The Erosion of Equal Protection

The Unsurprising Havoc of United States v. Skrmetti

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The U.S. Supreme Court issued its highly anticipated decision in *United States v. Skrmetti* and, as many expected, voted 6-3 along ideological lines to uphold a Tennessee law banning gender-affirming care for minors.

The law in question bars healthcare providers from offering puberty blockers, hormones, or surgical interventions to assist a minor in living with an "identity inconsistent with the minor's sex" or to alleviate distress "from a discordance between the minor's sex and asserted identity." The question presented to the Court was whether the law was subject to heightened scrutiny under the Fourteenth Amendment's Equal Protection Clause, either because it discriminated based on sex or because it discriminated based on transgender status, which some lower courts have found to be an additional quasi-suspect classification triggering heightened scrutiny.

The Court found that Tennessee's law did not trigger heightened scrutiny and, as feared, reached that conclusion by construing equal protection jurisprudence in regressive ways. The majority reasoned that the law not only did not discriminate on the basis of sex, but did not discriminate on the basis of transgender status either. In doing so, it left unresolved whether laws that discriminate based on transgender status are subject to heightened scrutiny and whether the logic of *Bostock v. Clayton County*, a relatively recent decision that protected transgender people from sex discrimination in the employment context, extends to equal protection claims.

In this post, I examine how the *Skrmetti* decision threatens to narrow the scope of constitutional equality protections in the United States, why it is dangerous for the equality claims of women and lesbian, gay, and bisexual people, and why it is likely to be so damaging for transgender people targeted by state and federal lawmakers in recent years.

The court's cramped view of equal protection

To uphold Tennessee's law, Chief Justice Roberts' majority opinion construed existing equal protection precedents in a way that is both permissive toward discrimination and overly formalistic. As the United States pointed out in its briefing, the law in Tennessee classifies based on sex; to know whether a young person could receive a particular treatment that amplifies or develops certain sex characteristics, one would have to know their sex assigned at birth. This kind of sex classification has long triggered heightened scrutiny in the sex discrimination context. Nearly fifty years ago, the Court made clear in *Craig v. Boren* that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." And the Court has continued to use this anti-classification approach in other cases, including in their decision invalidating affirmative action policies in *Students for Fair Admissions v. Harvard*.

In *Skrmetti*, by contrast, the Court ruled that Tennessee's law did not discriminate based on sex, but on *age* and *purpose*. They noted the law restricted those under the age of 18 from obtaining treatments to alleviate gender dysphoria or to align one's physical characteristics with their gender identity. The Court determined that, in spite of the varied references to sex in the law, this was not sex discrimination because no minor of any sex could receive gender-affirming treatments. More surprisingly, the Court determined that a law banning gender-affirming care was not discrimination based on transgender status. It relied to this end on *Geduldig v. Aiello*, a widely criticized deci-

sion from the early 1970s that held that pregnancy discrimination was not sex discrimination because it discriminated between pregnant and nonpregnant people, and women fell into both categories. Here too, they found that because not all transgender youth receive gender affirming care, it was not anti-transgender discrimination to restrict those treatments. (The majority's contortions on this front were not lost on Justice Alito, who wrote separately to acknowledge that of course the Tennessee law discriminates based on transgender status, although he considered that discrimination legally permissible.)

The majority's reasoning leaves much to be desired, but two challenges for equal protection law are especially evident. First, the Court gives little guidance to lower courts to determine when a procedure or activity regulated by the state is sufficiently related to a person's protected identity to constitute discrimination. The majority ignores that "gender dysphoria, gender identity disorder, and gender incongruence" are not comparable to pregnancy because as a general matter that disconnect between sex assigned at birth and gender identity constitutes transgender people as a class. By contrast, pregnancy does not constitute the category of womanhood. In that sense, it is notable that the Court foregrounded *Geduldig* and ignored more apposite precedent that would lean the other way. For example, it recognized in *Lawrence v. Texas* that prohibiting same-sex activity raises equal protection concerns even though some gay and lesbian individuals may be celibate and some heterosexual individuals may engage in same-sex sex, because such a ban cuts to the heart of what it means to live as part of that class.

This is representative of a second shortcoming of the majority opinion, which is a dogged refusal to attend to the larger social context of anti-transgender discrimination from which the ban arose. The ban was enacted as part of a wave of thousands of bills being proposed and adopted to restrict LGBT rights in the United States in the past five years, with Tennessee among the leaders in enacting anti-transgender legislation. While the Court left open the possibility that laws motivated by invidious discrimination might still raise equal protection concerns, its insistence on examining Tennessee's law in a vacuum leaves it ill-equipped to appreciate the collective impact of anti-transgender discrimination and to recognize why and how the most aggressively discriminatory campaigns deny targeted groups the equal protection of the law.

Foreclosing sex equality claims

Like the curtailment of gender affirming care in the United Kingdom, the *Skrmetti* decision will likely be celebrated by many anti-gender activists around the globe, including groups that oppose transgender rights under the banner of women's rights and gay and lesbian rights. Those celebrations are likely premature, as the Court's approach in *Skrmetti* is also likely to bolster opposition to reproductive rights and threaten legal protections against sex discrimination.

First, by relying again on *Geduldig*, the Court affirms and extends an argument it made when it overturned *Roe v. Wade* in *Dobbs v. Jackson Women's Health Association* – that restricting healthcare utilized by one sex is not sex discrimination and does not give rise to heightened scrutiny under the Equal Protection Clause. Unlike *Geduldig* and *Dobbs*, however, the Court in *Skrmetti* extends that reasoning outside the context of pregnancy. It thereby diminishes constitutional scrutiny of restrictions on women's health precisely at a time when sexual and reproductive health services are under sustained attack.

Second, the concurring opinions by members of the conservative majority suggest that their refusal to see and address discrimination based on gender identity could foreclose recognition of discrimination based on sexual orientation as well. Justices Barrett, Alito, and Thomas made clear in *Skrmetti* that they would reject the idea that transgender status is a quasi-suspect class triggering heightened scrutiny under the Equal Protection Clause, with Justice Barrett writing a lengthy concurring opinion focusing on this question. As Justice Barrett noted, to identify whether a classification should be subjected to heightened scrutiny under the Equal Protection Clause, the Court looks at whether the group in question has shared and immutable or distinguishing characteristics, has been

historically subjected to discrimination, and is politically powerless.

From the outset of the analysis, Justice Barrett characterized the set of suspect classifications as "virtually closed," and indicated that "we have *never* embraced a new suspect class under this test." She then proceeded to reject transgender status as satisfying the requirements that would make it "akin to the canonical examples of race and sex." Justice Barrett first reasoned that because transgender identity can be changed over time and can take a wide range of forms, transgender status is unlikely to qualify for heightened protection. She also suggested that the absence of a long history of de jure discrimination against transgender people could be fatal to their claims, minimizing a rich history of de jure discrimination against transgender people and the recent eruption of anti-transgender lawmaking in the United States.

Though discrimination based on gender identity and sexual orientation differ in important respects, setting a high bar for the recognition of new classes is potentially dangerous for lesbian, gay, and bisexual rights claims. Advocates would need to grapple with Justice Barrett's narrow reading of the requirement that a class must be sufficiently bounded and defined, even if the Court has historically been somewhat cognizant of de jure discrimination based on sexual orientation. At a time when anti-LGBT laws are gaining traction and some lawmakers and organizations have begun urging the Court to reconsider the constitutional right to marry, the concurrences in *Skrmetti* suggest there may also be a difficult road ahead for gay, lesbian, and bisexual plaintiffs bringing equal protection claims.

These considerations are a reminder that all marginalized groups suffer when the promise of the Equal Protection Clause is eviscerated. The most extreme version of this appeared in the ominous footnote three of Justice Thomas's concurrence in *Skrmetti*, where he suggested that the Equal Protection Clause was not originally conceived to address sex discrimination and that he might be willing to entertain arguments that sex discrimination should not trigger heightened scrutiny at all. While no other justice joined that concurrence, the mere prospect of jettisoning the Court's sex discrimination jurisprudence in its entirety shows the danger of this Court's retreat from the promise of the Equal Protection Clause.

Turning the Constitution's back on anti-transgender discrimination

Of course, the most immediate impact of the decision is that laws restricting gender-affirming care will remain in place across the United States. A full twenty-five U.S. states now ban a wide range of gender-affirming care for transgender youth, with another two states banning surgical care alone and Alabama, Florida, Idaho, North Dakota, Oklahoma, and South Carolina punishing the provision of gender-affirming care as a felony. As Human Rights Watch has recently documented, these laws wreak havoc in the lives of transgender children and their families, replacing patient-centered, individualized care with blanket bans that are not attentive to young people's needs. For many transgender young people, that care is critically important for both their physical and mental health, and both the deprivation of that care and the politicized, sensationalized debate will inflict great harm.

In the current climate, the Court's refusal to recognize widespread discrimination against transgender people also threatens to encourage and embolden anti-transgender animus. In addition to laws and regulations restricting transgender people from accessing bathrooms, participating in sports, using gendered resources, obtaining accurate identification, or serving in the military based on their gender identity, the decision in *Skrmetti* will potentially embolden lawmakers to go even further, taking aim at gender-affirming care for adults. These dangers are particularly acute where, as in the military context, policymakers have invoked medical history and gender dysphoria as a purported justification for overtly discriminating against transgender people.

While the majority opinion in *Skrmetti* contains important language acknowledging that some anti-transgender laws may yet be subjected to heightened scrutiny if they are "a mere pretext for invidious sex discrimination," it will now be up to lower courts to

determine the decision's scope. In the interim, it will be the difficult work of advocates, parents, medical providers, lawyers, and social movements to continue caring for trans youth and making the legal and popular case for a version of equal protection law that recognizes and appreciates anti-transgender discrimination.

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