Skrmetti's Mistake

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Introduction

Can the government define who you are and, having labeled you, prohibit you from accessing medically necessary care simply because of that label? Should the answer be any different if you are a minor?

Does it matter whether the rule is guaranteed to deprive some individuals who, but for the law, are capable of evaluating the pros and cons of treatment and whose judgment to decide for themselves is attested to by both their doctors and parents? Should the rarity of the ailment for which treatment is sought factor into the scheme?

These are some of the questions that the United States Supreme Court wrestles with in *Skrmetti v. United States*,[1] a recent equal protection challenge to Tennessee's SB1.[2] But they are not the only ones.

SB1 regulates minors' access to hormone blockers, masculinizing and feminizing exogenous hormones, and reconstructive surgeries of primary and secondary sexual characteristics.

SB1 does not presumptively ban care for all minors. Instead, all minors are further classified as either trans, nontrans (without an intersex condition), and intersex. Trans and nontrans kids (but not intersex kids) are further tautologically classed as either male or female. Males are only those assigned male at birth, and females are only those assigned female at birth. The overarching classificatory

* Thanks to Kylar Broadus, Jessica Clarke, Kimberlé Crenshaw, Michael Dorf, Sheri Johnson, Chan Tov McNammarah, Sloan Manning, Sawyer Nash, Victoria Rodriguéz-Roldán, Katavia Sloan, and Brittany Stewart for helpful conversations and comments. All mistakes are my own.

[1] 145 S. Ct. 1816 (2025).

[2] Tenn. Code Ann. § 68-33-101 *et seq.*

scheme is not premised on any individual's chosen identity. Nor is it informed by medicine or science.

In *Skrmetti*, before assessing whether Tennessee has the specific power to impose SB1, the Supreme Court asks what degree of judicial scrutiny should be afforded to trans minors diagnosed with gender dysphoria who medically need the prohibited care. If heightened scrutiny applies, SB1 is presumptively unconstitutional. If instead rational basis applies, SB1 is presumptively constitutional.

This means that to determine whether discrimination hurting a particular individual violates equal protection, the Supreme Court first must pick which groups deserve more protection than others. This is despite the fact that choosing at the threshold *which* groups to protect more than others is itself a violation of equal protection.

This Article uses *Skrmetti v. United States* to illustrate how the Court's analytic mistake unconstitutionally deprives members of targeted groups of the guarantee of equal protection.

Part I explains an analytic mistake that plagues the Supreme Court's equal protection jurisprudence. From there it explains SB1's design and uplifts the faulty rationales Tennessee lawmakers proffered in support of the law's enactment.

Part II evaluates Chief Justice John Roberts's majority opinion and Justice Amy Coney Barrett's concurrence in *Skrmetti v. United States*. It goes on to dissect how both Chief Justice Roberts's and Justice Barrett's opinions fail to apprehend how SB1 functions as per its text and misevaluate the evidence of irrationality and bias presented to the Court.

I. Contextualizing Tennessee's SB1

In the last several years, lawmakers across the nation have enacted a slew of anti-trans bills. All are premised on the notion that government has the power to idiosyncratically define sex to single out trans persons for burdens and deny them benefits otherwise due them but for being trans. Tennessee's SB1 is one example.

Unfortunately, the Supreme Court is ill-equipped to ascertain whether anti-trans laws like SB1 are unconstitutional. This is because the Court insists, in violation of equal protection itself, that it has the judicial power to pick and choose what degree of judicial

scrutiny should be afforded equal protection challenges solely premised on the identity of persons who allege discrimination.

A. The Court's Equal Protection Mistake

The notion that all persons are equal before the law is not a lofty ideal. It is a legal reality that is constitutionally mandated. The equal protection clause of the Fourteenth Amendment is not ambiguous. Government is without power to "deny any person within its jurisdiction the equal protection of the laws."[3]

There are no textual exceptions to equal protection.[4] Equal protection is an absolute limit on governmental power.[5] With respect to the branches of government, the express powers conferred to them by the Constitution are constrained by rights expressly conferred to the people[6] (in addition to those impliedly conferred by reservation

[3] U. S. Const. amend. XIV, § 1, cl. 1 (equal protection clause) *constitutionally rejecting* Barron v. Baltimore, 32 U.S. 243 (1833) (holding individuals' rights guaranteed by Constitution are solely limitation on federal, not state government). *See also* U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.") *and* U.S. Const. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

[4] *See, e.g.,* Plyler v. Doe, 457 U.S. 202, 212 (1982) (quoting Yick Wo v. Hopkins, 118 US 356, 369 (1886) (provisions of the Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction")); Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring) ("There is only one Equal Protection Clause").

[5] *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (Jackson, J.) ("The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

[6] *Cf.* Bond v. United States, 564 U.S. 211, 221 (2011) (the Constitution allocates powers "between the National Government and the States [to enhance freedom] first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived"); New York v. United States, 505 U.S. 144, 181 (1992) ("federalism secures to citizens the liberties that derive from the diffusion of sovereign power") (cleaned up).

through the Ninth[7] and Tenth[8] Amendments). This means that even where the Constitution gives Congress, the Executive, and the Judiciary general and specific powers, none contains within that delegation the power to violate equal protection.[9]

There are some seminal Supreme Court opinions that call out and condemn equal protection violations committed by judicial officers.[10] Taken together, they teach that equal protection bars the

[7] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.").

See also generally Daniel Farber, Retained by the People: The 'Silent' Ninth Amendment and the Constitutional Rights Americans Don't Know They Have (Basic Books 2007) (arguing that originalism illustrates that conservatives are hypocritically refusing to apply their commitment to text and history when it comes to the Ninth Amendment); Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 Colum. L. Rev. 1215 (1990) (presenting an originalist account of the Ninth Amendment as securing residual rights as opposed to affirmative rights).

[8] District of Columbia v. Heller, 554 U.S. 570, 580 (2008) (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)) ("'The people' seems to have been a term of art employed in select parts of the Constitution[. Its uses suggest] that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.") (cleaned up).

[9] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 471 (1982) ("The judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts. The power to declare the rights of individuals and to measure the authority of governments . . . is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.").*Cf.* Am. K-9 Detection Servs., LLC v. Freeman, 556 S.W.3d 246, 252 (Tex. 2018) (Hecht, C.J.) ("limits on judicial power are as important as its reach").

See also Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231–32 (1995) ("the Constitution imposes upon federal, state, and local government actors the same obligation to respect the personal right to equal protection") (citing Charles Fried, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 Harv. L. Rev. 107, 113–17 (1990) (arguing "adoption of different standards of review for federal and state classifications placed the law in an 'unstable condition' and advocating for strict scrutiny across the board")).

[10] *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432 n.1 (1984) ("The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment.") (citing Shelley v. Kraemer, 334 US 1 (1948); Ex parte Virginia, 100 U.S. 339, 346–47 (1880)).

judiciary from employing the judicial power to authorize, enforce, or give effect to discriminatory schemes. This rule holds true even where the government, litigants, or third parties insist that they prefer discrimination for extra-constitutional reasons.

Nevertheless, the Supreme Court's equal protection jurisprudence allows and facilitates the judiciary meting out equal protection unequally, which itself is an equal protection violation. Since the mid-twentieth century, the Court has employed the tiers of scrutiny, a framework used to justify different degrees of judicial scrutiny afforded to equal protection challenges. Under the tiers of scrutiny, race and sex classifications are afforded heightened scrutiny and thus presumed unconstitutional. And virtually all other classifications are given only rational basis review and thus presumed constitutional. The net result is again that the Court is picking and choosing which classifications get more equal protection than others.[11]

The Court occasionally explains away the discrimination built into the judicial decision-making process that the tiers of scrutiny mandate as a kind of institutional reparations. On this logic, race and sex classifications merit heightened scrutiny because of the Court's historic failure to realize both are inherently suspect.[12] Conversely, all other classifications are not inherently suspect because they are neither race nor sex.

Ultimately, the tiers of scrutiny framework simply redound to whether the Supreme Court wishes to give certain groups more or less equal protection. This is not analytically different from the

[11] *Cf.* Romer v. Evans, 517 U.S. 620, 633 (1996) (Kennedy, J.) ("[L]aws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from government is itself a denial of equal protection of the laws in the most literal sense."); Sweatt v. Painter, 339 U.S. 629, 635 (1950) ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.") (citing *Shelley*, 334 U.S. at 22); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) ("The guarantee of equal protection of the laws is a pledge of the protection of equal laws.") (cleaned up).

[12] For examples of race cases, see for example Hernandez v. Texas, 347 U.S. 475 (1954); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954); Loving v. Virginia, 388 U.S. 1 (1967). For sex cases, see, for example, Frontiero v. Richardson, 411 U.S. 677 (1973); Orr v. Orr, 440 U.S. 268 (1979); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982); United States v. Virginia, 518 U.S. 515, 533 (1996); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994).

Court's holdings in *Plessy v. Ferguson*[13] and *Bradwell v. Illinois*,[14] which respectively reasoned that race and sex-based rules are not inherently suspect and thus do not merit searching judicial scrutiny.

B. SB1's Design

SB1 is designed to do one thing—bar only trans kids from accessing puberty blockers, hormones, and surgical treatment.[15] The law does not have a safety-valve to permit the small number of children who indisputably require those treatments for gender dysphoria in youth.[16]

Trans kids are categorically barred from hormone blockers, hormones, and reconstructive surgeries where treatment is indicated by a gender dysphoria diagnosis.[17] (Gender dysphoria is today highly associated with trans persons, but intersex and nontrans persons can also be diagnosed with the condition.[18]) This categorical ban

[13] 163 U.S. 537 (1896).

[14] 83 U.S. 130 (1973).

[15] *Accord* Romer v. Evans, 517 U.S. 620, 635 (1996) (Kennedy, J.) ("It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.").

[16] This is achieved by reading together § 68-33-102(9), which tautologically defines sex as that which is assigned at birth, with § 68-33-102(1)'s provision that creates a carve out for intersex kids (those with a "congenital defect") and § 68-33-102(1)'s exclusion of "gender dysphoria, gender identity, [and] gender incongruence" from the definition of congenital defect.

[17] Even the UK's Hillary Cass agrees that there are a small number of trans kids who need treatment for gender dysphoria in youth. *See generally* Hillary Cass, Independent Review of Gender Identity Services for Children and Young People (2024), https://cass.independent-review.uk/home/publications/final-report/.

[18] *See, e.g.*, Paulo Sampaio Furtado et al., *Gender Dysphoria Associated with Disorders of Sex Development*, 9 Nature Reviews Urology 620 (2012) (elevating that rates of gender dysphoria in patients with disorders of sex development ranging somewhere between 8.5–20%); Cynthia Kraus, *Classifying Intersex in DSM-5: Critical Reflections on Gender Dysphoria*, 44 Archives Sex Behavior 1147 (2015) (addressing shift from intersex conditions being an exclusion criteria for gender dysphoria in past versions of the DSM to the DSM-5's embrace of intersex conditions being a specifier of gender dysphoria); Lih-Mei Liao et al., *Determinant Factors of Gender Identity: A Commentary*, 8 J. Pediatric Urology 597 (2012) (observing that gender assignment of newborn infants diagnosed with a disorder of sexual development does not predict long-term gender outcome with certainty); Yuqi Li & Lijun Zheng, *Validation of Two Measures of Gender Dysphoria/Incongruence in Transgender and Cisgender Populations in China*, 52 Archives Sexual Behavior 1019 (2023) (measuring relative rates of gender dysphoria in trans and nontrans populations).

is imposed despite decades of evidence-based research concluding medical transition is the only viable treatment for gender dysphoria.[19] The ban also flies in the face of more than 150 years of research evidencing that it is impossible to change any person's (trans, nontrans, or intersex) innermost sense of sex.[20]

Nontrans kids without intersex conditions face no restrictions on access to hormone blockers, hormones, and reconstructive surgeries.[21] This is so even though this population seeks the same care

[19] *See, e.g.*, Kellan E. Baker et al., *Hormone Therapy, Mental Health, and Quality of Life Among Transgender People: A Systematic Review*, 5 J. Endocrine Soc'y 1 (2021); Tim C. van de Grift et al., *A Longitudinal Study of Motivations Before and Psychosexual Outcomes After Genital Gender-Confirming Surgery in Transmen*, 12 J. Sexual Medicine 1621 (2017); Dogu Aydin et al., *Transgender Surgery in Denmark from 1994 to 2015: 20-Year Follow-Up Study*, 13 J. Sexual Medicine 720 (2016); Sofia Pavenello Decaro et al., *It Might Take Time: A Study on the Evolution of Quality of Life in Individuals with Gender Incongruence During Gender-Affirming Care*, 12 J. Sexual Medicine 2045 (2021).

[20] *See, e.g.*, Richard von Krafft-Ebing, Pyschopathia Sexualis, With Especial Reference to Contrary Sexual Instinct: A Medico-Legal Study (1870) (employing the term androgyny to refer to FtM persons and gyandry to refer to MtF patients, and concluding both conditions are "congenital" and "incurable" where cross-sex identity established in early childhood); Havelock Ellis, *The Study of Sexual Inversion*, 12 Medico-Legal J. 148 (1894) (discussing Dr. Westphal of Berlin's 1870 study of an FtM transsexual whose gender identity was deemed congenital and could not be altered); Magnus Hirschfeld, Die Transvestiten (1910) (articulating a grand theory to explain trans persons as a natural variation of human sex); J. Allen Gilbert, *Homo-sexuality and its Treatment*, 52 J. Nervous & Mental Disease 297 (1920) (observing that FtM transsexual's male identity could not be altered by psychoanalytic treatment); Harry Benjamin, *Transsexualism and Transvestism as Psychosomantic and Somato-Psychic Syndromes*, 8 Am. J. Psychotherapy 219 (1954) (refining framework proposed by Hirschfeld); Robert Stoller, Sex and Gender (1968) (observing impossibility of changing gender identity of MtF and FtM patients); Milton T. Edgerton, Norman J. Knorr, & James R. Callison, *The Surgical Treatment of Transsexual Patients: Limitations and Indications*, 45 Plastic & Reconstructive Surgery 38, 38 (1970) ("Since antiquity some men have shown evidence of conflict, arising from feelings of inappropriateness of the sex assigned to them on the basis of their external anatomical development."); Lawrence Newman, *Transsexualism in Adolescence: Problems in Evaluation and Treatment*, 23 Archives Gen. Psychiatry 112 (1970) ("There are no reports of older children responding to psychological treatment aimed at reversing their cross-gender orientation.").

[21] Tenn. Code Ann. § 68-33-102(9) defines male and female tautologically to always be that which corresponds with sex assigned at birth. Consequently, male and female are defined in such a way that only nontrans kids' innermost sense of sex—because it is not discordant with that assigned at birth—is recognized. Tennessee Code Section 68-33-103(b)(1)(A) goes on to specify that nontrans kids may undergo treatment if sought "to treat a minor's congenital defect, precocious puberty, disease, or physical injury" without any limitations.

denied to trans kids for similar reasons—to pause puberty, or to induce permanent masculinization or feminization of the body while natural puberty is still in process.[22]

Intersex kids fall into their own sex category under SB1.[23] These children may access puberty blockers, hormone therapy, and reconstructive surgeries at any age, even if the sole impetus for care is that the child's parents' wish her to undergo treatments as young as possible for social, not medical reasons.[24]

[22] Nontrans children diagnosed with cancer or precocious puberty are also routinely prescribed hormone blockers. Louis J. Gooren, *Care of Transsexual Persons*, 364 New Eng. J. Med. 1251, 1253 (2011) (noting similarity between cancer treatment and GD); *id.* at 1255 (noting similarity between precocious puberty treatment and GD).

Exogenous masculinizing and feminizing hormones are used to treat both trans and nontrans patient populations. *See, e.g.*, Eva Moore et al., *Endocrine Treatment of Transsexual People: A Review of Treatment Regimens, Outcomes, and Adverse Effects*, 88 J. Clinical Endocrinology & Metabolism 3467, 3470 (2003) (describing similarities in testosterone regimens for transgender men and nontrans men with hypogonadism); *id.* at 3472 (comparing estrogen regimens for transgender women and nontrans women with hypogonadism).

Surgery is also a last resort for both trans and nontrans patient populations where other interventions fail to alleviate symptoms of distress or meet the aesthetic preferences of the specific patient. Take as one example double mastectomies, a surgery that can be medically indicated in both trans and nontrans males during adolescence. *See, e.g.*, Kotb Metwalley & Hekma Saad Farghaly, *Gynecomastia in Adolescent Males: Current Understanding of its Etiology, Pathophysiology, Diagnosis, and Treatment*, 29 Annals Pediatric Endocrinology & Metabolism 75 (2024). Today double mastectomy is the most popular surgery regularly performed on both adolescent trans and nontrans males. It is estimated that by today's metrics, upwards of one-third of non-trans males qualify for double-mastectomy in adolescence. *See, e.g.*, Trine Koch, et. al., *Marked Increase in Incident Gynecomastia: A 20-Year National Registry Study, 1998 to 2017*, 105 J. Clinical Endocrinology & Metabolism 3134 (2020). *See also* Annie Tang et al., *Gender-Affirming Mastectomy Trends and Surgical Outcomes In Adolescents*, 88 Annals Plastic Surgery S325 (2022) (observing similar increase of treatment performed in trans male population between 2013 and 2020).

[23] This is achieved by Tennessee Code Paragraph 68-33-102(1) tautologically defining congenital defects as those which are "inconsistent with the normal development of a human being of the minor's sex," as including "abnormalities caused by a medically verifiable disorder of sex development," but absolutely excluding from disorders of sex development "gender dysphoria, gender identity disorder, [and] gender incongruence." Read in conjunction with Tennessee Code Section 68-33-103(b)(1)(A), which does not prohibit the "performance or administration of the medical procedure [if it] is to treat a minor's congenital defect."

[24] For discussion of how intersex children are harmed by laws that allow parents and doctors to change their sex in youth without consent, *see generally* Ido Katri & Maayan Sudai, *Intersex, Trans, and the Irrationality of Gender Affirming-Care-Bans*, 134 Yale L.J. 1521 (2025).

C. SB1's Irrationality

Tennessee's rationales for treating trans, nontrans, and intersex minors differently under SB1 are not premised on medical or scientific truths. In fact, some of the rationales for drawing class lines under SB1 are false or merely stereotypes. And some aspects of SB1 conflict with federal law that already regulates the same pharmaceuticals and medical devices and state law that already regulates medical licensure, punishes malpractice, and restricts when genital surgery may be performed on minors.

1. SB1 causes the very harm it purports to prevent

At the threshold, SB1 is a solution in search of a problem. Take, as one example, the legislative finding that SB1 is needed to protect all minor children from permanent alteration by surgery of a minor's genitals that they may, upon adulthood, regret.[25]

SB1's legislative findings insist that it is inherently evil for doctors and parents to make decisions that permanently alter kids' genitals.[26] This is so because kids cannot make decisions about preferred reproductive capacities or sexual function before adulthood.[27]

[25] Tenn. Code Ann. § 68-33-101(a) ("The legislature declares that it must take action to protect the health and welfare of minors."); *Id.* at (b) ("The legislature determines that medical procedures that alter a minor's hormonal balance, remove a minor's sex organs, or otherwise change a minor's physical appearance are harmful to a minor when these medical procedures are performed for the purpose of enabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex or treating purported discomfort or distress from a discordance between the minor's sex and asserted identity. These procedures can lead to the minor becoming irreversibly sterile, having increased risk of disease and illness, or suffering from adverse and sometimes fatal psychological consequences. Moreover, the legislature finds it likely that not all harmful effects associated with these types of medical procedures when performed on a minor are yet fully known, as many of these procedures, when performed on a minor for such purposes, are experimental in nature and not supported by high-quality, long-term studies.").

[26] Tenn. Code Ann. § 68-33-101(d) ("The legislature finds that medical procedures are being performed on and administered to minors in this state for such purposes, notwithstanding the risks and harms to the minors.").

[27] Tenn. Code Ann. § 68-33-101(h) ("The legislature finds that minors lack the maturity to fully understand and appreciate the life-altering consequences of such procedures and that many individuals have expressed regret for medical procedures that were performed on or administered to them for such purposes when they were minors.").

SB1 does not solve this problem. It causes the very harm it is supposed to guard against.

Intersex minors are worse off under SB1 than before it was adopted.[28] Prior to SB1, some genital surgeries with respect to minors were already restricted, even if recommended by medical providers and approved by parents. The only exceptions were procedures that were approved and deemed medically efficacious by the American College of Obstetrics and Gynecology.[29] Under that rule, a small fraction of trans and intersex minors may qualify for pharmaceutical interventions and, in exceedingly rare cases, surgery prior to majority.

But SB1 turns the old rule on its ear. Rather than defer to what medical experts think is best and allow individual minors and their parents to opt into treatment in light of the pros and cons of care, SB1 prohibits both trans and intersex kids from having a say one way or another. The restraints SB1 places on trans and intersex kids' capacity to consent to medical treatment helps neither group. This is because, by design, SB1's intent is to coerce minors to accept the label SB1 applies to them.[30] Consequently, under SB1 trans children who

[28] Intersex treatment protocols for the last seven decades are inhumane in the most basic sense. Their primary concern is sexing a child's body as young as possible, despite the interventions being permanent and initiated long before the child is capable of consent. *See* Julie A. Greenberg, *Intersex and Intrasex Debates: Building Alliances to Challenge Sex Discrimination*, 12 Cardozo J. L. & Gender 99, 104–05 (2005).

[29] *Compare* Tenn. Code Ann. § 39-13-101(e)(3) (allowing surgery that conforms with standards of the American College of Obstetrics and Gynecology) *with* American College of Obstetricians and Gynecologists, Committee Opinion, Care for Transgender Individuals 1 (December 2011) ("The American College of Obstetricians and Gynecologists opposes discrimination on the basis of gender identity and urges public and private health insurance plans to cover the treatment of gender identity disorder."). *See also* American College of Obstetricians and Gynecologists, Committee Opinion, Healthcare for Transgender and Gender Diverse Individuals (Policy No. 823, Mar. 2021), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/03/health-care-for-transgender-and-gender-diverse-individuals.

[30] Medical treatment is only prohibited where provision enables "a minor to identify with, or live as, a purported identity inconsistent with the minor's sex." Tenn. Code §68-33-103(a)(1)(A).

See also id. at (c) (characterizing trans kids' identities as "purported" and insisting that any measurable "discordance can be resolved by less invasive approaches that are likely to result in better outcomes for the minor"); *id.* at (m) ("This state has a legitimate, substantial, and compelling interest in encouraging minors to appreciate their sex, particularly as they undergo puberty.").

medically need care cannot access it, and intersex children who do not need medical care are forced to undergo it anyways.[31]

2. SB1 Imposes a Sex Classification

While SB1 might look a bit different than sex classification schemes that discriminate between males and females, it operates the same. The sex any given individual is labeled operates to impose different benefits and burdens upon otherwise similarly situated persons.

Taking a closer look, SB1 insists that girls and boys as defined by statute should only ever be legally permitted to undergo medical treatments that permanently alter their bodies during minority if treatment accords with the girl and boy labels as defined by SB1 itself. This is tautological. It imagines sex as only intelligible by parameters that deny the existence of trans persons.[32]

At bottom, SB1's animating purpose is to restrict some groups, but not others, from access to generally available medical care based solely on group membership. This is so because Tennessee presumes that the same treatments, which pose the same chance of permanently altering the body during minority because the group label itself bespeaks a greater hazard incurred but for the law. But that premise defies the evidence we have about the pros and cons of treatment for all three groups.

For as long as hormone blockers, masculinizing and feminizing hormones, and reconstructive surgery have existed, all three groups

[31] For a thoughtful approach to treatment of intersex conditions in minors, *see generally* Kevin G. Behrens, *A Principled Ethical Approach to Intersex Pediatric Surgeries*, 21 BMC Med. Ethics 108 (2020) (proposing five principles for intersex surgeries: (1) they should only be performed when there is strong evidence that they are beneficial and not harmful, (2) they should only be performed in cases of true medical necessity, (3) they should normally only be performed in cases of true medical necessity; (4) conventional ethical requirements regarding truth telling apply equally to intersex children as to anyone else; (5) where physicians or parents think that surgery is in the best interests of the child, the burden of proof lies with them).

[32] *See, e.g.*, Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L. J. 1281, 1292–93 (1991) ("[T]he law of discrimination, to the extent it centers on empirical accuracy of classification and categorization, has targeted inequality's failures of perception such that full human variety is not recognized, above inequality's imposition of commonalities, such that full human variety is not permitted to exist."); Courtney Megan Cahill, *Sex Equality's Irreconcilable Differences*, 132 Yale L.J. 1065 (2023) (biologically rationalized sex distinctions have always been sex stereotypes); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. Pa. L. Rev. 1, 2 (1995) ("By accepting . . . biological differences, equality jurisprudence reifies as a foundational fact that which is really an effect of normative gender ideology.").

in SB1's scheme have had access and utilized those treatments. SB1 sidesteps that historical fact by simply insisting the use-case is so recent for trans minors as to be experimental and inherently dangerous. This is false.

The problem with the lack of medical evidence justification is that it is tautological. SB1 simply insists there is insufficient evidence of efficacy of treatment in trans youth, and presumes there must be considerably better evidence of the efficacy of care in nontrans and intersex youth.[33] But that is not true either.[34] Prior to this moment in

[33] *Compare* Tenn. Code Ann. § 68-33-101(a) ("The legislature declares that it must take action to protect the health and welfare of minors.") *with id.* at (b) ("The legislature determines that medical procedures that alter a minor's hormonal balance, remove a minor's sex organs, or otherwise change a minor's physical appearance are harmful to a minor when these medical procedures are performed for the purpose of enabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex or treating purported discomfort or distress from a discordance between the minor's sex and asserted identity. These procedures can lead to the minor becoming irreversibly sterile, having increased risk of disease and illness, or suffering from adverse and sometimes fatal psychological consequences. Moreover, the legislature finds it likely that not all harmful effects associated with these types of medical procedures when performed on a minor are yet fully known, as many of these procedures, when performed on a minor for such purposes, are experimental in nature and not supported by high-quality, long-term studies.").

See also id. at (c) ("The legislature determines that there is evidence that medical procedures that alter a minor's hormonal balance, remove a minor's sex organs, or otherwise change a minor's physical appearance are not consistent with professional medical standards when the medical procedures are performed for the purpose of enabling a minor to identity with, or live as, a purported identity inconsistent with the minor's sex or treating purported discomfort or distress from a discordance between the minor's sex and asserted identity because a minor's discordance can be resolved by less invasive approaches that are likely to result in better outcomes for the minor.").

[34] *See generally* Julian Gill-Peterson, Histories of the Transgender Child (2018); Simona Giordano & Søren Holm, *Is Puberty Delaying Treatment 'Experimental Treatment'?*, 21 Int'l J. Transgender Health 113 (2020); Michael Biggs, *The Dutch Protocol for Juvenile Transsexuals: Origins and Evidence*, 49 J. Sex & Marital Therapy 348 (2023). *See also* Beth A. Clark & Alice Virani, *This Wasn't a Split-Second Decision": An Empirical Ethical Analysis of Transgender Youth Capacity, Rights, and Authority to Consent to Hormone Therapy*, 18 Bioethical Inquiry 151 (2021); Lieke JJJ Vrouenraets et al., *Assessing Medical Decision-Making Competence in Transgender Youth*, 148 Pediatrics e2020049643 (2021); O. Ravindranath et al., *Adolescent Neurocognitive Development and Decision-Making Abilities Regarding Gender-Affirming Care*, 67 Developmental Cognitive Neuroscience 67 (2024); Luk Gijs & Anne Brewaeys, *Surgical Treatment of Gender Dysphoria in Adults & Adolescents: Recent Developments, Effectiveness, and Challenges*, 18 Annual Rev. Sex Research 178 (2012); Yolanda Smith et al., *Sex Reassignment: Outcomes and Predictors of Treatment for Adolescent and Adult Transsexuals*, 35 Psych. Med. 89 (2005).

time, neither providers nor the government insisted that medical care be investigated on the basis of trans, nontrans, or intersex status.[35] Additionally, in light of evidence already accumulated in peer review medical literature over the last century, it is unethical to deny trans kids with gender dysphoria medical care in a double-blind study simply to reaffirm what previous studies already conclude.[36]

Take as one example hormone blockers. These drugs were first studied to treat trans and nontrans children in the 1980s.[37] Nevertheless, Tennessee insists that the use-case for treating trans minors is not well evidenced because the first peer review medical studies were not published until the 1990s. Properly contextualized, it is not alarming that medical researchers did not start writing about the use-case for trans minors in longitudinal studies until the 1990s. The same is true for all minor patient populations.

[35] Drugs and devices that have obtained FDA approval are always allowed to be prescribed off-label—meaning administered to a patient population not studied in the clinical trials required for initial approval and/or for a disease different than that for which it was originally approved. *See* Buckman v. Plaintiff's Legal Committee, 531 U.S. 341, 350 (2001) (Rehnquist, J.) (holding that off-label use is an accepted and necessary corollary to the FDA's mission to regulate in this area without directly interfering with the practice of medicine and has long been recognized as such by courts, states, and the FDA its self) (citing James Beck & Elizabeth Azari, *FDA, Off-Label Use, and Informed Consent: Debunking Myths and Misconceptions*, 53 Food & Drug L.J. 71, 76–77 (1998)).

[36] *See* Florence Ashley et al., *Randomized-Controlled Trials Are Inappropriate in Adolescent Transgender Healthcare*, 25 Int'l J. Transgender Health 407 (2024) (explaining evidence supporting care and explaining why randomized-controlled trials would be unethical in this context).

[37] *See, e.g.*, P. Feuillan et al., *Use of Aromatase Inhibitors in Precocious Puberty*, 6 Endocrine-Related Cancer 303, 304 (1999) (observing that earliest case study of single minor nontrans patient published in 1985 with follow up pilot study of five nontrans youth published in 1986); Peggy T. Cohen-Kettenis et al., *The Treatment of Adolescent Transsexuals: Changing Insights*, 5 J. Sex. Med. 1892, 1893 (2008) (observing that Dutch gender clinics had at that point already been treating trans youth for about 20 years, meaning earliest clinical studies began sometime in the mid 1980s). *See also* Yolanda L.S. Smith et al., *Adolescents with Gender Identity Disorder Who Were Accepted or Rejected for Sex Reassignment Surgery: A Prospective Follow-Up Study*, 40 J. Am. Acad. Child Adolescent. Psychiatry 472 (2001) (longitudinal assessment of psychological and social functioning); P.T. Cohen-Kettenis & S.H.M. van Goozen, *Pubertal Delay as an Aid in Diagnosis and Treatment of a Transsexual Adolescent*, 7 Euro. Child & Adolescent Psych. 246 (1998) (observing minors treated at gender clinics); Peggy T. Cohen-Kettenis & Stephanie H.M. van Goozen, *Sex Reassignment of Adolescent Transsexuals: A Follow Up Study*, 36 J. Am. Acad. Child Adolescent. Psychiatry 263 (1997).

3. Detransitioner Regret is a Red Herring

Other legislative findings also undermine, rather than support, the need for SB1. For instance, SB1 says it is trying to prevent today's kids from being driven to suicide by gender medicine initiated in youth that patients come to regret later in life. It points to two different examples of kids the law is supposedly trying to protect.

The first are detransitioners—persons who were incorrectly diagnosed with gender dysphoria in youth, underwent treatments indicated by that diagnosis even after being apprised of the permanent consequences of treatment, and later came to regret it.[38] While detransitioners, like all persons, deserve empathy and compassion, a law like SB1 does nothing to strike at the problem detransitioners actually experience.

The detransitioner's brief filed in *Skrmetti* proves this point.[39] All detransitioner signatories attest that they repeatedly lied to health providers (some also lied to their parents) leading up to obtaining a gender dysphoria diagnosis and thereafter.[40] They all also withheld doubts they experienced once medical interventions began, and they continued to do so for years. All three admit that they repeatedly threatened to kill themselves; some specifically threatened suicide if

[38] Tenn. Code Ann. § 68-33-103(h) ("The legislature finds that minors lack the maturity to fully understand and appreciate the life-altering consequences of such procedures and that many individuals have expressed regret for medical procedures that were performed on or administered to them for such purposes when they were minors.").

[39] Brief of Amici Curiae Isabelle Ayala, Jill Doe, Soren Aldaco, and Jane Smith, *Skrmetti v. United States*, 145 S. Ct. 1816 (2025) (No. 23-477), https://www.supremecourt.gov/DocketPDF/23/23-477/328202/20241015112933955_23-477bsacIsabelleAyala.pdf [Detransitioner Brief].

[40] Detransitioner Brief at 4 ("Isabelle's determination to pursue the path of medicalization grew to the point that she was ready to do or say whatever she needed to get what she thought would help her."); *id.* at 9–14 (blaming medical providers for Jill Doe's failure to divulge history of "prolonged sexual abuse" which, in hindsight Doe surmises explains why she found female puberty psychologically distressing; going on to reveal that Doe divulged her history of sexual abuse only at age 17 at which point she got mental health treatment and detransitioned); *id.* at 16–20 (contending Soren Aldaco at age 16, while in a manic episode told mental health providers that she identified as male and she did not correct providers despite being given plenty of opportunity to do so until age 19); *id.* at 20 (insisting that Jane Smith's self-diagnosis with gender dysphoria before seeking therapy at age 16 was the fault of her medical providers to whom she did not disclose her suicidal tendencies stemmed not from gender dysphoria but a history of sexual abuse and a "traumatic upbringing" for which she did seek care until after more than six years of treatment for gender dysphoria).

they were denied treatment for gender dysphoria. And all also admit they spent considerable time isolating themselves from others trying to come up with schemes to obtain the diagnosis and care they knew would be denied if they told the truth.

The detransitioners' candor should be taken at face value, but the legal conclusion they demand does not follow from what their experiences evidence. A child hellbent on lying to obtain a medical diagnosis by fraud and medical interventions they do not need even when repeatedly admonished there will be permanent consequences will not be stopped by a law like SB1. The hazard these children face is that of their own making.

Some people, irrespective of age, will engage in deceit for long periods of time during which they harm themselves irreversibly.[41] Even if in hindsight society prefers that the detransitioners did not, as adults, profoundly regret the medical decisions they made as children, such empathy does not constitutionally justify a law drawn like SB1. It is wildly arbitrary to insist state law be designed in such a way that children who absolutely need care are prohibited from getting it for the chance that children who do not need it will lie about symptoms and deceive providers and parents.

If we instead consider a less politically fraught form of medical care, SB1's error is easier to see. Open heart surgery is a go-to treatment for certain heart conditions. It is invasive, leaves permanent scars, and entails a lengthy recovery period. The surgery is also inherently dangerous. That is why the treatment is only available to patients with medical diagnoses that justify the risks of the intervention.

[41] *See, e.g.*, Joanne Turner & Steven Reid, *Munchausen's Syndrome*, 359 Lancet 346, 346 (2002) ("Munchausen's syndrome is a disorder characterized by a triad of features: simulated illness; pathological lying (psuedologia fantastica); and wandering from place to place (peregrination). It is an extreme variant of factitious disorder, and despite being the most widely reported in published work, Munchausen's syndrome probably accounts for less than 10% of all factitious disorders seen in the hospital. The main feature of factitious disorder is the simulation or fabrication of physical symptoms and signs, psychiatric symptoms and signs, or both, with no apparent motivation other than to adopt the role of being a patient."); Peggy Cadet & Marc D. Feldman, *Pretense of a Paradox: Factitious Intersex Conditions on the Internet*, 24 Int'l J. Sexual Health 91, 91 (2012) ("Persons with factitious intersex conditions may interfere with peer-group support and spread misinformation. While acknowledging the reality of intersex conditions in some people, we advise a high index of suspicion and, as needed, verification of claims."); Peggy Cadet, *Intersex Pretenders*, 53 Archives Sexual Behavior 1667 (2024) (similar).

If an adult, hellbent on having open heart surgery, were to engage in a protracted scheme to deceive her health care providers into mistakenly diagnosing her with a condition that is treatable with open heart surgery, who is at fault? At the very least, the patient is not an innocent so in need of protection that the law should forbid persons who do not lie about their need for treatment from receiving it.

4. SB1 Could Not Have Saved David Reimer

SB1 cites the suicides of David and Brian Reimer as evidence that hormone blockers, hormones, and surgery pose a special danger to trans minors.[42] There are several reasons why this premise is faulty.

Among them are that neither David nor Brian Reimer were trans, and both died in their late 30s. Another is that while David did commit suicide,[43] his twin brother Brian died from an accidental drug overdose two years prior.[44] But the bigger problem with even invoking David Reimer as proof of why SB1 is needed is that that real bad things that were done to him are perfectly licit under the law.

David Reimer's ordeal started with what was supposed to be a routine male circumcision.[45] When David and Brian were six months old, both were diagnosed with phimosis—a condition in which the foreskin cannot retract behind the glans of the penis. Phimosis is normal in young children; most of the time it resolves on its own. Unfortunately, David's surgeon imprudently used an electrocauterization tool to burn the flesh apart rather than a scalpel to cut. David's penis was catastrophically burned. (Brian was spared surgery—and his phimosis resolved without intervention later.) David's doctors and parents decided it would be better, because the penile injury was severe and reconstruction would be difficult, to create labia and castrate David while still a baby. And so, David was raised female until, at age 14, he was told the truth. Thereafter, David transitioned back to male, took testosterone, and eventually as an adult underwent phalloplasty.

[42] Tenn. Code Ann. § 68-33-101(f).

[43] *David Reimer, 38, Subject of John/Joan Case*, N.Y. Times (May 12, 2004), https://www.nytimes.com/2004/05/12/us/david-reimer-38-subject-of-the-john-joan-case.html.

[44] John Calapinto, *What Were the Real Reasons Behind David Reimer's Suicide*, Slate (June 3, 2004), https://slate.com/technology/2004/06/why-did-david-reimer-commit-suicide.html.

[45] *See generally* John Colapinto, As Nature Made Him: The Boy Who Was Raised as a Girl (Harper Perennial 2006).

The unnecessary circumcision David Reimer underwent is perfectly licit in Tennessee.[46] The State prohibits only female circumcision, not male circumcision.[47] Male circumcision can be performed at any age.[48] The minor's consent is unnecessary. And even a nonmedical professional may perform the procedure.[49] There is no medical diagnosis required.[50] If a child is injured like David was, SB1 does not prohibit his parents and doctors from choosing to change his sex without his consent.[51]

David Reimer's suicide at age 38 is a tragedy. But we do not know if he took his life because of his harrowing medical ordeal, or something else altogether. We know David struggled with his brother's death. We also know that he lost his job, separated from his wife, and had recently incurred a major financial loss all close in time to his suicide.[52]

What we do know for certain is that David wanted the world to know about his medical ordeal. He wanted the truth to be told about what damage can be done if a child's genitals are operated

[46] The same is true in every American jurisdiction. For a thoughtful critique of why male circumcision is presumptively licit in the United States and exploration of how this illustrates social norms' influence on behavior and law, *see generally* Sarah E. Waldeck, *Using Male Circumcision to Understand Social Norms as Multipliers*, 72 Univ. Cin. L. Rev. 455 (2003).

See also Shea Lita Bond, *State Laws Criminalizing Female Circumcision: A Violation of the Equal Protection Clause of the Fourteenth Amendment?*, 32 J. Marshall L. Rev. 353 (1999) (arguing that all minors be protected from circumcision).

[47] Tenn. Code Ann. § 39-13-110 (categorically prohibiting female circumcision, there termed "female genital mutilation").

[48] *See, e.g.*, Thompson v. Thomas, 12 Tenn. App. 484 (1930) (holding doctor liable for death induced by drug administered during surgery—infant's male circumcision should have been performed without pain relief).

[49] *See In re* EZ, 2019 WL 1380110, at *13 (Tenn. App. Mar. 26, 2019) (characterizing other tearing of penis, but not unrecorded circumcision likely performed by parents to be child abuse).

[50] *But see* J. Steven Svoboda et al., *Circumcision is Unethical and Unlawful*, 44 J. L. Med. & Ethics 263 (2016) (arguing that non-therapeutic minor male circumcision is not medically justified and unethical).

[51] The only bar on sex changes imposed by SB1 are those pursued to affirm the child's innermost sense of sex. There are no limitations placed on parents or doctors if care is instigated by them to "treat" an injury. *See* Tenn. Code Ann. § 68-33-103(a)(1)(A)–(B) (treatment is forbidden if it enables "a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or is intended to treat "purported discomfort or distress from a discordance between the minor's sex and asserted identity").

[52] See sources cited *supra* notes 44–46.

on unnecessarily and without their consent.[53] For obvious reasons, David thought even circumcision should require consent. But David did not blame trans people, or intersex people for his plight. He blamed the adults who insisted they knew what was best for him before he was capable of telling them what he wanted for himself. Things only got better for David once his parents and doctors finally started listening to what he wanted and needed.

II. *Skrmetti*'s Mistake

The primary analytic mistake made by the *Skrmetti* Court is that the judiciary, when confronted with an equal protection challenge, has the power to apply more or less scrutiny purely premised on how the law or the Court itself classifies the individual challenger. Equal protection allows no such thing. Once the Court made this mistake, *Skrmetti*'s result is a foregone conclusion. Trans kids get only rational basis scrutiny, and in affording as much deference as possible to Tennessee, the Court refuses to confront SB1's irrationality, let alone the real hazards it creates to solve a problem that does not exist.

A. Chief Justice Roberts's Majority Opinion

Chief Justice Roberts's opinion turns on SB1 being a diagnosis-based, not sex-based, classification scheme. Through that lens SB1 is cast as a valiant, neutral effort[54] by state lawmakers to help vulnerable children

[53] *See* BBC, *Transcript: Dr. Money and the Boy with No Penis*, https://www.bbc.co.uk/sn/tvradio/programmes/horizon/dr_money_trans.shtml (David Reimer: "You're always going to see people that are going to say well the Dave Reimer case could have been successful. I'm living proof, and if you're not going to take my word as gospel, because I have lived through it, who else are you going to listen to? Who else is there? I've lived through it. Like, is it going to take somebody to wind up killing themselves, shooting themselves in the head for people to listen?"); PBS, *Transcript: Sex Unknown*, Oct. 30, 2011, https://www.pbs.org/wgbh/nova/transcripts/2813gender.html (David Reimer: "I was never happy as Brenda. Never. I'd slit my throat before I'd go back to that. I'd never go back to that. It didn't work because that's life, because you're human and you're not stupid and eventually you wind up being who you are.").

[54] *But see* Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 Mich. L. Rev. 2128, 2140 (1989) ("Neutrality is from this perspective a suppression, an institutionalization of psychic taboos as much as segregation was the institutionalization of physical boundaries."); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111 (1997) (recognizing that the rules and reasons the legal system employees to enforce status relations evolve as they are contested, we should scrutinize justifications for racially neutral state action with skepticism, knowing that we may be rationalizing practices that perpetuate historic forms of stratification).

navigate a world with a new disease and little evidence supporting a specific treatment recently developed.[55] And given Tennessee's general police power, it seems sensible enough for state lawmakers to be afforded some leeway to figure out what is best for trans kids.[56]

At the threshold, supporters of Chief Justice Roberts's majority opinion in *Loper Bright Enterprise v. Raimondo*[57] should be dismayed that his opinion afforded such extreme deference to the Tennessee legislature in *Skrmetti*. After all, it was Roberts who insisted in *Loper Bright* that "judges have always been expected to apply their judgment independent of the political branches when interpreting the laws those branches enact."[58]

There are a few additional problems with Roberts's characterization of SB1 as a diagnosis-based instead of sex-based classification scheme. The most astounding is Roberts's insistence that SB1 does not discriminate on the basis of sex. His logic is that because all children are assigned a sex by the law—male or female—all are restricted to only care that corresponds to that sex stereotypically.[59]

[55] *But see* Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 30 (2020) (Kavanaugh, J., concurring) ("[J]udicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised.").

[56] *But see* South Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (Mem.), 717 (2021) (quoting South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring)) ("I adhere to the view that the 'Constitution principally entrusts the safety and health of the people to the politically accountable officials of the States.' But the constitution also entrusts the protection of the people's rights to the Judiciary—not despite judges being shielded by life tenure, but because they are. Deference, though broad, has its limits.").

See also Gamble v. United States, 139 S. Ct. 1960, 1985 (2019) (Thomas, J., concurring) ("The judicial power must be understood in light of the Constitution's status as the supreme legal document over other sources of law. . . . Put differently, because the Constitution is supreme over other sources of law, it requires us to privilege its text over our own precedents when the two are in conflict.").

[57] 603 U.S. 369 (2024).

[58] *Loper Bright*, 603 U.S. at 412 (cleaned up).

[59] *Contra Loving*, 388 U.S. at 8 (rejecting the "notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations"); *id.* at 11 (where laws "rest upon distinctions drawn according to race . . . the Equal Protection Clause demands that the classifications be subjected to the most rigid scrutiny") (cleaned up). *See also* Cruzan by Cruzan v. Missouri, 497 U.S. 261, 350 (1990) (Stevens, J., dissenting) ("It is not within the province of secular government to circumscribe the liberties of the people by regulations designed wholly for the purposes of establishing a sectarian definition of life.").

Therefore, all are regulated equally. This is why Roberts reasons that the same limit—prohibiting all children from accessing medical interventions to treat gender dysphoria—is imposed on both trans and nontrans kids.[60] But this is incorrect. As previously discussed, SB1 imposes male and female labels on all but intersex kids.

Roberts insists that in a compounded discrimination scheme, the lowest degree of scrutiny applicable to one of the several classifications at play should govern. That is illogical, and does not make sense even under the tiers of scrutiny. If a scheme like SB1 imposes a compounded classification, there is no way to distinguish between the parts that touch on sex from those that touch on disability. Any attempt at disentanglement misses how part of the scheme operates.[61]

Another flaw is that Roberts minimizes SB1's devastating consequences for trans kids.[62] Gender dysphoria is not a new

[60] *But see* Miller v. Johnson, 515 U.S. 900, 911 (1995) ("[A]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of racial, religious, sexual or national class.").

[61] Devon W. Carbado & Kimberlé W. Crenshaw, *An Intersectional Critique of Tiers of Scrutiny: Beyond "Either/Or" Approaches to Equal Protection*, 129 Yale L.J. F. 108, 127 (2019) ("Our worry is that the tiers-of-scrutiny approach legitimizes the existential predicament about which Audre Lorde so powerfully wrote: 'As a Black lesbian feminist comfortable with the many different ingredients of my identity, and a woman committed to racial and social freedom from oppression, I find I am constantly being encouraged to pluck out some one aspect of myself and present this as the meaningful whole, eclipsing or denying the other parts of self'.").

[62] *See, e.g.*, Katherine L. Kraschel et al., *Legislation Restricting Gender-Affirming Care for Transgender Youth: Politics Eclipse Healthcare*, 3 Cell Reports Med. 100719 (2022); Landon D. Hughes et al., *"These Laws Will Be Devastating": Pediatric Provider Perspectives on Laws and Policies Impacting Sports Participation for Transgender Youth*, 9 LGBT Health 247 (2022) (surveying transition care specialists concerns re exclusion of trans youth from sport); Ellis Barrera et al., Opinion, *The Medical Implications of Banning Transgender Youth from Sport Participation*, Jama Pediatrics (2021); Harry Barbee et al., Viewpoint, *Anti-Transgender Legislation—A Public Health Concern for Transgender Youth*, 176 Jama Pediatrics 125 (2022) (cautioning legislation could exacerbate existing health disparities, facilitate risky behaviors, and lead to preventable deaths); George B. Cunningham et al., *Anti-Transgender Rights Legislation and Internet Searches Pertaining to Depression and Suicide*, PLOS One, Dec. 22, 2022, https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0279420 (observing defeat of anti-trans bills linked with fewer depression-related internet searches, and a strong association between anti-trans bills being passed with suicide-related searches where state has high LGBT population density); Jaclyn M.W. Hughto et al., *Uncertainty and Confusion Regarding Transgender Non-discrimination Policies: Implications for the Mental Health of Transgender*

phenomenon—medical providers have acknowledged it since antiquity.[63] Moreover, gender dysphoria is not a fleeting bad feeling about one's body. Experiencing it feels like torture until medical intervention resolves the disconnect between mind and body. When properly contextualized, Tennessee's suggestion that trans kids simply "wait and see" whether gender dysphoria endures to majority before treatment is accessible is cruel. It is simply an impermissible government preference for trans kids to be subject to conversion attempts until majority (colloquially called conversion therapy)[64] that have no chance of working because once gender identity is formed it cannot be changed.[65]

Americans, 19 Sexuality Res. & Soc. Pol'y 1069 (2022) (study participants who were concerned about the enactment of state anti-trans laws had greater odds of depression, anxiety, and PTSD). *See also* Sharon G. Horne, *The Stench of Bathroom Bills and Anti-Transgender Legislation: Anxiety and Depression Among Transgender, Nonbinary, and Cisgender LGBQ People During a State Referendum*, 69 J. Counseling Psych. 1 (2022) (suggesting increased anxiety in the face of anti-LGBTQ ballot bills that is lessened after the bill is defeated).

There is also an emerging literature on supportive parental figures' fears about these laws. *See, e.g.*, Kacie M. Kidd et al., *"This Could Mean Death for My Child": Parent Perspectives on Laws Banning Gender-Affirming Care for Transgender Adolescents*, 68 J. Adolescent Health 1082 (2021) (finding in survey of 273 parents and guardians of trans youth most feared that anti-trans laws would lead to worsening mental health and suicide for trans youth); Roberto L. Abreu et al., *"I Am Afraid for Those Kids Who Might Find Death Preferable": Parental Figures' Reactions and Coping Strategies to Bans on Gender Affirming Care for Transgender and Gender Diverse Youth*, 9 Psych. Sexual Orientation & Gender Diversity 500 (2022).

[63] Nicholas S. Literski, *Defacing Dionysus: The Fabrication of an Anti-Transgender Myth*, 64 Psych. Perspectives 360 (2021); Milton T. Edgerton, Norman J. Knorr, & James R. Callison, *The Surgical Treatment of Transsexual Patients: Limitations and Indications*, 45 Plastic & Reconstructive Surgery 38, 38 (1970) ("Since antiquity some men have shown evidence of conflict, arising from feelings of inappropriateness of the sex assigned to them on the basis of their external anatomical development.").

[64] Even if conversion therapy were evidence based, it still would not be within the public health power to force persons to pick that treatment over puberty blockers, exogenous hormones, or surgery. *Accord* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 771 (2019) (Thomas, J.) (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market," and people lose when the government is the one deciding which ideas should prevail.).

[65] *See generally* Florence Ashley, Banning Transgender Conversion Practices: A Legal and Policy Analysis (Univ. B.C. 2022).

Roberts's opinion also fails to respect that the public health power conferred to states by our Constitution is not plenary.[66] Government cannot force even minors to undergo treatment against their wishes.[67] Nor does government have the power to categorically substitute its judgment for that of parents with respect to minor's treatment options.[68] Rather than mind the limits of the public health power, Roberts's opinion affords extreme deference to Tennessee lawmakers.

[66] Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 39 (1905) ("The police power of a state may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression.").

I agree with Daniel Rodriguez that the metes and bounds of government police powers has been undertheorized in the last several decades. While in earlier generations the Court tended to focus on whether government had the power to act in the first instance, the shift towards fundamental rights has distorted constitutional thinking into myopically only considering whether a fundamental right has been violated or the appropriate tier of scrutiny is applied. *See generally* Daniel B. Rodriguez, Good Governing: The Police Power in the American States (Cambridge Univ. Press 2024).

[67] The Constitution does not afford government special leeway with respect to incursions on children's liberty interest in picking what medical care they wish to undergo. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) (declaring that "the principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions"); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 74 (1976) (Blackmun, J.) ("Minors, as well as adults, are protected by the Constitution and possess constitutional rights."); Parham v. JR, 442 U.S. 584, 602 (1979) (citing Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); 1 Blackstone, Commentaries 447; 2 J. Kent, Commentaries on American Law 190) ("Our constitutional system long ago rejected any notion that a child is the mere creature of the State[.]"). *Cf.* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972) (in context of illegitimate children, "Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise.").

[68] Family bonds are usually respected by the government. Absent exceptional circumstances, minor children are not mere creatures of the State. *Parham*, 442 U.S. at 602 (citing *Pierce*, 268 U.S. at 535; 1 William Blackstone, Commentaries 447; 2 James Kent, Commentaries on American Law 190) ("Our constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare their children for additional obligations. Surely, this includes a high duty to recognize symptoms of illness and to seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.").

Roberts's majority opinion also improperly relies upon *Geduldig v. Aiello*,[69] a decision so bad that Congress immediately rebuked it decades ago, but which the Court in *Dobbs v. Jackson Women's Health Organization*[70] and again in *Skrmetti* insists remains good law today. Briefly, *Geduldig* holds that a disability insurance scheme which covers all disabilities except those connected to pregnancy discriminates on the basis of diagnosis, not sex. At the time, the Court reasoned that even though only women can get pregnant, not all women do in fact get pregnant, which in turn means that the scheme does not discriminate against all women, and therefore it does not discriminate on the basis of sex.

In *Skrmetti*, Roberts cites *Geduldig* for the proposition that a classificatory scheme does not discriminate on the basis of sex unless it treats all males worse than all females, or vice versa. Applying that rule to SB1, Roberts reasons if all female minors are prohibited from accessing treatments for the purpose of masculinizing the body, and all male minors are barred from treatments that feminize the body, there is no sex discrimination because all sexes are treated equally.[71] This point, Justice Sonia Sotomayor notes in dissent, is nonsensical and also defies *Loving v. Virginia*'s condemnation of equal application as a test for equal protection violations.[72]

Ironically enough, *Skrmetti* should have been a launch point for the Court to reassess the correctness of *Geduldig*. The *Geduldig* Court presumed at the time that only women can get pregnant. But Roberts's majority opinion, to its credit, acknowledges that some people at least in adulthood change sex. Consequently, even if statistically rare, there are some trans men who can be pregnant. (Some intersex persons can also get pregnant.) This possibility could retroactively justify the bizarre line drawing in *Geduldig*.

One reason the *Skrmetti* Court may have stopped short of shoring up *Geduldig* is SB1's unstated premise that trans people do not legitimately exist. Chief Justice Roberts seemingly did not wish to go that far. Roberts's opinion goes out of the way to call trans boys

[69] 417 U.S. 484 (1974).

[70] 597 U.S. 215, 236 (2022) (Alito, J.) (citing *Geduldig v. Aiello*, 417 U.S. 484, 496 n. 20 (1974)).

[71] *Skrmetti*, 145 S. Ct. at 1833–84 (Roberts, C.J.).

[72] *Skrmetti*, 145 S. Ct. at 1877 (Sotomayor, J., dissenting) (citing *Loving*, 388 U.S. at 9).

and trans girls boys and girls respectively throughout. However, the courtesy Justice Roberts extends trans youth misses that SB1 itself declares trans boys are not boys, and trans girls are not girls.[73]

Roberts's good manners may also have made it harder to discern the other ways that SB1 insists, by implication, that there is no such thing as trans kids. It is on that premise real trans kids are prohibited from medically treating gender dysphoria.[74] SB1's hyper fixation on the detransitioner problem, combined with its false insistence that trans people are new to our society and treatments for gender dysphoria are inherently dangerous, implies that but for the availability of treatment for gender dysphoria, no one would be trans.

If we step back from the minutiae of SB1's textual scheme and consider the law within the context of our current political moment, its invidious purpose is crystal clear. Trans people are not new. Nor are treatments for gender dysphoria. Trans kids with exceptionally severe gender dysphoria have been medically treated in some parts of the United States since at least the early twentieth century. Our predecessors were not idiots. They knew that modern medicine is capable of making permanent changes to the body, and they witnessed over the course of decades the difference that treatment makes in trans persons' lives. Ask any older American about Christine Jorgensen, the Caitlyn Jenner of the Greatest Generation.[75]

[73] M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights*, 39 Vt. L. Rev. 943, 947 (2015) ("For transgender people to be recognized as full human beings under the law, the legal system must make room for the existence of transgender people—not as boundary-crossers but as people claiming their birthright as part of a natural variation of human sexual development.").

[74] Michael C. Dorf, *The Roberts Court Puts a Velvet Glove on the Iron Fist of Anti-Trans Backlash*, Verdict, June 23, 2025, https://verdict.justia.com/2025/06/23/the-roberts-court-puts-a-velvet-glove-on-the-iron-fist-of-anti-trans-backlash ("The Chief Justice's opinion is not exactly offensive on its face. It uses terms like "transgender boy" in a matter-of-fact manner. Thus, it does not simply seek to erase or deny the existence of transgender persons[.] [While] the tone of the majority opinion in *Skrmetti* may be civil, its substance is highly problematic. Indeed, by treating the Tennessee legislature as having carefully attended to the medical evidence regarding the benefits and risks of puberty blockers and hormone therapy, the Court sanitizes the wave of transphobia washing over the United States.").

[75] Christine Jorgensen, a transgender woman who honorably served in World War II, made national headlines in 1952 when news of her sex reassignment surgery broke. *See* Joanne Meyerwotiz, *Sex Change and the Popular Press: Historical Notes on Transsexuality in the United States, 1930–50*, 4 GLQ 159 (1998) (exploring media coverage of Jorgensen's transition).

The only thing that changed in the 2020s is that it is now politically advantageous to discriminate against trans persons.[76] The tsunami of anti-trans bills lawmakers considered (let alone enacted) in the last five years alone illustrates just how quickly a group can go from experiencing sporadic *de facto* discrimination to being pummeled with *de jure* discrimination at every turn.[77] Even the executive branch has been captured by anti-trans animus that is unprecedented.[78]

The Supreme Court's failure to consider that, all of a sudden, there is an unmistakable sea change with respect to trans people in this nation is inexplicable. Even if the Court were only to consider *Skrmetti*'s docket, it is impossible to miss the shift. The case is titled *Skrmetti v. United States* because it is the federal government that sued

[76] *See, e.g.*, Andrew Demillo & John Hanna, *Some States Are Trying to Make Sex Binary. Transgender People See Their Existence Denied*, Assoc. Press, Feb. 27, 2024, https://apnews.com/article/states-define-sex-transgender-dc8c48669aef760c68d2fb7abde10e8c; Joe Killian, *"They Assume We Don't Exist,"* NC Newsline, Apr. 18, 2023, https://ncnewsline.com/2023/04/18/they-assume-we-dont-exist/; John Janna, *States' Push to Define Sex Decried as Erasing Trans* People, Assoc. Press, Feb. 15, 2023, https://apnews.com/article/politics-kansas-state-government-arkansas-health-8f2edaa40b962e5642e108b83bc14246.

[77] *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111 (1997) (observing that the rules and reasons the legal system employs to enforce status relationships evolve as they are contested).

[78] *See, e.g.*, Christopher Wiggins, *Donald Trump's Government Declares that Transgender and Nonbinary People Don't Exist*, The Advocate, Jan. 20, 2025, https://www.advocate.com/politics/donald-trump-invalidates-transgender-identities; Talya Minsberg, *What We Know About Trump's New Executive Order on Trans Athletes*, N.Y. Times, Feb. 5, 2025, https://www.nytimes.com/2025/02/05/us/politics/trump-trans-athletes-executive-order.html; Juliet Macur, N.Y. Times, Feb. 6, 2025, https://www.nytimes.com/2025/02/06/us/politics/ncaa-transgender-athletes-ban.html; Jeré Longman, *A Fencing Match, a Viral Video and a Hearing Before Congress*, N.Y. Times, May 6, 2025, https://www.nytimes.com/2025/05/06/us/trump-transgender-athletes-fencing-olympics.html; Juliet Macur, *US Olympic Officials Bar Transgender Women From Women's Competitions*, N.Y. Times, July 24, 2025, https://www.nytimes.com/2025/07/22/us/politics/us-olympics-trans-women-athletes-ban-trump.html.

The absolute bar on trans women competing in the Olympic games is a historical aberration. This appears to be the first ever historical bar on trans athletes in any modern Olympic Games. *See, e.g.*, Michael Waters, The Other Olympians: Fascism, Queerness, and the Making of Modern Sports (Farrar, Straus, and Giroux 2024) (reporting open participation of trans and intersex athletes at 1936 Olympic Games hosted by Adolf Hitler's Nazi Germany). *See also* Tariq Panja & Ken Belson, *Olympics First Openly Transgender Woman Stokes Debate on Fairness*, N.Y. Times (July 31, 2021), https://www.nytimes.com/2021/07/31/sports/laurel-hubbard-trans-weight-lifting.html (misreporting Ms. Laurel Hubbard, a weight lifter from New Zealand, is first trans women to compete in any sport at the Olympics).

Tennessee for violating the equal protection rights of trans minors in the first instance. Nevertheless, once Trump came into office, his Department of Justice notified the Court that the federal government concedes the constitutionality of SB1. No explanation was offered, let alone briefing explaining why the constitution requires the opposite of what it did on January 19, 2025.[79]

Taken together, the Court's opinion in *Skrmetti* is nothing more than judicial gaslighting. It is as if the Court is riding on top of a tsunami wave that is about to hit the shore, but nevertheless insists there is zero chance a tsunami will strike. The Court cannot see any tsunami wave if it looks only at shore, but if it looked down or behind it the tsunami would be impossible to miss.[80]

B. Justice Barrett's Concurrence

It is a classic horror movie trope for an innocent to get a terrifying phone call from a killer, only to realize after it is too late that the call is coming from inside the house.[81] This is how Justice Barrett's very sympathetic sounding concurrence comes across.[82]

The main premise of Barrett's concurrence is that trans kids may some day in the future qualify for heightened scrutiny. But she points out that this can only happen if there is proof of a long history of *de jure* discrimination targeting trans persons as such.[83] In the alternative, Justice Barrett commits that if trans kids one day have

[79] Amy Howe, *Trump Changes Government's Position in Pending Trans Healthcare Case at Supreme Court*, SCOTUSblog (Feb. 7, 2025), https://www.scotusblog.com/2025/02/trump-changes-governments-position-in-pending-trans-healthcare-case-at-supreme-court/.

[80] *Cf.* Don't Look Up (Paramount Pictures 2021).

[81] *See, e.g..,* When a Stranger Calls (Columbia Pictures 1979); Scream (Dimension Films 1996). *But see* Get Out (Universal Pictures 2017) (protagonist realizes threat is within house with just enough time to escape).

[82] *See* Mladen Dolar, A Voice and Nothing More 60–61 (MIT Press 2006) ("A voice whose source one cannot see, a voice whose origin cannot be identified, a voice one cannot place. It is a voice in search of an origin, in search of a body, but even when it finds its body, it turns out that this doesn't quite work, the voice doesn't stick to the body, it is an excrescence which doesn't match the body.").

[83] *Skrmetti*, 145 S. Ct. at 1854 (Barrett, J., concurring) (arguing that required showing of history of *de jure* discrimination "is consistent with the Fourteenth Amendment's text and purpose" and "is judicially manageable" given that courts "are ill suited to conduct an open-ended inquiry into whether the volume of private discrimination exceeds some indeterminate threshold.").

proof that a law like SB1 was enacted because of animus, anti-trans laws could be deemed unconstitutional.[84]

Justice Barrett misses entirely that the invidiousness of any given equal protection violation should not turn on whether there is a long history of similar *de jure* discrimination. It is perfectly possible, as has been trans Americans' experience recently, that our nation's politics devolve to inventing new kinds of bias not shared by our predecessors. Discrimination is, after all, neither rational nor evidence based. Bigotry does not concern itself with facts; it trades in myths, stereotypes, and untruths.

Justice Barrett's further suggestion that proof of animus was wanting in *Skrmetti* rings hollow.[85] Tennessee, along with many of the *amici* who filed briefs in support of SB1, do not think SB1 is good because it helps trans kids. SB1's entire purpose is to bar trans minors from obtaining safe and efficacious treatments. Tennessee does not want trans kids to exist. That is why it insists it is a good thing for trans kids to go without treatment in the first instance. That is also why all the supposed evidence of harm that will occur without SB1 suggests the Court not worry about trans kids and instead focus on whether nontrans kids will be harmed if trans kids are allowed medical care.[86]

The additional suggestion that if the Court misses some trans discrimination for a time, this might help trans people in the future make the case for heightened scrutiny also misses the mark. Even if the Court made good on that promise, being forced to endure *de jure* discrimination for a long period of time *before* heightened scrutiny is available is the very evil equal protection prohibits.

[84] *Id.* at 1855 ("Because the litigants assumed that evidence of private discrimination could suffice for the suspect-class inquiry, they did not thoroughly discuss whether transgender individuals have suffered a history of *de jure* discrimination as a class. And because the group of transgender individuals is an insufficiently discrete and insular minority, the question is largely academic. In future cases, however, I would not recognize a new suspect class absent a demonstrated history of *de jure* discrimination.").

[85] *Id.* at 1855 n.5 ("The evidence that is before this Court is sparse but suggestive of relatively little *de jure* discrimination.")

[86] *Contra id.* at 1853 ("If laws that classify based on transgender status necessarily trigger heightened scrutiny, then courts will inevitably be in the business of closely scrutinizing legislative choices in all these domains. To be sure, an individual law inexplicable by anything but animus is unconstitutional. But legislatures have many valid reasons to make policy in these areas, and so long as a statute is a rational means of pursuing a legitimate end, the Equal Protection Clause is satisfied.").

Justice Barrett's other point, that trans people should do their best to engage in the political process to defeat laws that target them, is also misguided.[87] Trans people have always participated in our political processes. The problem is not lack of engagement with politics. The problem is that the democratic process can be perverted by bias.

This takes me to the most troubling aspect of Justice Barrett's concurrence. She suggests in good faith that states should be afforded wide latitude to consider what the best legal solutions are to reckon with the existence of trans persons.[88] She goes on to hold that it is a good thing for states to be laboratories of democracy in times like these, and the judicial branch must allow the states some period of trial and error.

What Justice Barrett misses about laws like SB1 is they are not produced by laboratories of democracy. They are forged by laboratories of discrimination. The entire point of equal protection is that it deprives government, the political and judicial branches alike, from taking steps that cast some groups to the gutters. Lawmaking, like voting, is an awesome power. But neither lawmakers nor voters are permitted by our Constitution to deny others equal protection of the law.

Returning to the horror trope that begins this subsection, Justice Barrett is the innocent in the trope, but the phone call is coming from inside the house. Once the political branches have failed to abide by equal protection, it is the judiciary's solemn duty to call out and rebuke violations. Insisting that groups of victims suffer now, in hopes that the judiciary may one day decide to come to their rescue misses that the judiciary is not constitutionally permitted to wait this problem out in hopes it fixes itself down the line.

Conclusion

The Supreme Court's refusal to apply the same degree of judicial scrutiny to all classifications challenged under equal protection continues to wreak havoc on our nation.

In the months since *Skrmetti* issued, some commentators have fixated on what sets the opinion apart from others. Most conclude it is unique because the Court decides in *Skrmetti* for the first time

[87] *Id.* at 1851 (construing the Court's failure up to present to recognize any new suspect classes justifies that "when social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will be eventually rectified by the democratic processes") (cleaned up).

[88] *Id.* at 1852.

that laws that target trans persons for being trans are not sex classification schemes but instead discriminate because of disability.[89] Consequently, because as a class disabilities are distinct from sex, even where sex and disability are compounded within the discriminatory scheme, only rational basis review applies.

While I agree that SB1 is by all measures a sex classification scheme, that error appears to me to be incidental to the overarching mistake that still plagues the Court's equal protection jurisprudence. As in the past, today the Court insists different types of classification merit different degrees of judicial scrutiny. And where a classification scheme is compounded, the Court will ratchet down scrutiny.

The key problem with *Skrmetti* is not that trans persons' equal protection challenges are afforded only rational basis review. That is the symptom, not the disease. The overarching mistake is the Court's insistence that it is within the judicial power to pick and choose which groups of persons enjoy more equal protection than others.

Today the Court insists that the tiers of scrutiny are the right framework to guide judicial review of all equal protection challenges. The Court is unconcerned that so few classifications are afforded heightened scrutiny because, it reasons, nothing stands in the way of later in time challengers proving their classification should be afforded heightened scrutiny. This is tautological. It is also judicial gaslighting. The actual obstacle in the way is the Court itself. Unless the Court wishes to ratchet up scrutiny for all equal protection challenges, nothing changes.

In sum, this Article is mostly about an analytic mistake that has long plagued the Supreme Court's equal protection jurisprudence. It is also a critique of *Skrmetti v. United States*. It discusses trans rights at some length but does not contend that trans people merit special treatment under equal protection. Instead, it insists that all similarly situated individuals should be treated the same, and the judiciary has no constitutional power to declare, let alone allow, otherwise.

[89] *See, e.g.*, Leah Litman, *The Archaic Sex-Discrimination Case the Supreme Court is Reviving*, The Atlantic (June 24, 2025), https://www.theatlantic.com/ideas/archive/2025/06/supreme-court-sex-discrimination-skrmetti/683296/; Mark Joseph Stern, *John Roberts' Anti-Trans Opinion Is a Gabled Mess. It's Easy to See Why.*, Slate (June 18, 2025), https://slate.com/news-and-politics/2025/06/skrmetti-john-roberts-anti-trans-supreme-court.html; Elie Mystal, *The Supreme Court's Anti-Trans Decision Will Live in Infamy*, The Nation (June 18, 2025), https://www.thenation.com/article/politics/us-vs-skrmetti-ruling-analysis/.