Foreword

The Government Still Knows How to Win at the Supreme Court

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The Cato Institute's Robert A. Levy Center for Constitutional Studies is pleased to publish this 24th volume of the *Cato Supreme Court Review*, an annual critique of the Court's most important decisions from the Term just ended plus a look at the Term ahead. We are the first such journal to be released, and the only one that approaches its task from a classical liberal, Madisonian perspective. We release this volume each year at Cato's annual Constitution Day symposium.

Like every Supreme Court Term, this past Term featured some decisions that advanced liberty and limited government and some that were setbacks from a libertarian perspective. It would have been hard for the Court to match the number of momentous decisions from last year. If anything, this Term showed that even with a Supreme Court majority that is more skeptical of government power in some respects, the government still has many advantages. In last year's Foreword I highlighted three cases from the Term that I believed classical liberals should be excited about. To counterbalance that optimism, the story of this Term was, in my opinion, several cases where the Court was all too quick to accept the government's justifications for its exercise of power. My thoughts on one of those cases, *Kennedy v. Braidwood Management*, can be found in another article in this Volume. Below are my takes on three other decisions that I found disappointing from this Term, all three of which ruled in favor of a state or federal government.

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Free Speech Coalition v. Paxton

In *Free Speech Coalition v. Paxton*,[1] the Supreme Court upheld as constitutional a Texas law mandating that websites impose age verification if those websites feature one-third or more content that is obscene for minors. In rejecting a First Amendment challenge to the law, the Supreme Court held that the law should neither be subjected to the most searching and skeptical form of judicial review (strict scrutiny) nor the most lenient and deferential (rational basis scrutiny). Rather, the Court applied the middle-ground "intermediate scrutiny."

The Court's opinion by Justice Clarence Thomas emphasized that many areas of the law distinguish based on age, including minimum age requirements to purchase guns, drive a car, or get married. And the Court reasoned that ID checks are a natural requirement for enforcing such distinctions. Prior Supreme Court cases have held that some forms of sexual content are obscene for children (meaning states can ban minors from viewing them without violating the First Amendment) but not obscene for adults. The Court concluded that if a state wants to enforce a law restricting minors' access to obscene content, ID checks are the natural means of enforcement.

On this basis, the Court concluded that only intermediate scrutiny should apply to laws establishing ID checks for access to age-restricted obscene content. The Court reasoned that the intermediate scrutiny standard is sufficient to ensure that the government is not using such ID checks as a pretext for a law aimed at limiting the access of adults to protected speech.

After determining that intermediate scrutiny applied, the Court held that the law survived intermediate scrutiny. It held so because the law advances the state's interest in shielding children from sexual content. The Court held, in addition, that requiring adults to verify their ages online before accessing such content did not impermissibly burden the speech rights of adults. Because the Court applied only intermediate (rather than strict) scrutiny, the Court did not require Texas to prove that it could achieve the state's interest in protecting children in a way that imposed less of a burden on adults.

Unfortunately, this decision upends two decades of settled understanding about adults' freedom to access legal content online without

[1] 145 S. Ct. 2291 (2025).

government-mandated ID checkpoints. In the case *Ashcroft v. ACLU*,[2] the Supreme Court held that strict scrutiny applied to a very similar federal law, affirming a decision blocking that law. Implausibly, the Court in *Paxton* attempted to distinguish *Ashcroft* as not binding in this case. The Court reasoned that the law in *Ashcroft* required websites to show they had verified IDs as a *defense* to a prosecution, while the Texas law requires the state to show that a website lacked the required ID verification process at an earlier stage of an enforcement proceeding.

But although the procedures and burdens of proof in the two laws differed, the upshot of both laws was the same: mandatory ID checks for accessing online adult content. In effect, the Court has now overruled *Ashcroft*'s application of strict scrutiny to laws mandating such ID checkpoints.

In addition, the Court's application of intermediate scrutiny significantly downplayed the unique risks and burdens of online ID checks for adult content. In his majority opinion, Justice Thomas wrote that "the decades-long history of some pornographic websites requiring age verification refutes any argument that the chill of verification is an insurmountable obstacle for users."[3] But the First Amendment test has never been whether a law presents an "insurmountable obstacle." As Justice Elena Kagan noted in her dissent, the "First Amendment prevents making speech hard, as well as banning it outright."[4]

Indeed, online ID checks for adult content make it harder for adults to access that speech because the risk of leaks and blackmail is significantly higher for online ID checks than for in-person ID checks. Scans and photos can all too easily be accessed for nefarious purposes. As Justice Kagan wrote in dissent, an online ID scan is not "like having to flash ID to enter a club."[5] Rather, it is "turning over information about yourself and your viewing habits—respecting speech many find repulsive—to a website operator, and then to . . . who knows? The operator might sell the information; the operator

[2] 542 U.S. 656 (2004).

[3] *Free Speech Coal.*, 145 S. Ct. at 2319.

[4] *Id.* at 2320 (Kagan, J., dissenting).

[5] *Id.* at 2321.

might be hacked or subpoenaed."[6] Thus, online ID checkpoints dissuade adults from accessing lawful speech and from exercising their constitutional rights. That chilling effect is far greater than any caused by ID checks for a marriage license or driver's license.

Fortunately, the Court's reasoning applies only to ID checks for content that is obscene for minors, which is the only category of speech where the Court has held that age makes a constitutional difference. The Court's reasoning in *Paxton* does not justify ID checks for online speech that is legal and constitutionally protected for people of all ages, such as social media. While the Court's decision is disappointing, it remains to be seen whether it will lead to a weakening of First Amendment protections in any area outside the context of obscenity.

TikTok v. Garland

Consider the following true scene from the U.S. Congress: One after another, members rose on the House floor to support the bill. "It is really incredible," one member said, "that we should allow an avowed and powerful enemy to be pouring poisonous propaganda into the minds of our own youth." Another member quoted an article warning of "unsolicited propaganda attacking the United States as 'imperialist,' 'war mongering,' and 'colonialist.'" The article asked rhetorically whether "a free society ha[s] to leave itself totally exposed to an unending brainwashing of foreign Communist propaganda—mostly concealed in its origin, subtle, purposeful—directed primarily at young Americans, at college students."

The impressionability of youth was a running theme of the day. The same member repeatedly emphasized that the propaganda at issue was "addressed to our youth, the teachers, and to colleges and universities, because this is a favorite trick of the Communists to get at the minds of our young people." Urging other members to support the bill, he called it "one of the most serious problems we have, to stop this Communist propaganda coming into our country. It is the technique of the Communists to work on the young minds of the various nations."

These fears might sound familiar to anyone who followed the legal controversy surrounding TikTok. But these members were not

[6] *Id.*

talking about TikTok. They were not talking about social media at all, because social media did not exist when they spoke. These congressional remarks were delivered not in 2024, but in 1961.[7] The members were urging support for a bill that would subject so-called "Communist political propaganda" to a regime of censorship, under which mail from abroad was opened and read by government officials. If the officials decided that a piece of mail qualified as such "propaganda," the addressee could only receive it by affirmative request.

The law mandating that TikTok "divest" or face a ban was motivated by the same flawed instinct that was on display in 1961: the belief that disfavored speech must be fought with censorship rather than with counterspeech. Members of Congress justified the TikTok law with claims that "Communist China is using TikTok as a tool to spread dangerous propaganda."[8] They described the speech available on TikTok as "bold attempts to infiltrate our country, spread propaganda."[9] And some candidly admitted that the content and viewpoint of the speech on TikTok was their primary motivation for the bill, not data privacy concerns. A co-sponsor of the bill admitted that "the greater concern is the propaganda threat" and the question of "what information America's youth gets."[10]

The rhetoric that members used to justify the two bills was strikingly similar despite being separated by 60 years. Even the metaphors echoed across the decades. In 1961: "We would not allow any other country to be shipping in dangerous drugs or disease bacteria. We would not allow anybody to pour poison into our water supply. But here is our most important possession, the minds and attitudes of our youth, and . . . we allow that enemy to pour this poisonous material day after day into the untrained and uncritical minds of

[7] 107 Cong. Rec. 17,815 (1961) (statement of Rep. Walter Judd); *id*. at 17,818 (statement of Rep. Glenn Cunningham) (quoting Roscoe Drummond, *Propaganda War: Moscow and the Mails*, Wash. Post (July 15, 1961)); *id*. at 17,814 (statement of Rep. Glenn Cunningham).

[8] Press Release, The Select Comm. on the CCP, Gallagher, Bipartisan Coalition Introduce Legislation to Protect Americans from Foreign Adversary Controlled Applications, Including TikTok (Mar. 5, 2024), https://tinyurl.com/yshcpwew (statement of Rep. Elise Stefanik).

[9] Press Release, Rep. Beth Van Duyne, Rep. Beth Van Duyne Votes to Protect North Texans from Communist China (Mar. 13, 2024), https://tinyurl.com/3f999s7r.

[10] Jane Coaston, *What the TikTok Bill is Really About, According to a Leading Republican*, N.Y. Times (Apr. 1, 2024), https://tinyurl.com/rfrwhyda.

our youth."[11] In 2024: "TikTok is Communist Chinese malware that is poisoning the minds of our next generation;"[12] it is "digital fentanyl"[13] that is "poisoning the minds of our youth every day on a massive scale."[14]

In the 1960s, the Supreme Court rightly struck down the restriction on "Communist political propaganda," finding it to be "an unconstitutional abridgment of the addressee's First Amendment rights."[15] The Court described that law as being "at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment."[16]

Unfortunately, the Court did not take the same stand for free speech in *TikTok v. Garland*.[17] The Court upheld the law, applying only intermediate scrutiny and finding that national security concerns satisfied that standard. The Court's *per curiam* opinion was explicitly cautious in its language, and the Court clearly hoped that the opinion wouldn't become a foundational precedent, given its rushed nature. In choosing to apply only intermediate scrutiny, the Court accepted the government's argument that there are speech-neutral reasons for a law to single out TikTok, despite all the evidence in the legislative record that TikTok was targeted *because of* the speech on the platform. The rushed nature of the litigation also meant that the courts did not have a sufficient evidentiary record to assure themselves that any data-privacy concerns relevant to TikTok are truly unique.

Nonetheless, one silver lining is that the Court relied only on the government's data-privacy rationale and did not accept the government's argument that it has an interest in changing the content-moderation choices on TikTok. Still, the Court was all too willing to accept the government's say-so rather than demand hard evidence that TikTok poses a unique danger. A law singling out and banning

[11] 107 Cong. Rec. 17,815 (1961) (statement of Rep. Walter Judd).

[12] Press Release, The Select Comm. on the CCP, *supra* (statement of Rep. Elise Stefanik).

[13] Daniel Arkin, *Pence Calls TikTok 'Digital Fentanyl'*, NBC News (Mar. 13, 2024), https://tinyurl.com/wkemkcka.

[14] Press Release, The Select Comm. on the CCP, *supra* (Statement of Rep. Chip Roy).

[15] *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965).

[16] *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

[17] 145 S. Ct. 57 (2025).

a particular speaker by name requires much more judicial scrutiny and skepticism than what the Court gave it.

Lackey v. Stinnie

Suing the government is expensive work. That's why federal law authorizes the "prevailing party" in a civil rights suit against the government to request attorneys' fees.[18] But what happens if a court temporarily blocks a law as likely unconstitutional, and the legislature then repeals that law? Do the law's challengers qualify as "prevailing parties" because they got everything they wanted? Or must a court strike the final blow against a law for its challengers to qualify as "prevailing"? That is the question the Supreme Court answered in *Lackey v. Stinnie*.[19]

Unfortunately, the decision the Court reached is a setback for civil rights plaintiffs, who will now find it more difficult to muster the legal resources they need. Before *Lackey*, most appellate courts had held that a party who receives a preliminary injunction against a law is the "prevailing party" if the government then repeals the law and leaves nothing further for the court to do. That rule made sense because civil rights litigation is designed to impact the law. When people cause the law to change in their favor, they "prevail" in every sense of that concept. This principle could be easily enforced with a bright-line rule: A party that wins relief at a preliminary stage of litigation "prevails" if it then obtains a change in policy that materially alters the law in its favor.

Indeed, some of the most influential civil rights decisions in history never reached final judgment. Impact litigation is about setting precedents just as much as it is about winning a particular case. Many of the Supreme Court's most important decisions were at the preliminary injunction stage, and it would be bizarre to say that the winning side in those cases did not qualify as the "prevailing party."

But the Supreme Court in *Lackey* instead construed "prevailing party" narrowly, ruling that litigants are eligible for attorneys' fees only when courts "conclusively resolve the rights of parties on the merits."[20] That excludes suits that are mooted after a preliminary

[18] 42 U.S.C § 1988(b).

[19] 145 S. Ct. 659 (2025).

[20] *Id.*

injunction. As Justice Jackson noted in dissent, there is "every reason to believe that the net result of [this] decision will be less civil rights enforcement in the long run."[21] This decision will promote the "strategic mooting of cases by defendants" who see "the writing on the wall."[22]

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It remains to be seen whether the *TiokTok* and *Free Speech Coalition* decisions will be extended to future circumstances, or whether their reasoning is unique to the particular speech at issue. And it remains to be seen whether Congress will choose to amend federal law to return to the pre-*Lackey* status quo, as Chief Justice John Roberts noted they are free to do. As always, the *Review* comes out as a first draft of the history of this Term, not a final assessment. The articles in this volume of the *Review* will give a fuller picture of the Term, both the good and the bad. We hope you enjoy the 24th volume of the *Cato Supreme Court Review*.

[21] *Id.* at 681 (Jackson, J., dissenting).

[22] *Id.* at 680.