

A Coasean Analysis of Online Age-Verification and Parental-Consent Regimes

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I. Introduction

Proposals to protect children and teens online are among the few issues in recent years to receive at least rhetorical bipartisan support at both the national and state level. Citing findings of alleged psychological harm to teen users,¹ legislators from around the country have moved to pass bills that would require age verification and verifiable parental consent for teens to use social-media platforms.² But the primary question these proposals raise is whether such laws will lead to greater parental supervision and protection for teen users, or whether they will backfire and lead teens to become less likely to use the covered platforms altogether.

The answer, this issue brief proposes, is to focus on transaction costs.³ Or more precisely, the answer can be found by examining how transaction costs operate under the Coase theorem.

The major U.S. Supreme Court cases that have considered laws to protect children by way of parental consent and age verification all cast significant doubt on the constitutionality of such regimes under the First Amendment. The reasoning such cases have employed appears to apply a Coasean transaction-cost/least-cost-avoider analysis, especially with respect to *strict scrutiny*'s least-restrictive-means test.

This has important implications for recent attempts to protect teens online by way of an imposed duty of care, mandatory age verification, and/or verifiable parental consent. First, because it means these solutions are likely unconstitutional. Second, because a least-cost-avoider analysis suggests that parents are in best positioned to help teens assess the marginal costs and benefits of social media, by

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¹ See, e.g., Kirsten Weir, *Social Media Brings Benefits and Risks to Teens. Here's How Psychology Can Help Identify a Path Forward*, 54 MONITOR ON PSYCHOLOGY 46 (Sep. 1, 2023), <https://www.apa.org/monitor/2023/09/protecting-teens-on-social-media>.

² See, e.g., Khara Boender, Jordan Rodell, & Alex Spyropoulos, *The State of Affairs: What Happened in Tech Policy During 2023 State Legislative Sessions?*, PROJECT DISCO (Jul. 25, 2023), <https://www.project-disco.org/competition/the-state-of-affairs-state-tech-policy-in-2023> (noting laws passed and proposed addressing children's online safety at the state level, including California's Age-Appropriate Design Code and age-verification laws in both Arkansas and Utah, all of which will be considered below).

³ With apologies to Mike Munger for borrowing the title of his excellent podcast, invoked several times in this issue brief; see THE ANSWER IS TRANSACTION COSTS, <https://podcasts.apple.com/us/podcast/the-answer-is-transaction-costs/id1687215430> (last accessed Sept. 28, 2023).

way of the power of the purse and through available technological means. Placing the full burden of externalities on social-media companies would reduce the options available to parents and teens, who could be excluded altogether if transaction costs are sufficiently large as to foreclose negotiation among the parties. This would mean denying teens the overwhelming benefits of social-media usage.

Part II of this brief will define transaction costs and summarize the Coase theorem, with an eye toward how these concepts can help to clarify potential spillover harms and benefits arising from teens' social-media usage. Part III will examine three major Supreme Court cases that considered earlier parental-consent and age-verification regimes enacted to restrict minors' access to allegedly harmful content, while arguing that one throughline in the jurisprudence has been the implicit application of least-cost-avoider analysis. Part IV will argue that, even in light of how the internet ecosystem has developed, the Coase theorem's underlying logic continues to suggest that parents and teens working together are the least-cost avoiders of harmful internet content.

Part V will analyze proposed legislation and recently enacted bills, some of which already face challenges in the federal courts, and argue that the least-cost-avoider analysis embedded in Supreme Court precedent should continue to foreclose age-verification and parental-consent laws. Part VI concludes.

II. The Coase Theorem and Teenage Use of Social-Media Platforms

A. The Coase Theorem Briefly Stated and Defined

The Coase theorem has been described as “the bedrock principle of modern law and economics,”⁴ and the essay that initially proposed it may be the most-cited law-review article ever published.⁵ Drawn from Ronald Coase's seminal work “The Problem of Social Cost”⁶ and subsequent elaborations in the literature,⁷ the theorem suggests that:

1. The problem of externalities is bilateral;
2. In the absence of transaction costs, resources will be allocated efficiently, as the parties bargain to solve the externality problem;
3. In the presence of transaction costs, the initial allocation of rights does matter; and
4. In such cases, the burden of avoiding the externality's harm should be placed on the lowest-cost avoider, while taking into consideration the total social costs of the institutional framework.

A few definitions are in order. An *externality* is a side effect of an activity that is not reflected in the cost of that activity—basically, what occurs when we do something whose consequences affect other

⁴ Steven G. Medema, “Failure to Appear”: *The Use of the Coase Theorem in Judicial Opinions*, at 4, DEP'T OF ECON. DUKE UNIV., Working Paper No. 2.1 (2019), available at <https://hope.econ.duke.edu/sites/hope.econ.duke.edu/files/Medema%20workshop%20paper.pdf>.

⁵ Fred R. Shapiro & Michelle Pearse, *The Most Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012).

⁶ R.H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

⁷ See generally Steven G. Medema, *The Coase Theorem at Sixty*, 58 J. ECON. LIT. 1045 (2020).

people. A *negative externality* occurs when a third party does not like the effects of an action. When we say that such an externality is *bilateral*, it is to say that it takes two to tango: only when there is a conflict in the use or enjoyment of property is there an externality problem.

Transaction costs are the additional costs borne in the process of buying or selling, separate and apart from the price of the good or service itself—*i.e.*, the costs of all actions involved in an economic transaction. Where transaction costs are present and sufficiently large, they may prevent otherwise beneficial agreements from being concluded. *Institutional frameworks* determine the rules of the game, including who should bear transaction costs. In order to maximize *efficiency*, the Coase theorem holds that the burden of avoiding negative externalities should be placed on the party or parties that can avoid them at the *lowest cost*.

A related and interesting literature focuses on whether the common law is efficient, and the mechanisms by which that may come to be the case.⁸ Todd J. Zywicki and Edward P. Stringham argue—contra the arguments of Judge Richard Posner—that the common law’s relative efficiency is a function of the legal process itself, rather than whether judges implicitly or explicitly adopt efficiency or wealth maximization as goals.⁹ Zywicki & Stringham find both demand-side and supply-side factors that tend to promote efficiency in the common law, but note that the supply-side factors (*e.g.*, competitive courts for litigants) have changed over time in ways that may result in diminished incentives for efficiency.¹⁰ Their central argument is that the re-litigation of inefficient rules eventually leads to the adoption of more efficient ones.¹¹ Efficiency itself, they argue, is also best understood as the ability to coordinate plans, rather than as wealth maximization.¹²

In contrast to common law, there is a relative paucity of literature on whether constitutional law follows a pattern of efficiency. For example, one scholar notes that citations to Coase’s work in the corpus of constitutional-law scholarship are actually exceedingly rare.¹³ This brief seeks to contribute to the law & economics literature by examining how the Supreme Court appears implicitly to have adopted one version of efficiency—the least-cost-avoider principle—in its First Amendment reviews of parental-consent and age-verification laws under the compelling-government-interest and least-restrictive-means tests.

⁸ Todd J. Zywicki & Edward Peter Stringham, *Common Law and Economic Efficiency*, GEO. MASON UNIV.. L. & ECON. RSCH., Working Paper No. 10-43 (2010), available at https://www.law.gmu.edu/assets/files/publications/working_papers/1043CommonLawandEconomicEfficiency.pdf.

⁹ See *id.* at 4.

¹⁰ See *id.* at 3.

¹¹ See *id.* at 10.

¹² See *id.* at 34.

¹³ Medema, *supra* note 4, at 39.

B. Applying the Coase Theorem to Teenage Social-Media Usage

The Coase theorem's basic insights are useful in evaluating not only legal decisions, but also legislation. Here, this means considering issues related to children and teenagers' online social-media usage. Social-media platforms, teenage users, and their parents are the parties at-issue in this example. While social-media platforms create incredible value for their users,¹⁴ they also arguably impose negative externalities on both teens and their parents.¹⁵ The question here, as it was for Coase, is how to deal with those externalities.

The common-law framework of rights in this scenario is to allow minors to enter into enforceable agreements, except where they are void for public-policy reasons. As Adam Candeub points out:

Contract law is a creature of state law, and states require parental consent for minors entering all sorts of contracts for services or receiving privileges, including getting a tattoo, obtaining a driver's license, using a tanning facility, purchasing insurance, and signing liability waivers. As a general rule, all contracts with minors are valid, but with certain exceptions they are voidable. And even though a minor can void most contracts he enters into, most jurisdictions have laws that hold a minor accountable for the benefits he received under the contract. Because children can make enforceable contracts for which parents could end up bearing responsibility, it is a reasonable regulation to require parental consent for such contracts. The few courts that have addressed the question of the enforceability of online contracts with minors have held the contracts enforceable on the receipt of the mildest benefit.¹⁶

Of course, many jurisdictions have passed laws requiring age-verification for various transactions prohibited to minors, such as laws for buying alcohol or tobacco,¹⁷ obtaining driver's licenses,¹⁸ and buying lottery tickets or pornography.¹⁹ Through the Children's Online Privacy Protection Act and

¹⁴ See, e.g., Matti Cuorre & Andrew K. Przybylski, *Estimating the Association Between Facebook Adoption and Well-Being in 72 Countries*, 10 ROYAL SOC'Y OPEN SCI. 1 (2023), <https://royalsocietypublishing.org/doi/epdf/10.1098/rsos.221451>; Sabrina Cipoletta, Clelia Malighetti, Chiara Cenedese, & Andrea Spoto, *How Can Adolescents Benefit from the Use of Social Networks? The iGeneration on Instagram*, 17 INT. J. ENVIRON. RES. PUB. HEALTH 6952 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7579040>.

¹⁵ See Jean M. Twenge, Thomas E. Joiner, Megan L Rogers, & Gabrielle N. Martin, *Increases in Depressive Symptoms, Suicide-Related Outcomes, and Suicide Rates Among U.S. Adolescents After 2010 and Links to Increased New Media Screen Time*, 6 CLINICAL PSYCH. SCI. 3 (2018), available at https://courses.engr.illinois.edu/cs565/sp2018/Live1_Depression&ScreenTime.pdf.

¹⁶ Adam Candeub, *Age Verification for Social Media: A Constitutional and Reasonable Regulation*, FEDSOC BLOG (Aug. 7, 2023), <https://fedsoc.org/commentary/fedsoc-blog/age-verification-for-social-media-a-constitutional-and-reasonable-regulation>.

¹⁷ See Wikipedia, *List of Alcohol Laws of the United States*, https://en.wikipedia.org/wiki/List_of_alcohol_laws_of_the_United_States (last accessed Sep. 28, 2023); Wikipedia, *U.S. History of Tobacco Minimum Purchase Age by State*, https://en.wikipedia.org/wiki/U.S._history_of_tobacco_minimum_purchase_age_by_state (last accessed Sep. 28, 2023).

¹⁸ See Wikipedia, *Driver's Licenses in the United States*, https://en.wikipedia.org/wiki/Driver%27s_licenses_in_the_United_States (last accessed Sep. 28, 2023).

¹⁹ See Wikipedia, *Gambling Age*, https://en.wikipedia.org/wiki/Gambling_age (last accessed Sep. 28, 2023) (table on minimum age for lottery tickets and casinos by state). As far as this author is aware, every state and territory requires identification demonstrating the buyer is at least 18 years old to make a retail purchase of a pornographic magazine or video.

its regulations, the federal government also requires that online platforms obtain verifiable parental consent before they are permitted to collect certain personal information regarding children under age 13.²⁰

The First Amendment, however, has been found to protect minors' ability to receive speech, including through commercial transactions.²¹ The question therefore arises: how should the law regard minors' ability to access information on social-media platforms? In recent years, multiple jurisdictions have responded to this question by proposing or passing age-verification and parental-consent laws for teens' social-media usage.²²

As will be detailed below,²³ while the internet has contributed to significant reductions in transaction costs, they are still present. Thus, in order to maximize social-media platforms' benefits while minimizing the negative externalities they impose, policymakers should endeavor to place the burden of avoiding the harms associated with teen use on the least-cost avoider. I argue that the least-cost avoider is parents and teens working together to make marginal decisions about social-media use, including by exploiting relatively low-cost practical and technological tools to avoid harmful content. The thesis of this issue brief is that this finding is consistent with the implicit Coasean reasoning in the Supreme Court's major First Amendment cases on parental consent and age verification.

III. Major Supreme Court Cases on Parent Consent and Age Verification

Parental-consent and age-verification laws that seek to protect minors from harmful content are not new. The Supreme Court has had occasion to review several of them, while applying First Amendment scrutiny. An interesting aspect of this line of cases is that the Court appears implicitly to have used Coasean analysis in understanding who should bear the burden of avoiding harms associated with speech platforms.

Specifically, in each case, after an initial finding that the restrictions were content-based, the Court applied strict scrutiny. Thus, the burden was placed on the government to prove the relevant laws

²⁰ See 15 U.S.C. § 6501, et seq. (2018); 16 CFR Part 312.

²¹ See *infra* Part III. See *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 794 (2011) ("California does not argue that it is empowered to prohibit selling offensively violent works to adults—and it is wise not to, since that is but a hair's breadth from the argument rejected in *Stevens*. Instead, it wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children. That is unprecedented and mistaken. '[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them...' No doubt a State possesses legitimate power to protect children from harm... but that does not include a free-floating power to restrict the ideas to which children may be exposed. 'Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.'") (internal citations omitted).

²² See *infra* Part V.

²³ See *infra* Part IV.

were narrowly tailored to a compelling government interest using the least-restrictive means. The Court's transaction-cost analysis is implicit throughout the descriptions of the problem in each case. But the main area of analysis below will be from each case's least-restrictive-means test section, with a focus on the compelling-state-interest test in Part III.C. Parts III.A, III.B, and III.C will deal with each of these cases in turn.

A. *United States v Playboy Entertainment Group*

In *United States v. Playboy Entertainment Group*,²⁴ the Supreme Court reviewed § 505 of the Telecommunications Act of 1996, which required “cable television operators who provide channels ‘primarily dedicated to sexually-oriented programming’ either to ‘fully scramble or otherwise fully block’ those channels or to limit their transmission to hours when children are unlikely to be viewing, set by administrative regulation as the time between 10 p.m. and 6 a.m.”²⁵ Even prior to the regulations promulgated pursuant to the law, cable operators used technological means called “scrambling” to blur sexually explicit content for those viewers who didn’t explicitly subscribe to such content, but there were reported problems with “signal bleed” that allowed some audio and visual content to be obtained by nonsubscribers.²⁶ Following the regulation, cable operators responded by shifting the hours when such content would be aired—*i.e.*, by making it unavailable for 16 hours a day. This prevented cable subscribers from viewing purchased content of their choosing at times they would prefer.²⁷

The basic Coasean framework is present right from the description of the problems that the statute and regulations were trying to solve. As the Court put it:

Two essential points should be understood concerning the speech at issue here. First, we shall assume that many adults themselves would find the material highly offensive; and when we consider the further circumstance that the material comes unwanted into homes where children might see or hear it against parental wishes or consent, there are legitimate reasons for regulating it. Second, all parties bring the case to us on the premise that Playboy's programming has First Amendment protection. As this case has been litigated, it is not alleged to be obscene; adults have a constitutional right to view it; the Government disclaims any interest in preventing children from seeing or hearing it with the consent of their parents; and Playboy has concomitant rights under the First Amendment to transmit it. These points are undisputed.²⁸

In Coasean language, the parties at-issue were the cable operators, content-providers of sexually explicit programming, adult cable subscribers, and their children. Cable television provides

²⁴ 529 U.S. 803 (2000).

²⁵ *Id.* at 806.

²⁶ *See id.*

²⁷ *See id.* at 806-807.

²⁸ *Id.* at 811.

tremendous value to its customers, including sexually explicit subscription content that is valued by those subscribers. There is, however, a negative externality to the extent that such programming may become available to children whose parents find it inappropriate. The Court noted that some parents may allow their children to receive such content, and the government disclaimed an interest in preventing such reception with parental consent. Given imperfect scrambling technology, this possible negative externality was clearly present. The question that arose was whether the transaction costs imposed by time-shifting requirements in Section 505 have the effect of restricting adults' ability to make such viewing decisions for themselves and on behalf of their children.

After concluding that Section 505 was a content-based restriction, due to the targeting of specific adult content and specific programmers, the Court stated that when a content-based restriction is designed "to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities 'simply by averting [our] eyes.'" ²⁹

This application of strict scrutiny does not change, the court noted, because we are dealing in this instance with children or the issue of parental consent:

No one suggests the Government must be indifferent to unwanted, indecent speech that comes into the home without parental consent. The speech here, all agree, is protected speech; and the question is what standard the Government must meet in order to restrict it. As we consider a content-based regulation, the answer should be clear: The standard is strict scrutiny. This case involves speech alone; and even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative. ³⁰

Again, using our Coasean translator, we can read the opinion as saying the least-cost way to avoid the negative externality of unwanted adult content is by just not looking at it, or for parents to use the means available to them to prevent their children from viewing it.

In fact, that is exactly where the Court goes, by comparing, under the least-restrictive-means test, the targeted blocking mechanism made available in Section 504 of the statute to the requirements imposed by Section 505:

[T]argeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners—listeners for whom, if the speech is unpopular or indecent, the privacy of their own homes may be the optimal place of receipt. Simply put, targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests. This is not to say that the absence of an effective blocking mechanism will in all cases suffice to support a law restricting the

²⁹ *Id.* at 813 (internal citation omitted).

³⁰ *Id.* at 814.

speech in question; but if a less restrictive means is available for the Government to achieve its goals, the Government must use it.³¹

Moreover, the Court found that the fact that parents largely eschewed the available low-cost means to avoid the harm was not necessarily sufficient for the government to prove that it is the least-restrictive alternative:

When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals. The Government has not met that burden here. In support of its position, the Government cites empirical evidence showing that § 504, as promulgated and implemented before trial, generated few requests for household-by-household blocking. Between March 1996 and May 1997, while the Government was enjoined from enforcing § 505, § 504 remained in operation. A survey of cable operators determined that fewer than 0.5% of cable subscribers requested full blocking during that time. *Id.*, at 712. The uncomfortable fact is that § 504 was the sole blocking regulation in effect for over a year; and the public greeted it with a collective yawn.³²

This is because there were, in fact, other market-based means available for parents to use to avoid the harm of unwanted adult programming,³³ and the government had not proved that Section 504 could be effective with more adequate notice.³⁴ The Court concluded its least-restrictive means analysis by saying:

Even upon the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech. The Government's argument stems from the idea that parents do not know their children are viewing the material on a scale or frequency to cause concern, or if so, that parents do not want to take affirmative steps to block it and their decisions are to be superseded. The assumptions have not been established; and in any event the assumptions apply only in a regime where the option of blocking has not been explained. The whole point of a publicized § 504 would be to advise parents that indecent material may be shown and to afford them an opportunity to block it at all times, even when they are not at home and even after 10 p.m. Time channeling does not offer this assistance. The regulatory alternative of a publicized § 504, which has the real possibility of promoting more open disclosure and the choice of an effective blocking system, would provide parents the information needed to engage in active supervision. The Government has not shown that this alternative, a regime of added communication

³¹ *Id.* at 815.

³² *Id.* at 816.

³³ *See id.* at 821 (“[M]arket-based solutions such as programmable televisions, VCR's, and mapping systems [which display a blue screen when tuned to a scrambled signal] may eliminate signal bleed at the consumer end of the cable.”).

³⁴ *See id.* at 823 (“The Government also failed to prove § 504 with adequate notice would be an ineffective alternative to § 505.”).

and support, would be insufficient to secure its objective, or that any overriding harm justifies its intervention.³⁵

In Coasean language, the government's imposition of transaction costs through time-shifting channels is *not* the least-cost way to avoid the harm. By publicizing the blocking mechanism of Section 504, as well as promoting market-based alternatives like VCRs to record programming for playback later or blue-screen technology that blocks scrambled video, adults would be able to effectively act as least-cost avoiders of harmful content, including on behalf of their children.

B. *Ashcroft v. ACLU*

In *Ashcroft v. ACLU*,³⁶ the Supreme Court reviewed a U.S. District Court's preliminary injunction of the age-verification requirements imposed by the Children Online Protection Act (COPA), which was designed to "protect minors from exposure to sexually explicit materials on the Internet."³⁷ The law created criminal penalties "of a \$50,000 fine and six months in prison for the knowing posting" for 'commercial purposes' of World Wide Web content that is 'harmful to minors.'³⁸ The law did, however, provide an escape hatch, through:

...an affirmative defense to those who employ specified means to prevent minors from gaining access to the prohibited materials on their Web site. A person may escape conviction under the statute by demonstrating that he

"has restricted access by minors to material that is harmful to minors—

"(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

"(B) by accepting a digital certificate that verifies age; or

"(C) by any other reasonable measures that are feasible under available technology." § 231(c)(1).³⁹

Here, the Coasean analysis of the problem is not stated as explicitly as in *Playboy*, but it is still apparent. The internet clearly provides substantial value to users, including those who want to view pornography. But there is a negative externality in internet pornography's broad availability to minors for whom it would be inappropriate. Thus, to prevent these harms, COPA established a criminal regulatory scheme with an age-verification defense. The threat of criminal penalties, combined with the age-verification regime, imposed high transaction costs on online publishers who post content defined as harmful to minors. This leaves adults (including parents of children) and children

³⁵ *Id.* at 825-826.

³⁶ 542 U.S. 656 (2004).

³⁷ *Id.* at 659.

³⁸ *Id.* at 661.

³⁹ *Id.* at 662.

themselves as the other relevant parties. Again, the question is: who is the least-cost avoider of the possible negative externality of minor access to pornography? The adult-content publisher or the parents, using technological and practical means?

The Court immediately went to an analysis of the least-restrictive-means test, defining the inquiry as follows:

In considering this question, a court assumes that certain protected speech may be regulated, and then asks what is the least restrictive alternative that can be used to achieve that goal. The purpose of the test is not to consider whether the challenged restriction has some effect in achieving Congress' goal, regardless of the restriction it imposes. The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to ensure that legitimate speech is not chilled or punished. For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.⁴⁰

The Court then considered the available alternative to COPA's age-verification regime: blocking and filtering software. They found that such tools are clearly less-restrictive means, focusing not only on the software's granting parents the ability to prevent their children from accessing inappropriate material, but also that adults would retain access to any content blocked by the filter by simply turning it off.⁴¹ In fact, the Court noted that the evidence presented to the District Court suggested that filters, while imperfect, were probably even more effective than the age-verification regime.⁴² Finally, the Court noted that, even if Congress couldn't require filtering software, it could encourage it through parental education, by providing incentives to libraries and schools to use it, and by subsidizing development of the industry itself. Each of these, the Court argued, would be clearly less-restrictive means of promoting COPA's goals.⁴³

In Coasean language, the Court found that parents using technological and practical means are the least-cost avoider of the harm of exposing children to unwanted adult content. Government

⁴⁰ *Id.* at 666.

⁴¹ *See id.* at 667 ("Filters are less restrictive than COPA. They impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their home computers. Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished. All of these things are true, moreover, regardless of how broadly or narrowly the definitions in COPA are construed.").

⁴² *See id.* at 667-669.

⁴³ *See id.* at 669-670.

promotion and support of those means were held up as clearly less-restrictive alternatives than imposing transaction costs on publishers of adult content.

C. *Brown v Entertainment Merchants Association*

In *Brown v. Entertainment Merchants Association*,⁴⁴ the Court considered California Assembly Bill 1179, which prohibited the sale or rental of “violent video games” to minors.⁴⁵ The Court first disposed of the argument that the government could create a new category of speech that it considered unprotected, just because it is directed at children, stating:

The California Act is something else entirely. It does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children. California does not argue that it is empowered to prohibit selling offensively violent works to *adults*—and it is wise not to, since that is but a hair's breadth from the argument rejected in *Stevens*. Instead, it wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children.

That is unprecedented and mistaken. “[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.” *Erznoznik v. Jacksonville*, 422 U.S. 205, 212-213, 95 S.Ct. 2736*2736 2268, 45 L.Ed.2d 125 (1975) (citation omitted). No doubt a State possesses legitimate power to protect children from harm, *Ginsberg*, supra, at 640-641, 88 S.Ct. 1274; *Prince v. Massachusetts*, 321 U.S. 158, 165, 64 S.Ct. 438, 88 L.Ed. 645 (1944), but that does not include a free-floating power to restrict the ideas to which children may be exposed. “Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” *Erznoznik*, supra, at 213-214, 95 S.Ct. 2268.⁴⁶

The Court rejected that there was any “longstanding tradition” of restricting children’s access to depictions of violence, as demonstrated by copious examples of violent content in children’s books, high-school reading lists, motion pictures, radio dramas, comic books, television, music lyrics, etc. Moreover, to the extent there was a time when government enforced such regulations, the courts have eventually overturned them.⁴⁷ The fact that video games were interactive did not matter either, the Court found, as all literature is potentially interactive, especially genres like choose-your-own-adventure stories.⁴⁸

⁴⁴ 564 U.S. 786 (2011).

⁴⁵ *See id.* at 787.

⁴⁶ *Id.* at 793-795.

⁴⁷ *See id.* at 794-797.

⁴⁸ *See id.* at 796-799.

Thus, because the law was clearly content-based, the Court applied strict scrutiny. The Court was skeptical even of whether the government had a compelling state interest, finding the law to be both seriously over- and under-inclusive. The same effects of exposure to violent content, the Court noted, could be found from covered video games and cartoons not subject to the law's provisions. Moreover, the law allowed a parent or guardian (or any adult) to buy violent video games for their children.⁴⁹

The Court then gets to the law's real justification, which it summarily rejected as inconsistent with the First Amendment:

California claims that the Act is justified in aid of parental authority: By requiring that the purchase of violent video games can be made only by adults, the Act ensures that parents can decide what games are appropriate. At the outset, we note our doubts that punishing third parties for conveying protected speech to children *just in case* their parents disapprove of that speech is a proper governmental means of aiding parental authority.⁵⁰

In Coasean language, the Court is saying that video games—even violent ones—are subjectively valued by those who play them, including minors. There may be negative externalities from playing such games, in that exposure to violence could be linked to psychological harm, and that they are interactive, but these content and design features are still protected speech. Placing the transaction costs on parents/adults to buy such games on behalf of minors, just in case some parents disapprove of their children playing them, is not a compelling state interest.

While the Court is only truly focused on whether there is a compelling state interest in California's statutory scheme regulating violent video games, some of the language would equally apply to a least-restrictive means analysis:

But leaving that aside, California cannot show that the Act's restrictions meet a substantial need of parents who wish to restrict their children's access to violent video games but cannot do so. The video-game industry has in place a voluntary rating system designed to inform consumers about the content of games. The system, implemented by the Entertainment Software Rating Board (ESRB), assigns age-specific ratings to each video game submitted: EC (Early Childhood); E (Everyone); E10 + (Everyone 10 and older); T (Teens); M (17 and older); and AO (Adults Only—18 and older). App. 86. The Video Software Dealers Association encourages retailers to prominently display information about the ESRB system in their stores; to refrain from renting or selling adults-only games to minors; and to rent or sell "M" rated games to minors only with parental consent. *Id.*, at 47. In 2009, the Federal Trade Commission (FTC) found that, as a result of this system, "the video game industry outpaces the movie and music industries" in "(1) restricting target-marketing of mature-rated products to children; (2) clearly and prominently disclosing rating information; and (3) restricting children's access to mature-rated

⁴⁹ See *id.* at 799-802.

⁵⁰ *Id.* at 801.

products at retail." FTC, Report to Congress, Marketing Violent Entertainment to Children 30 (Dec.2009), online at [http://www.ftc.gov/os/2009/12/P994511violent entertainment.pdf](http://www.ftc.gov/os/2009/12/P994511violent%20entertainment.pdf) (as visited June 24, 2011, and available in Clerk of Court's case file) (FTC Report). This system does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home. Filling the remaining modest gap in concerned parents' control can hardly be a compelling state interest.

And finally, the Act's purported aid to parental authority is vastly overinclusive. Not all of the children who are forbidden to purchase violent video games on their own have parents who *care* whether they purchase violent video games. While some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want. This is not the narrow tailoring to "assisting parents" that restriction of First Amendment rights requires.⁵¹

In sum, the Court suggests that the law would not be narrowly tailored, because there are already market-based systems in place to help parents and minors make informed decisions about which video games to buy—most importantly from the rating system that judges appropriateness by age and offers warnings about violence. Government paternalism is simply insufficient to justify imposing new transaction costs on parents and minors who wish to buy even violent video games.

Interestingly, the concurrence of Justice Samuel Alito, joined by Chief Justice John Roberts, also contains some language that could be interpreted through a Coasean lens. The concurrence allows, in particular, the possibility that harms from interactive violent video games may differ from other depictions of violence that society has allowed children to view, although it concludes that reasonable minds may differ.⁵² In other words, the concurrence basically notes that the

⁵¹ *Id.* at 801-804.

⁵² *See id.* at 812 (J. Alito, concurring):

"There is a critical difference, however, between obscenity laws and laws regulating violence in entertainment. By the time of this Court's landmark obscenity cases in the 1960's, obscenity had long been prohibited, *See Roth v. U.S.*, 354 U.S. 476, at 484-485, and this experience had helped to shape certain generally accepted norms concerning expression related to sex.

There is no similar history regarding expression related to violence. As the Court notes, classic literature contains descriptions of great violence, and even children's stories sometimes depict very violent scenes.

Although our society does not generally regard all depictions of violence as suitable for children or adolescents, the prevalence of violent depictions in children's literature and entertainment creates numerous opportunities for reasonable people to disagree about which depictions may excite "deviant" or "morbid" impulses. *See Edwards & Berman, Regulating Violence on Television*, 89 NW. U.L.REV. 1487, 1523 (1995) (observing that the *Miller* test would be difficult to apply to violent expression because "there is nothing even approaching a consensus on low-value violence").

Finally, the difficulty of ascertaining the community standards incorporated into the California law is compounded by the legislature's decision to lump all minors together. The California law draws no distinction between young children and adolescents who are nearing the age of majority."

See also id. at 819 (Alito, J., concurring) ("If the technological characteristics of the sophisticated games that are likely to be available in the near future are combined with the characteristics of the most violent games already marketed, the result will

negative externalities may be greater than the majority opinion would allow, but nonetheless, that Justices Alito and Roberts agreed the law was not drafted in a constitutional manner that comports with the obscenity exception to the First Amendment.

Nonetheless, it appears the Court applies an implicit Coasean framework when it rejects the imposition of transaction costs on parents and minors to gain access to protected speech—in this case, violent video games. Parents and minors remain the least-cost avoiders of the potential harms of violent video games.

IV. Coase Theorem Applied to Age-Verification and Verifiable-Consent Laws

As outlined above, the issue is whether social media needs age-verification and parental-consent laws in order to address negative externalities to minor users. This section will analyze this question under the Coasean framework introduced in Part II.

The basic argument proceeds as follows:

1. Transaction costs for age verification and verifiable consent from parents and/or teens are sufficient large to prevent a bargain from being struck;
2. The lowest-cost avoiders are parents and teens working together, using practical and technological means, including low-cost monitoring and filtering services, to make marginal decisions about minors' social-media use; and
3. Placing the transaction costs on social-media companies to obtain age verification and verifiable consent from parents and/or teens would actually *reduce* their ability to make marginal decisions about minors' social-media use, as social-media companies will respond by investing more in excluding minors from access than in creating safe and vibrant spaces for interaction.

Part IV.A will detail the substantial transaction costs associated with obtaining age verification and verifiable parental consent. Part IV.B argues that parents and teens working together using practical and technological means are the lowest-cost avoiders of the harms of social-media use. Part IV.C will consider the counterfactual scenario of placing the transaction costs on social-media companies and argue that the result would be teens' exclusion from social media, to their detriment, as well as the detriment of parents who would have made different choices.

be games that allow troubled teens to experience in an extraordinarily personal and vivid way what it would be like to carry out unspeakable acts of violence.”).

A. Transaction Costs, Age Verification, and Verifiable Parental Consent⁵³

As Coase taught, in a world without transaction costs (or where such costs are sufficiently low), age-verification laws or mandates to obtain verifiable parental consent would not matter, because the parties would bargain to arrive at an efficient solution. Because there are high transaction costs that prevent such bargains from being easily struck, making the default that teens cannot join social media without verifiable parental consent could have the effect of excluding them from the great benefits of social media usage altogether.⁵⁴

There is considerable evidence that, even despite the internet and digital technology serving to reduce transaction costs considerably across a wide range of fronts,⁵⁵ transaction costs remain high when it comes to age verification and verifiable parental consent. A data point that supports this conclusion is the experience of social-media platforms under the Children’s Online Privacy Protection Act (COPPA).⁵⁶ In their working paper “COPPAocalypse? The YouTube Settlement’s Impact on Kids Content,”⁵⁷ Garrett Johnson, Tesary Lin, James C. Cooper, & Liang Zhong summarized the issue as follows:

The Children’s Online Privacy Protection Act (COPPA), and its implementing regulations, broadly prohibit operators of online services directed at children under 13 from collecting personal information without providing notice of its data collection and use practices and obtaining verifiable parental consent. **Because obtaining verifiable parental consent for free online services is difficult and rarely cost justified, COPPA essentially acts as a de facto ban on the collection of personal information by providers of free child-directed content.** In 2013, the FTC amended the COPPA rules to include in the definition of personal information “persistent identifier that can be used to recognize a user over time and across different Web sites or online services,” such as a “customer number held in a cookie . . . or unique device identifier.” This regulatory change meant

⁵³ The following sections are adapted from Ben Sperry, *Right to Anonymous Speech, Part 3: Anonymous Speech and Age-Verification Laws*, TRUTH ON THE MARKET (Sep. 11, 2023), <https://truthonthemarket.com/2023/09/11/right-to-anonymous-speech-part-3-anonymous-speech-and-age-verification-laws>.

⁵⁴ See Ben Sperry, *Online Safety Bills Will Mean Kids Are No Longer Seen or Heard Online*, THE HILL (May 12, 2023), <https://thehill.com/opinion/congress-blog/4002535-online-safety-bills-will-mean-kids-are-no-longer-seen-or-heard-online>; Ben Sperry, *Bills Aimed at ‘Protecting’ Kids Online Throw the Baby out with the Bathwater*, THE HILL (Jul. 26, 2023), <https://thehill.com/opinion/congress-blog/4121324-bills-aimed-at-protecting-kids-online-throw-the-baby-out-with-the-bathwater>; Przybylski & Vuorre, *supra* note 14; Mesfin A. Bekalu, Rachel F. McCloud, & K. Viswanath, *Association of Social Media Use With Social Well-Being, Positive Mental Health, and Self-Rated Health: Disentangling Routine Use From Emotional Connection to Use*, 42 SAGE J. 69S, 69S-80S (2019), <https://journals.sagepub.com/doi/full/10.1177/1090198119863768>.

⁵⁵ See generally MICHAEL MUNGER, *TOMORROW 3.0: TRANSACTION COSTS AND THE SHARING ECONOMY*, Cambridge University Press (Mar. 22, 2018).

⁵⁶ *The Future of the COPPA Rule: An FTC Workshop Part 2*, FEDERAL TRADE COMMISSION (Oct. 7, 2019), available at https://www.ftc.gov/system/files/documents/public_events/1535372/transcript_of_coppa_workshop_part_2_1.pdf.

⁵⁷ Garrett A. Johnson, Tesary Lin, James C. Cooper, & Liang Zhong, *COPPAocalypse? The YouTube Settlement’s Impact on Kids Content*, SSRN (Apr. 26, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4430334.

that, as a practical matter, online operators who provide child-directed content could no longer engage in personalized advertising.

On September 4, 2019, the FTC entered into a consent agreement with YouTube to settle charges that it had violated COPPA. The FTC's allegations focused on YouTube's practice of serving personalized advertising on child-directed content at children without obtaining verifiable parental consent. Although YouTube maintains it is a general audience website and users must be at least 13 years old to obtain a Google ID (which makes personalized advertising possible), the FTC complaint alleges that YouTube knew that many of its channels were popular with children under 13, citing YouTube's own claims to advertisers. The settlement required YouTube to identify child-directed channels and videos and to stop collecting personal information from visitors to these channels. In response, YouTube required channel owners producing ["made-for-kids"] MFK content to designate either their entire channels or specific videos as MFK, beginning on January 1, 2020. YouTube supplemented these self-designations with an automated classifier designed to identify content that was likely directed at children younger than 13.⁵⁸ In so doing, YouTube effectively shifted liability under COPPA to the channel owners, who could face up to \$42,530 in fines per video if they fail to self-designate and are not detected by YouTube's classifier.⁵⁸

The rule change and settlement *increased* the transaction costs imposed on social-media platforms by requiring verifiable parental consent. YouTube's economically rational response was to restrict the content creators' ability to benefit from (considerably more lucrative) personalized advertising. The end result was less content created for children, with competitive effects to boot:

Consistent with a loss in personalized ad revenue, we find that child-directed content creators produce 13% less content and pivot towards producing non-child-directed content. On the demand side, views of child-directed channels fall by 22%. Consistent with the platform's degraded capacity to match viewers to content, we find that content creation and content views become more concentrated among top child-directed YouTube channels.⁵⁹

This is not the only finding regarding COPPA's role in reducing the production of content for children. The president of the App Association, a global trade association for small and medium-sized technology companies, presented extensively at the Federal Trade Commission's (FTC) 2019 COPPA Workshop.⁶⁰ The testimony from App Association President Morgan Reed detailed that the transaction costs associated with obtaining verifiable parental consent did little to enhance parental control, but much to reduce the quality and quantity of content directed to children. But it is worth highlighting Reed's constant use of the words "friction," "restriction," and "cost" to describe how the institutional environment of COPPA affects the behavior of the social media platforms, parents, and children. While noting that general audience content is "unfettered, meaning that you

⁵⁸ *Id.* at 6-7 (emphasis added).

⁵⁹ *Id.* at 1.

⁶⁰ FTC, *supra* note 56.

don't feel restricted by what you can get to, how you do it. It's easy, it's low friction. Widely available. I can get it on any platform, in any case, in any context and I can get to it rapidly," COPPA-regulated apps and content are, Reed said, all about:

Friction, restriction, and cost. Every layer of friction you add alters parent behavior significantly. We jokingly refer to it as the over the shoulder factor. If a parent wants access to something and they have to pass it from the back seat to the front seat of the car more than one time, the parent moves on to the next thing. So the more friction you add to an application directed at children the less likely it is that the parent is going to take the steps necessary to get through it because the competition, of course, is as I said, free, unfettered, widely available. **Restriction. Kids balk against some of the restrictions. I can't get to this, I can't do that. And they say that to the parent. And from the parent's perspective, fine, I'll just put in a different age date. They're participating, they're parenting but they're not using the regulatory construction that we all understand. ...**

The COPPA side, expensive, onerous or friction full. We have to find some way around that. Restrictive, fewer features, fewer capabilities, less known or available, and it's entertaining-ish. ...

Is COPPA the barrier? I thought this quote really summed it up. "Seamlessness is expected. But with COPPA, seamlessness is impossible." And that has been one of the single largest areas of concern. Our folks are looking to provide a COPPA compliant environment. And **they're finding doing VPC is really hard. We want to make it this way, we just walked away.** And why do they want to do it? We wanted to create a hub for kids to promote creativity. So these are not folks who are looking to take data and provide interest based advertising. They're trying to figure out how to do it so they can build an engaging product. **Parental consent makes the whole process very complicated. And this is the depressing part. ...**

We say that VPC is intentional friction. It's clear from everything we've heard in the last two panels that the authors of COPPA, we don't really want information collected on kids. **So friction is intentional. And this is leading to the destruction of general audience applications basically wiping out COPPA apps off the face of the map.**⁶¹

Reed's use of the word "friction" is particularly enlightening. Mike Munger has often described transaction costs as frictions, explaining that, to consumers, all costs are transaction costs.⁶² When higher transaction costs are imposed on social-media platforms, end users feel the impact. In this case, the result is that children and parents receive less quality children's apps and content.

A similar example can be seen in the various battles between traditional media and social-media companies in Australia, Canada, and the EU, where laws have been passed that would require

⁶¹ *Id.* at 6 (emphasis added).

⁶² See Michael Munger, *To Consumers, All Costs are Transaction Costs*, AM. INST. ECON. RSCH. (June 13, 2023), <https://www.aier.org/article/to-consumers-all-costs-are-transaction-costs>.

platforms to pay for linking to certain news content.⁶³ Because these laws raise transaction costs, social-media platforms have responded by restricting access to news links,⁶⁴ to the detriment of users and the news-media organizations themselves. In other words, much like with verifiable parental consent, the intent of these laws is thwarted by the underlying economics.

More evidence that imposing transaction costs on social-media companies can have the effect of diminishing the user experience can be found in the preliminary injunction issued by the U.S. District Court in Austin, Texas in *Free Speech Coalition Inc. v. Colmenero*.⁶⁵ The court cited evidence from the plaintiff's complaint that included bills for "several commercial verification services, showing that they cost, at minimum, \$40,000.00 per 100,000 verifications."⁶⁶ The court also noted that "[Texas law] H.B. 1181 imposes substantial liability for violations, including \$10,000.00 per day for each violation, and up to \$250,000.00 if a minor is shown to have viewed the adult content."⁶⁷

Moreover, the transaction costs in this example also include the subjective costs borne by those who actually go through with verifying their age to access pornography. As the court noted "the law interferes with the Adult Video Companies' ability to conduct business, and risks deterring adults from visiting the websites."⁶⁸ The court issued a preliminary injunction against the law's age-verification provision, finding that other means—such as content-filtering software—are clearly more effective than age verification to protect children from unwanted content.⁶⁹

In sum, transaction costs for age verification and verifiable parental consent are sufficiently high as to prevent an easy bargain from being struck. Thus, which party bears the burden of those costs will determine the outcome. The lessons from COPPA, news-media laws, and online-pornography age-verification laws are clear: if the transaction costs are imposed on the online platforms and apps, it will lead to access restrictions on the speech those platforms provide, almost all of which is protected speech. This is the type of collateral censorship that the First Amendment is designed to avoid.⁷⁰

⁶³ See Katie Robertson, *Meta Begins Blocking News in Canada*, N.Y. TIMES (Aug. 2, 2023), <https://www.nytimes.com/2023/08/02/business/media/meta-news-in-canada.html>; Mark Collom, *Australia Made a Deal to Keep News on Facebook. Why Couldn't Canada?*, CBC NEWS (Aug. 3, 2023), <https://www.cbc.ca/news/world/meta-australia-google-news-canada-1.6925726>.

⁶⁴ See *id.*

⁶⁵ *Free Speech Coal. Inc. v. Colmenero*, No. 1:23-CV-917-DAE, 2023 U.S. Dist. LEXIS 154065 (W.D. Tex. 2023), available at <https://storage.courtlistener.com/recap/gov.uscourts.txwd.1172751222/gov.uscourts.txwd.1172751222.36.0.pdf>.

⁶⁶ *Id.* at 10.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 44.

⁷⁰ Geoffrey A. Manne, Ben Sperry, & Kristian Stout, *Who Moderates the Moderators?: A Law & Economics Approach to Holding Online Platforms Accountable Without Destroying the Internet*, 49 RUTGERS COMPUT. & TECH. L.J. 26 (2022), <https://laweconcenter.org/resources/who-moderates-the-moderators-a-law-economics-approach-to-holding-online-platforms-accountable-without-destroying-the-internet>; Geoffrey A. Manne, Kristian Stout, & Ben Sperry, *Twitter v. Taamneh and the*

B. Parents and Teens as the Least-Cost Avoiders of Negative Externalities

If transaction costs due to online age-verification and verifiable-parent-consent laws are substantial, the question becomes which party or parties should be subject to the burden of avoiding the harms arising from social-media usage.

It is possible, in theory, that social-media platforms are the best-positioned to monitor and control content posted to their platforms—for instance, when it comes to harms associated with anonymous or pseudonymous accounts imposing social costs on society.⁷¹ In such cases, a duty of care that would allow for intermediary liability against social-media companies may make sense.⁷²

On the other hand, when it comes to online age-verification and parental-consent laws, widely available practical and technological means appear to be lowest-cost way to avoid the negative externalities associated with social-media usage. As NetChoice put it in their complaint against Arkansas’ social-media age-verification law, “[p]arents have myriad ways to restrict their children’s access to online services and to keep their children safe on such services.”⁷³

In their complaint, NetChoice recognizes the subjective nature of negative externalities, stating:

Just as people inevitably have different opinions about what books, television shows, and video games are appropriate for minors, people inevitably have different views about whether and to what degree online services are appropriate for minors. While many minors use online services in wholesome and productive ways, online services, like many other technologies, can be abused in ways that may harm minors.⁷⁴

They then expertly list all the ways that parents can take control and help their children avoid online harms, including with respect to the decisions to buy devices for their children and to set terms for

Law & Economics of Intermediary Liability, TRUTH ON THE MARKET (Mar. 8, 2023), <https://truthonthemarket.com/2023/03/08/twitter-v-taamneh-and-the-law-economics-of-intermediary-liability>; Ben Sperry, *The Law & Economics of Children’s Online Safety: The First Amendment and Online Intermediary Liability*, TRUTH ON THE MARKET (May 12 2023), <https://truthonthemarket.com/2023/05/12/the-law-economics-of-childrens-online-safety-the-first-amendment-and-online-intermediary-liability>.

⁷¹ See Manne, Stout, & Sperry, *Twitter v. Taamneh and the Law & Economics of Intermediary Liability*, *supra* note 70; Ben Sperry, *Right to Anonymous Speech, Part 2: A Law & Economics Approach*, TRUTH ON THE MARKET. (Sep. 6, 2023), <https://truthonthemarket.com/2023/09/06/right-to-anonymous-speech-part-2-a-law-economics-approach>; Manne, Sperry, & Stout, *Who Moderates the Moderators?: A Law & Economics Approach to Holding Online Platforms Accountable Without Destroying the Internet*, *supra* note 70.

⁷² See Manne, Stout, & Sperry, *Who Moderates the Moderators?: A Law & Economics Approach to Holding Online Platforms Accountable Without Destroying the Internet*, *supra* note 70, at 28 (“To the extent that the current legal regime permits social harms online that exceed concomitant benefits, it should be reformed to deter those harms, provided it can be done so at sufficiently low cost.”); Sperry, *Right to Anonymous Speech, Part 2: A Law & Economics Approach*, *supra* note 71.

⁷³ See NetChoice Complaint, *NetChoice LLC v. Griffin*, NO. 5:23-CV-05105, available at [2023 U.S. Dist. LEXIS 154571](https://www.lexis.com/document/2023-06-29-netchoice-llc-v-griffin-complaint) (W.D. Ark. 2023), https://netchoice.org/wp-content/uploads/2023/06/NetChoice-v-Griffin-Complaint_2023-06-29.pdf.

⁷⁴ *Id.* at para. 13.

how and when they are permitted to use them.⁷⁵ Parents can also choose to use tools from cell-phone carriers and broadband providers to block certain apps and sites from their children’s devices, or to control with whom their children can communicate and for how long they can use the devices.⁷⁶ They also point to wireless routers that allow for parents to filter and monitor online content;⁷⁷ parental controls at the device level;⁷⁸ third-party filtering applications;⁷⁹ and numerous tools offered by NetChoice members that all allow for relatively low-cost monitoring and control by parents and even teen users acting on their own behalf.⁸⁰ Finally, they note that NetChoice members, in response to market demand,⁸¹ expend significant resources curating content to make sure it’s appropriate.⁸²

The recent response from the Australian government to the proposed “Roadmap for Age Verification”⁸³ buttresses this analysis. The government pulled back from plans to “force adult websites to bring in age verification following concerns about privacy and the lack of maturity of the technology.”⁸⁴ In particular, the government noted that:

It is clear from the Roadmap that at present, each type of age verification or age assurance technology comes with its own privacy, security, effectiveness and implementation issues. For age assurance to be effective, it must:

- work reliably without circumvention;
- be comprehensively implemented, including where pornography is hosted outside of Australia’s jurisdiction; and
- balance privacy and security, without introducing risks to the personal information of adults who choose to access legal pornography.

⁷⁵ See *id.* at para. 14

⁷⁶ See *id.*

⁷⁷ See *id.* at para 15.

⁷⁸ See *id.* at para 16.

⁷⁹ See *id.*

⁸⁰ See *id.* at para. 17, 19-21

⁸¹ See Ben Sperry, *Congress Should Focus on Protecting Teens from Real Harms, Not Targeted Ads*, THE HILL (Feb. 12, 2023), <https://thehill.com/opinion/congress-blog/3862238-congress-should-focus-on-protecting-teens-from-real-harms-not-targeted-ads>.

⁸² See NetChoice Complaint, *supra* note 73 at para. 18.

⁸³ *Government Response to the Roadmap for Age Verification*, AUSTRALIAN GOV’T DEP’T OF INFRASTRUCTURE, TRANSP., REG’L DEV., COMMC’NS AND THE ARTS (Aug. 2023), available at <https://www.infrastructure.gov.au/sites/default/files/documents/government-response-to-the-roadmap-for-age-verification-august2023.pdf>.

⁸⁴ See Josh Taylor, *Australia Will Not Force Adult Websites to Bring in Age Verification Due To Privacy And Security Concerns*, THE GUARDIAN (Aug. 30, 2023), <https://www.theguardian.com/australia-news/2023/aug/31/roadmap-for-age-verification-online-pornographic-material-adult-websites-australia-law>.

Age assurance technologies cannot yet meet all these requirements. While industry is taking steps to further develop these technologies, the Roadmap finds that the age assurance market is, at this time, immature.

The Roadmap makes clear that a decision to mandate age assurance is not ready to be taken.⁸⁵

As a better solution, the government offered “[m]ore support and resources for families,”⁸⁶ including promoting tools already available in the marketplace to help prevent children from accessing inappropriate content like pornography,⁸⁷ and promoting education for both parents and children on how to avoid online harms.⁸⁸

In sum, this is all about transaction costs. The least-cost avoider from negative externalities imposed by social-media usage are the parents and teens themselves, working together to make marginal decisions about how to use these platforms through the use of widely available practical and technological means.

C. Teen Exclusion Online and Reduced Parental Involvement in Social-Media Usage Decisions

If the burden of avoiding negative externalities is placed on social-media platforms, the result could be considerable collateral censorship of protected speech. This is because of transaction costs, as explained above in Part IV.A. Thus, while one could argue that the externalities imposed by social-media platforms on teen users and their parents represent a market failure, this is not the end of the analysis. Transaction costs help to explain that the institutional environment we create fosters the rules of the game that platforms, parents, and teens follow. If transaction costs are too high and placed incorrectly on social-media platforms, parents and teens’ ability to control how they use social media will actually suffer.

As can be seen most prominently in the COPPA examples discussed above,⁸⁹ the burden of obtaining verifiable parental consent leads to platforms reallocating investments into the exclusion of the protected class—in that case, children under age 13—that could otherwise go toward creating a safe and vibrant community from which children could benefit. Thus, proposals like COPPA 2.0,⁹⁰ which would extend the need for verifiable consent to teens, could yield an equivalent result of

⁸⁵ See NetChoice Complaint, *supra* note 73 at 2.

⁸⁶ *Id.* at 6.

⁸⁷ See *id.*

⁸⁸ See *id.* at 6-8.

⁸⁹ *Supra* Part IV.A.

⁹⁰ See Children and Teen’s Online Privacy Protection Act, S. 1418, 118th Cong. (2023), as amended Jul. 27, 2023, available at <https://www.congress.gov/bill/118th-congress/senate-bill/1418/text> (last accessed Oct. 2, 2023). Other similar bills have been proposed as well. See Protecting Kids on Social Media Act, S. 1291, 118th Cong. (2023); Making Age-Verification Technology Uniform, Robust, and Effective Act, S. 419, 118th Cong. (2023); Social Media Child Protection Act, H.R. 821, 118th Cong. (2023).

greater exclusion of teens. State laws that would require age verification and verifiable parental consent for teens are likely to produce the same result, as well. The irony, of course, is that parental consent laws would actually reduce the available choices for those parents who see the use value for their teenagers.

In sum, the economics of transaction costs explains why age-verification and verifiable-parental-consent laws will not satisfy their proponents' stated objectives. As with minimum-wage laws⁹¹ and rent control,⁹² economics helps to explain the counterintuitive finding that well-intentioned laws can actually produce the exact opposite end result. Here, that means age-verification and verifiable-parental-consent laws lead to parents and teens being less able to make meaningful and marginal decisions about the costs and benefits of their own social-media usage.

V. The Unconstitutionality of Social-Media Verification and Verifiable-Consent Laws

Bringing this all together, Part V will consider the constitutionality of the enacted and proposed laws on age verification and verifiable parental consent under the First Amendment. As several courts have already suggested, these laws will not survive First Amendment scrutiny.

The first question is whether these laws will be subject to strict scrutiny (because they are content-based) or instead to intermediate scrutiny as content-neutral regulations. There is a possibility that it will not matter, because a court could find—as one already has—that such laws burden more speech than necessary anyway. Part V.A will take up these questions.

The second set of questions is whether, assuming strict scrutiny applies, these enacted and proposed laws could survive the least-restrictive-means test. Part V.B will consider this set of questions and

⁹¹ See David Neumark & Peter Shirley, *Myth or Measurement: What Does the New Minimum Wage Research Say About Minimum Wages and Job Loss in the United States?* (NAT'L BUR. ECON. RES. Working Paper 28388, Mar. 2022), available at <https://www.nber.org/papers/w28388> (concluding that "(i) there is a clear preponderance of negative estimates in the literature; (ii) this evidence is stronger for teens and young adults as well as the less-educated; (iii) the evidence from studies of directly-affected workers points even more strongly to negative employment effects; and (iv) the evidence from studies of low-wage industries is less one-sided.").

⁹² See Lisa Sturtevant, *The Impacts of Rent Control: A Research Review and Synthesis*, at 6-7, NAT'L MULTIFAMILY HOUS. COUN'CL RES. FOUND. (May 2018), available at <https://www.nmhc.org/globalassets/knowledge-library/rent-control-literature-review-final2.pdf> ("1. Rent control and rent stabilization policies do a poor job at targeting benefits. While some low-income families do benefit from rent control, so, too, do higher-income households. There are more efficient and effective ways to provide assistance to lower-income individuals and families who have trouble finding housing they can afford. 2. Residents of rent-controlled units move less often than do residents of uncontrolled housing units, which can mean that rent control causes renters to continue to live in units that are too small, too large or not in the right locations to best meet their housing needs. 3. Rent-controlled buildings potentially can suffer from deterioration or lack of investment, but the risk is minimized when there are effective local requirements and/or incentives for building maintenance and improvements. 4. Rent control and rent stabilization laws lead to a reduction in the available supply of rental housing in a community, particularly through the conversion to ownership of controlled buildings. 5. Rent control policies can hold rents of controlled units at lower levels but not under all circumstances. 6. Rent control policies generally lead to higher rents in the uncontrolled market, with rents sometimes substantially higher than would be expected without rent control. 7. There are significant fiscal costs associated with implementing a rent control program.").

argue that, as the lowest-cost avoiders, parents and teens working together using widely available practical and technological means to avoid negative externalities also represents the least-restrictive means to promote the government's interest in protecting minors from the harms of social media.

A. Questions of Content Neutrality

The first important question is whether laws that attempt to protect minors from externalities associated with social-media usage are content-neutral. One argument that has been forwarded is that they are simply content-neutral contract laws that shift the consent default to parents before teens can establish an ongoing contractual relationship with a social-media company by creating a profile.⁹³

Before delving into whether that argument could work, it is worth considering laws that *are* clearly content-based to help tell the difference. For instance, the Texas law challenged in *Free Speech Coalition v. Colmenero* is clearly content-based, because “the regulation is based on whether content contains sexual material.”⁹⁴

Similarly, laws like the Kids Online Safety Act (KOSA)⁹⁵ are content-based, in that they require covered platforms to take:

reasonable measures in its design or operation of products and services to prevent or mitigate the following:

- 1) Consistent with evidence-informed medical information, the following mental health disorders: anxiety, depression, eating disorders, substance use disorders, and suicidal behaviors.
- 2) Patterns of use that indicate or encourage addiction-like behaviors.
- 3) Physical violence, online bullying, and harassment of the minor.
- 4) Sexual exploitation and abuse.
- 5) Promotion and marketing of narcotic drugs (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), tobacco products, gambling, or alcohol.
- 6) Predatory, unfair, or deceptive marketing practices, or other financial harms.⁹⁶

⁹³ See Candeub, *supra* note 16.

⁹⁴ Colmenero, *supra* note 65, at 22.

⁹⁵ See Kids Online Safety Act, S. 1409, 118th Cong. (2023), as amended and posted by the Senate Committee on Commerce, Science, and Transportation on July 27, 2023, available at <https://www.congress.gov/bill/118th-congress/senate-bill/1409/text#toc-id6fefcf1d-a1ae-4949-a826-23c1e1b1ef26> (last accessed Oct. 2, 2023).

⁹⁶ See *id.* at Section 3.

While parts 4-6 and actual physical violence all constitute either unprotected speech or conduct, decisions about how to present information from part 2 is arguably protected speech.⁹⁷ Even true threats like online bullying and harassment are speech subject to at least some First Amendment scrutiny, in that they would require some type of *mens rea* to be constitutional.⁹⁸ Part 1 may be unconstitutionally vague as written.⁹⁹ Moreover, 1-3 are clearly content-based, in that it is necessary to consider the content presented, which will include at least some protected speech. This equally applies to the California Age Appropriate Design Code,¹⁰⁰ which places an obligation on covered companies to identify and mitigate speech that is harmful or potentially harmful to users under 18 years old, and to prioritize speech that promotes such users' well-being and best interests.¹⁰¹

In each of these cases, it would be difficult to argue that strict scrutiny ought not apply. On the other hand, some have argued that the Utah and Arkansas laws requiring age verification and verifiable parental consent are simply content-neutral regulations of contract formation, which can be considered independently of speech.¹⁰² Arkansas has argued that Act 689's age-verification requirements are "merely a content-neutral regulation on access to speech at particular 'locations,' so intermediate scrutiny should apply."¹⁰³

But even in *NetChoice v. Griffin*,¹⁰⁴ the U.S. District Court in Arkansas, while skeptical that the law was content-neutral,¹⁰⁵ proceeded as if it was and still found, in granting a preliminary injunction, that the age-verification law "is likely to unduly burden adult and minor access to constitutionally

⁹⁷ Cf. *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930-31 (2019):

[M]erely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints...

If the rule were otherwise, all private property owners and private lessees who open their property for speech would be subject to First Amendment constraints and would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum. Private property owners and private lessees would face the unappetizing choice of allowing all comers or closing the platform altogether.

⁹⁸ See *Counterman v. Colorado*, 600 U.S. 66 (2023); Ben Sperry (@RBenSperry), Twitter (June 28, 2023, 4:46 PM), <https://twitter.com/RBenSperry/status/1674157227387547648>.

⁹⁹ Cf. *HÖEG v. Newsom*, 2023 WL 414258 (E.D. Cal. Jan. 25, 2023); Sperry, *The Law & Economics of Children's Online Safety: The First Amendment and Online Intermediary Liability*, *supra* note 70.

¹⁰⁰ California Age-Appropriate Design Code Act, AB 2273 (2022), https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2273.

¹⁰¹ See *id.* at § 1798.99.32(d)(1), (2), (4).

¹⁰² See Candeub, *supra* note 16.

¹⁰³ *NetChoice LLC v. Griffin*, Case No. 5:23-CV-05105 at 25 (Aug. 31, 2023), slip op., available at <https://netchoice.org/wp-content/uploads/2023/08/GRIFFIN-NETCHOICE-GRANTED.pdf>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 38 ("Having considered both sides' positions on the level of constitutional scrutiny to be applied, the Court tends to agree with NetChoice that the restrictions in Act 689 are subject to strict scrutiny. However, the Court will not reach that conclusion definitively at this early stage in the proceedings and instead will apply intermediate scrutiny, as the State suggests.").

protected speech.”¹⁰⁶ Similarly, the U.S. District Court for the Northern District of California found that all major provisions of California’s AADC were likely unconstitutional under a lax commercial-speech standard.¹⁰⁷

Nonetheless, there are strong arguments that these laws are content-based. As the court in *Griffin* put it:

Deciding whether Act 689 is content-based or content-neutral turns on the reasons the State gives for adopting the Act. First, the State argues that the more time a minor spends on social media, the more likely it is that the minor will suffer negative mental health outcomes, including depression and anxiety. Second, the State points out that adult sexual predators on social media seek out minors and victimize them in various ways. Therefore, to the State, a law limiting access to social media platforms based on the user’s age would be content-neutral and require only intermediate scrutiny.

On the other hand, the State points to certain speech-related content on social media that it maintains is harmful for children to view. Some of this content is not constitutionally protected speech, while other content, though potentially damaging or distressing, especially to younger minors, is likely protected nonetheless. Examples of this type of speech include depictions and discussions of violence or self-harming, information about dieting, so-called “bullying” speech, or speech targeting a speaker’s physical appearance, race or ethnicity, sexual orientation, or gender. If the State’s purpose is to restrict access to constitutionally protected speech based on the State’s belief that such speech is harmful to minors, then arguably Act 689 would be subject to strict scrutiny.

During the hearing, the State advocated for intermediate scrutiny and framed Act 689 as “a restriction on where minors can be,” emphasizing it was “not a speech restriction” but “a location restriction.” The State’s briefing analogized Act 689 to a restriction on minors entering a bar or a casino. But this analogy is weak. After all, minors have no constitutional right to consume alcohol, and the primary purpose of a bar is to serve alcohol. By contrast, the primary purpose of a social media platform is to engage in speech, and the State stipulated that social media platforms contain vast amounts of constitutionally protected speech for both adults and minors. Furthermore, Act 689 imposes much broader “location restrictions” than a bar does. The Court inquired of the State why minors should be barred from accessing entire social media platforms, even

¹⁰⁶ *Id.* at 48 (“In sum, NetChoice is likely to succeed on the merits of the First Amendment claim it raises on behalf of Arkansas users of member platforms. The State’s solution to the very real problems associated with minors’ time spent online and access to harmful content on social media is not narrowly tailored. Act 689 is likely to unduly burden adult and minor access to constitutionally protected speech. If the legislature’s goal in passing Act 689 was to protect minors from materials or interactions that could harm them online, there is no compelling evidence that the Act will be effective in achieving those goals.”).

¹⁰⁷ See *NetChoice v. Bonta*, Case No. 22-cv-08861-BLF (N.D. Cal. Sept. 18, 2023), slip op., available at <https://netchoice.org/wp-content/uploads/2023/09/NETCHOICE-v-BONTA-PRELIMINARY-INJUNCTION-GRANTED.pdf>; Ben Sperry, *What Does NetChoice v. Bonta Mean for KOSA and Other Attempts to Protect Children Online?*, TRUTH ON THE MARKET (Sep. 29, 2023), <https://truthonthemarket.com/2023/09/29/what-does-netchoice-v-bonta-mean-for-kosa-and-other-attempts-to-protect-children-online>.

though only some of the content was potentially harmful to them, and the following colloquy ensued:

THE COURT: Well, to pick up on Mr. Allen's analogy of the mall, I haven't been to the Northwest Arkansas mall in a while, but it used to be that there was a restaurant inside the mall that had a bar. And so certainly minors could not go sit at the bar and order up a drink, but they could go to the Barnes & Noble bookstore or the clothing store or the athletic store. Again, borrowing Mr. Allen's analogy, the gatekeeping that Act 689 imposes is at the front door of the mall, not the bar inside the mall; yes?

THE STATE: The state's position is that the whole mall is a bar, if you want to continue to use the analogy.

THE COURT: The whole mall is a bar?

THE STATE: Correct.

Clearly, the state's analogy is not persuasive.

NetChoice argues that Act 689 is not a content-neutral restriction on minors' ability to access particular spaces online, and the fact that there are so many exemptions to the definitions of "social media company" and "social media platform" proves that the State is targeting certain companies based either on a platform's content or its viewpoint. Indeed, Act 689's definitions and exemptions do seem to indicate that the State has selected a few platforms for regulation while ignoring all the rest. The fact that the State fails to acknowledge this causes the Court to suspect that the regulation may not be content neutral. "If there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction, for instance, that restriction may be content-based." *City of Austin v. Reagan Nat'l Advertising of Austin, LLC*, 142 S. Ct. 1464, 1475 (2022).¹⁰⁸

Utah's laws HB 311 and 152 would also seem to suffer from a similar defect as KOSA and AADC,¹⁰⁹ though they have not yet been litigated.

B. Least-Restrictive Means Is to Promote Monitoring and Filtering

Assuming that courts do, in fact, find that these laws are content-based, strict scrutiny would apply, including the least-restrictive-means test.¹¹⁰ In that case, the caselaw is clear: the least-restrictive

¹⁰⁸ *Id.* at 36-38.

¹⁰⁹ See Carl Szabo, *NetChoice Sends Veto Request to Utah Gov. Spencer Cox on HB 311 and SB 152*, NETCHOICE (Mar. 3, 2023), <https://netchoice.org/netchoice-sends-veto-request-to-utah-gov-spencer-cox-on-hb-311-and-sb-153>.

¹¹⁰ See, e.g., *Sable Commcn's v. FCC*, 492 U.S. 115, 126 (1989) ("The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

means to achieve the government's interest of protecting minors from social media's speech and design problems is to promote low-cost monitoring and filtering.

First, however, it is also worth inquiring whether the government would be able to establish a compelling state interest, as the Court discussed in *Brown*. The Court's strong skepticism of government paternalism¹¹¹ applies equally to the verifiable-parental-consent laws enacted in Arkansas and Utah, as well as COPPA 2.0. Aiding parental consent likely fails to "meet a substantial need of parents who wish to restrict their children's access"¹¹² to social media, but can't do so, to use the late Justice Antonin Scalia's language. Moreover, the "purported aid to parental authority" is likely to be found to be "vastly overinclusive" because "[n]ot all of the children who are forbidden" to join social media on "their own have parents who *care* whether" they do so.¹¹³ While such laws "may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want. This is not the narrow tailoring to 'assisting parents' that restriction of First Amendment rights requires."¹¹⁴

As argued clearly above, *Ashcroft* is strong precedent that promoting the practical and technological means available in the marketplace, outlined by NetChoice in its brief in *Griffin*, is less restrictive than age-verification laws to protect minors from harms associated with social-media usage.¹¹⁵ In fact, there is a strong argument that the market has subsequently produced more and more effective tools than were available even then. This makes it exceedingly unlikely that the Supreme Court will change its mind.

While some have argued that Justice Clarence Thomas' dissent in *Brown* offers roadmap to reject these precedents,¹¹⁶ there is little basis for that conclusion. First, Thomas' dissent in *Brown* was not joined by any other members of the Supreme Court.¹¹⁷ Second, Justice Thomas joined the majority in *Ashcroft v. ACLU*, suggesting he probably still sees age-verification laws as unconstitutional.¹¹⁸

¹¹¹ *Brown*, 564 U.S. at 801 ("California claims that the Act is justified in aid of parental authority: By requiring that the purchase of violent video games can be made only by adults, the Act ensures that parents can decide what games are appropriate. At the outset, we note our doubts that punishing third parties for conveying protected speech to children *just in case* their parents disapprove of that speech is a proper governmental means of aiding parental authority.").

¹¹² *Brown*, 564 U.S. at 801.

¹¹³ *Id.* at 803

¹¹⁴ *Id.*

¹¹⁵ See *supra* IV.B.

¹¹⁶ See Clare Morrell, Adam Candeub, & Michael Toscano, *No, Big Tech Doesn't Have A Right To Speak To Kids Without Their Parent's Consent*, THE FEDERALIST (Sept. 21, 2023), <https://thefederalist.com/2023/09/21/no-big-tech-doesnt-have-a-right-to-speak-to-kids-without-their-parents-consent> (noting "Justice Clarence Thomas wrote in his dissent in the *Brown* case 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.").

¹¹⁷ *Brown*, 564 U.S. at 821.

¹¹⁸ *Id.* at 822.

Even Associate Justice Samuel Alito issued a concurrence to the majority in that case,¹¹⁹ expressing skepticism of Justice Thomas' approach.¹²⁰ Third, it seems unlikely that the newer conservative justices, whose jurisprudence has been more speech-protective by nature,¹²¹ would join Justice Thomas in his opinion on the right of children to receive speech. And far from being vague on the issue of whether a minor has a right to receive speech,¹²² Justice Scalia's majority opinion clearly stated that:

[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them... but that does not include a free-floating power to restrict the ideas to which children may be exposed.¹²³

Precedent is strong against age-verification and parental-consent laws, and there is no reason to think the personnel changes on the Supreme Court would change the analysis.

In sum, straightforward applications of *Brown* and *Ashcroft* doom these new social-media laws.

VI. Conclusion

This issue brief has two main conclusions, one of interest to the scholarship of applying law & economics to constitutional law, and the other to the policy and legal questions surrounding social-media age-verification and parental-consent laws:

1. The Supreme Court appears to implicitly adopt a Coasean framework in its approach to parental-consent and age-verification laws in the three major precedents of *Playboy*, *Ashcroft*, and *Brown*; and
2. The application of this least-cost avoider analysis in the least-restrictive-means test, in particular, is likely to doom these laws constitutionally, but also as a matter of economically grounded policy.

In conclusion, these online age-verification laws should be rejected. Why? The answer is transaction costs.

¹¹⁹ *Id.* at 805.

¹²⁰ *Id.* at 813.

¹²¹ See, e.g., Ben Sperry, *There's Nothing 'Conservative' About Trump's Views on Free Speech and the Regulation of Social Media*, TRUTH ON THE MARKET (Jul. 12, 2019), <https://truthonthemarket.com/2019/07/12/theres-nothing-conservative-about-trumps-views-on-free-speech> (noting Kavanaugh's majority opinion in *Halleck* on compelled speech included all the conservative justices; at the time he and Gorsuch were relatively new Trump appointees); Justice Amy Comey Barrett has also joined the majority opinion in *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), written by Gorsuch and joined by all the conservatives, which found public-accommodations laws are subject to strict scrutiny if they implicate expressive activity.

¹²² Clare Morell (@ClareMorellEPPC), TWITTER (Sept. 7, 2023, 8:27 PM), <https://twitter.com/ClareMorellEPPC/status/1699942446711357731>.

¹²³ *Brown*, 564 U.S. at 786.