comedian George Carlin’s monologue, *Filthy Words*, which was broadcast over the radio and contained words such as shit and fuck and others, was as potentially degrading and harmful to children as representations of many erotic acts.⁸⁹ The Court noted that these types of broadcasts were easily accessible to minors and could enlarge a child’s vocabulary in an instant.⁹⁰ This led the Court to “justify special treatment of indecent broadcasting” and prevent the general dissemination of such speech at certain times when children would likely be among the audience.⁹¹ This is yet another example of the government curtailing parental rights in order to protect children.

Lastly, in *Action for Children’s Television v. FCC*, the court held unconstitutional a law that tried to shield minors from indecent radio and television by restricting the hours they could be broadcast by declaring the restrictions as overly broad.⁹² However, the court stated that in *Ginsberg*, the Supreme Court recognized the “Government’s interest in protecting children extends beyond shielding them from physical and psychological harm.”⁹³ In addition, they found that the government had an independent and compelling interest to prevent minors from being exposed to indecent broadcasts.⁹⁴ The court held that “it treats the Government interest in supporting parental authority and its independent interest in the well-being of its youth as

receive discounts, to certify that they have an internet safety policy that restricted minors’ access to obscene material to include pornography. *Id.*

⁸⁸ *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978).

⁸⁹ *Id.* at 758.

⁹⁰ *Id.* at 749.

⁹¹ *Id.* at 750.

⁹² *Action for Children’s Television v. FCC*, 58 F.3d 654, 656 (D.C. Cir. 1995).

⁹³ *Id.* at 662.

⁹⁴ *Id.* at 663.

complimentary objectives mutually supporting limitations on children's access to obscene material."⁹⁵ If the hours of the law were more narrowly tailored, it would have been constitutional and a legitimate use of state power.⁹⁶

Obscenity and pornography can have a lasting impact on the health of children. As stated in *Ginsberg*, states have an independent interest to ensure the protection of children.⁹⁷ If the laws are narrowly tailored, courts will all allow states to use their police powers to regulate obscene materials as these laws protect minors.

C. Smoking/Vaping

Both smoking and vaping have been very popular at one point or another in America. Currently it is the latter, but historically smoking was extremely rampant in America, including among minors. States have used their police powers to regulate the age in which minors could purchase and possess these types of products.

i. Smoking/Vaping Health Issues

While popular, both smoking and vaping cause many concerning health issues that can affect nearly every organ in the body.⁹⁸ Cigarette smoking is the leading preventable cause of death in the United States and causes more than 480,000 deaths a year.⁹⁹ Smoking causes more deaths each year than the following causes combined: human immunodeficiency virus (HIV), illegal drug use, alcohol use, motor vehicle injuries, and firearm-related incidents.¹⁰⁰

⁹⁵ *Id.* at 663 (internal quotation marks omitted).

⁹⁶ *Id.* at 656.

⁹⁷ *Ginsberg*, 390 U.S. at 640.

⁹⁸ CTR. FOR DISEASE CONTROL AND PREVENTION, *Smoking and Tobacco Use*, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/index.htm, (last updated Apr. 28, 2020)

⁹⁹ *Id.*

¹⁰⁰ *Id.*

Smokers are more likely than nonsmokers to develop heart disease, strokes, and lung cancer.¹⁰¹ In fact, estimates have shown that smoking increases the risk for coronary heart disease by two to four times, a stroke by two to four times, and of developing lung cancer by twenty-five times.¹⁰² In addition to lung cancer, smoking can cause cancer almost anywhere in the body.¹⁰³

The effect on minors can be even more devastating. More than 3,200 children age eighteen or younger start smoking every day.¹⁰⁴ Young people who smoke are in danger of addiction to nicotine, reduced lung growth, reduced lung function, and early cardiovascular damage.¹⁰⁵ In addition, exposure to nicotine can have long lasting impact on adolescent brains that are still developing.¹⁰⁶

While the research on smoking cigarettes is widely available, the health effects of vaping e-cigarettes is not as well known. However, as they have gained in popularity, there have been studies that show that vaping can be extremely harmful as well.¹⁰⁷ One main concern is that most e-cigarettes contain nicotine, the addictive drug found in cigarettes. In fact, a recent CDC study found that 99% of e-cigarettes sold in the United States contained nicotine.¹⁰⁸ Nicotine can harm the developing brain and use by an adolescent can harm the parts of the brain that control attention, learning, mood, and impulse control.¹⁰⁹

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ CTR. FOR DISEASE CONTROL AND PREVENTION, *Smoking and Youth*, https://www.cdc.gov/tobacco/data_statistics/sgr/50th-anniversary/pdfs/fs_smoking_youth_508.pdf, (last visited July 1, 2020).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ SURGEON GENERAL, *E-Cigarettes and Young People*, <https://e-cigarettes.surgeongeneral.gov/getthefacts.html>, (last visited July 1, 2020).

¹⁰⁸ CTR. FOR DISEASE CONTROL AND PREVENTION, *supra* note 104.

¹⁰⁹ *Id.*

Contrary to some assertions, the e-cigarette aerosol is not just harmless “water vapor.”¹¹⁰ In fact, e-cigarettes contain harmful substances such as nicotine, chemical flavorings (like diacetyl, which is linked to a serious lung disease), cancer-causing chemicals, and heavy metals such as nickel, tin, and lead.¹¹¹

E-cigarette companies sell flavors, like fruit and candy, that are especially appealing to youth.¹¹² According to a report in 2016, more than twenty million youth had seen advertisements for e-cigarettes.¹¹³ This has led to a dramatic growth in e-cigarette use and it is now the most commonly used tobacco product by youth.¹¹⁴ This is concerning because of 72% of teens believe e-cigarettes cause little or no harm.¹¹⁵ While still relatively new, the early research has shown that vaping is anything but safe.

ii. Smoking/Vaping Legislation

Both smoking and vaping health impacts have led to restrictions for minors regarding both these products. In 2009, Congress passed the Family Smoking Prevention and Tobacco Control Act.¹¹⁶ This Act gave the FDA authority to regulate the manufacturing, distribution, and marketing of tobacco products.¹¹⁷ It also restricted access to minors by banning: sales to minors, vending machine sales, tobacco-brand sponsorships of sports and entertainment events, and free giveaways of sample cigarettes.¹¹⁸

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² SURGEON GENERAL, *supra* note 107.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ CTR. FOR DISEASE CONTROL AND PREVENTION, *Quick Facts on E-Cigarettes*, https://www.cdc.gov/tobacco/basic_information/e-cigarettes/Quick-Facts-on-the-Risks-of-E-cigarettes-for-Kids-Teens-and-Young-Adults.html, (last updated (July 28, 2020)).

¹¹⁶ Family Smoking Prevention and Tobacco Control Act, 111 P.L. 31, 123 Stat. 1776.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

In *Lorillard Tobacco Co. v. Reilly*, the court considered a Massachusetts law that regulated the advertising and sale of cigarettes.¹¹⁹ The Court held that states have a substantial interest in preventing minors from accessing tobacco products.¹²⁰ The Court noted that while some of the advertisement laws enacted may be unconstitutional, states have the right to prohibit tobacco sales to minors.¹²¹ Moreover, the Court determined that the ban on self-service displays was narrowly tailored to prevent access to tobacco products by minors and therefore was constitutional.¹²²

In *Dwafgy's Manufacturing, Inc. v. City of Topeka*, the Kansas Supreme Court upheld a city ordinance that increased the smoking age from eighteen to twenty-one.¹²³ The court held that this was a valid exercise of the city's home rule power under the State Constitution as there was no state law that preempted the local government from enacting tougher laws.¹²⁴ The home rule amendment in Kansas "empower[s] local governments to determine their local affairs and government by ordinance" and therefore gave cities the "largest measure of self-government."¹²⁵

As some states raised the smoking age to twenty-one, the federal government acted. On December 20, 2019, President Donald J. Trump signed legislation that amended the Federal Food, Drug, and Cosmetic Act.¹²⁶ This change raised the federal minimum age of sale of tobacco products from eighteen to twenty-one.¹²⁷ It is now illegal for a retailer to sell tobacco

¹¹⁹ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 532 (2001).

¹²⁰ *Id.* at 539.

¹²¹ *Id.*

¹²² *Id.* at 552.

¹²³ *Dwafgy's Mfg., Inc. v. City of Topeka*, 433 P.3d 1052, 1055 (Kan. 2019).

¹²⁴ *Id.* at 1056.

¹²⁵ *Id.* at 1341.

¹²⁶ Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 355 (1938).

¹²⁷ FDA, *Newly Signed Legislation Raises Federal Age of Sale of Tobacco Products to 21*, (Jan. 15, 2020), <https://www.fda.gov/tobacco-products/ctp-newsroom/newly-signed-legislation-raises-federal-minimum-age-sale-tobacco-products-21#:~:text=On%20Dec.,cigarettes%E2%80%94to%20anyone%20under%2021>.

products, which includes cigarettes and e-cigarettes, to anyone under twenty-one.¹²⁸ While this law does not require any states to raise the sales age to twenty-one, it does require states to show that their retailers are complying with the law.¹²⁹ If states fail to do so, they can lose federal substance abuse grant funding.¹³⁰ While this law punishes those trying to sell tobacco to minors, it did not punish those trying to buy tobacco underage.¹³¹ Strikingly, all but seven states have laws prohibiting the possession, use, and purchase of tobacco products by minors, also known as PUP laws.¹³²

While the new twenty-one minimum age limit has yet to be challenged, many proponents believe it will survive litigation.¹³³ Much like alcohol minimum age laws, there is substantial medical research to show the harms of smoking for minors, which creates a compelling state interest to regulate.¹³⁴

D. Gambling

Gambling has been popular since the beginning of America. The amount of money that Americans spend each year on gambling, legal or illegal, is in the billions.¹³⁵ While gambling adds excitement it also brings a variety of health issues that are a major concern, especially to minors. For these reasons, all fifty states have enacted minimum age laws for gambling.¹³⁶

¹²⁸ *Id.*

¹²⁹ STAFF, *Tobacco 21*, <https://tobacco21.org>, (last visited July 2, 2020).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² STAFF, *Tobacco 21 Laws: Raising the Minimum Sales Age for All Tobacco Products to 21*, <https://www.lung.org/policy-advocacy/tobacco/prevention/tobacco-21-laws>, (last visited July 15, 2020).

¹³³ STAFF, *Tobacco 21: Tip and Tools*, (Oct. 2016), <https://www.publichealthlawcenter.org/sites/default/files/resources/phlc-Tobacco-21-Tips-Tools-2016.pdf>.

¹³⁴ *See also* *Gabree v. King*, 614 F.2d 1 (1st Cir. 1980) (upholding Massachusetts law that increased minimum drinking age to twenty); *Felix v. Milliken*, 463 F. Supp. 1360 (E.D. Mich. 1978) (upholding Michigan constitutional amendment raising minimum drinking age to twenty-one).

¹³⁵ AGA, *State of the States 2020*, <https://www.americangaming.org/resources/state-of-the-states-2020/>, (last updated June 3, 2020).

¹³⁶ STAFF, *State-by-State Gambling Law*, <https://www.letsgambleusa.com/state-gambling-laws/>, (last visited July 2, 2020).

i. Gambling Health Issues

Although it can be widely entertaining, gambling can have severe health consequences. One concern about gambling is the addiction that it can create, especially in minors.¹³⁷ Children and teenage brains are not fully developed and thus they are more likely to act impulsively and take risks.¹³⁸ In fact, studies have shown that those who start gambling by age twelve are four times more likely to become problem gamblers.¹³⁹ While the majority of gamblers do not suffer significant adverse consequences, approximately 20% are considered to either be over-involved in gambling or at risk for developing gambling problems.¹⁴⁰

Gambling also presents other mental health outcomes including high rates of depression and anxiety.¹⁴¹ Teen gamblers also tend to have increased risk of suicide attempts and ideations compared to other adolescents.¹⁴² Further, these minors have an increased risk of alcohol and substance abuse disorders.¹⁴³ A Minnesota study, which assessed high risk behaviors in sixth, ninth, and twelfth graders, showed considerable overlap between gambling and drug use.¹⁴⁴

In relation to their peers, young gamblers are at an increased risk for criminal behavior, poor academic health, and disruption in their relationships.¹⁴⁵ There is growing concern that the internet and video games have given unfettered access to gambling for minors.¹⁴⁶ Studies have

¹³⁷ STAFF, *The Dangers of Youth Gambling Addiction*, https://knowtheodds.org/wp-content/uploads/2013/05/NYCPG_ebook_YouthGambling_052114.pdf, (last visited July 5, 2020).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Carmen Messerlian, *Beyond Drugs and Alcohol: Including Gambling in a High-risk Behavior Framework*, (Mar. 01, 2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2528700/>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Carmen Messerlian, *Youth Gambling Problems: A Public Health Perspective*, <https://academic.oup.com/heapro/article/20/1/69/797595>, (last visited July 5, 2020).

¹⁴⁴ *See* Messerlian, *supra* note 140.

¹⁴⁵ Goran Livazovic, *Problem Gambling in Adolescents: What are the Psychological, Social and Financial Consequences*, (Jan. 28, 2005), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6878669/>.

¹⁴⁶ Ben Gilbert, *Video Game Industry is Facing Scrutiny Over Loot Boxes*, BUSINESS INSIDER (Jun. 23, 2019, 7:43 a.m.), <https://www.businessinsider.com/video-game-industry-loot-box-legislation-2019-6>.

shown that loot boxes, which are items in video games that can be bought with money, are linked to problem gambling among adolescents.¹⁴⁷ A large scale study that was conducted showed a correlation between the amount spent on loot boxes and the severity of their problem gambling.¹⁴⁸ Currently there are no laws against loot boxes, however, there has been a growing concern to regulate them as they are seen as harmful to minors.¹⁴⁹

ii. Gambling Legislation

The health risks associated with gambling led politicians to introduce legislation to protect individuals from the harms of gambling. In 1992, Congress passed the Professional and Amateur Sports Protection Act (PASPA) which effectively outlawed sports betting nationwide.¹⁵⁰ PASPA was passed to, among other reasons, reduce the promotion of sports gambling among America's youth.¹⁵¹ In 2018, the Supreme Court, in *Murphy v. NCAA*, ruled that PASPA violated the Tenth Amendment by commandeering states' power to regulate sports betting by the federal law.¹⁵² After this decision, states, such as New Jersey, are now allowed to regulate sports betting.¹⁵³

One area of gambling that all states have regulated is minimum age laws.¹⁵⁴ While there is no specific federal law that mandates a minimum gambling age, all fifty states restrict minors from gambling.¹⁵⁵ Both New York and New Jersey require individuals to be at least eighteen to

¹⁴⁷ David Zendle, *Video Game Loot Boxes Are Linked to Gambling*, (Nov. 21, 2018), <https://pubmed.ncbi.nlm.nih.gov/30462669/>.

¹⁴⁸ *Id.*

¹⁴⁹ Gilbert, *supra* note 146.

¹⁵⁰ Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702 (1992).

¹⁵¹ S. REP. NO.102-248, at 4-5.

¹⁵² *Murphy v. NCAA*, -- U.S. --, 138 S. Ct. 1461, 1468 (2018).

¹⁵³ *Id.*

¹⁵⁴ STAFF, *State-by-State Gambling Law*, <https://www.letsgambleusa.com/state-gambling-laws/>, (last visited July, 22020).

¹⁵⁵ *Id.*

participate in the lottery and horse racing.¹⁵⁶ The minimum age to enter a casino in New York is eighteen; and twenty-one in New Jersey.¹⁵⁷ These regulations on the minimum gambling age are valid state actions due to the compelling interest of protecting minors.

In *Latour v. State*, the Louisiana Supreme Court upheld a law that raised the gambling age in Louisiana to twenty-one.¹⁵⁸ The court stated that the legislation was “substantially related to the protection of the general welfare of the state.”¹⁵⁹ Based on this rationale, the court upheld the age increase as they believed it protected young adults and protected the general public health and welfare.¹⁶⁰

States have seen the harmful impacts that gambling can have on minors and implemented laws to protect them. While there have not been many court cases challenging the minimum age of gambling, the same constitutional analysis applies. Like the other three public health issues, there is a compelling state interest to protect minors from gambling. Even if the courts give special weight to the parents’ considerations, these types of laws are well within the states powers to regulate so long as they are narrowly tailored.

VI. Smartphones

Like the other four public health issues discussed above, smartphones are extremely popular in America. However, the popularity of something does not mean that it should be accessible to children of all ages. I posit that the negative health impact on minors provides a compelling state interest that would allow the states to regulate smartphones, even over parents’ objections.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Latour v. State*, 778 So. 2d 557, 557 (La. 2001).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 564.

i. Smartphone Health Issues

The use of a smartphone has many health implications. These health issues should be a major concern to all parents of children under the age of eighteen. One of the worries regarding smartphones is the addictive nature of device. Studies show that 54% of teens stated that they spent too much time on their cell phones, while 60% of U.S college students consider themselves to have a cell phone addiction.¹⁶¹ In a study conducted by Common Sense Media, teens averaged nine hours of screen time a day, with Snapchat and Instagram being the most popular sites.¹⁶²

Much of this screen time may be the fault of social media giants such as Facebook, Snapchat and Instagram. “Likes” on these sites lead to a surge in dopamine, the “feel good” hormone.¹⁶³ According to a report from Harvard University, this stimulation is as rewarding as hitting a small jackpot for gamblers and leads to the potential for addiction.¹⁶⁴ The more screen time on these sites, means more money for the companies and they will continue to try and keep people’s eyes on the screen.¹⁶⁵ A 60 Minutes interview discussed how Instagram takes advantage of minors’ dopamine-driven desire for social validation.¹⁶⁶ For example, Instagram notification algorithms withhold “likes” on minors’ photos and deliver them later in larger bursts.¹⁶⁷ This causes the mind to respond robustly to the sudden influx of “likes.” Minors crave

¹⁶¹ *Id.*

¹⁶² Chrisanna Mink, *How Growing Screen Time is Impacting Teen’s Mental Health*, (Sep. 22, 2019, 5:00 a.m.), <https://www.modbee.com/living/health-fitness/article234323582.html>.

¹⁶³ Trevor Haynes, *Dopamine, Smartphones and You*, (May 01, 2018), <http://sitn.hms.harvard.edu/flash/2018/dopamine-smartphones-battle-time/>.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Anderson Cooper, *What is “Brain Hacking?” Tech Insiders on Why You Should Care*, (Apr. 9, 2017), <https://www.cbsnews.com/news/brain-hacking-tech-insiders-60-minutes/>.

¹⁶⁷ *Id.*

feelings like this and they keep checking their smartphones which in-turn leads to more screen time.¹⁶⁸

This addiction has also led to arguments between parents and children regarding the minor's smartphone usage. Research has shown that 35% of parents and 32% of teens stated that they argue daily about the device use while 43% of parents and 38% of teens stated that they argued a few times a week.¹⁶⁹ This means that 78% of parents and 70% of teens believe that they argue over the minors use of their smartphone at least a few times a week.¹⁷⁰ This type of environment is not good for the family dynamic.

Recently, the American Academy of Pediatrics has issued guidelines limiting screen time for children of all ages.¹⁷¹ The recommendation of the Academy pertained to all screen time and not just smartphones as the Academy recognized the impact screen time can have on minors.¹⁷²

In addition to being addictive, social media creates the perfect environment for cyberbullying. Nearly 60% of teens reported some sort of cyberbullying with name calling and spreading of false rumors being the most common offense.¹⁷³ A vast majority of teens, 90%, believe that online harassment is a problem that affects people their age and 63% believe it is a major problem.¹⁷⁴ The likelihood of teens facing harassment varies based upon the amount of time the teen goes online. Strikingly, 45% of teens said they are constantly online and those

¹⁶⁸ *Id.*

¹⁶⁹ Michael B. Robb, *The New Normal: Parents, Teens, Screens, and Sleep in the United States*, <https://www.common sense media.org/sites/default/files/uploads/research/2019-new-normal-parents-teens-screens-and-sleep-united-states.pdf>, (lasted updated 2019).

¹⁷⁰ *Id.*

¹⁷¹ AMERICAN ACADEMY OF PEDIATRICS, *Media and Children Communication Toolkit*, <https://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/Pages/Media-and-Children.aspx>, (last visited Oct. 20, 2020).

¹⁷² *Id.*

¹⁷³ Monica Anderson, *A Majority of Teens Have Experience Some Form of Cyberbullying*, (Sep. 27, 2018), <https://www.pewresearch.org/internet/2018/09/27/a-majority-of-teens-have-experienced-some-form-of-cyberbullying/>.

¹⁷⁴ *Id.*

teens were more likely to be cyberbullied.¹⁷⁵ In addition to name calling and false rumors, 7% of teens have said that someone has shared an explicit picture of them without their consent.¹⁷⁶ On top of this, 20% of boys and 29% of girls have stated that they have received explicit pictures that they did not ask for.¹⁷⁷

The time spent on their phones has led teens to be more anxious, depressed, and even suicidal.¹⁷⁸ A study conducted between 2010-2015 found that teens who reported spending more time on social media and their phones were more likely to report mental health issues than those who spent time on non-screen activities.¹⁷⁹ In fact, this study showed that depressive symptoms and suicide among adolescents all increased during the 2010s.¹⁸⁰ The study showed a clear pattern, linking screen activities with higher levels of depression systems and suicide outcomes than non-screen activities.¹⁸¹ Surprisingly, this risk was seen after only two hours or more of electronic screen time.¹⁸² Another study conducted in 2019 stated that there is a relationship between cell phone usage and adolescent's mental or physical health.¹⁸³ Roughly 40% of adolescents said they felt anxious if they left home without their cellphones and 56% said that they associated absence of cellphones with at least one of these three emotions: loneliness, being upset, or feeling anxious.¹⁸⁴

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Jean M. Twenger, *Increases in Depressive Symptoms, Suicide-Related Outcomes, and Suicide Rates Among U.S. Adolescents After 2010 and Links to Increased New Media Screen Time*, (Nov. 14, 2017), <https://journals.sagepub.com/doi/full/10.1177/2167702617723376>.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ See Shoukat, *supra* note 3.

¹⁸⁴ Kari Paul, *This is What Happens When You Take Phones Away From Teenagers*, MARKETWATCH (Aug. 25, 2018, 10:22 p.m.), <https://www.marketwatch.com/story/this-is-what-happens-when-you-take-phones-away-from-teenagers-2018-08-22>.

Furthermore, there are also physical side effects from smartphone usage. Sleep duration and quality are disrupted from smartphone usage.¹⁸⁵ There is also mixed evidence, which requires further studies, on the impact of smartphones on physical activity and obesity. While some studies have found a correlation between increased smartphone usage and obesity, other studies have not.¹⁸⁶

In addition to these health effects, there has been concern over smartphones and cancer. Cell phones emit radio frequency which can target radiation to the brain when the cell phone is held to the ear. Both the World Health Organization review panel and the American Academy of Pediatrics concluded this is a “possible” risk for cancer but more studies were needed.¹⁸⁷

Lastly, motor vehicle accidents are the number one cause of death among adolescents.¹⁸⁸ Using a phone while driving has been shown to have a three to four fold increase in risk of crash or near crash.¹⁸⁹ Studies have shown that drivers aged sixteen to nineteen are most likely to die in distracted driving crashes.¹⁹⁰ Although this age group only accounts for 6% of total drivers, they have accounted for 10% of all drivers determined to be distracted at the time of crash and 11% of all drivers killed in crashes related to cell phone usage.¹⁹¹ In addition to motor vehicle accidents, the American Academy of Pediatrics has also seen a surge in distracted pedestrian injuries from smartphone usage, which may now be responsible for 10% of pedestrian injuries.¹⁹²

¹⁸⁵ Sara E. Domoff, *Excessive Use of Mobile Devices and Children's Physical Health*, (Apr. 16, 2019), <https://onlinelibrary.wiley.com/doi/full/10.1002/hbe2.145>.

¹⁸⁶ See Mink, *supra* note 162.

¹⁸⁷ *Id.*; Ruth. A. Etzel, *More Study Needed on Risk of Brain Tumors from Cell Phone Use*, (Oct. 2011), <https://www.aapublications.org/content/32/10/28>.

¹⁸⁸ M. Kit Delgado, *Adolescent Cellphone Use While Driving: An Overview of the Literature and Promising Future Directions for Prevention*, (June 16, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5041591/>.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Dr. William Raszka, *Heads Up: Cell Phone Use and Pedestrian Injury.*, (Mar. 25, 2016), <https://www.aapublications.org/news/2016/03/25/Cell-Phone-Use-and-Pedestrian-Injury-pediatrics-0316>.

While smartphones are still relatively new, the research to determine the impact on minors is steadily growing. In a new report, two psychology professors examined forty reports on the impact between social media use and both depression and anxiety among adolescents.¹⁹³ They concluded that right now the link is small and inconsistent.¹⁹⁴ While they do not argue that intensive use of smartphones does not matter, they do challenge the belief that smartphones are responsible for broad societal problems among minors.¹⁹⁵

With that being said, those in Silicon Valley, have started to look at cell phones and their own adolescents differently.¹⁹⁶ Tim Cook, the CEO of Apple, stated that he would not let his nephew join social networks.¹⁹⁷ Bill Gates, the co-founder of Microsoft, banned cellphones for his children until they were teenagers and even then, his wife stated they wished they had waited longer.¹⁹⁸ Even the late Steve Jobs, the co-founder of Apple, would not let his young children near iPads.¹⁹⁹

In 2019, Senators and Representatives reintroduced a bill, the *Children and Media Research Advancement Act* (CAMRA), that would commission research on children's technology use and outcomes including addiction, bullying, and depression.²⁰⁰ While this bill has not yet made much movement within the House or Senate, there seems to be more elected officials who are beginning to recognize the dangers of smartphones.

¹⁹³ Nathaniel Popper, *Panicking About Taking Your Kids Smart Phone Away? New Research Says Don't*, NEW YORK TIMES (Jan. 1, 2020), <https://www.nytimes.com/2020/01/17/technology/kids-smartphones-depression.html>.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Nellie Bowles, *A Dark Consensus About Screens and Kids Begins to Emerge in Silicon Valley*, NEW YORK TIMES (Oct. 26, 2018), <https://www.nytimes.com/2018/10/26/style/phones-children-silicon-valley.html?action=click&module=RelatedLinks&pgtype=Article>.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Ed Markey, *Children and Media Research Advancement Act* (CAMRA), <https://www.markey.senate.gov/news/press-releases/senators-markey-sasse-blunt-schatz-bennet-and-collins-and-reps-raskin-and-budd-reintroduce-bipartisan-bicameral-legislation-to-study-impact-of-technology-and-media-on-children>, (last visited July 6, 2020).

ii. Cell Phone Legislation

Recently, legislation has been introduced in states to limit and or ban smartphones from those under a certain age. In 2017, a Colorado parent, Timothy Farnum, led the charge for a ballot initiative that would ban the sale of smartphones for children under thirteen.²⁰¹ As written, the ban would require cellphone companies to ask the age of the primary user.²⁰² These companies could face fines if they sell phones to someone underage.²⁰³ Unfortunately, they were unable to get enough signatures to be on the 2018 ballot.²⁰⁴ Some opponents of the bill stated that the government should not be involved in telling a parent if their child should have a cell phone.²⁰⁵

In 2020, Vermont State Senator John Rodgers introduced Vermont Bill S.212 which would make it illegal for anyone under the age of twenty-one to use or possess a cellphone.²⁰⁶ The bill outlines the dangers of cell phones to include cyberbullying and use while driving (which causes automobile accidents) among others.²⁰⁷ Senator Rodgers himself stated, “I have no delusions that it’s going to pass. I wouldn’t probably vote for it myself.”²⁰⁸ His reasoning behind introducing this bill was that the legislature seemed intent on regulating gun use and based on the information,

²⁰¹ Alicia Stice, *Colorado Group Wants to Ban Sale of Smartphones for Kids Under 13*, USA TODAY (June 19, 2017), <https://www.usatoday.com/story/tech/nation-now/2017/06/19/colorado-group-wants-ban-sale-cellphones-smartphones-kids-under-13/407898001/>.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Colorado Ballot, *Colorado Prohibit Sale of Smartphones to Persons Under Age 13 Initiative (2018)*, [https://ballotpedia.org/Colorado_Prohibit_Sale_of_Smartphones_to_Persons_Under_Age_13_Initiative_\(2018\)](https://ballotpedia.org/Colorado_Prohibit_Sale_of_Smartphones_to_Persons_Under_Age_13_Initiative_(2018)), (last visited July 5, 2020).

²⁰⁵ Ashton & Price, *Proposed State Law Bans Use of Smart Phones for Children Under 13*, <http://ashtonandprice.com/proposed-state-law-bans-use-smart-phones-children-13/>, (last visited July 6, 2020).

²⁰⁶ VERMONT GENERAL ASSEMBLY, *S.212*, <https://legislature.vermont.gov/bill/status/2020/S.212>, (last visited July 6, 2020).

²⁰⁷ *Id.*

²⁰⁸ Eric Blaisdell, *Bill Would Ban Cellphone Use for Those Under 21*, (Jan. 08, 2020), https://www.timesargus.com/news/local/bill-would-ban-cellphone-use-for-those-under-21/article_2e4064f1-892f-5a83-95a2-d8a4272942d9.html.

cell phones are more dangerous than a gun.²⁰⁹ While Senator Rodgers may have used this bill for publicity, others took it more serious and debated the merits of such a ban.

In addition to attempting outright bans, schools have banned cell phones among students while in school. California recently passed legislation that allows schools to restrict or prohibit devices in class, although it is not required.²¹⁰ Studies have shown that students in schools where cell phones were banned performed better on exams.²¹¹

This is not an issue that is just affecting the United States. In July 2018, the French government was concerned over the use of cell phones among children which led them to pass a bill banning cell phones in school.²¹² In 2019, Victoria, Australia banned cell phones in school as well.²¹³ Dr. Neil Selwyn, a professor at Monash University, stated that in a survey of 2,000 adults, 75% supported the school ban and about 33% supported an outright ban.²¹⁴

While still a new technology, the debate will only continue to grow on whether there is such a thing as too much screen time for children. If research continues to support the negative impact on children, the support for bans on smartphones will likely continue to grow as well.

iii. Proposals

Although parents have a fundamental right to raise their children, this right can be infringed on by the state when there is a compelling state interest. Courts have found that health and safety are compelling interests for the state to intervene. While at first glance smartphone regulation may seem outlandish, the impacts on minors suggests that at least some regulation is warranted.

²⁰⁹ *Id.*

²¹⁰ Alyson Klein, *Schools Say No to Cellphones in Class. But Is It a Smart Move?*, (Sep. 6, 2019), <https://www.edweek.org/ew/articles/2019/09/11/schools-say-no-to-cellphones-in-class.html>.

²¹¹ *Id.*

²¹² *Id.*

²¹³ Henrietta Cook, *Mobile Phones to be Banned in State Primary and Secondary Schools*, <https://www.theage.com.au/national/victoria/mobile-phones-to-be-banned-in-state-primary-and-secondary-schools-20190625-p5217a.html>, (last visited July 3, 2020).

²¹⁴ *Id.*

Much like we have seen with smoking, alcohol, gambling, and pornography, the harms of smartphones to minors are significant and would rise to the level of a compelling interest. Moreover, as with distracted driving, minors can cause harm to others while on the smartphones and this legislation would be for the general public welfare.

As with many of the other public health issues, the state regulation on smartphones will infringe on the rights of the parents. In *Ginsberg*, the court acknowledged that while it is the parental right to raise a child, the state can also help with this obligation in order to protect children.²¹⁵ The damage that is caused by smartphones can be detrimental to a minor. Since smartphones are relatively new, more research may be needed to determine if this damage will be long lasting. However, steps can still be taken now in order to protect minors.

As some school districts have already done in America, outlawing smartphones in schools is a good first step. School is meant for learning and the more distractions that are in front of the students prevent or impede them from accomplishing this goal. As mentioned above, studies have already shown that banning cell phones in school has helped improve grades.²¹⁶

The next step would be to determine what age is appropriate for minors to get smartphones. After looking at the current research, banning the sale of smartphones for those under eighteen seems to be warranted. While the world is becoming more connected with technology, it does not mean that we should allow harm to minors if it can be avoided.

States should pass a bill like the one that was introduced in Colorado in 2017.²¹⁷ This bill would ban the sale of smartphones if the primary user is below the age of eighteen. Retailers would be required to inquire who would be the primary user of the smartphone. Retailers will be

²¹⁵ *Ginsberg*, 390 U.S. at 639.

²¹⁶ Klein, *supra* note 210.

²¹⁷ See Stice, *supra* note 201.

fined if they do not follow the regulations. This type of regulation is similar to the one in *Ginsberg*, which banned the sale of adult magazines to minors, however, the Court stated that parents could still buy the magazines for their children.²¹⁸ These types of regulations help parents understand the risks associated with buying a smartphone for the minor and ensure that minors cannot go into the store to buy the smartphones on their own accord. As research continues to mount, if the harm to minors is more akin to alcohol and smoking, then states should further regulate smartphones and ban the possession of smartphones for all minors under the age of eighteen. Both of these actions by the state would be within their police powers to regulate smartphones for minors.

Minors would still be allowed to have cell phones that do not have access to the internet. This would allow them to call and text their parents, friends, and emergency numbers if needed. However, they would not be allowed to access the more damaging applications like Snapchat, Instagram, TikTok, etc.

VII. Conclusion

Smartphone bans should be among the other age-based regulations that protect children. While the smartphone ban will undoubtedly receive public backlash, the precedent is there for the state to protect minors from harmful conduct. States have already banned minors from smoking, drinking alcohol, gambling, and viewing pornography because they are detrimental to minors. Smartphones should be next.

²¹⁸ *Ginsberg*, 390 U.S. at 639.