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# Supreme Court Traps Itself in Muddy First Amendment Standards

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*Kelley Drye's Alysa Hutnik and Gregory Pruden examine what the Supreme Court's decision upholding an age verification law in Texas means for future First Amendment restrictions and protections.*

The US Supreme Court's [decision](#) in *Free Speech Coalition v. Paxton* denying a First Amendment challenge to a Texas law requiring online publishers of sexual content to verify the ages of Texas users likely represents a narrow holding applicable only to obscene content. But the court's analysis raises broader questions that bear on the constitutionality of other age verification provisions.

The Texas law at the center of the case requires operators of websites, at least one-third of whose content is "sexual material harmful to minors," to verify that every Texas user is older than 18. Texas asserted the law holds website operators to the same standard as brick-and-mortar institutions, which must check identification to sell explicit content.

Complicating matters, the law is substantially similar to the federal Child Online Protection [Act](#), the Supreme Court held in *Ashcroft v. ACLU* failed strict scrutiny under the First Amendment.

The Supreme Court held that Texas House Bill 1181 is subject to intermediate scrutiny because it explicitly regulates minors' access to obscene content they have no First Amendment right to view, and only incidentally burdens adults' right of access to that same speech. It also held that the law meets that standard.

Justice Clarence Thomas, writing for the majority, began with an analogy to brick-and-mortar ID requirements for the same sexual content, describing "States' traditional power to prevent minors from accessing speech that is obscene from their perspective." That traditional power, the majority reasoned, allows states to impose identification restrictions outside the First Amendment's ambit.

The court then cited its past precedent holding that “basic principles of freedom of speech do not vary’ when a new and different medium for communication appears.” Thus, the court concluded, Texas can enforce the same age verification mechanisms over the internet.

The court’s reasoning has intuitive appeal, but runs into issues when placed into the existing First Amendment framework.

## Content-Based Restraint

Generally, if a law restricts speech based on its content, it must meet strict scrutiny. Prior cases—including *Ashcroft II* and *United States v. Playboy Entertainment Group*—have looked past express statutory text aimed at children to evaluate whether those same limitations burden the speech of adults.

If they do, and they reference specific content, they are content-based. Here, though, the court simply accepts that Texas seeks to prevent children from viewing sexual content that is obscene for minors—which they have no First Amendment right to view—while ignoring that the law would burden adults’ access to the exact same content.

Indeed, HB 1181 identifies the websites that must perform age verification requirements by reference to their content.

But the majority takes a more limited view of the law’s scope, which suggests that states may avoid strict scrutiny by framing their law in a way that isn’t explicitly content-based, even if the net effect is on speech identifiable by reference to its content.

## Bans and Burdens

Even assuming HB 1181 garners only intermediate scrutiny, the court didn’t explain why *Ashcroft II* applied strict scrutiny to COPA—a law that undisputedly had the same aim—but declined to abrogate or overrule it.

The court’s first-level answer is that the parties in *Ashcroft II* didn’t contest the applicability of strict scrutiny, but as the dissent points out, the federal government likely declined to do so because the court had recently and repeatedly found that strict scrutiny applied in the same situation.

And the court’s more detailed answer is unsatisfying: It argues that COPA banned the same category of speech upon which HB 1181 imposes a supposedly lesser age-gating requirement.

But that's only true if we ignore that COPA provided website operators an affirmative defense that they implemented an age verification feature to restrict access to minors. HB 1181 differs only in that it goes straight to the age-verification requirement.

Whether a law imposes a ban on speech or a lesser hurdle is usually a matter of the burden the law places upon speech, considered after a court chooses the appropriate level of scrutiny, which turns on the nature of the content being regulated.

## Future Verification Language

States are likely to argue that *Free Speech Coalition* provides broader support for age verification. It's far from clear whether the court's analysis here is peculiar to obscene content, or whether it applies to any age verification mechanism.

The court, for instance, states that "adults have no First Amendment right to avoid age verification, and the statute can readily be understood as an effort to restrict minors' access." Read literally, this could apply to virtually any age-gating requirement.

But there are good arguments to the contrary, including in the majority's own opinion.

The court elsewhere finds error in the US Court of Appeals for the Fifth Circuit's application of rational basis review because it "fails to account for the incidental burden that age verification necessarily has on an adult's First Amendment right to access speech that is obscene only to minors." Factual application aside, that rendition of the law comports with established First Amendment analysis, not altogether different today than it was a week ago.

The majority also clarifies that "the First Amendment leaves undisturbed States' power to impose age limits on speech that is obscene to minors," leaving open the possibility that the First Amendment outcome might be different for other types of speech. The best reading of the court's main holding is that it applies only to obscene content, but its language is less than clear.

## Chances to Clarify

Courts may ultimately cabin *Free Speech Coalition* to the facts before the court. And there's ample basis to do so.

They may rely on the fact that the court traced a "traditional power" to regulate obscene content back to the time of the Constitution, or that the content that HB 1181 regulates isn't First Amendment protected at least as to children. But states are likely to argue that courts should read the decision more broadly in support of other age verification provisions.

While the court has no present opportunity on its docket to address the issue further, there are numerous opportunities for the lower courts to opine.

Both Arkansas's original and amended [Social Media Safety Act](#) are currently subject to challenges in federal court. The District Court found Arkansas's original law unconstitutional under a strict scrutiny analysis, and an appeal to the Eighth Circuit is currently stayed.

Another court likewise granted preliminary injunction against a Mississippi age verification [law](#), holding it unlikely to withstand strict scrutiny. In both cases, the states will likely leverage the court's recent analysis to argue that strict scrutiny wasn't the appropriate standard.

The case is [Free Speech Coalition, Inc. et al v. Paxton, Attorney General of Texas](#), U.S., 23-1122, 6/27/25.

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