

Ruling on porn is a comeuppance for the worst industry

BY DAVID FRENCH

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The porn industry just got what it deserved at the Supreme Court.

On the last day of its term, by a 6-3 vote, the court delivered a decisive ruling against one of the worst industries in America. It upheld a Texas law that requires pornographic websites to "use reasonable age verification methods" to make sure that their customers are at least 18 years old. The court split on ideological lines, with the six Republican appointees voting to uphold the law and the three Democratic appointees in dissent.

When you see what appears to be a sharp ideological divide on the court, it's easy to jump to conclusions, to label, for example, the liberals on the court pro-porn compared with the conservatives, but that's fundamentally wrong. In this case, the most important words from the court came not from Justice Clarence Thomas' majority opinion but from Justice Elena Kagan's dissent.

"No one doubts that the distribution of sexually explicit speech to children, of the sort involved here, can cause great harm," Kagan wrote. "Or to say the same thing in legal terms, no one doubts that states have a compelling interest in shielding children from speech of that kind. What is more, children have no constitutional right to view it."

There, in plain English, is a powerful declaration — one that should echo in American law and American culture. From left to right, all nine justices agree that pornography can cause great harm to children. All nine agree not merely that children have no constitutional right to view it but also that the state has a compelling interest in blocking their access.

And it's no wonder. Our nation's young people are in the midst of a virtual pornography pandemic. The combination of early exposure and the sheer violence and cruelty in so much modern pornography means that children are getting a sex education in exploitation.

Interestingly, the difference between the justices was about not the degree of depravity in porn but rather the precise legal test to use to evaluate the Texas law. The lower court, the 5th U.S. Circuit Court of Appeals, had used the most lenient possible standard, rational-basis review.

Under rational-basis review, a court will uphold a statute as long as the law has a rational connection to a legitimate state interest. It is exceedingly rare for a court to strike down a law under rational-basis review.

Because kids have no right of access to porn, the 5th Circuit reasoned, the Texas law didn't implicate the First Amendment, and thus the court should uphold the law so long as Texas could articulate a rational basis for it.

Rational-basis review was never going to fly at the Supreme Court. Kids don't have a right of access to pornography, but adults do, and the identification requirement puts a burden on adults' rights by requiring them to upload identification (and risk their privacy), which means it couldn't be the case that only rational-basis review applied.

Under strict scrutiny, a law can survive judicial review only if it is narrowly tailored and uses the least restrictive means to advance a compelling state interest. Lawyers like to say that strict scrutiny is so tough that it's strict in theory but fatal in fact.

This technical legal explanation brings me to an important point: Although Kagan wanted to send the case back to the lower court so that it could apply the stricter test, she also wrote that in this case, strict scrutiny might not be fatal after all. The Texas law, she wrote, "might well pass the strict-scrutiny test, hard as it usually is to do so."

To understand why, let's leave the court for a moment. There is no comparison between a stack of Playboys underneath a friend's father's bed and the tidal wave of vile content online.

But the problem extends well beyond the sheer volume of pornography. Citing my colleague Nick Kristof's vitally important 2020 report "The Children of Pornhub," Justice Thomas explained that "many of these readily accessible videos portray men raping and physically assaulting women — a far cry from the still images that made up the bulk of online pornography in the 1990s."

It is a grotesque industry that produces content like this. An even worse industry makes it available to children.

Against this backdrop, Thomas was right about the outcome, but Kagan was right about the test. A law aimed at the content of speech should receive strict scrutiny, but Texas' law should still have survived even the most exacting review.

A generation ago, the Supreme Court struck down efforts to age-limit access to porn websites. The technology was too primitive, and besides, aren't there other ways to limit kids' access to pornography? Can't parents supervise their children? Can't blocking technology protect young eyes?

After more than two decades of effort, the answer is clear: no. Limiting access to pornography doesn't simply provide a legal barrier; it helps replace the depravity of pornography with a moral message: a woman is a person to be loved, not an object of gratification.

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