From Erosion to Evisceration

Skrmetti's Narrowing of Sex-Based Protection under Equal Protection

Dara Purvis

24.06.2025 doi: 10.59704/9afdbb8012092c30

Last week, the Supreme Court decided the case *United States v. Skrmetti*, challenging one of twenty seven statutes throughout the United States prohibiting or limiting access to gender affirming care for transgender children. The Court upheld the law, holding that the statute did not classify on the basis of sex and did not violate the Equal Protection Clause. The result is undeniably devastating for thousands of children and their families throughout the country, and indicates a skepticism of challenges brought to other laws targeting transgender people in other ways. As Ryan Thoreson has argued on this blog, the Court's opinion also rolls back existing understandings of sex discrimination in ways that will likely play out in future cases. Building on that insight, I examine how the Court narrows what counts as sex discrimination and strips the concept of stereotypes of its constitutional force. The most troubling aspects of the decision, however, appear in concurrences written by the ultraconservative members of the Court, which confine the reach of equal protection to formal legal classifications alone. Their opinions indicate a door slamming firmly shut to any development of equal protection doctrine for any group.

How to evaluate the challenged law

Tennessee's law, known as SB1, is typical of the wave of gender affirming care bans that have swept across the country in the last five years. It prohibits health care providers from administering any treatment such as puberty blockers or hormones to a minor in order to treat that minor's gender dysphoria – the distress that arises when a person's sex assigned at birth, appearance, and body do not match their gender identity. (1) The ostensible reasons given in the statute are concerns that this treatment might cause the minor to become sterile, have an increased risk of disease and illness, or have significant psychological consequences. These reasons were not sufficient, however, for Tennessee to ban the treatment entirely, even for minors. Minors who receive the very same drugs for a different diagnosis, such as precocious puberty or PCOS, may continue to do so.

The question before the Supreme Court was whether this distinction allowing cisgender children to receive specific medical treatment but not transgender children is a classification on the basis of sex. If so, heightened scrutiny – specifically a test known as intermediate scrutiny – would be applied to evaluate the law. Tennessee would thus have the burden of proof to show that the law is substantially related to an important state interest. If Tennessee failed to meet its burden, the law would be struck down as unconstitutional. By contrast, if the law does not classify on the basis of sex, it would instead receive the very deferential rational basis review, meaning that the law's challengers would have the burden of proof to show that the law is not rationally related to a legitimate state interest for the law to be struck down.

Is gender dysphoria connected to sex?

In the eyes of the lawyers representing the transgender plaintiffs and their doctors, the answer to whether the law classifies on the basis of sex was obvious. The availability of medical treatment turns on the sex of the child. Imagine that a child and their parents visit a doctor requesting treatment such as puberty blockers and later estrogen hormone therapy. If the child's sex assigned at birth was female, then the doctor could prescribe those drugs. If the child's sex assigned at birth was male, however, the doctor could not.

Chief Justice Roberts's opinion for the Court, however, answered the question differently. The classifications in his reading are not the sex of the child, but the child's age and the medical use of the treatment. (9) The age limit is straightforwardly part of the statutory language, applying the ban only to people younger than eighteen years old, and the Supreme Court held in 1976 that classifications based on age receive only rational basis review.

The "medical use" argument is trickier. Roberts argues that a transgender boy taking puberty blockers to treat gender dysphoria is undergoing different medical treatment than a cisgender boy taking puberty blockers to treat precocious puberty. (12) As Justice Sotomayor points out in her dissent, a similar rule outside of the medical context would obviously be a classification on the basis of sex. For example, as Tennessee conceded, if it passed a law that prohibited wearing clothing inconsistent with one's sex assigned at birth, that would be a sex-based classification and trigger heightened constitutional review (Sotomayor dissent at 12). In this reading, the diagnosis of "gender dysphoria" merely gives a medicalized gloss to the status of being transgender.

Chief Justice Roberts, however, argues that medical treatment is fundamentally different than sex, writing: "SB1 does not mask sex-based classifications. . . . [T]he law does not prohibit conduct for one sex that it permits for the other. Under SB1, no minor may be administered puberty blockers or hormones to treat gender dysphoria . . . minors of any sex may be administered puberty blockers or hormones for other purposes." (13)

A similar argument played out with very different results five years ago in *Bostock v. Clayton County* (2020). In that case, employees who faced discrimination at work on the basis of their sexual orientation or gender identity sued under Title VII of the Civil Rights Act of 1964, which prohibits employers from treating employees badly because of (among other things) the employee's sex. (655) When employers argued that Title VII did not ban discrimination on the basis of sexual orientation or gender identity, the employees responded that sexual orientation and gender identity were inherently linked to sex.

Writing in dissent in *Bostock*, Justice Alito argued that the concepts were not linked. The employees had argued that the discrimination they faced turned on their sex – a transgender employee, for example, argued that her employer fired her because her gender identity was female but her employer knew that she was assigned male at birth. She pointed out that if her sex was changed – if she was assigned female at birth – her employer would not have fired her because her gender identity was female. Alito argued that although her employer knew her sex, he could have taken the same actions without ever knowing her sex assigned at birth. Pointing to specific examples from employers such as the U.S. military, Alito argued that an employer could ask potential employees to check a box identifying themselves as LGBTQ+ and refuse to hire those people. In such a case, changing the potential employee's sex wouldn't change the result. (690)

Writing for the Court, Justice Gorsuch explained why such a checkbox would not decouple sexual orientation and gender identity from sex: "[I]magine an applicant doesn't know what the words homosexual or transgender mean. Then try writing out instructions for who should check the box without using the words man, woman, or sex (or some synonym). It can't be done. Likewise, there is no way an employer can discriminate against those who check the homosexual or transgender box without discriminating in part because of an applicant's sex. (668-69)

In *Skrmetti,* Chief Justice Roberts relies on the formal medical diagnosis of gender dysphoria in place of a checkbox. But this rejection is difficult to understand: how is such a diagnosis made? If someone doesn't know what the term "gender dysphoria" means, can you write out instructions for who might be diagnosed with gender dysphoria without using the words boy, girl, sex, or some other synonym? Justice Sotomayor certainly thinks not, writing that the medical purpose the Court relies upon "is defined by reference to the patient's sex." (Sotomayor dissent at 16).

Is "consistency with one's sex" a sex stereotype?

A second dimension of sex-based classifications raises even broader questions about the future of the Court's equal protection analysis. Another framing of sex discrimination claims, and a justification for why heightened scrutiny is necessary, is that sex-based classifications are often based upon or reinforcing gender stereotypes. Relying upon gender stereotypes was why, for example, Justice Ruth Bader Ginsburg wrote so forcefully to find that the Virginia Military Institute's insistence that they not admit women cadets violated the Equal Protection Clause. Solicitor General Elizabeth Prelogar argued that Tennessee's ban also reinforces gender stereotypes, explaining that the goal of the statute was to encourage minors to appreciate their sex (as assigned at birth) and enforce conformity with sex stereotypes. SB1's purpose, in other words, was at least in part to prevent a child assigned male at birth from appearing too feminine.

Chief Justice Roberts concludes that no such stereotype is present in Tennessee's law, concluding that if a law does not have a sex-based classification, "we do not subject the law to heightened review unless it was motivated by an invidious discriminatory purpose." (15) But the statute itself says that the state has an interest in "encouraging minors to appreciate their sex" and prohibiting medical procedures "that might encourage minors to become disdainful of their sex." The law declares that its purpose is to prohibit medical treatment that enables a minor to identify as "a purported identity inconsistent with the minor's sex." Chief Justice Roberts waved away the references to sex and said such a statute would only receive heightened review if it was "motivated by an invidious discriminatory purpose." (15) This is a tightly cabined definition of sex-based classifications that would see only the most explicit differential treatment as constitutionally noteworthy.

Closing the door on suspect classes

Another sign of the current Court's approach to equal protection was voiced more fully in the concurrences. The challengers of SB1 had also argued that even if the law does not classify on the basis of sex, it classifies on the basis of transgender status, and transgender people should be recognized as a quasi-suspect class. If the Court agreed, then laws classifying on the basis of gender identity would also receive intermediate scrutiny. Chief Justice Roberts sidestepped the question, holding that the law does not classify on the basis of gender identity for the same reasons that the law in his opinion does not classify on the basis of sex: the only cognizable classifications are age and medical condition. He thus explicitly declined to address whether transgender people are a quasi-suspect class.

Justice Amy Coney Barrett wrote separately, however, to address that question, and to argue that transgender people are not a quasi-suspect class. (Barrett concurrence 1) She returned to a topic she raised at oral argument, whether transgender people have suffered a history of formal legal discrimination. When identifying existing suspect and quasi-suspect classes, one factor evaluated by past Courts has been whether a group experienced a history of discrimination. Justice Barrett narrowed this question to ask whether transgender people have been the subject of *de jure* discrimination, meaning formal discrimination enacted by the government. One response is simply that they have – attorney Chase Strangio offered two examples, notably a long history of anti-cross-dressing laws. Another response would point out that the term transgender is only a few decades old, so to fully recognize the legal treatment of trans people requires casting a wider net into laws that regulate gender conformity in many ways. Another might be to argue that given the breadth and depth of laws targeting transgender people in America in the past five years, recent history strongly supports treatment of trans people as a suspect class. Justice Barrett rejected all of these possibilities, and instead concluded that a distinction "between *de jure* discrimination and private animus is consistent with the Fourteenth Amendment's text and purpose." (8) In her reading, widespread societal discrimination – employers firing transgender people, banks refusing to issue loans to transgender people, hospitals refusing to treat them, even violence directed against them by individual

perpetrators – is not relevant. Only formal discrimination such as legislation or other governmental action forms the history of discrimination contemplated by the Equal Protection Clause. If a majority of the Court were to agree with her definition of a history of discrimination, it would slam the door shut on *any* other group being recognized as a suspect class. If the threshold for a history of discrimination is Jim Crow segregation oppressing Black Americans or coverture laws treating women as second-class citizens, it is difficult to imagine another group with a similar history. Other groups have faced societal discrimination, but not the formal, explicit discrimination enacted into law. Justice Thomas joined Justice Barrett's concurrence, and Justice Alito wrote his own concurrence similarly arguing that transgender people are not a quasi-suspect class, echoing Justice Barrett's focus on a history of formal legal discrimination. (Alito concurrence 9, 19)

What's next

In some ways, Chief Justice Roberts's opinion leaves room for future transgender plaintiffs challenging the myriad laws and executive orders targeting them. For example, his focus on medical treatment as the relevant classification of the law at least leaves the possibility that other laws outside of the medical context would be analyzed differently. Additionally, although it is unlikely that he or Justices Gorsuch and Kavanaugh would find that transgender people are a suspect class, his opinion leaves the question for another day, letting the two circuits that have found that transgender people are a quasi-suspect class continue to apply that doctrine.

The Court's opinion, however, employs a narrow understanding of what sex-based classifications are. This will likely arise again not only in the context of future cases affecting transgender people, but laws that unequally affect women. This is consistent with the Court that decided *Dobbs v. Jackson Women's Health Organization* reversing *Roe v. Wade* and holding that abortion is neither a privacy nor equality right. Despite the Court's assurances in *Dobbs* that its reasoning was cabined to abortion, the refusal to see gendered impacts of the law persists – from *Dobbs* through *Skrmetti*.

ABOUT THE AUTHOR

Dara Purvis

Professor Dara E. Purvis is a scholar of family law, sexual orientation and gender identity, feminist legal theory, and masculinities at Temple University Beasley School of Law.

SUGGESTED CITATION

Purvis, Dara: From Erosion to Evisceration: Skremetti's Narrowing of Sex-Based Protection under Equal Protection, Verfassungsblog, 24.06.2025, doi: 10.59704/9afdbb8012092c30.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20250627-143611-0.