



Online Age Verification (Part II): Constitutional Background

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This Legal Sidebar is the second installment in a three-part series on efforts to require online services to verify the ages of their users. Part I discussed the common elements of online age verification laws, using enacted state legislation as examples. This part provides an overview of potentially relevant constitutional provisions and how courts have applied these provisions to age verification requirements in the past.

Age verification laws may unconstitutionally burden the free speech rights of website operators or users, in violation of the [Free Speech Clause](#) of the First Amendment. [Civil rights groups](#) and [trade associations](#) have filed legal challenges to age verification laws in several states.

Laws that include an age verification element frequently require age verification in conjunction with other obligations. The California Age-Appropriate Design Code (CAADC) [requires](#) that businesses consider “the best interests of children” when designing products or services that children are likely to access. The other obligations imposed by these laws may pose separate constitutional issues, including potential First Amendment issues. This Sidebar focuses on questions presented by age verification requirements.

Free Speech Principles

The Free Speech Clause limits the government’s ability to enact laws that may discourage expression. The Supreme Court has recognized the “[vast democratic forums of the internet](#)” as fertile grounds for constitutionally protected expression. The Court has specifically pointed to social media as allowing individuals “[to engage in a wide array of protected First Amendment activity](#).”

As discussed in more detail in [this CRS In Focus](#) and these [essays from the Constitution Annotated](#), laws that restrict speech based on its content face a higher constitutional burden than *content-neutral* laws that apply without regard to the subject matter, topic, or viewpoint of that speech. Content-based restrictions on speech must satisfy a legal standard known as *strict scrutiny*, which requires the government to demonstrate that the law is the “least restrictive means” of advancing a “compelling” governmental interest. Content-neutral restrictions on speech are judged under a standard called *intermediate scrutiny*, which requires that a law “not burden substantially more speech than necessary” to further “important” governmental interests. By contrast to content-based restrictions on speech, content-neutral laws may be constitutional even if less speech-restrictive alternatives to the law exist. The requirement that a law

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burden no more speech than is necessary to advance the government's interest is sometimes called *narrow tailoring*—ensuring the law appropriately “fits” its intended purposes.

To determine whether a law is content based or content neutral, a court may examine whether a law is content based “on its face”—that is, whether it explicitly distinguishes between different types of speech, such as a [city sign ordinance](#) that singles out “political” signs. The fact that a law requires reference to the content of speech does not necessarily render a law content based: the Supreme Court has held that a law is content based on its face only when application of the law turns on the “substantive message” conveyed by the regulated speech. For example, the Court held in *City of Austin v. Reagan National Advertising of Austin* that a city sign ordinance that distinguished between “off-premises” and “on-premises” advertisements was content neutral on its face because the law turned on the location of the signs rather than their substantive messages.

A law that is content neutral on its face may still be content based if it reflects a [discriminatory purpose](#). Laws may distinguish among speakers—such as applying only to certain entities—without being content based, though the Supreme Court has [recognized](#) that speaker-based restrictions may act as proxies for content-based restrictions. Additionally, the Court has held that content-based [exceptions](#) to otherwise content-neutral laws may raise First Amendment concerns.

Laws that limit the ability of children to access speech raise unique constitutional issues. The Supreme Court has long [recognized](#) that minors are entitled to constitutional protections, including those granted by the [First Amendment](#). In some instances, the government has more power to abridge the rights of minors—and particularly [minor students](#)—than it might otherwise. One such circumstance, established by the Supreme Court's decision in *Ginsberg v. New York*, is regulating material that is *harmful to minors*—a category that covers certain sexually explicit material. The Court's test for material that is “harmful to minors” is a variation on the court's test for [obscenity](#), articulated in the case *Miller v. California*. Laws aimed at material harmful to minors must be narrowly tailored to avoid unduly [burdening](#) the free speech rights of adults. For further background, see [this CRS Report](#).

History of Age Verification in the Supreme Court

As discussed in [this CRS Report](#), the Supreme Court has heard several cases involving federal laws designed to protect minors online. Issues relating to age verification played important roles in the Supreme Court's decisions.

An early federal effort to protect minors online, the [Communications Decency Act](#) (CDA), criminalized the distribution of “indecent” material to an individual under 18 years of age. The CDA created two “affirmative defenses” that would allow someone engaged in conduct prohibited by the law to avoid conviction. First, a person or business could avoid conviction by taking “good faith, reasonable, effective, and appropriate actions” to restrict access by minors to indecent material. The second defense was available to anyone who restricted access to material “by requiring the use of a verified credit card, debit account, adult access code, or adult personal identification number.”

The Supreme Court invalidated much of the CDA in *Reno v. American Civil Liberties Union*. The Court in *Reno* held that the CDA was a content-based restriction subject to strict scrutiny. Applying this standard, the Court determined that the CDA was not narrowly tailored, particularly because it would burden lawful speech between adults.

In its decision, the Supreme Court [accepted](#) a conclusion from the district court where the challenge originated that there “is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms.” The Court further [opined](#) that credit card verification “would impose costs on non-commercial web sites that would require many of them to shut down,” and such verification would prevent adults without credit cards from accessing material. The

Supreme Court also [referred](#) to a finding from the district court that “currently available *user-based* software” provided an effective alternative method for parents to prevent children from accessing certain material. The apparent ineffectiveness and cost-prohibitive nature of age verification procedures, coupled with the availability of private filtering software, led the Court to conclude that the CDA was not the least restrictive means of achieving its legislative purpose.

Following the Supreme Court’s decision in *Reno*, Congress enacted the [Child Online Protection Act](#) (COPA), a law that criminalized distribution of “material that is harmful to minors.” The definition of “material that is harmful to minors” largely tracked the language used by the Supreme Court in *Ginsberg v. New York* and *Miller v. California*. Like the CDA, COPA provided an affirmative defense for restricting access to harmful content (1) “by requiring use of a credit card, debit account, adult access code, or adult personal identification number”; (2) “by accepting a digital certificate that verifies age”; or (3) “by any other reasonable measures that are feasible under available technology.”

The Supreme Court did not render a final decision on the constitutionality of COPA, but in *Ashcroft v. American Civil Liberties Union* it upheld a district court’s grant of a preliminary injunction preventing enforcement of the law—and therefore held that COPA was likely unconstitutional. The Supreme Court’s decision [relied](#) in part on the district court’s determination that blocking and filtering software provided a less restrictive means of achieving COPA’s purpose than the law’s criminal penalties. The Court also [credited](#) findings from the district court that age verification systems “may be subject to evasion and circumvention.”

Following a trial in which the court considered additional evidence on the efficacy of age verification from the parties, [a district court](#) found COPA unconstitutional. Applying strict scrutiny because COPA applied to “material that is harmful to minors” and was therefore a content-based law, the district court determined that the law would prohibit more speech than necessary to further Congress’s interest in protecting minors online. On appeal, the U.S. Court of Appeals for the Third Circuit [affirmed](#) the district court’s ruling. Among other things, the Third Circuit concluded—as the district court had—that age verification was “[effectively unavailable](#)” as a defense to COPA because commercial age verification tools could not reliably ascertain a website visitor’s age. The court further [concluded](#) that implementing age verification “would involve high costs and also would deter users from visiting implicated web sites,” thus further inhibiting protected speech.

The history of the CDA and COPA may be instructive as courts consider challenges to age verification laws. Groups have already [filed](#) legal challenges to [several](#) state age verification laws. The third installment in this series will discuss how the constitutional principles discussed here might apply to state age verification laws or proposed federal legislation.

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