

## SKRMETTI BEYOND SCRUTINY

*Kate Redburn\**

### INTRODUCTION

In *United States v. Skrmetti*,<sup>1</sup> the Supreme Court upheld Tennessee Senate Bill 1 (SB 1), a state law that prohibits transgender minors from accessing gender-affirming care.<sup>2</sup> For the first time, the Court considered a fundamental question in civil rights law: How does the Fourteenth Amendment regard transgender people? The Court gave little guidance. It did not sort out principles for deciding when anti-transgender discrimination classifies by sex, nor whether transgender people are a suspect class. Instead, the Court held that “[i]n the medical context, the mere use of sex-based language does not sweep a statute within the reach of heightened scrutiny.”<sup>3</sup> It turned a question of equality into an exercise in deference.

For more than a century, American law permitted sex discrimination on the theory that women were naturally inferior to men.<sup>4</sup> Starting in the 1970s, the Court began to confront this stereotype at its root by applying elevated scrutiny to distinctions based on sex.<sup>5</sup> The “intermediate scrutiny” standard tests whether a legal sex classification is “substantially related” to advancing “important governmental objectives”<sup>6</sup> without “rely[ing] on overbroad generalizations about the different talents, capacities, or preferences of males and females.”<sup>7</sup> Some sex

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\* Associate Professor, Columbia Law School. For discussion, feedback, and guidance that improved the piece tremendously, I am grateful to Ashraf Ahmed, Courtney Cahill, Jessica Clarke, Katie Eyer, Katherine Franke, Cary Franklin, José Argueta Funes, Suzanne Goldberg, Serena Mayeri, Melissa Murray, Farah Peterson, Reva Siegel, and Nelson Tebbe. The piece would not have been possible without exceptional research assistance from Carly Feldman, and support from the editors of the *Harvard Law Review*. Remaining errors are mine.

<sup>1</sup> 145 S. Ct. 1816 (2025).

<sup>2</sup> See *id.* at 1826, 1837; TENN. CODE ANN. §§ 68-33-101 to -109 (2025). Gender-affirming care is an umbrella term for medical treatments which may include puberty blockers, hormones, surgery, and therapy. *Skrmetti* concerned only SB 1’s prohibitions on puberty blockers and hormones. *Skrmetti*, 145 S. Ct. at 1827.

<sup>3</sup> *Skrmetti*, 145 S. Ct. at 1830.

<sup>4</sup> See *infra* section III.B.

<sup>5</sup> See *Reed v. Reed*, 404 U.S. 71, 75–76 (1971); *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (plurality opinion); *Craig v. Boren*, 429 U.S. 190, 197–99 (1976); *United States v. Virginia (VMI)*, 518 U.S. 515, 555–56 (1996).

<sup>6</sup> *Sessions v. Morales-Santana*, 582 U.S. 47, 59 (2017) (quoting *VMI*, 518 U.S. at 533).

<sup>7</sup> *VMI*, 518 U.S. at 533.

classifications survive this standard,<sup>8</sup> but they are always evaluated under heightened scrutiny.<sup>9</sup>

Or are they? *Skrmetti* determined that SB 1 does not classify by sex, and so the Court only applied rational basis review.<sup>10</sup> Looked at one way, *Skrmetti* appears to offer a narrow holding about medical classifications.<sup>11</sup> From another vantage point, the ruling mischaracterized a sex classification and applied the wrong standard of review.<sup>12</sup> The Court's reference to "the medical context"<sup>13</sup> might be a passing phrase, but it could also signal a new route to bypass elevated review altogether. Did *Skrmetti* sidestep intermediate scrutiny because there were no sex classifications to be found, or did it move sex discrimination — at least in some forms, or in some contexts — beyond constitutional scrutiny?

In this Comment, I argue that *Skrmetti* inaugurated a new approach to sex classifications "in the medical context." The statute does much more than mention sex incidentally. It creates sex categories by defining "sex" itself.<sup>14</sup> Once SB 1 is properly understood as a sex classification, the Court's move to rational basis review looks like a consequential error. The potential reach of the new approach is difficult to decipher, however, because the Court did not offer limiting principles. The medical context exception to heightened scrutiny may apply only to bans on gender-affirming care for transgender minors. On that narrow reading, the opinion fails by its own standard, and it enables substantial harm to transgender youth,<sup>15</sup> but it does not inflict significant damage to the cause of transgender equality. If, on the other hand, the Court pushes *Skrmetti* to its limits, it could evade heightened scrutiny for a wide range of sex-related regulations by describing them as essentially medical.<sup>16</sup>

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<sup>8</sup> See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464, 475–76 (1981) (plurality opinion) (upholding California statutory rape law that made only male perpetrators criminally liable); *Nguyen v. INS*, 533 U.S. 53, 60–61 (2001) (sustaining immigration regulations imposing a higher burden on children of unmarried U.S. citizen fathers than children of unmarried U.S. citizen mothers).

<sup>9</sup> See *Morales-Santana*, 582 U.S. at 57 ("Today, laws of this kind are subject to review under the heightened scrutiny that now attends 'all gender-based classifications.'" (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994))).

<sup>10</sup> *Skrmetti*, 145 S. Ct. at 1829.

<sup>11</sup> See Jessica A. Clarke, *Skrmetti's Shell Game* 5 (Aug. 16, 2025) (unpublished manuscript), <https://ssrn.com/abstract=5394647> [<https://perma.cc/K3DT-HZMP>] (describing *Skrmetti's* limited reach).

<sup>12</sup> See *Skrmetti*, 145 S. Ct. at 1868 (Sotomayor, J., dissenting).

<sup>13</sup> *Id.* at 1829 (majority opinion).

<sup>14</sup> TENN. CODE ANN. § 68-33-102(9) (2025) ("Sex" means a person's immutable characteristics of the reproductive system that define the individual as male or female, as determined by anatomy and genetics existing at the time of birth.").

<sup>15</sup> See, e.g., *Brandt ex rel. Brandt v. Griffin*, No. 23-2681, 2025 WL 2317546, at \*4–5, \*11 (8th Cir. Aug. 12, 2025) (relying on *Skrmetti* to reverse a permanent injunction against transgender youth healthcare ban in Arkansas).

<sup>16</sup> The Court granted certiorari, vacated lower court decisions, and remanded three transgender rights cases in light of *Skrmetti*. Two concern health insurance coverage for adult gender-affirming

On this trajectory, the Court could convert the Constitution's obligation to eliminate sex discrimination into a presumption of deference, inviting state actors to justify inequality as a matter of biological fact once again.<sup>17</sup>

The Court mooted something similar three years ago in *Dobbs v. Jackson Women's Health Organization*.<sup>18</sup> In *Dobbs*, the Court described abortion regulations as “health and safety measures”<sup>19</sup> which would not be considered sex classifications for equal protection purposes.<sup>20</sup> Although the analysis was in dicta, scholars noticed that the Court recast a sex-related government regulation as benign medical line-drawing.<sup>21</sup> To get there, the *Dobbs* Court relied on *Geduldig v. Aiello*,<sup>22</sup> an infamous case which determined that pregnancy discrimination does not always classify by sex.<sup>23</sup> Over the half-century since *Geduldig* was decided, scholars have pilloried its classification reasoning for failing to appreciate the close proxy between pregnancy and women.<sup>24</sup> Legal feminists

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care in North Carolina and West Virginia. See *Folwell v. Kadel*, No. 24-99, 2025 WL 1787687, at \*1 (U.S. June 30, 2025) (mem.); *Crouch v. Anderson*, No. 24-90, 2025 WL 1787678, at \*1 (U.S. June 30, 2025) (mem.). The third addresses Oklahoma's policy for updating the sex marker on state-issued birth certificates. See *Stitt v. Fowler*, No. 24-801, 2025 WL 1787695, at \*1 (U.S. June 30, 2025) (mem.). These may be signs that *Skrmetti* will not be contained to healthcare for transgender minors, or indeed to healthcare.

<sup>17</sup> See *infra* section III.B.

<sup>18</sup> 142 S. Ct. 2228 (2022).

<sup>19</sup> *Id.* at 2246.

<sup>20</sup> *Id.* at 2245–46.

<sup>21</sup> See, e.g., Courtney Megan Cahill, *Sex Equality's Irreconcilable Differences*, 132 YALE L.J. 1065, 1086 (2023) [hereinafter Cahill, *Irreconcilable Differences*]; Marc Spindelman, Essay, *Trans Sex Equality Rights After Dobbs*, 172 U. PA. L. REV. ONLINE 1, 2–3 (2023); Courtney Megan Cahill, *The Other Footnote*, 135 YALE L.J. (forthcoming 2026) (manuscript at 1) (on file with the Harvard Law School Library) [hereinafter Cahill, *Footnote*]. See generally Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1405 (2023) (noting concern among observers that *Dobbs* would have a negative impact on equal protection and due process claims by transgender litigants in a study finding a remarkable rate of success from 2017–2021).

<sup>22</sup> 417 U.S. 484 (1974); *Dobbs*, 142 S. Ct. at 2235 (citing *Geduldig*, 417 U.S. at 496 n.20; *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273–74 (1993)).

<sup>23</sup> See Jessica A. Clarke, *Scrutinizing Sex*, 92 U. CHI. L. REV. 1, 32 & n.200 (2025); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 268–69 (1992); Katie Eyer, *Transgender Equality and Geduldig* 2.0, 55 ARIZ. ST. L.J. 475, 477 (2023).

<sup>24</sup> See, e.g., Siegel, *supra* note 23, at 269–70. Some scholars have suggested that subsequent cases passively overruled *Geduldig*'s classification reasoning, or assimilated it into the anti-stereotyping framework of *VMI*, 518 U.S. 515 (1996). See, e.g., Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1892 n.103 (2006); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 153–54 (2010); Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 794–96 (2010); Deborah Dinner, *Sex Equality and the U.S. Welfare Regime: The Story of Geduldig v. Aiello*, in *REPRODUCTIVE RIGHTS AND JUSTICE STORIES* 77, 94 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019); David Fontana & Naomi Schoenbaum, *Unsexed Pregnancy*, 119 COLUM. L. REV. 309, 354–58 (2019). But see Mary Ziegler, *Choice at Work: Young v. United*

spent decades convincing courts that regulating reproductive biology was often a proxy for sex discrimination,<sup>25</sup> so *Dobbs* elicited fear that the Court would find new applications for *Geduldig*'s faulty formalism.<sup>26</sup>

It also raised concerns that deeper mischief was waiting in the wings. When reasoning about classifications, the *Geduldig* Court ignored the ways pregnancy discrimination harms women by reinforcing stereotypes about their social role.<sup>27</sup> In the historical context of the time, when debates raged over the relationship between pregnancy and sex stereotypes, *Geduldig* looks to some scholars like a rejection of the idea that pregnancy regulation reinforces background assumptions that women should be domestic and reproductive.<sup>28</sup> In the time since, an anti-stereotyping principle has become the lodestar of sex-based equality doctrine.<sup>29</sup> Many wondered if *Dobbs* and its reliance on *Geduldig* might signal the Court's appetite to ignore sex classifications altogether by describing them as a natural outgrowth of physical differences.<sup>30</sup>

Both fears roused by *Dobbs* — about classification analysis and standard of review — have been vindicated by *Skrametti*. The Court's classification reasoning relied on "the medical context" to describe gender dysphoria as such a close proxy for transgender identity that SB 1 is not a sex classification,<sup>31</sup> but also not a sufficient proxy for transgender identity to count as a classification by transgender status.<sup>32</sup> The Court then compounded its mistake by offering SB 1 rational basis review.<sup>33</sup> If we peel back the layers, we can see that the effect was to move the locus for evaluating which sex classifications are permissible from the application of heightened scrutiny to the threshold question of whether a classification exists in the first place. Taken together, *Skrametti*'s approach to "the medical context" produced a troubling double deference: First the Court deferred to the state's claim that SB 1 is

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Parcel Service, *Pregnancy Discrimination, and Reproductive Liberty*, 93 DENV. L. REV. 219, 225 (2015); William N. Eskridge, Jr., *America's Statutory "Constitution"*, 41 U.C. DAVIS L. REV. 1, 4 (2007).

<sup>25</sup> Reva B. Siegel, *The Pregnant Citizen, From Suffrage to the Present*, 108 GEO. L.J. 167, 170, 176–84 (2020); see also Clarke, *supra* note 23, at 8 & n.41 (discussing the Sixth Circuit's misapplication of *Dobbs* in *Skrametti*).

<sup>26</sup> See Eyer, *supra* note 23, at 477 & n.4; Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 67, 76 (2023).

<sup>27</sup> See *Geduldig*, 417 U.S. at 496–97; see also Siegel, *supra* note 25, at 172–73 (arguing that *Geduldig* relied on stereotypes to perpetuate the subordination of women).

<sup>28</sup> See, e.g., Siegel, *supra* note 23, at 270; Cahill, *Irreconcilable Differences*, *supra* note 21, at 1095; Franklin, *supra* note 24, at 128; Siegel, *supra* note 25, at 192–93.

<sup>29</sup> See Franklin, *supra* note 24, at 83, 138, 153–54.

<sup>30</sup> See Spindelman, *supra* note 21, at 2–3; Siegel, Mayeri & Murray, *supra* note 26, at 69.

<sup>31</sup> See *Skrametti*, 145 S. Ct. at 1829–31.

<sup>32</sup> See *id.* at 1832–34.

<sup>33</sup> *Id.* at 1835–36.

sex neutral because it reflects medical categories, and then the Court offered the statute its most deferential level of review.<sup>34</sup>

At each step, the Court's deference was unwarranted. The legislative history, text, and structure of SB 1 all show that the statute reflects Tennessee's preference that minors conform to the sex they were assigned at birth, or in other words, that young people not live transgender lives.<sup>35</sup> The resulting regulatory scheme classifies by sex and transgender status quite directly. SB1 is not a ban on gender-affirming care for patients under eighteen reflecting expert medical judgments. SB 1 *authorizes* most minors to access puberty blockers, hormones, and surgery, with an *exception* only for transgender youth. The statute singles out transgender youth for special prohibitions because they are transgender.

SB1 draws this line by defining sex to exclude transgender minors,<sup>36</sup> and by using that definition to distribute access to healthcare.<sup>37</sup> Rather than examine SB 1's definition of sex — the proper object of the Court's inquiry — the Court flirted with providing its own definition of sex as the factual basis from which to reason about classifications.<sup>38</sup> If the Court persists in this kind of slip, it could damage transgender equality outside the "medical context," as well as the broader landscape for sex equality under the Constitution.

We may have a better sense of *Skrmetti*'s scope by this time next year. The *Skrmetti* opinion had hardly arrived before the Court granted certiorari in *Hecox v. Little*<sup>39</sup> and *B.P.J. ex rel. Jackson v. West Virginia State Board of Education*,<sup>40</sup> two cases challenging categorical bans on transgender girls' participation in women's sports.<sup>41</sup> If we consider what *Skrmetti* may portend for *Hecox* and *B.P.J.*, its errors become more alarming. Double deference could again provide the Court with a sleight of hand to portray a sex and status classification as a neutral reflection of medical authority. Like SB 1, the laws at issue in those cases also define sex to sort individuals into two categories and then rely on that definition to distribute benefits.<sup>42</sup> But where *Skrmetti* skirted the definition issue, *Hecox* and *B.P.J.* depend on it. The transgender girls in the next cases argue that Idaho and West Virginia define sex for

<sup>34</sup> Cf. Emily Hammond, *Double Deference in Administrative Law*, 116 COLUM. L. REV. 1705, 1711 (2016) (using "double deference" in an analogous way to analyze administrative law).

<sup>35</sup> See *infra* Part II.

<sup>36</sup> See TENN. CODE ANN. § 68-33-102(9) (2025).

<sup>37</sup> See *id.* § 68-33-103(a).

<sup>38</sup> See *Skrmetti*, 145 S. Ct. at 1829.

<sup>39</sup> 104 F.4th 1061, 1068 (9th Cir. 2024), *cert. granted*, No. 24-38, 2025 WL 1829165 (U.S. July 3, 2025).

<sup>40</sup> 98 F.4th 542, 550 (4th Cir. 2024), *cert. granted*, No. 24-43, 2025 WL 1829164 (U.S. July 3, 2025).

<sup>41</sup> *Hecox*, 104 F.4th at 1068; *B.P.J.*, 98 F.4th at 550.

<sup>42</sup> See Fairness in Women's Sports Act, IDAHO CODE §§ 33-6201 to -6206 (2025); Save Women's Sports Act, W. VA. CODE § 18-2-25d (2025).

the express purpose of excluding athletes like them, while the state petitioners contend that dividing sports by “biological sex” is not discriminatory.<sup>43</sup> The Court may be forced to adjudicate the definition of sex to determine how the statutes classify and how closely to evaluate them.

*Skrmetti*, *Hecox*, and *B.P.J.* are likely to be read together in the long run, since they raise related questions about sex equality and the constitutional status of transgender people under the Equal Protection Clause. In the interregnum between them, I consider *Skrmetti* on its own, and as a potential harbinger of sex equality doctrine to come. First, Part I reconstructs *Skrmetti*’s approach to “the medical context.” The Court determined that SB 1 does not turn on sex because it mentions sex only in service of medical descriptions.<sup>44</sup> This “mere use” of “sex” in the medical domain, the Court concluded, does not warrant heightened scrutiny.<sup>45</sup> The contours of the “medical context” are not defined. In Part II, I consider *Skrmetti* as postscript to the specific dispute in the case. Setting aside the Court’s coming engagement with *Hecox* and *B.P.J.*, I argue that *Skrmetti*’s classification reasoning relies on a mistaken double deference. Examining SB 1 reveals that the statute reflects Tennessee’s policy judgments about transgender youth, not objective medical categories. The opinion falls from within. Finally, Part III considers *Skrmetti* as a prelude to *Hecox* and *B.P.J.* If allowed to expand, double deference could puncture more holes in equal protection jurisprudence — for “the medical context,” but also perhaps the athletics context, or more. The Court could set additional blatant forms of sex and status discrimination beyond scrutiny.

### I. SKRMETTI’S MEDICAL CONTEXT

SB 1 prohibits healthcare providers from performing or administering hormones, puberty blockers, or surgery if it is “for the purpose” of “[e]nabling a minor to identify with, or live as, a purported identity inconsistent with the minor’s sex,” or “[t]reating purported discomfort or distress from a discordance between the minor’s sex and asserted identity.”<sup>46</sup> The statute defines sex as “a person’s immutable characteristics of the reproductive system that define the individual as male or female, as determined by anatomy and genetics existing at the time of birth.”<sup>47</sup> It clarifies that hormones, puberty blockers, and surgery are available “to treat a minor’s congenital defect, precocious puberty, disease, or physical injury,”<sup>48</sup> but that neither “[c]ongenital defect” nor “disease” encompasses “gender dysphoria, gender identity disorder, [or] gender

<sup>43</sup> *Hecox*, 104 F.4th at 1074; *B.P.J.*, 98 F.4th at 555.

<sup>44</sup> See *Skrmetti*, 145 S. Ct. at 1829–30.

<sup>45</sup> *Id.*

<sup>46</sup> TENN. CODE ANN. § 68-33-103(a)(1).

<sup>47</sup> *Id.* § 68-33-102(9).

<sup>48</sup> *Id.* § 68-33-103(b)(1)(A).

incongruence.”<sup>49</sup> The state printed fourteen separate justifications for the law among its legislative findings, including concerns about the “health and welfare of minors,” specific risks of gender-affirming care, and the quality of medical support for the treatments.<sup>50</sup> The legislature also explained that it wanted to “encourag[e] minors to appreciate their sex” and limit access to medicine “that might encourage minors to become disdainful of their sex.”<sup>51</sup>

Most legislative classifications are presumptively constitutional, and are evaluated only to see if they bear a rational relationship with a plausible governmental objective.<sup>52</sup> Courts take a closer look when laws infringe on “fundamental right[s]” or “target[] a suspect class.”<sup>53</sup> By longstanding precedent, sex classifications warrant an elevated level of review called intermediate scrutiny.<sup>54</sup> To satisfy it, the sex classification must have an “exceedingly persuasive justification.”<sup>55</sup> The burden is on the state actor to demonstrate that its rule “serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”<sup>56</sup>

Litigation in *Skremetti* began in April of 2023, when three transgender youths, their families, and a doctor who treats transgender patients in Memphis brought a suit challenging SB 1.<sup>57</sup> Among other things, the complaint alleged that the statute “discriminate[d] on the basis of sex and transgender status” in violation of the Equal Protection Clause.<sup>58</sup> The Supreme Court had not (and has not) decided what kind of scrutiny to apply when laws classify by transgender status, but the majority of lower federal courts that had assessed the issue had found that transgender people constitute a quasi-suspect class and that transgender status distinctions warrant heightened scrutiny.<sup>59</sup>

<sup>49</sup> *Id.* §§ 68-33-102(1), 68-33-103(b)(2).

<sup>50</sup> *Id.* § 68-33-101(a)-(n).

<sup>51</sup> *Id.* § 68-33-101(m).

<sup>52</sup> See *Skremetti*, 145 S. Ct. at 1835.

<sup>53</sup> *Romer v. Evans*, 517 U.S. 620, 631 (1996) (explaining that absent these conditions, state action is evaluated under rational basis review).

<sup>54</sup> See *Craig v. Boren*, 429 U.S. 190, 197–99 (1976); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723–26 (1982); *Nguyen v. INS*, 533 U.S. 53, 60–61 (2001); *Michael M. v. Superior Court*, 450 U.S. 464, 468–69 (1981) (plurality opinion); *VMI*, 518 U.S. 515, 532–33 (1996); *Sessions v. Morales-Santana*, 582 U.S. 47, 58 (2017).

<sup>55</sup> *VMI*, 518 U.S. at 531 (quoting *J.E.B.*, 511 U.S. at 136; *Hogan*, 458 U.S. at 724).

<sup>56</sup> *Morales-Santana*, 582 U.S. at 59 (quoting *VMI*, 518 U.S. at 533).

<sup>57</sup> See Complaint for Declaratory and Injunctive Relief at 4–5, 34, *L.W. ex rel. Williams v. Skremetti*, 679 F. Supp. 3d 668 (M.D. Tenn. 2023) (No. 23-cv-00376).

<sup>58</sup> *Id.* at 34.

<sup>59</sup> See, e.g., *Brandt v. Rutledge*, 677 F. Supp. 3d 877, 917–18 (E.D. Ark. 2023) (finding that “[t]ransgender people satisfy all indicia of a suspect class,” *id.* at 917, and applying heightened scrutiny, *id.* at 918); *Doe v. Ladapo*, 737 F. Supp. 3d 1240, 1267 (N.D. Fla. 2024) (finding that “[t]ransgender individuals are a discrete and insular minority” and applying heightened scrutiny); *Poe ex rel. Poe v. Labrador*, 709 F. Supp. 3d 1169, 1191, 1193 (D. Idaho 2023) (finding that the

The Biden Administration intervened to support the plaintiffs, and they obtained a preliminary injunction against SB 1's prohibitions on puberty blockers and hormones, which the Sixth Circuit stayed temporarily.<sup>60</sup> On appeal, the Sixth Circuit reversed the district court,<sup>61</sup> and it also reversed the order of doctrinal operations. The Sixth Circuit recognized that SB 1 does “treat minors differently based on sex,”<sup>62</sup> but did not apply heightened scrutiny because it found that the sex classification neither “perpetuate[d] invidious stereotypes [n]or unfairly allocate[d] benefits and burdens.”<sup>63</sup> In light of this basic doctrinal error, appellants and the United States as intervenor requested Supreme Court review.<sup>64</sup> At the time, all of the federal district courts to evaluate similar bans had ruled in favor of transgender plaintiffs.<sup>65</sup>

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healthcare ban “explicitly classifie[d] on the basis of transgender status,” *id.* at 1191, and applying heightened scrutiny, *id.* at 1193); *Skrmetti*, 679 F. Supp. 3d at 689–91 (noting that “[t]he overwhelming majority of courts to consider the question . . . have found that transgender individuals constitute a quasi-suspect class for the purposes of the Equal Protection Clause,” *id.* at 689–90 (citing, *inter alia*, *Ray v. McCloud*, 507 F. Supp. 3d 925, 937 (S.D. Ohio 2020)), and applying heightened scrutiny, *id.* at 691). Other district courts applied heightened scrutiny after finding that discrimination on the basis of gender nonconformity or transgender status constitutes sex-based classification and therefore did not reach the question of transgender status as its own suspect classification. *See, e.g.*, *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1147 (M.D. Ala. 2022) (applying intermediate scrutiny after finding that discrimination on the basis of gender nonconformity is sex discrimination); *Doe 1 v. Thornbury*, 679 F. Supp. 3d 576, 582 (W.D. Ky. 2023) (finding that the healthcare ban discriminated on the basis of sex and applying heightened scrutiny); *K.C. v. Individual Members of the Med. Licensing Bd.*, 677 F. Supp. 3d 802, 815 (S.D. Ind. 2023) (applying heightened scrutiny based on sex-based classification); *Koe v. Noggle*, 688 F. Supp. 3d 1321, 1348 (N.D. Ga. 2023) (finding that the healthcare ban “places a special burden on nonconformity with sex stereotypes” and applying heightened scrutiny).

<sup>60</sup> United States’ Motion to Intervene at 1, *Skrmetti*, 679 F. Supp. 3d 668 (No. 23-cv-00376); *Skrmetti*, 679 F. Supp. 3d at 679 (granting preliminary injunction in part); *L.W. ex rel. Williams v. Skrmetti*, 73 F.4th 408, 413 (6th Cir. 2023) (staying preliminary injunction).

<sup>61</sup> *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 491 (6th Cir. 2024).

<sup>62</sup> *Id.* at 481.

<sup>63</sup> *Id.* at 484.

<sup>64</sup> *See* Petition for a Writ of Certiorari at 14, *Skrmetti*, 145 S. Ct. 1816 (No. 23-477); Petition for a Writ of Certiorari, *Doe 1 v. Kentucky ex rel. Cameron*, No. 23-492 (filed Nov. 3, 2023); Petition for a Writ of Certiorari, *L.W. ex rel. Williams*, No. 23-466 (filed Nov. 1, 2023). Donald Trump was elected President and assumed office in the time between oral argument and the Court’s opinion. After oral argument, the United States wrote to the Court that it no longer agreed with the Biden Administration’s position, but that “the confluence of several factors counsel[ed] against seeking to dismiss.” *Skrmetti*, 145 S. Ct. at 1828 n.1 (quoting Letter from Curtis E. Gannon, Deputy Solic. Gen., to Hon. Scott S. Harris, Clerk of the U.S. Sup. Ct. (Feb. 7, 2025), [https://www.supremecourt.gov/DocketPDF/23/23-477/342223/20250207133625781\\_Letter%2023-477.pdf](https://www.supremecourt.gov/DocketPDF/23/23-477/342223/20250207133625781_Letter%2023-477.pdf) [<https://perma.cc/KJT7-KD22>]).

<sup>65</sup> The Department of Justice filed a petition for a writ of certiorari on November 6, 2023. *See* Petition for Writ of Certiorari, *Skrmetti*, 145 S. Ct. 1816 (No. 23-477). Each challenged state healthcare ban had been successfully enjoined in their respective district courts. *See* *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1151 (M.D. Ala. 2022) (issuing preliminary injunction), *vacated sub nom.*, *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205 (11th Cir. 2023); *Brandt v. Rutledge*, 677 F. Supp. 3d 877, 922, 925 (E.D. Ark. 2023) (finding bill failed heightened scrutiny and permanently enjoining enforcement); *Koe v. Noggle*, 688 F. Supp. 3d 1321, 1363 (N.D. Ga. 2023) (granting

Chief Justice Roberts wrote the majority opinion,<sup>66</sup> while Justice Sotomayor wrote the principal dissent.<sup>67</sup> After introducing transgender people in respectful terms, the majority explained that some trans people are diagnosed with gender dysphoria, and that their doctors prescribe forms of gender-affirming care.<sup>68</sup> The Court noted that “[i]n recent years, the number of minors requesting sex transition treatments has increased,” a change that “corresponded with rising debates” about the “risks and benefits” of gender-affirming care.<sup>69</sup> Turning to the legal analysis, the Court shared a reminder that sex-based state action gets a close look because “sex ‘generally provides no sensible ground for differential treatment,’”<sup>70</sup> and “sex-based lines too often reflect stereotypes or overbroad generalizations about the differences between men and women.”<sup>71</sup>

The majority’s legal analysis began by looking for facial classifications. It found two: First, because the prohibitions were limited to minors, the statute classified by age; second, because physicians may prescribe medicine “to treat certain conditions but not to treat gender dysphoria, gender identity disorder, or gender incongruence,” it facially classified by “medical use.”<sup>72</sup>

Neither classification triggered elevated scrutiny.<sup>73</sup> To explain why this was so for medical use, the Court turned to *Vacco v. Quill*,<sup>74</sup> a failed challenge to New York’s ban on assisted suicide.<sup>75</sup> At the time, seriously ill New Yorkers could choose to end their lives by rejecting lifesaving treatment, but state laws prevented them from electing physician-assisted suicide.<sup>76</sup> The *Vacco* Court disclaimed any equality problem

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preliminary injunction); *Poe ex rel. Poe v. Labrador*, 709 F. Supp. 3d 1169, 1200 (D. Idaho 2023) (granting preliminary injunction), *emergency stay app. granted*, 144 S. Ct. 921 (2024); *K.C. v. Individual Members of Med. Licensing Bd.*, 677 F. Supp. 3d 802, 821 (S.D. Ind. 2023) (granting preliminary injunction), *rev’d*, 121 F.4th 604, 634 (7th Cir. 2024). This winning streak for transgender plaintiffs included judges appointed by President Trump. *See, e.g.*, Rick Rojas, *Alabama’s Transgender Youth Can Use Medicine to Transition, Judge Rules*, N.Y. TIMES (May 14, 2022), <https://www.nytimes.com/2022/05/14/us/alabama-transgender-law.html> [<https://perma.cc/3EGS-HZFU>]; Clarke, *supra* note 11, at 26–27 (discussing district court opinion in favor of transgender plaintiffs in *Skremetti* by Trump appointee Judge Richardson).

<sup>66</sup> Chief Justice Roberts was joined in full by Justices Thomas, Gorsuch, Kavanaugh, and Barrett, and by Justice Alito as to Parts I and II-B.

<sup>67</sup> Justice Sotomayor was joined in full by Justice Jackson and by Justice Kagan as to Parts I–IV. Justice Kagan wrote separately to explain that she joined the main dissent only as far as the classification analysis, not the application of scrutiny, because that was the question on appeal. *Skremetti*, 145 S. Ct. at 1884–85 (Kagan, J., dissenting).

<sup>68</sup> *See id.* at 1824–25 (majority opinion).

<sup>69</sup> *Id.* at 1825.

<sup>70</sup> *Id.* at 1828 (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985)).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1829.

<sup>73</sup> *Id.*

<sup>74</sup> 521 U.S. 793 (1997).

<sup>75</sup> *See id.* at 796–97.

<sup>76</sup> *Id.*

because New York law was structured so that “[e]veryone, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment; *no one* is permitted to assist a suicide.”<sup>77</sup> The New York statutes did not infringe on fundamental rights or sort by suspect classes, the *Vacco* Court reasoned; indeed, they did not treat people differently at all.<sup>78</sup> Similarly, the *Skrmetti* Court explained, SB 1 bans medicine for “*minors* for certain *medical uses*, regardless of a minor’s sex.”<sup>79</sup>

But what to make of the statute’s use of “sex”? The government and the transgender challengers argued that SB 1 draws a facial sex classification because sex is an express criterion for the statute’s operation,<sup>80</sup> because the law turns on sex in a formal way,<sup>81</sup> and because the purpose of the law is to force minors to “appreciate” and not “disdain[] . . . their sex.”<sup>82</sup> In the paradigmatic sex-based equal protection cases, laws that treated men differently from women were deemed sex classifications.<sup>83</sup> SB 1 treats potential patients differently if they seek treatment that is “inconsistent” with the sex they were assigned at birth, according to the challengers.<sup>84</sup> A boy who was assigned male at birth can access treatment consistent with his male sex characteristics, while a boy who was assigned female cannot access the same treatment.<sup>85</sup> In the petitioners’ view, sex assigned at birth does the work of sorting minors into groups.<sup>86</sup>

The Court was not persuaded. According to the majority, “mere reference to sex” is not enough to warrant heightened scrutiny, especially “in the medical context” because “[s]ome medical treatments and procedures are uniquely bound up in sex.”<sup>87</sup> On this crucial point, the Court’s reasoning was murky. It cited *Nguyen v. INS*,<sup>88</sup> which could have been relevant because the *Nguyen* Court upheld a sex classification as a valid way to “assur[e] that a biological parent-child relationship exists.”<sup>89</sup> But

<sup>77</sup> *Id.* at 800.

<sup>78</sup> *See id.* at 799–800.

<sup>79</sup> *Skrmetti*, 145 S. Ct. at 1829. The Court has never held that classifications are mutually exclusive, so finding that the statute facially divides by age and medical use does not preclude it classifying by sex. In *Craig v. Boren*, 429 U.S. 190 (1976), for example, the first time the Court announced the intermediate scrutiny standard for sex classifications, the challenged statute classified by both age and sex. *See id.* at 191–92.

<sup>80</sup> Brief for the Petitioner at 21, *Skrmetti*, 145 S. Ct. 1816 (No. 23-477) (“SB 1’s prohibitions ‘cannot be stated without referencing sex.’” (quoting *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017))).

<sup>81</sup> *See id.* at 27–28.

<sup>82</sup> *Id.* at 27 (quoting TENN. CODE ANN. § 68-33-101(m)).

<sup>83</sup> *See, e.g., Craig*, 429 U.S. at 197–98, 210; *VMI*, 518 U.S. 515, 532, 557 (1996); *Michael M. v. Superior Court*, 450 U.S. 464, 476 (1981) (plurality opinion); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982).

<sup>84</sup> Brief for the Petitioner, *supra* note 80, at 21.

<sup>85</sup> *Id.* at 21–22.

<sup>86</sup> *See id.* at 22.

<sup>87</sup> *Skrmetti*, 145 S. Ct. at 1829.

<sup>88</sup> 533 U.S. 53 (2001).

<sup>89</sup> *Id.* at 62.

the *Skrmetti* Court did not cite *Nguyen*'s language about biology, only its reminder that "gender specific terms can mark a permissible distinction."<sup>90</sup> And the *Nguyen* Court reasoned this way after it found a sex classification, as part of its heightened scrutiny analysis, not at the threshold question of whether a classification existed.<sup>91</sup> In *Skrmetti*, the Court concluded instead that "[i]n the medical context, the mere use of sex-based language" is not a sex classification, so SB 1 did not warrant heightened scrutiny in the first place.<sup>92</sup> Without more analysis defining the contours of "the medical context," or explaining why SB 1's use of "sex" is a "mere reference," the scope of the rule is unclear.

Having reached its holding, the Court began rejecting counterarguments. As the Court weighed claims that SB 1 turns on inconsistency with sex,<sup>93</sup> that it hides sex classifications in abstract language,<sup>94</sup> and that it enforces sex conformity,<sup>95</sup> it emphasized SB 1's medical nature.<sup>96</sup> The majority engaged the dissent in a dizzying, at times befuddling, contest of formal logic. The resulting legal analysis reads like an exercise in judicial compromise, but not judicial craft.<sup>97</sup>

The most important objection was that SB 1 "turns on sex" as a matter of constitutional law,<sup>98</sup> and by analogy to transgender employment protections under Title VII of the Civil Rights Act.<sup>99</sup> In *Bostock v. Clayton County*,<sup>100</sup> Justice Gorsuch wrote that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."<sup>101</sup> *Bostock*'s highly formalistic reasoning considered a hypothetical employer of two women who were identical except that one of them was transgender.<sup>102</sup> If the employer were to fire the transgender woman and retain the other employee, it would be "penaliz[ing] a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at

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<sup>90</sup> *Skrmetti*, 145 S. Ct. at 1829 (quoting *Nguyen*, 533 U.S. at 64).

<sup>91</sup> See *Nguyen*, 533 U.S. at 62–64.

<sup>92</sup> *Skrmetti*, 145 S. Ct. at 1830.

<sup>93</sup> *Id.* at 1831.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1832.

<sup>96</sup> See *id.* at 1829–32.

<sup>97</sup> Justice Barrett, joined by Justice Thomas, and Justice Alito, writing alone, said in their respective concurrences that they would have reached the question of whether transgender individuals constitute a suspect class, and what level of scrutiny to apply to state action that distinguishes on the basis of transgender identity. See *id.* at 1849–50, 1855 (Barrett, J., concurring); *id.* at 1867 (Alito, J., concurring in part and concurring in the judgment).

<sup>98</sup> See *id.* at 1830 (majority opinion).

<sup>99</sup> See *id.* at 1834–35.

<sup>100</sup> 140 S. Ct. 1731 (2020).

<sup>101</sup> *Id.* at 1741.

<sup>102</sup> See *id.* at 1741–42. A transgender woman is a woman who was assigned male at birth.

birth.”<sup>103</sup> If you “change one thing at a time,” *Bostock* instructed, then “the outcome changes.”<sup>104</sup>

The *Skrametti* dissent urged that SB 1 violates *Bostock*’s command by penalizing transgender minors “for traits or actions that it tolerates” in others.<sup>105</sup> Justice Sotomayor raised the example of a doctor considering hormone therapy to treat unwanted breast tissue for a teenage patient. To know whether prescribing hormones is permitted, the doctor would need to know the patient’s sex.<sup>106</sup> A patient assigned male at birth could receive treatment, but “a child identified as female at birth” — a transgender boy — “experiencing the same (or more) distress” could not access “the same prescription.”<sup>107</sup> On this view, the sex of the patient would seem to determine the operation of the law.<sup>108</sup>

In response, the Court accused the dissent of misunderstanding the meaning of “medical treatment.”<sup>109</sup> It suggested that “treatment” incorporates both the drug and “medical concern” it addresses, so that a transgender boy who receives puberty blockers to treat gender dysphoria “receives a different medical treatment” than a cisgender boy who receives puberty blockers to treat precocious puberty.<sup>110</sup> On the Court’s account, sex is not an independent variable because it is linked inextricably with diagnosis. If sex is embedded in medical treatment classifications, then SB 1’s line drawing is not a legislative choice. It’s simply a reference to medical decisions about drugs and their indications.

Once the Court determined that SB 1 classifies only by age and medical use, it briefly considered whether the law classifies by transgender status. Here the majority reasoned by extended analogy to *Geduldig v. Aiello*, the 1974 case we encountered earlier, which held that pregnancy discrimination does not always classify by sex.<sup>111</sup> That case arose when a woman suffered a miscarriage after an accident and attempted to

<sup>103</sup> *Id.* at 1741.

<sup>104</sup> *Id.* at 1739.

<sup>105</sup> *Skrametti*, 145 S. Ct. at 1875 (Sotomayor, J., dissenting) (quoting *Bostock*, 140 S. Ct. at 1741); *see id.* at 1875 n.9 (disputing Justice Thomas’s and Justice Alito’s respective analyses of the differing wording between Title VII and the Equal Protection Clause); *see also* Clarke, *supra* note 23, at 17 (explaining that *Bostock*’s but-for standard originated in equal protection law).

<sup>106</sup> *See Skrametti*, 145 S. Ct. at 1873 (Sotomayor, J., dissenting).

<sup>107</sup> *Id.*

<sup>108</sup> As the dissent notes, the district court and circuit court reached different conclusions on the merits but seemed to agree that SB 1 turns on sex. *See id.* at 1871–72.

<sup>109</sup> *Id.* at 1830 (majority opinion). Note that the Court did not suggest that *Bostock*’s logic is limited to the statutory setting where it originated. Instead, the Court distinguished the reasoning and left *Bostock*’s application to equal protection for another day. *See id.* at 1834–35.

<sup>110</sup> *Id.* at 1830.

<sup>111</sup> *See* 417 U.S. 484, 496 n.20 (1974). As Justice Sotomayor noted in dissent, “[c]riticizing *Geduldig* has . . . become a cottage industry.” *Skrametti*, 145 S. Ct. at 1880 (Sotomayor, J., dissenting) (quoting Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 (1984)). For excellent examples, see Siegel, *supra* note 25, at 189; Siegel, Mayeri & Murray, *supra* note 26, at 75; Cahill, *Footnote*, *supra* note 21 (manuscript at 1).

enroll in California’s temporary disability insurance program.<sup>112</sup> The program categorically denied coverage for disabilities related to normal pregnancy.<sup>113</sup> The Court reasoned that the policy did not classify by sex because it differentiated between pregnant women on the one hand, and non-pregnant men and women on the other.<sup>114</sup>

The *Skrmetti* Court similarly found that SB 1 turned on gender dysphoria, not transgender identity.<sup>115</sup> According to the majority, transgender kids could not receive treatment for gender dysphoria, but transgender kids and cisgender kids could receive treatment for other diagnoses, meaning that the law did not draw a line between trans and cis minors.<sup>116</sup> Because SB 1 did not classify by transgender status, there was no need to decide what level of scrutiny to apply when the government does set transgender people apart.<sup>117</sup>

All that remained was the application of rational basis review to determine if “any reasonably conceivable state of facts” supported the state’s reasoning.<sup>118</sup> The Court pointed to the statute’s extensive list of legislative findings, and it left SB 1 standing.<sup>119</sup> To the dissent, this was a form of doctrinal malpractice. Because Justice Sotomayor believed that SB 1 classified by sex, she insisted that it should have gotten intermediate scrutiny like all sex-based distinctions,<sup>120</sup> and that deviating from that standard was both “indefensible” and “extraordinarily consequential.”<sup>121</sup>

Justice Sotomayor wanted to understand why SB 1’s medical content could not be evaluated as a part of heightened scrutiny. Prior to *Skrmetti*, the Court had sustained sex distinctions that were rationalized by reference to biology.<sup>122</sup> In *Michael M. v. Superior Court*,<sup>123</sup> the Court upheld California’s statutory rape law, which only criminalized male perpetrators.<sup>124</sup> In a plurality opinion, Justice Rehnquist acknowledged

<sup>112</sup> Dinner, *supra* note 24, at 77–78.

<sup>113</sup> Siegel, *supra* note 25, at 192.

<sup>114</sup> See *Geduldig*, 417 U.S. at 496 n.20.

<sup>115</sup> See *Skrmetti*, 145 S. Ct. at 1833.

<sup>116</sup> *Id.* The Court conjured a strange vision of a transgender child who could theoretically receive puberty blockers or hormone treatment for reasons besides the fact that they are trans. See *id.* at 1834. As I will elaborate in Part II, this is actually not possible under SB 1 because the law turns on whether treatment supports an identity that confirms or rejects the sex a minor was assigned at birth. See *infra* notes 163–67 and accompanying text. The reasoning is also at odds with the Court’s discussion of sex classifications, where the Court found that SB 1 treats all minors equally in the sense that any minor can receive cisgender-affirming treatment and no minor can receive transgender-affirming treatment. See *Skrmetti*, 145 S. Ct. at 1830–31.

<sup>117</sup> *Skrmetti*, 145 S. Ct. at 1832–34.

<sup>118</sup> *Id.* at 1835 (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993)).

<sup>119</sup> See *id.* at 1835–36.

<sup>120</sup> See *id.* at 1872 (Sotomayor, J., dissenting).

<sup>121</sup> *Id.* at 1882.

<sup>122</sup> Cf. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

<sup>123</sup> 450 U.S. 464 (1981).

<sup>124</sup> *Id.* at 466, 476 (plurality opinion).

that the law was a “gender-based classification,”<sup>125</sup> but determined that it was tailored to the purpose of preventing pregnancy because of “the immutable physiological fact that it is the female exclusively who can become pregnant.”<sup>126</sup> Another occasion was *Nguyen*.<sup>127</sup> Scholars disagree about whether this reasoning has been passively overruled in the interim,<sup>128</sup> but at a minimum all agree that these opinions endorsed the state’s biological reasoning during the application of heightened scrutiny.<sup>129</sup> Other cases where the Court rejected biological reasoning — indeed all of the Court’s sex-based equal protection cases since the 1970s — have operated the same way.<sup>130</sup> The dissent took no issue with the idea that a statute could refer to sex or biology in tolerable ways; Justice Sotomayor’s concern was that distinguishing between tolerable and intolerable sex-related legislation is what heightened scrutiny is all about.<sup>131</sup>

The crux of the disagreement was whether SB 1 was a form of sex discrimination, or if it was a genre of medical and age discrimination that mentions sex incidentally. According to Justice Sotomayor, SB 1 is a sex classification because it defines prohibited conduct “based on” an individual’s sex assigned at birth.<sup>132</sup> The dissent feared that *Skrmetti* had opened a “medical-context-only exception” to the doctrinal structure of the Equal Protection Clause.<sup>133</sup> To the Court’s majority, “the medical context” meant that SB 1 does not classify by sex.<sup>134</sup>

If we scratch the surface, however, “the medical context” justification falls apart. Sex distinctions in the medical context, like sex distinctions everywhere else, are properly assessed under the heightened scrutiny standard. In the last analysis, SB 1 may well have survived if the Court considered it parallel to other situations where purportedly biological differences have buttressed sex distinctions. When we examine the legislative history, it becomes difficult to locate SB 1 in “the medical context” at all, since it reflects Tennessee’s policy preference that minors conform to the sex they were assigned at birth, not medical expertise

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<sup>125</sup> *Id.* at 468.

<sup>126</sup> *Id.* at 467.

<sup>127</sup> See *supra* notes 88–91 and accompanying text.

<sup>128</sup> See, e.g., Franklin, *supra* note 24, at 153–54; Naomi Schoenbaum, *Rethinking Sex as Biology Under Equal Protection*, 58 U.C. DAVIS L. REV. 905, 972 (2024); see also *supra* note 24.

<sup>129</sup> See Cary Franklin, *Biological Warfare: Constitutional Conflict over “Inherent Differences” Between the Sexes*, 2017 SUP. CT. REV. 169, 172 n.13 (2018); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 419 n.152 (1984); Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 239 (2006).

<sup>130</sup> See Clarke, *supra* note 23, at 15–16; Franklin, *supra* note 129, at 172 n.13.

<sup>131</sup> See *Skrmetti*, 145 S. Ct. at 1882–83 (Sotomayor, J., dissenting).

<sup>132</sup> *Id.* at 1879.

<sup>133</sup> *Id.*

<sup>134</sup> See *id.* at 1829–31, 1835 (majority opinion).

about healthcare. The Court wrote as if medicine was doing the sex and status classifying, not the state.

That the Court did not take the available path — applying heightened scrutiny and thereby sustaining SB 1 — should give us pause. It is not yet clear whether this move will be limited to the regulation of gender-affirming care for transgender minors, or if it signals a larger rupture with the past. If the former, as Part II will discuss, the reasoning is conclusory, relying on Tennessee’s assertions to defer to the state’s judgment. And if the latter, addressed in Part III, *Skrmetti* may augur sweeping changes to equal protection doctrine as soon as next Term.

## II. SKRMETTI AS POSTSCRIPT: DOUBLE DEFERENCE

Even if *Skrmetti*’s reasoning is limited to the facts of the case, it fails on its own terms. Equal protection doctrine and *Bostock*’s formal logic both point to facial sex and transgender status classifications in SB 1, requiring heightened scrutiny. The Court barely referenced any precedents to support its conclusions to the contrary. Instead, much of the analytical weight of the opinion rests on the bare assertion that sex categories in medicine are presumptively innocuous. The Court’s medical mystification is unpersuasive. Any suggestion that the law turns on sex or transgender status was rejected as incidental to fundamentally medical categories, which in turn warranted only cursory review. I call this sleight of hand double deference: First the Court deferred to Tennessee’s mischaracterization of SB 1, and then it compounded the error by deferring to Tennessee again in rational basis review.

This sequence of deference may be appropriate in other cases where the factual basis for reasoning about classifications is accurate. A law that regulates access to healthcare “regardless of sex,”<sup>135</sup> to use one of the dissent’s examples, would be fairly described as making a reference to sex that is not a sex classification. In *Skrmetti*, however, the Court had to distort SB 1’s text and warp its structure to make it appear to turn on medical treatment for specific diagnoses. As a regulatory scheme, SB 1 singles out transgender minors for prohibitions that other minors do not face. It is not tailored to legitimate health and safety concerns; it is tailored to Tennessee’s preference for how minors should relate to their own bodies. To enforce those judgments, the statute relies on sex categories of its own creation. It is worth unpacking each mistaken deference in turn.

Begin with the Court’s first move: to frame SB 1 as a medical regulation that does not classify by sex. The Court suggested that it “would be especially inappropriate” to apply heightened scrutiny where medical regulations make incidental reference to sex.<sup>136</sup> For support it

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<sup>135</sup> *Id.* at 1878 (Sotomayor, J., dissenting).

<sup>136</sup> *Id.* at 1829 (majority opinion).

referenced documents from the FDA about the medical necessity of distinguishing on the basis of “biological differences between men and women,” defined as “differences due to sex chromosome or sex hormones.”<sup>137</sup> The implication seems to be that SB 1 does make a sex-based distinction, but it does not warrant heightened scrutiny because medicine has particularly good reasons, perhaps biological reasons, for treating individuals differently on account of sex.

The dissent objected that existing doctrine already has a way to evaluate biological differences within heightened scrutiny.<sup>138</sup> Since the mid-1970s, the purpose of sex-based equal protection doctrine has been to rid state action of just this kind of presumption.<sup>139</sup> Lawmakers cannot base policy — medical or otherwise — on “archaic,”<sup>140</sup> “increasingly outdated,”<sup>141</sup> “old notions”<sup>142</sup> about sex roles. The law’s purpose must be judged by the standards of “today” because “new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged.”<sup>143</sup> An anti-stereotyping principle guides the Court to locate sex classifications, and to evaluate their purpose and fit.<sup>144</sup>

Nor may states rely on “archaic and overbroad generalizations”<sup>145</sup> to support an otherwise legitimate purpose. As Professor Mary Anne Case has argued, the Court has looked for “perfect prox[ies]” between sex

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<sup>137</sup> *Id.* at 1829–30 (quoting *Sex as a Biological Variable*, OFF. OF WOMEN’S HEALTH, U.S. FDA (Jan. 30, 2025), <https://www.fda.gov/consumers/about-owh/sex-biological-variable> [<https://perma.cc/GC8M-358D>]).

<sup>138</sup> *See id.* at 1882–83 (Sotomayor, J., dissenting).

<sup>139</sup> *See, e.g., VMI*, 518 U.S. 515, 541 (1996) (“State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females.’” (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982))); *see also id.* at 541–42 (“[E]qual protection principles, as applied to gender classifications, mean state actors may not rely on ‘overbroad’ generalizations to make ‘judgments about people that are likely to . . . perpetuate historical patterns of discrimination.’” (second alteration in original) (quoting and citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994))); *Hogan*, 458 U.S. at 729–30 (“By assuring that Mississippi allots more openings in its state-supported nursing schools to women than it does to men, [the university]’s admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy.”).

<sup>140</sup> *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975) (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)).

<sup>141</sup> *Craig v. Boren*, 429 U.S. 190, 198 (1976).

<sup>142</sup> *Stanton v. Stanton*, 421 U.S. 7, 10 (1975) (quoting *Stanton v. Stanton*, 517 P.2d 1010, 1012 (Utah 1974)).

<sup>143</sup> *Sessions v. Morales-Santana*, 582 U.S. 47, 59 (2017) (alteration in original) (quoting *Obergefell v. Hodges*, 576 U.S. 644, 673 (2015)).

<sup>144</sup> *See Franklin, supra* note 24, at 86; Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORN. L. REV. 1447, 1449 (2000); Siegel & Siegel, *supra* note 24, at 776; Cahill, *Irreconcilable Differences, supra* note 21, at 1097–98.

<sup>145</sup> *Schlesinger*, 419 U.S. at 508.

categories and regulatory line-drawing.<sup>146</sup> In *Frontiero v. Richardson*,<sup>147</sup> a plurality of the Court described the harm of overbreadth as “relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.”<sup>148</sup> Similarly, in *Craig v. Boren*,<sup>149</sup> the Court struck down a liquor law imposing different age requirements on men and women because sex was not an “accurate proxy for the regulation of drinking and driving.”<sup>150</sup> As sex discrimination doctrine came of age, the Court found “any irrebuttable presumption, any failure to make room for individual exceptions to general rules” constitutionally suspect.<sup>151</sup> The purpose and accomplishment of this line of cases has been to dismantle presumptions in favor of sex distinctions wherever they reside, ensuring that the state does not perpetuate derogatory or inaccurate assumptions based on sex. In *Skrmetti*, the Court appeared to abandon that commitment, at least in the nebulous “medical context.”

A deeper problem lurks in the notion that medical sex distinctions are presumptively benign, regardless of where they are evaluated doctrinally. Medical regulation of sex, like legal regulation of sex, is shaped by social and political norms outside the clinic.<sup>152</sup> To support its approach in *Skrmetti*, the Court raised the example of the FDA, which “frequently approves drugs for use by only one sex.”<sup>153</sup> The Court’s own source criticized this sex-based distinction.<sup>154</sup> In the document, the FDA expressed concern that most breast cancer treatments are only approved for women, making it harder to treat men who suffer from it too.<sup>155</sup> The agency’s point was that generalizations about breast cancer patients, stemming from stereotypical assumptions about which bodies have breast tissue, reduced medical efficacy. Even the medical

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<sup>146</sup> Case, *supra* note 144, at 1449.

<sup>147</sup> 411 U.S. 677 (1973).

<sup>148</sup> *Id.* at 687 (plurality opinion).

<sup>149</sup> 429 U.S. 190 (1976).

<sup>150</sup> *Id.* at 204; *see also* Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975) (rejecting a sex-based classification because, while it was “not entirely without empirical support,” such a classification could not be used to “denigrat[e] . . . the efforts of women”); Stanton v. Stanton, 421 U.S. 7, 14 (1975) (rejecting the use of a sex-based classification even though some of the generalizations underlying it “may be true”).

<sup>151</sup> Case, *supra* note 144, at 1451.

<sup>152</sup> *See, e.g.*, Buck v. Bell, 274 U.S. 200, 204, 207 (1927) (upholding a Virginia law allowing for the forced sterilization of those deemed “feeble-minded,” *id.* at 204, by the state).

<sup>153</sup> *Skrmetti*, 145 S. Ct. at 1830.

<sup>154</sup> *See FDA in Brief: FDA Encourages Inclusion of Male Patients in Breast Cancer Clinical Trials*, U.S. FDA (Aug. 26, 2019), <https://www.fda.gov/news-events/fda-brief/fda-brief-fda-encourages-inclusion-male-patients-breast-cancer-clinical-trials> [<https://perma.cc/M2MY-UKFX>] (“[Men] have typically not been included in clinical trials for breast cancer treatment. This has led to a lack of data, so their treatment is generally based upon studies and data collected in women.”).

<sup>155</sup> *See id.*

authorities the Court elevated above scrutiny counsel against exempting medical sex distinctions from searching review to root out stereotypes.<sup>156</sup>

More to the point, the Court's task was not to evaluate how the FDA reasons about sex, or how American or international medical communities reason about sex. It was to examine how Tennessee reasons about sex in SB 1. The Court completely ignored the fact that the statute defines sex as "immutable," binary, and "determined by anatomy and genetics."<sup>157</sup> The state did not rely on the FDA's different definition; neither should the Court. The charitable reading of this elision is that the majority did not appreciate that the Court, the FDA, and Tennessee might define "sex" differently because the Court assumed that "sex" can only be defined one way.<sup>158</sup> We cannot know the reason, but the effect was to pull SB 1 out of the normal process of constitutional evaluation under the guise of deferring to medical authority.

The remainder of the classification analysis similarly depended on contorting SB 1's plain terms and stretching its structure to characterize it as a medical classification. The Court's lesson about the meaning of "medical treatment,"<sup>159</sup> for example, is unpersuasive given that the statute never uses that term.<sup>160</sup> The Court asserted from nowhere that the law turns on medication and diagnosis<sup>161</sup> — in other words, the medical reasons for seeking healthcare. Framed this way, sex became merely a criterion of diagnosis, rather than the subject being directly regulated. The Court converted the normative purposes that animate SB 1 — whether the treatment is consistent with sex assigned at birth — into "medical concern[s]" like gender dysphoria.<sup>162</sup>

Even if the Court could justify its definition of medical treatment, SB 1 simply does not work that way. "[E]nabling a minor to identify with, or live as, a purported identity inconsistent with the minor's

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<sup>156</sup> It is difficult to believe that the Court was unaware that this source undermined its argument. Elsewhere I have discussed the use of feigned ignorance as a particular exercise of power. See Kate Redburn, *The Visibility Trap*, 89 U. CHI. L. REV. 1515, 1534 (2022) (reviewing ANNA LVOVSKY, VICE PATROL (2021)) (elaborating the concept of "[p]ower-ignorance").

<sup>157</sup> TENN. CODE ANN. § 68-33-102(9) (2025).

<sup>158</sup> That would be odd, given that the majority itself is not of one mind about how to define sex. Justice Alito defined sex in his concurrence differently than the majority opinion. He asserted that sex is "the status of having the genes of a male or female." *Skrametti*, 145 S. Ct. at 1856 (Alito, J., concurring in part and concurring in the judgment). To support this definition, he relied on dictionaries from the time of *Reed v. Reed*, 404 U.S. 71 (1971). Neither of these definitions refers to genes. They say sex is "the fact or character of being either male or female," THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1307 (1966), and "one of the two divisions of . . . human beings respectively designated male or female," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2081 (1966). Cf. Jessica A. Clarke, *Sex Assigned at Birth*, 122 COLUM. L. REV. 1821, 1859 (2022) (discussing the "imprecis[ion]" of the "assum[ption]" that there is one definition of "biological sex").

<sup>159</sup> *Skrametti*, 145 S. Ct. at 1830.

<sup>160</sup> TENN. CODE ANN. §§ 68-33-101 to -109.

<sup>161</sup> See *Skrametti*, 145 S. Ct. at 1830-31.

<sup>162</sup> See *id.* at 1830.

sex”<sup>163</sup> is not a medical diagnosis, it is a policy preference.<sup>164</sup> The statute does not turn on diagnosis — it turns on the patient’s relationship to the sex they were assigned at birth. Tennessee prevents transgender youth from accessing care because it would be contrary to the state’s desire for minors to “appreciate their sex,” and not “become disdainful of their sex.”<sup>165</sup> A transgender boy cannot access puberty blockers because he wants to live as a boy; a cisgender boy may access the same medication because Tennessee believes that he already is one. In fact, cisgender minors face no limitations on accessing the same puberty blockers, hormones, or surgery under SB 1.<sup>166</sup> Gender-affirming care for these non-transgender patients, including minors, is far more pervasive, if paradoxically less visible.<sup>167</sup>

The Court also tried to use “the medical context” to evade its own legal formalism when addressing the *Bostock* comparison directly. Considering the case of a transgender boy, the Court suggested:

If you change his biological sex from female to male, SB1 would still not permit him the hormones he seeks because he would lack a qualifying diagnosis for the testosterone . . . . The transgender boy could receive testosterone only if he had one of those permissible diagnoses. And, if he had such a diagnosis, he could obtain the testosterone regardless of his sex or transgender status.<sup>168</sup>

Not so. The Court did not “change one thing at a time,” as *Bostock* requires.<sup>169</sup> It changed the sex *and* the diagnosis of the hypothetical patient, evading *Bostock*’s logical application.

These statements also bear little resemblance to SB 1. Imagine a statute that says “puberty blockers and hormones may only be provided to minors with congenital defects, precocious puberty, disease, or physical injury.” Like SB 1, the imaginary statute excludes “gender dysphoria, gender identity disorder, [and] gender incongruence” from the

<sup>163</sup> TENN. CODE ANN. § 68-33-101(b).

<sup>164</sup> The statute only mentions gender dysphoria to clarify that it is not among the exceptions to the general prohibition on using gender affirming care to choose sex. *See id.* §§ 68-33-102(1), 68-33-103(b)(2). Those exceptions allow doctors to administer non-consensual treatments to individuals with intersex conditions to make their sex binary. *See id.* § 68-33-103(b)(1).

<sup>165</sup> *Id.* § 68-33-101(m).

<sup>166</sup> *See id.* § 68-33-103.

<sup>167</sup> *See* Theodore E. Schall & Jacob D. Moses, *Gender-Affirming Care for Cisgender People*, HASTINGS CTR. REP., May–June 2023, at 15, 15 (“[M]ost people who receive gender-affirming care are not transgender.”); *see also* Jacob D. Moses, Theodore E. Schall & Lisa Campo-Engelstein, *Unjust Discrimination Between Cisgender and Transgender Gender-Affirming Care*, 176 ANNALS INTERNAL MED. 991, 991 (2023) (describing greater accessibility of gender-affirming care treatments to cisgender patients compared to transgender patients); Brief of Experts on Gender Affirming Care as *Amici Curiae* in Support of Petitioner and Respondents in Support of Petitioner at 8, *Skremetti*, 145 S. Ct. 1816 (No. 23-477) (explaining that cisgender people receive the majority of gender-affirming care); Craig Konnoth, *The Comparator Argument in Trans-Healthcare Ban Cases*, 76 U.C. L.J. (forthcoming 2025) (manuscript at 3) (on file with the Harvard Law School Library) (same).

<sup>168</sup> *Skremetti*, 145 S. Ct. at 1834.

<sup>169</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020).

definitions of “disease” and “congenital defect.”<sup>170</sup> If a transgender boy sought hormones under that statute, it would operate as the Court described.

SB 1 looks different. It prohibits access to medicine where it will enable a minor to adopt an identity that Tennessee believes is “inconsistent” or “discordan[t]” with the sex they were assigned at birth.<sup>171</sup> A patient who seeks to conform to the sex they were assigned at birth may access the medication, but a transgender patient may not. The statute includes exceptions to this bright-line rule to account for Tennessee’s wish to empower doctors to assign a sex to patients with intersex conditions.<sup>172</sup> The transgender boy in the Court’s hypothetical is prohibited access to medication because he wishes “to identify with, or live as, a purported identity inconsistent with [his] sex.”<sup>173</sup> If he were assigned male at birth and sought hormone treatment, SB 1 would be silent. In short, there is no “qualifying diagnosis”<sup>174</sup> in SB 1, only disqualifying purposes.

And reaching this conclusion does not depend on the Court adopting any particular definition of sex. Under Tennessee’s definition, the transgender boy is designated as a girl who cannot receive puberty blockers because it would be “inconsistent with” being “female.”<sup>175</sup> If Tennessee considered him a “biological boy,” he could receive treatment consistent with being male. Even where legislatures define sex to render transgender identity illegible, the formal logic of *Bostock* leads to the same destination: SB 1 classifies by sex.<sup>176</sup>

<sup>170</sup> TENN. CODE ANN. §§ 68-33-103(b), 68-33-102(1).

<sup>171</sup> See *id.* § 68-33-103(a)(1).

<sup>172</sup> In relevant part, SB 1 states the following:

It is not a violation of subsection (a) if a healthcare provider knowingly performs, or offers to perform, a medical procedure on or administers, or offers to administer, a medical procedure to a minor if . . . [t]he performance or administration of the medical procedure is to treat a minor’s congenital defect, precocious puberty, disease, or physical injury . . .

*Id.* § 68-33-103(b)(1). Other state healthcare bans define the intersex exception with more specificity. See, e.g., ALA. CODE § 26-26-4(b) (2025) (“[A] minor born with a medically verifiable disorder of sex development, including . . . : (1) An individual born with external biological sex characteristics that are irresolvably ambiguous, including an individual born with 46 XX chromosomes with virilization, 46 XY chromosomes with under virilization, or having both ovarian and testicular tissue[, or] (2) An individual whom a physician has otherwise diagnosed with a disorder of sexual development, in which the physician has determined through genetic or biochemical testing that the person does not have normal sex chromosome structure, sex steroid hormone production, or sex steroid hormone action for a male or female.”); see also Ido Katri & Maayan Sudai, *Intersex, Trans, and the Irrationality of Gender-Affirming-Care Bans*, 134 YALE L.J. 1521, 1553 & nn.147–49 (2025) (collecting statutes).

<sup>173</sup> TENN. CODE ANN. § 68-33-103(a)(1)(A); see *Skrametti*, 145 S. Ct. at 1834.

<sup>174</sup> *Skrametti*, 145 S. Ct. at 1834.

<sup>175</sup> See TENN. CODE ANN. §§ 68-33-101(n)(1), 68-33-102(g).

<sup>176</sup> For further analysis of *Skrametti*’s *Bostock* problem, see generally Neil S. Siegel, *The Triumph of Legal Realism in United States v. Skrametti*, 2026 U. ILL. L. REV. (forthcoming 2026) (on file with the Harvard Law School Library) (quoting Amici Curiae Brief of Yale Philosophers in Support of 1) Petitioner and 2) Respondents in Support of Petitioner at 10, *Skrametti*, 145 S. Ct. 1816 (No. 23-477)).

At the same time, the definition of sex is an essential part of the statute’s structure, which the Court again mischaracterized by insisting that SB 1 turns on gender dysphoria but not on sex. The dissent pointed out that laws policing consistency with a protected characteristic must be found to turn on that characteristic, as the challengers had also argued.<sup>177</sup> Laws requiring “sex-consistent clothing”<sup>178</sup> or prohibiting attendance at a service “inconsistent with the minor’s religion,”<sup>179</sup> for example, mask sex and religious discrimination in rules that sound universal. The Court seemed to agree in principle that these kinds of “equal application” rules formally treat individuals the same way, but still warrant heightened scrutiny because they reinforce social hierarchy. The majority explained that a law banning interracial marriage — like the one rejected in *Loving v. Virginia*<sup>180</sup> — could not be saved by prohibiting “any person from marrying an individual of a different race.”<sup>181</sup>

Restating a principle is not the same as following where it leads. The Court contended that “a prohibition on the prescription of puberty blockers and hormones to ‘[e]nabl[e] a minor to identify with, or live as, a purported identity inconsistent with the minor’s sex’ is simply a prohibition on the prescription of puberty blockers and hormones to treat gender dysphoria, gender identity disorder, or gender incongruence.”<sup>182</sup> With that one assertion, the Court laundered a sex classification into a law that turns on gender dysphoria.

The problem is that “inconsisten[cy] with . . . sex”<sup>183</sup> is not the same as treating gender dysphoria, because “inconsistency with sex” has no meaning without defining sex in the first place.<sup>184</sup> Tennessee’s definition categorizes individuals according to the sex they were assigned at birth.<sup>185</sup> Transgender people “move away from” that designation, sometimes through changes in the social signifiers of sex like names and gender pronouns, and sometimes through changes to their bodies.<sup>186</sup> A transgender minor therefore defines their sex differently than Tennessee does, and so could easily take the position that accessing gender-

<sup>177</sup> See *Skrmetti*, 145 S. Ct. at 1873 (Sotomayor, J., dissenting); Brief for the Petitioner, *supra* note 80, at 21.

<sup>178</sup> *Skrmetti*, 145 S. Ct. at 1874 n.8. (Sotomayor, J., dissenting).

<sup>179</sup> *Id.* at 1873 (emphasis omitted).

<sup>180</sup> 388 U.S. 1 (1967).

<sup>181</sup> *Skrmetti*, 145 S. Ct. at 1831.

<sup>182</sup> *Id.* (alterations in original) (citation omitted) (quoting TENN. CODE ANN. § 68-33-103(a)(1)(A) (2025)).

<sup>183</sup> *Id.* (quoting TENN. CODE ANN. § 68-33-103(a)(1)).

<sup>184</sup> Justice Alito seemed to recognize this problem in his concurrence when he discussed the question of whether SB 1 turns on transgender status or gender identity. See *id.* at 1860 (Alito, J., concurring in part and concurring in the judgment).

<sup>185</sup> TENN. CODE ANN. § 68-33-102(9).

<sup>186</sup> Here I rely on Professor Susan Stryker’s definition of transgender as “people who move away from the gender they were assigned at birth, people who cross over (*trans-*) the boundaries constructed by their culture to define and contain that gender.” SUSAN STRYKER, *TRANSGENDER HISTORY* 1 (2008).

affirming care is essential to living “consistently” with their sex. Only by combining Tennessee’s definition of sex with the statute’s substantive provisions does SB 1 become a bar to accessing transgender care. It amounts to a rule that everyone can be cisgender, and no one can be transgender — a kind of discrimination the majority explicitly disavowed.<sup>187</sup>

After deferring to Tennessee’s claim that SB 1 merely engages in medical line-drawing, the Court doubled its error by offering Tennessee’s justifications for the statute its most permissive level of review.<sup>188</sup> This second deference, asking only if the state had a “reasonably conceivable” explanation,<sup>189</sup> meant that SB 1’s political provenance remained out of frame. Turning to it now, we can see that SB 1 reflects negative judgments about transgender life, not medical judgments about transgender healthcare.<sup>190</sup> In crafting the statute, lawmakers relied on the apparently neutral and objective register of medicine to express their discomfort with transgender life. *Skrmetti* validated this feint to medicine by deferring to it in both the classification and review stages of analysis.

The conflict began in 2022, when conservative provocateur Matt Walsh began posting criticisms of Vanderbilt University Medical Center (VUMC)’s transgender children’s clinic to X (formerly Twitter) and YouTube.<sup>191</sup> That year Walsh had declared an “all out assault on gender

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<sup>187</sup> See *Skrmetti*, 145 S. Ct. at 1831 (“The antiscegenation law that this Court struck down in *Loving v. Virginia* would not have shed its race-based classification had it, for example, prohibited ‘any person from marrying an individual of a different race.’” (citation omitted)); see also *supra* notes 178–81 and accompanying text.

<sup>188</sup> In his concurrence, Justice Thomas shared his belief that the Court “should [not] defer to so-called expert consensus” about medical treatment for transgender minors. *Skrmetti*, 145 S. Ct. at 1840 (Thomas, J., concurring). And yet by invoking the FDA rather than SB 1, the majority that Justice Thomas joined partook of its own deference to an apparent expert consensus in place of Tennessee’s “legislative choices.” See *id.* at 1829–30 (majority opinion).

<sup>189</sup> *Id.* at 1835 (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993)).

<sup>190</sup> There is a certain irony to the Court’s reasoning from medicine. In the classification analysis, the Court deferred to medical authority, but in the application of rational basis review, the Court deferred to medical uncertainty. Compare *id.* at 1829–30 (appealing to federal medical agency regarding “biological differences,” *id.* at 1829, and “medical treatment[s],” *id.* at 1830), with *id.* at 1836–37 (contending that SB 1 “responds directly to [expert] uncertainty” concerning “the risks and benefits” of gender-affirming treatments, *id.* at 1836, and invoking debates abroad “to demonstrate the open questions regarding basic factual issues before medical authorities and other regulatory bodies,” *id.* at 1837). In both cases, the Court in fact deferred to Tennessee. The Court cited contested studies from the United Kingdom “not for guidance they might provide on the ultimate question of United States law, but to demonstrate the open questions regarding basic factual issues before medical authorities and other regulatory bodies. Such uncertainty ‘afford[s] little basis for judicial responses in absolute terms.’” *Id.* at 1837 (alteration in original) (citation omitted) (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)).

<sup>191</sup> See Matt Walsh (@MattWalshBlog), X (Sep. 20, 2022, at 15:55 ET), <https://x.com/mattwalshblog/status/1572313523232931840> [<https://perma.cc/PN39-KKEP>]; MATT WALSH, *Matt Walsh Investigates Nashville Gender Clinic* (YouTube, Sep. 20, 2022), <https://www.youtube.com/watch?v=RDhshvoJnqU> [<https://perma.cc/7JLB-JZ7Y>].

ideology,”<sup>192</sup> and the *New Republic* named him “Transphobe of the Year.”<sup>193</sup> Walsh alleged that the hospital “drugs, chemically castrates, and performs double mastectomies on minors.”<sup>194</sup> He had previously used his platform on the Daily Wire to levy similar accusations against Boston Children’s Hospital, leading to threats of violence against practitioners and a bomb scare that evacuated the hospital.<sup>195</sup> Walsh is well known for popularizing the accusation that gay people are “groomers” who target children,<sup>196</sup> and he is on the record calling for gender-affirming medicine to be punished by the death penalty.<sup>197</sup>

In response to the posts, Tennessee Governor Bill Lee called for an investigation into the Vanderbilt clinic,<sup>198</sup> and the state Attorney General John Skrmetti also launched an inquiry.<sup>199</sup> The clinic issued a statement confirming that it did not perform any genital surgeries on transgender minors,<sup>200</sup> in line with medical standards.<sup>201</sup> Walsh capitalized on the momentum to organize a “Rally to End Child

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<sup>192</sup> Video posted by Daily Wire (@realDailyWire), X (Feb. 23, 2023, at 14:12 ET), <https://x.com/realDailyWire/status/1628835106956754952> [<https://perma.cc/LF4A-CCJA>] (describing his decision in 2022 to wage the “all out assault”).

<sup>193</sup> Indigo Olivier, *Transphobe of the Year: Matt Walsh*, NEW REPUBLIC (Dec. 27, 2022), <https://newrepublic.com/article/169609/transphobe-year-matt-walsh> [<https://perma.cc/79QM-3WJQ>].

<sup>194</sup> Matt Walsh (@MattWalshBlog), X (Sep. 20, 2022, at 15:54 ET), <https://x.com/mattwalshblog/status/1572313369528635392?s=42> [<https://perma.cc/ZN4H-ZPVZ>].

<sup>195</sup> Sam Stockard & Anita Wadhvani, *Republican Lawmakers Plan to Strip Vanderbilt Hospital of Child Transgender Surgeries*, TENN. LOOKOUT (Sep. 21, 2022, at 20:17 ET), <https://tennesseelookout.com/2022/09/21/republican-lawmakers-plan-to-strip-vanderbilt-hospital-of-child-transgender-surgeries> [<https://perma.cc/SC7W-Q6UW>].

<sup>196</sup> See Media Matters Staff, *Daily Wire’s Matt Walsh Calls LGBTQ Teachers “Groomers,” Adding, “There Is No Heterosexual Person Demanding This Sort of Thing on the Other Side,”* MEDIA MATTERS FOR AM. (May 17, 2023, at 15:09 ET), <https://www.mediamatters.org/matt-walsh/daily-wires-matt-walsh-calls-lgbtq-teachers-groomers-adding-there-no-heterosexual-person> [<https://perma.cc/9CPN-9CNY>].

<sup>197</sup> Media Matters Staff, *Daily Wire Host: Doctors Who Provide Gender-Affirming Care Should Be Executed*, MEDIA MATTERS FOR AM. (Feb. 2, 2023, at 15:13 ET), <https://www.mediamatters.org/matt-walsh/daily-wire-host-doctors-who-provide-gender-affirming-care-should-be-executed> [<https://perma.cc/PN7H-XKC2>].

<sup>198</sup> Stockard & Wadhvani, *supra* note 195.

<sup>199</sup> Lil Kalish, *This State Tried to Pass Anti-Trans Laws for Years. Then a Right-Wing Media Star Got Involved.*, HUFFINGTON POST (Oct. 31, 2023, at 15:21 ET), [https://www.huffpost.com/entry/matt-walsh-anti-trans-push-tennessee\\_n\\_653fd5e8e4bo32ae1c9c0497](https://www.huffpost.com/entry/matt-walsh-anti-trans-push-tennessee_n_653fd5e8e4bo32ae1c9c0497) [<https://perma.cc/P2G4-9FC5>]; Kelly Broderick et al., *Tennessee Lawmakers Weigh in on Vanderbilt Providing Gender-Affirming Care*, NEWSCHANNEL 5 NASH. (WTVF) (Sep. 22, 2022, at 06:28 ET), <https://www.newschannel5.com/news/vanderbilt-university-medical-center-at-center-of-social-media-controversy-surrounding-transgender-clinic> [<https://perma.cc/F23T-5NXC>].

<sup>200</sup> Andy Rose, *Vanderbilt Transgender Health Clinic Suspends Gender-Affirming Surgery for Minors*, CNN (Oct. 9, 2022, at 02:27 ET), <https://www.cnn.com/2022/10/09/us/vanderbilt-suspends-gender-affirming-surgery-minors/index.html> [<https://perma.cc/B7TJ-VYAK>].

<sup>201</sup> Kalish, *supra* note 199. The drumbeat became so intense that the hospital announced a pause to these non-existent surgeries. See Rose, *supra* note 200; Kalish, *supra* note 199.

Mutilation,”<sup>202</sup> where he referred to ending care at VUMC as a battle between good and evil to defeat the “woke mind virus infecting children’s hospitals.”<sup>203</sup> Several state lawmakers also spoke at the rally, and within two weeks they introduced SB 1 in both chambers, citing Walsh’s influence.<sup>204</sup>

Over five hearings before Tennessee House and Senate Committees, no medical or scientific experts in transgender care testified on behalf of the bill.<sup>205</sup> The only doctor to support it had no experience in transgender medicine and admitted, “I’m getting my information from the Heritage Foundation.”<sup>206</sup> The Tennessee House Committee on Health did hear from Matt Walsh, however. Walsh’s testimony rested on his opinion that sex cannot change. He claimed that “children are being coerced . . . in pursuit of a goal that can never be attained.”<sup>207</sup> He elaborated that the positive effects of gender-affirming care were “utterly, totally baseless.”<sup>208</sup>

Walsh’s claim to be defending biological “truths”<sup>209</sup> expressed his belief that being transgender is wrong, if not impossible. He posited that “the girl who gets the double mastectomy is no closer to being a boy after getting the procedure than she was before. She’s still a girl and will always be a girl, just now a mutilated and damaged one.”<sup>210</sup> Another representative repeated a similar sentiment when he said in a

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<sup>202</sup> Hannah Herner, *Anti-Trans Rally Led by Matt Walsh Brings Right-Wing Media Stars to Nashville*, NASH. SCENE (Oct. 21, 2022), [https://www.nashvillescene.com/news/pithinthewind/anti-trans-rally-led-by-matt-walsh-brings-right-wing-media-stars-to-nashville/article\\_62c08340-5160-11ed-81bb-53478d4387aa.html](https://www.nashvillescene.com/news/pithinthewind/anti-trans-rally-led-by-matt-walsh-brings-right-wing-media-stars-to-nashville/article_62c08340-5160-11ed-81bb-53478d4387aa.html) [https://perma.cc/W2VM-8QAA].

<sup>203</sup> *Id.*; Daily Wire (@realDailyWire), X (Feb. 23, 2023, at 14:09 ET), <https://x.com/realDailyWire/status/1628834365319905280> [https://perma.cc/A42S-EH6L].

<sup>204</sup> Kalish, *supra* note 199; see also Jack Johnson & William Lamberth, *Tennessee Leads The Way: The Continued Fight for Our Children*, DAILY WIRE (Nov. 27, 2024), <https://www.dailywire.com/news/tennessee-leads-the-way-the-continued-fight-for-our-children> [https://perma.cc/8ZTA-T59S].

<sup>205</sup> Across two state senate hearings and three state house hearings, only two doctors testified. Dr. Allison Stiles, a pediatrician who treats transgender patients, opposed the bill. See Lil Kalish, *Tennessee Is Considering Banning Gender-Affirming Care as Child Abuse. Doctors, Parents, and Advocates Are Speaking Out*, BUZZFEED NEWS (Feb. 1, 2023, at 20:18 ET), <https://www.buzzfeednews.com/article/lilikalish/tennessee-transgender-gender-affirming-care-abuse> [https://perma.cc/C66Y-KMAD]. Dr. Omar Hamada, an OB/GYN with no specialty treating trans patients, testified in support of the bill before the House and Senate committees. See Memorandum of Law in Support of Motion for Preliminary Injunction at 6–7, 7 n.9, L.W. *ex rel.* Williams v. Skrmetti, 679 F. Supp. 3d 668 (M.D. Tenn. 2023) (No. 23-cv-376); *Hearing on H.B. 1 Before the H. Health Comm.*, 113th Gen. Assemb., at 57:52–1:04:20 (Tenn. 2023) (testimony of Dr. Omar Hamada), [https://tnga.granicus.com/player/clip/27453?view\\_id=703&redirect=true](https://tnga.granicus.com/player/clip/27453?view_id=703&redirect=true) [https://perma.cc/2U7T-FVGB].

<sup>206</sup> Dr. Omar Hamada made this admission in response to a representative questioning his characterization of gender-affirming care in Finland. *Hearing on H.B. 1 Before the H. Health Comm.*, *supra* note 205, at 1:02:27 (statement of Dr. Omar Hamada).

<sup>207</sup> *Id.* at 16:20 (statement of Matt Walsh).

<sup>208</sup> *Id.* at 43:00.

<sup>209</sup> *Id.* at 17:21.

<sup>210</sup> *Id.* at 16:26.

hearing, “our preacher would say, if you don’t know what you are — a boy or girl, male or female — just go in the bathroom and take your clothes off and look in the mirror, and you’ll find out.”<sup>211</sup> Tennessee echoed this reasoning in its brief before the Sixth Circuit when it wrote that “[n]o amount of puberty blockers, hormones, or surgeries will ever transform a male into a female. It is biologically impossible.”<sup>212</sup>

By his own admission, Walsh is not an expert on transition medicine.<sup>213</sup> When pressed by a representative, he suggested that his relevant background to speak on the issue “is that I’m a human being with a brain and common sense and I have a soul and so therefore I think it’s a really bad idea to chemically castrate children.”<sup>214</sup> Using inaccurate and inflammatory language, Walsh demonstrated that his position was rooted in his preference that sex be fixed at birth rather than any rigorous or credible exercise of judgment or expertise. Tennessee adopted Walsh’s logic in its final bill — redefining the legal meaning of “sex” to exclude transgender people, and then framing transgender identity and healthcare as self-evident problems to be solved.<sup>215</sup> Before the Supreme Court, the state obscured Walsh’s role while relying on his “evidence,” arguing that SB 1 “reflect[ed] lawmakers’ well-informed judgment about the rise, risks, and disputed benefits of gender-transition procedures.”<sup>216</sup>

Tennessee could have tailored SB 1 to any of the health and safety concerns expressed by critics of transgender medicine and people who have detransitioned, including stronger oversight to safeguard informed consent, proper timelines, and appropriate dosages. It could have taken steps to ensure that financial pressure does not incentivize unnecessary healthcare, and it could have addressed scientific uncertainty by funding

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<sup>211</sup> *Hearing on H.B. 1 Before the H. Health Subcomm.*, 113th Gen. Assemb., at 1:07:09 (Tenn. 2023) (statement of Rep. Paul Sherrell questioning H.B. 1’s sponsor), [https://tnga.granicus.com/player/clip/27344?view\\_id=703&meta\\_id=690241&redirect=true](https://tnga.granicus.com/player/clip/27344?view_id=703&meta_id=690241&redirect=true) [https://perma.cc/SV4Q-R3FP].

<sup>212</sup> Brief of Defendants-Appellants at 35–36, *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023) (No. 23-5600).

<sup>213</sup> He admitted he had no medical background. *Hearing on H.B. 1 Before the H. Health Comm.*, *supra* note 205, at 52:46 (statement of Matt Walsh).

<sup>214</sup> *Id.* at 47:44.

<sup>215</sup> See TENN. CODE ANN. § 68-33-102(9) (2025) (defining “sex” as “a person’s immutable characteristics of the reproductive system . . . existing at the time of birth”). SB 1 cites increased access to medicine as a reason for the state to intervene, and repeats popular right-wing accusations that rapacious pharmaceutical companies are pushing sex transition on unwitting children to boost profits, and perhaps to satisfy prurient interests. See *id.* § 68-33-101(i)–(l). Among the legislature’s published findings in support of the bill was the notion that “healthcare providers in this state have posted pictures of naked minors online to advertise such surgeries,” *id.* § 68-33-101(l), suggesting that doctors and nurses exploit young people’s bodies. See generally Joanna Wuest, *Exposing the Gender Identity Industry: Anti-Gender and the Paranoid Critique of Trans Medicine*, SIGNS (forthcoming 2026) (on file with the Harvard Law School Library) (examining how anti-pharma sentiment founded in legitimate concerns about exploitative healthcare practices have been redirected into ideological anti-trans politics).

<sup>216</sup> Brief for Respondents at 50, *Skrmetti*, 145 S. Ct. 1816 (No. 23-477).

studies.<sup>217</sup> Instead, the legislature refashioned outrage, animosity, and disgust into the ostensibly neutral register of science.

*Skrmetti* never discussed these questions of fit because it reviewed SB 1 under the Court's most deferential standard.<sup>218</sup> The Court was aware of reasons to push a bit harder on Tennessee, as the majority acknowledged from the outset that "[l]eft untreated, gender dysphoria may result in severe physical and psychological harms."<sup>219</sup> The possibility of such significant harm is one reason why, in the past, the Court has carefully evaluated the purpose and scope of challenged laws. This is standard fare under intermediate scrutiny, and it sometimes features in a genre of rational basis review scholars call "rational basis with bite."<sup>220</sup> When the rights of marginalized people, including undocumented immigrants,<sup>221</sup> people with disabilities,<sup>222</sup> gay men, lesbians,<sup>223</sup> and other non-normative families are at stake, the Court sometimes looks more closely at legislative purposes and the means used to achieve

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<sup>217</sup> Fears that small portions of a federal grant to fight HIV were going to a Trans Task Force and abortion services prompted the state government to reject over eight million dollars in federal aid. Ariana Eunjung Cha & Fenit Nirappil, *HIV at Center of Latest Culture War After Tennessee Rejects Federal Funds*, WASH. POST (Jan. 26, 2023), <https://www.washingtonpost.com/health/2023/01/26/tennessee-federal-hiv-funding> [<https://perma.cc/RH3P-78TY>]; Benjamin Ryan, *How Tennessee Axed Millions in HIV Funds amid Scrutiny from Far-Right Provocateurs*, NBC NEWS (Feb. 2, 2023, at 12:32 ET), <https://www.nbcnews.com/nbc-out/out-news/tennessee-axed-millions-hiv-funds-scrutiny-far-right-provocateurs-rcna67769> [<https://perma.cc/Q6CS-S6RC>]. The federal government circumvented the state government to ensure that funds were allocated. Benjamin Ryan, *Tennessee Blocked \$8 Million for HIV, Now Ends Up with \$13 Million, Stunning Advocates*, NBC NEWS (Apr. 21, 2023, at 14:26 ET), <https://www.nbcnews.com/nbc-out/out-health-and-wellness/tennessee-blocked-8-million-hiv-now-ends-13-million-stunning-advocates-rcna80814> [<https://perma.cc/F88Z-LJJY>]. In 2025, Tennessee passed the Medical Ethics Defense Act, which enables healthcare providers to deny service on religious, ethical, or moral grounds. See Medical Ethics Defense Act, Pub. Ch. No. 266, § 1 (2025) (codified as amended at TENN. CODE ANN. § 63-1-903(a)(1)). Recently a doctor in the state refused to serve a pregnant woman because she was not married. Rachel Wells, *Pregnant Mother in Tennessee Denied Care for Being Unmarried*, NASH. BANNER (July 20, 2025), <https://nashvillebanner.com/2025/07/20/doctor-denies-pregnant-woman-care> [<https://perma.cc/7Q6W-K3XC>]; Chantelle Lee, *A Woman Says She Was Denied Prenatal Care for Being Unmarried Under a New Tennessee Law. Here's What to Know About It*, TIME (July 28, 2025, at 15:57 ET), <https://time.com/7306009/tennessee-prenatal-care-medical-ethics-defense-act> [<https://perma.cc/H6SG-ZN3L>].

<sup>218</sup> See *Skrmetti*, 145 S. Ct. at 1829, 1835.

<sup>219</sup> *Id.* at 1824.

<sup>220</sup> See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 760 (2011).

<sup>221</sup> See *Plyler v. Doe*, 457 U.S. 202, 228–30 (1982) (applying something more than ordinary rational basis review and holding that a Texas statute withholding funds from school districts that educated children of aliens violated the Equal Protection Clause).

<sup>222</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–50 (1985) (applying rational basis with bite to a statute requiring a special use permit for a proposed group home for people with intellectual disabilities).

<sup>223</sup> See *Romer v. Evans*, 517 U.S. 620, 635 (1996) (applying rational basis with bite to a Colorado amendment to its constitution which precluded all legislative, executive, or judicial action designed to protect homosexual and bisexual individuals).

them.<sup>224</sup> “For if the constitutional conception of ‘equal protection of the laws’ means anything,” the Court has instructed in expounding this standard, “it must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”<sup>225</sup> By using the most deferential version of rational basis, the *Skrametti* Court skirted any significant engagement with SB 1’s legislative history and avoided the state’s clear intent to treat transgender kids differently.

In full context, *Skrametti* evinces a double deference: deference to Tennessee’s policy judgments to mischaracterize SB 1 as sex neutral, and deference again by applying rational basis review. The Court acted as if it was adjudicating a medical debate over transgender care rather than the legal dispute before it.<sup>226</sup> As we have seen, SB 1 does not wade into the medicine of gender-affirming care, barely mentions diagnoses, never defines specific drugs. The question before the Court was not whether a state may regulate gender-affirming care for minors in general, but whether SB 1 was an appropriate way to do so. The effect was to obscure the obvious ways that SB 1 classifies by sex and transgender status, and to evade the constitutional mandate to scrutinize the statute further.

### III. SKRAMETTI AS PRELUDE

*Skrametti*’s end-run around heightened scrutiny could be limited to bans on gender-affirming care for transgender minors, but it could also announce a new path through sex equality law, moving the locus for considering medical or biological justifications for sex classifications from heightened scrutiny to the threshold question of whether a classification exists. It all depends on the scope of “the medical context” going forward. If the Court resorts to the same double deference in the athlete cases, it could apply rational basis review to statutes explicitly intended to discriminate against transgender girls. And the Court’s avoidance

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<sup>224</sup> See, e.g., U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 533–38 (1973). Scholars call this “rational basis with bite,” e.g., Yoshino, *supra* note 220, at 760, but the Court has not used that phrase.

<sup>225</sup> *Moreno*, 413 U.S. at 534.

<sup>226</sup> Public commentary on the decision has likewise mischaracterized *Skrametti* as turning on scientific, rather than legal, questions. See, e.g., Megan McArdle, Opinion, *The ACLU Bet Big on a Trans Rights Case. Its Loss Was Predictable.*, WASH. POST (June 21, 2025), <https://www.washingtonpost.com/opinions/2025/06/21/supreme-court-youth-gender-transition-ban> [https://perma.cc/PED3-EX6S] (arguing that medical uncertainty undermined the plaintiffs’ arguments); Nicholas Confessore, *What to Know About the Transgender Rights Movement’s Supreme Court Gamble*, N.Y. TIMES MAG. (June 19, 2025), <https://www.nytimes.com/2025/06/19/magazine/transgender-supreme-court-skrametti-takeaways.html> [https://perma.cc/SC7D-QRQZ] (same). *But cf.* Jeannie Suk Gersen, *Was a Right to Gender-Affirming Care for Minors Possible?*, NEW YORKER (June 20, 2025), <https://www.newyorker.com/news/the-lede/was-a-right-to-gender-affirming-care-for-minors-possible> [https://perma.cc/Y7FU-NC4J] (describing legal strengths of plaintiffs’ case).

when it comes to anti-transgender discrimination could pave the way for a similar retreat from sex equality more broadly.

### A. *Double Deference after Skrmetti*

The fuzzy scope of *Skrmetti*'s holding may come into focus over the next year. Shortly after handing down *Skrmetti*, the Court granted certiorari in *Little v. Hecox* and *West Virginia v. B.P.J.*, two cases about categorical bans on trans girls playing women's sports in Idaho and West Virginia.<sup>227</sup> Both states define "female" to exclude transgender girls, and then limit women's sports to "females" so defined.<sup>228</sup> Two transgender girls challenged the laws.<sup>229</sup> They brought equal protection challenges which did not object to separating men's and women's sports, but asked that they be allowed to play with other girls.<sup>230</sup> Lower courts granted preliminary injunctive relief allowing them to play.<sup>231</sup>

Idaho and West Virginia do not consider their laws discriminatory because they sort individuals by "biological sex."<sup>232</sup> The states argue that the laws reflect "inherent differences" between men and women,<sup>233</sup> that they do not classify by transgender status because not all transgender people are negatively affected,<sup>234</sup> and that transgender

<sup>227</sup> Petition for a Writ of Certiorari at 3, *Little v. Hecox*, No. 24-38 (U.S. filed July 11, 2024); Petition for a Writ of Certiorari at 7, *West Virginia v. B.P.J.*, No. 24-43 (U.S. filed July 11, 2024).

<sup>228</sup> See IDAHO CODE § 33-6203 (2025); W. VA. CODE §§ 18-2-25d(b)(2), (c)(2) (2025). Idaho is more roundabout than West Virginia. The statute refers to "biological sex," IDAHO CODE § 33-6203, which is verified by reference to characteristics that transgender people can't change. See *id.* Elsewhere state law defines "female" as "an individual who has, had, will have, or, but for a developmental or genetic anomaly or historical accident, would have the reproductive system that at some point produces, transports, and utilizes eggs for fertilization." IDAHO CODE § 73-114(2)(c) (2025). West Virginia's sports ban simply defines "female" itself. W. VA. CODE § 18-2-25d(b)(2) (2025). The Idaho sports statute also includes an enforcement provision suggesting that students have their "reproductive anatomy" examined and reported to school officials. See IDAHO CODE § 33-6203(3) (2025).

<sup>229</sup> Another named plaintiff in *Hecox*, Jane Doe, was a cisgender woman who "feared that her sex would be 'disputed' under the Act due to her masculine presentation." *Hecox v. Little*, 104 F.4th 1061, 1072 (9th Cir. 2024), *cert. granted*, No. 24-38, 2025 WL 1829165 (U.S. July 3, 2025).

<sup>230</sup> See *Hecox v. Little*, 479 F. Supp. 3d 930, 971, 988 (D. Idaho 2020); *B.P.J. v. W. Va. State Bd. of Educ.*, 649 F. Supp. 3d 220, 225, 227 (S.D. W. Va. 2023). See generally Katie Eyer, *As-Applied Equal Protection*, 59 HARV. C.R.-C.L. L. REV. 49 (2024) (discussing as-applied equal protection claims).

<sup>231</sup> *Hecox*, 479 F. Supp. 3d at 943; *B.P.J.*, 649 F. Supp. 3d at 225.

<sup>232</sup> See, e.g., Petition for a Writ of Certiorari at 17, *Little v. Hecox*, No. 24-38 (U.S. filed July 11, 2024); Supplemental Brief for the Petitioners at 3, *West Virginia v. B.P.J.*, No. 24-43 (U.S. filed June 23, 2025).

<sup>233</sup> Petition for a Writ of Certiorari, *supra* note 232, at 22 (quoting *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 819 (11th Cir. 2022) (Lagoa, J., specially concurring)); W. VA. CODE § 18-2-25d(a)(1).

<sup>234</sup> See Petition for a Writ of Certiorari, *supra* note 232, at 26. The cert petition in *B.P.J.* uses curious language to make the same argument, describing the West Virginia statute as "deliberately indifferent to the question of gender identity." Petition for a Writ of Certiorari at 27, *West Virginia v. B.P.J.*, No. 24-43 (U.S. filed July 11, 2024). Deliberate indifference is a liability standard,

people are not a suspect class under the Equal Protection Clause in any case.<sup>235</sup> The first and second of these claims will push the Court to clarify ambiguities in *Skrmetti* about whether purportedly biological reasoning places sex-based or transgender-based state action beyond heightened scrutiny’s reach.

Like *Skrmetti*, *Hecox* and *B.P.J.* ask the Court to explain how to identify classifications based on transgender status. The issue returns equal protection law to familiar terrain, where it must examine social context to understand when regulations use proxies to target and uniquely impact identity groups.<sup>236</sup> Although such laws may not refer to the groups directly, they are still facial classifications, which must be reviewed under heightened scrutiny if they implicate protected classes.<sup>237</sup> For example, state actors defended sodomy laws, Don’t Ask Don’t Tell, and same-sex marriage bans as regulations about sex acts and marriage partners, not gay identity.<sup>238</sup> The Court rejected these

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including in the Title IX context, for failing to address known harms. *See, e.g.,* *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). In 2024, the Department of Education’s Office for Civil Rights applied this standard in an enforcement action against a school district where officials did not respond to harassment of a transgender student who later died by suicide. *See* Letter from Karen E. Mines, Reg’l Dir. for the Off. of C.R., U.S. Dep’t of Educ., to Margaret Coates, Superintendent, Owasso Pub. Schs. 13, 19 (Nov. 13, 2024), <https://ocrcas.ed.gov/sites/default/files/ocr-letters-and-agreements/05241363-a.pdf> [<https://perma.cc/FDT3-AYDC>].

<sup>235</sup> Petition for a Writ of Certiorari, *supra* note 232, at 27–28. A full accounting of what *Skrmetti* might mean for transgender people as a suspect class under the Equal Protection Clause is beyond the scope of this short Comment. The Court did not reach the issue, but Justices Thomas, Alito, and Barrett all indicated that they would have ruled that transgender status discrimination warrants only rational basis review. *See Skrmetti*, 145 S. Ct. at 1851 (Barrett, J., concurring) (“[T]ransgender individuals do not constitute a suspect class . . .”); *id.* at 1860 (Alito, J., concurring in part and concurring in the judgment) (“[N]either transgender status nor gender identity should be treated as a suspect or ‘quasi-suspect’ class.”). Justice Barrett’s concurrence, which Justice Thomas joined, suggested truncating the four-part test for suspect classes into the single question of whether a group has faced a history of legal discrimination. *See id.* at 1855 (Barrett, J., concurring). “[S]parse” evidence struck Justice Barrett as “suggestive of relatively little *de jure* discrimination” against transgender people, but she took “no position” given that “the issue was unbriefed.” *Id.* at 1855 n.5. There is ample and growing evidence of *de jure* discrimination against transgender people throughout American history. *See id.* at 1881 (Sotomayor, J., dissenting) (collecting several sources); Brianne Felsher, Shay Ryan Olmstead & Kate Redburn, Opinion, *To Protect Transgender Rights in the Future, We Must Look to the Past*, L.A. TIMES (Feb. 7, 2025, at 03:00 PT), <https://www.latimes.com/opinion/story/2025-02-07/transgender-rights-supreme-court-skrmetti> [<https://perma.cc/7E3E-AG2P>]; Brianne Felsher, “*Sex Changed by a Court’s Decree*”: *The History-and-Tradition of Gender Transitions in the United States*, 114 GEO. L.J. (forthcoming 2026) (manuscript at 28) (on file with the Harvard Law School Library).

<sup>236</sup> *See* Kenji Yoshino, *The Supreme Court, 2022 Term — Comment: Rights of First Refusal*, 137 HARV. L. REV. 244, 251–52 (2023); Craig Konnoth, *Discrimination Denials: Are Same-Sex Wedding Service Refusals Discriminatory?*, 124 COLUM. L. REV. 2003, 2009–10 (2024).

<sup>237</sup> *See* Eyer, *supra* note 23, at 484.

<sup>238</sup> *See id.* at 497; *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O’Connor, J., concurring in the judgment); *Thomasson v. Pery*, 80 F.3d 915, 928 (4th Cir. 1996); *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015). The Court said that it had rejected the status/conduct distinction for gays and lesbians in *Christian Legal Society Chapter of the University of California, Hastings College of the*

attempts to separate conduct from status in the gay rights context,<sup>239</sup> as it has for proxy discrimination on the basis of race and national origin.<sup>240</sup> In a famous quip on the subject, Justice Scalia explained, “A tax on wearing yarmulkes is a tax on Jews.”<sup>241</sup>

*Skrmetti*’s discussion of transgender status discrimination emits a troubling signal. It suggests that gender dysphoria is not a sufficiently tight proxy for transgender status to be a facial classification. The Court cited only *Geduldig v. Aiello*,<sup>242</sup> the case we already recognized for its flimsy reasoning about classifications.<sup>243</sup> In 1978, Congress passed the Pregnancy Discrimination Act<sup>244</sup> to prevent *Geduldig*’s reasoning from expanding into statutory anti-discrimination law.<sup>245</sup> After that period, the Court’s majority did not cite *Geduldig* to interpret the Equal Protection Clause for more than forty years.<sup>246</sup> In other contexts, however, *Geduldig* stood for the proposition that pregnancy is not always a proxy for sex.<sup>247</sup>

Then came *Dobbs*. In a paragraph of dicta, the Court cited *Geduldig* to dismiss equal protection arguments against abortion bans.<sup>248</sup> It said that the bans did not classify by sex because “[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a ‘mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other.’”<sup>249</sup> *Dobbs* returned *Geduldig*’s formalism to equal protection law, and *Geduldig* appeared in post-*Dobbs* arguments against transgender rights in a wide range of contexts from health insurance to school

*Law v. Martinez*, 561 U.S. 661, 689 (2010) (“Our decisions have declined to distinguish between status and conduct in this context.”). But a resurgence appears ongoing. See 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2318 (2023); Yoshino, *supra* note 236, at 251–52; see also Konnoth, *supra* note 236, at 2009–10; William N. Eskridge Jr., *Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 662 (2011).

<sup>239</sup> See *Martinez*, 561 U.S. at 689.

<sup>240</sup> See Yoshino, *supra* note 236, at 252 & n.98 (quoting *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) (regarding race)); Eyer, *supra* note 23, at 485 & n.50 (citing, *inter alia*, *Rice v. Cayetano*, 528 U.S. 495, 514 (2000) (regarding ancestry)).

<sup>241</sup> *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993).

<sup>242</sup> See *Skrmetti*, 145 S. Ct. at 1833.

<sup>243</sup> See *supra* pp. 169–70.

<sup>244</sup> Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)).

<sup>245</sup> See Siegel, *supra* note 25, at 208 n.229.

<sup>246</sup> See *id.* As Professor Reva Siegel notes, Justice Scalia cited *Geduldig* in a statutory case in 1993. *Id.*; see also *Bray*, 506 U.S. at 271; Eyer, *supra* note 23, at 500.

<sup>247</sup> See Cahill, *Footnote*, *supra* note 21 (manuscript at 1); Eyer, *supra* note 23, at 487; *Bray*, 506 U.S. at 271.

<sup>248</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2245–46 (2022) (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974); *Bray*, 506 U.S. at 273–74).

<sup>249</sup> *Id.* (second alteration in original) (quoting *Geduldig*, 417 U.S. at 496 n.20). The *Skrmetti* district court was puzzled by the state’s combination of arguments that (a) all sexes “are treated equally” by the statute (the equal application argument) and (b) the statute regulates a treatment that “only one sex” can undergo. See *L.W. ex rel. Williams v. Skrmetti*, 679 F. Supp. 3d 668, 693–94 (M.D. Tenn. 2023); see also Cahill, *Footnote*, *supra* note 21 (manuscript at 23).

restrooms to gender-affirming care bans.<sup>250</sup> Now *Skrametti* suggests that the Court may have a renewed appetite to ignore social facts about reproduction and gender dysphoria, and to expand *Geduldig*'s classification errors to new contexts.

The dissent highlighted this dynamic, expressing concern that regulating reproductive biology was closely linked with judgments about how people should use their bodies — the kinds of judgments for which intermediate scrutiny was designed.<sup>251</sup> Justice Sotomayor raised the example of a hypothetical law banning health insurance coverage for “all individuals who ‘have ever, or may someday, menstruate.’”<sup>252</sup> She worried that the Court would not consider the hypothetical law to be a sex classification, even though it uses menstruation as a proxy to target women, “because not all women menstruate.”<sup>253</sup>

The Court's response is confusing. It asserted that unlike the lines considered in *Skrametti* and *Geduldig*, a menstruation regulation would “not regulate a class of treatments or conditions,” but would instead “regulate[] a class of *persons* identified on the basis of a specified characteristic.”<sup>254</sup> SB 1 could easily be characterized the same way: as regulating transgender people based on their relationship to the sex they were assigned at birth. California's insurance exclusion was structured differently, but it too was understood to affect only women.<sup>255</sup> A classification need not affect all members of a class to facially discriminate on a protected basis,<sup>256</sup> however, and the policy regulated women who were pregnant on the basis of that characteristic.<sup>257</sup> The Court's attempt to distinguish these situations is made even more baffling by the majority's own analysis. Several paragraphs earlier, the Court defined “medical treatment” so that transgender identity cannot be severed from gender dysphoria for sex-classification purposes,<sup>258</sup> but the distance between them is fatal to claims that the law turns on transgender status.<sup>259</sup>

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<sup>250</sup> See Eyer, *supra* note 23, at 477 n.5 (collecting examples); see also Mary Ziegler, *Fresh Fallout From the Supreme Court's Dobbs Ruling Just Hit Trans People*, SLATE (July 19, 2023, at 11:00 ET), <https://slate.com/news-and-politics/2023/07/supreme-court-dobbs-ruling-trans-backlash.html> [<https://perma.cc/QH6N-RDFW>].

<sup>251</sup> See *Skrametti*, 145 S. Ct. at 1883 (Sotomayor, J., dissenting).

<sup>252</sup> *Id.* at 1880.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 1834 n.3 (majority opinion).

<sup>255</sup> See *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974). Men can become pregnant, but that was not conventional wisdom in 1974.

<sup>256</sup> Eyer, *supra* note 23, at 503.

<sup>257</sup> See Siegel, *supra* note 25, at 227.

<sup>258</sup> See *Skrametti*, 145 S. Ct. at 1830.

<sup>259</sup> Gender dysphoria is obviously a proxy for transgender identity, and the fact that not all transgender people are diagnosed with gender dysphoria is not to the contrary. To elaborate Justice Scalia's point in *Bray*, in many Jewish traditions, men wear yarmulkes but women do not. A “tax on wearing yarmulkes” is still “a tax on Jews,” even though most Jewish women are not affected, because only Jews wear yarmulkes. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). Professor Jessica Clarke had the same idea. See Clarke, *supra* note 11, at 65 & n.496.

The athlete cases present the same Rorschach test. Are bans on transgender women playing women's sports drawing lines around "a class of persons," like transgender women, or "a class of . . . conditions," like being assigned male at birth?<sup>260</sup> If a transgender girl is treated as if she is "male," then the law divides by sex assigned at birth. If the Court views her as a girl, then the law turns on transgender status. The analysis formally depends on how the Court regards statutory definitions of sex.

The danger lies in *Skrmetti's* double deference. If the Court again credits legislative assertions that statutory sex categories merely reflect scientific judgment, then *Hecox* and *B.P.J.* could render laws that classify by "biological sex" presumptively constitutional. The Court might be tempted to defer to West Virginia and Idaho because their laws use some medical and biological terms to create sex categories, but like in SB 1, those categories were designed to exclude transgender people from equal participation in public life.<sup>261</sup> These laws emerged in an environment of enormous hostility toward transgender people, which lawmakers made very little effort to hide.<sup>262</sup> Exempting these statutes from

<sup>260</sup> *Skrmetti*, 145 S. Ct. at 1834 n.3 (emphasis omitted).

<sup>261</sup> See Complaint at 2, *B.P.J. v. W. Va. State Bd. of Educ.*, 649 F. Supp. 3d 220 (S.D.W. Va. 2023) (No. 21-cv-00316) ("Proponents of H.B. 3293 made clear that its purpose is to exclude what they referred to as 'transgenders' from girls' sports teams." (footnote omitted)); W. VA. SENATE, *Senate Testimony on H.B. 3293*, at 13:37:03–13:37:09 ET (Sliq Media Technologies, streamed Apr. 8, 2021, at 11:07 ET) (statement of Sen. Michael Maroney), <https://sg001-harmony.sliq.net/00289/Harmony/en/PowerBrowser/PowerBrowserV2/20210408/-1/50919> [<https://perma.cc/XLZ9-HYPM>] ("The bill, the bill it talks about, it's about transgenders.").

<sup>262</sup> As the Ninth Circuit noted in *Hecox*:

Representative Ehardt, who introduced the bill, characterized the law as a "preemptive" strike that would allow Idaho to "remove [transgender women] and replace them with the young gal that should have been on the team." Representative Ehardt reiterated that the Act would require transgender women to "compete on the side of those biological boys and men with whom they look or, about whom they look alike." Much of the legislative debate centered around two transgender women athletes running track in Connecticut high schools, as well as one running college track in Montana, and the potential "threat" those athletes presented to female athletes in Idaho.

*Hecox v. Little*, 79 F.4th 1009, 1022 (9th Cir. 2023) (alteration in original), *cert. granted*, No. 24-38, 2025 WL 1829165 (U.S. July 3, 2025). See also, e.g., W. VA. SENATE, *supra* note 261, at 13:51:27–13:51:59 ET (statement of Sen. Rollan Roberts quoting a constituent email) ("There are too many groups on both sides of the aisle trying to politicize a subject that should be 100% science and common sense. Due to the trans movement, what it is to be a female and to be safe in this country is being erased. The entire trans movement is an attack upon womanhood. I urge you to save our young women from allowing biological males into sports, locker rooms, et cetera with our girls."); Nikki Haley, *We Must Protect Women's Sports*, NAT'L REV. (Feb. 8, 2021, at 06:30 ET), <https://www.nationalreview.com/2021/02/we-must-protect-womens-sports> [<https://perma.cc/E9L3-C5LL>]; Lauren Holt, *Transgender Rights in the Spotlight as Arkansas and Tennessee Become Latest States to Pass Anti-Trans Legislation*, CNN (Mar. 31, 2021, at 16:06 ET), <https://www.cnn.com/2021/03/28/us/transgender-rights-arkansas-tennessee-anti-trans-laws/index.html> [<https://perma.cc/5BZL-G2PN>]; Jeremy W. Peters, *Why Transgender Girls Are Suddenly the G.O.P.'s Culture-War Focus*, N.Y. TIMES (May 3, 2021), <https://www.nytimes.com/2021/03/29/us/politics/transgender-girls-sports.html> [<https://perma.cc/4R3M-YFNR>]; Gabby Orr, *GOP Seizes on Women's Sports as*

heightened scrutiny would validate anti-transgender animus masquerading as medical or biological judgment.<sup>263</sup>

This kind of scientific ventriloquism has become a defining feature of anti-transgender political mobilization. Vocal segments of society believe that sex and gender cannot change, and consequently that transgender people are ontologically impossible. They have found voice in conservative organizations like the Alliance Defending Freedom, the American Principles Project, and the Heritage Foundation.<sup>264</sup> They consider transgender equality an insidious “gender ideology” and sometimes subscribe to a radical essentialism that would collapse distinctions between the body, sex, and gender. These groups sometimes describe their disapproval in religious terms.<sup>265</sup> In the words of the *Skrmetti* majority in a different case this term, “[m]any Americans . . . believe that biological sex reflects divine creation, that sex and gender are inseparable, and that children should be encouraged to accept their sex and to live accordingly.”<sup>266</sup> On this view, God gives the body one of two sexes, and that sex determines an individual’s social role, sex identity, and gender presentation.

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*Unlikely Wedge Issue*, POLITICO (Mar. 5, 2021, at 14:12 ET), <https://www.politico.com/news/2021/03/05/gop-transgender-rights-women-sports-473746> [<https://perma.cc/AZ9K-UBRS>] (“‘This issue will help [the] GOP win midterms,’ said Stephen Miller, the former Trump White House aide who helped advise the former president on his CPAC speech.” (alteration in original)).

<sup>263</sup> See generally Scott Skinner-Thompson, *Trans Animus*, 65 B.C. L. REV. 965 (2024) (discussing anti-trans animus motivating recent waves of sex and gender regulation at the state level and arguing that much of it violates the Equal Protection Clause).

<sup>264</sup> See, e.g., Erin Hawley, *Skrmetti: The Supreme Court Reaffirms That Biology Matters*, SCOTUSBLOG (July 3, 2025, at 13:24 ET), <https://www.scotusblog.com/2025/07/skrmetti-the-supreme-court-reaffirms-that-biology-matters> [<https://perma.cc/4259-GVFT>]; Sarah Parshall Perry, *Sorry Democrats, But Trump’s “Two Sexes” Executive Order Is Constitutional*, HERITAGE FOUND. (Mar. 20, 2025), <https://www.heritage.org/gender/commentary/sorry-democrats-trumps-two-sexes-executive-order-constitutional> [<https://perma.cc/3FDC-TBGT>]; Liz Skalka, *The Activist Who Persuaded Republicans to Target Trans Rights*, THE ASSEMBLY (May 12, 2025), <https://www.theassemblync.com/politics/terry-schilling-trans-bathroom-bill-hb2> [<https://perma.cc/NWL7-SRNY>].

<sup>265</sup> See, e.g., *Marriage & Family*, ALL. DEFENDING FREEDOM, <https://adfflegal.org/issues/marriage> [<https://perma.cc/3BYG-BMRS>] (“We uphold the fundamental truths of Genesis 1:26–27 that all people are created male or female in the image of God, equal in dignity and worth.”); see also Clarke, *supra* note 158, at 1849–50, 1850 n.152, 1895 (describing moral and religious dimensions of anti-transgender movement). In 2025, Arkansas passed a law to protect the state’s definition of sex as a religious belief. 2025 Ark. Acts 677 (codified as amended at ARK. CODE ANN. §§ 16-123-601 to -607) (“‘Belief about biological sex or marriage’ means a belief based on religious or philosophical premises: (A) Regarding the sex of two (2) individuals who may enter into marriage; or (B) That ‘male’ or ‘man’ or ‘female’ or ‘woman’ refers exclusively to a person’s immutable biological sex as objectively determined by anatomy and genetics at the time of birth.”). For introductions to the international dimensions of the anti-gender movement and its religious components, see generally JUDITH BUTLER, WHO’S AFRAID OF GENDER? (2024) and Mary Anne Case, *Seeing the Sex and Justice Landscape Through the Vatican’s Eyes: The War on Gender and the Seamless Garment of Sexual Rights*, in THE WAR ON SEX 211 (David M. Halperin & Trevor Hoppe eds., 2017).

<sup>266</sup> *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2354 (2025).

Over the last decade, this cohort has channeled its perspective into laws redefining sex.<sup>267</sup> Twenty-five states have enacted laws or regulations like SB 1 to ban gender-affirming care for minors.<sup>268</sup> In 2023 alone lawmakers in at least half the states proposed over 150 anti-trans bills.<sup>269</sup> “[A]lmost all” of these efforts “directly invok[ed] the idea of ‘biological sex.’”<sup>270</sup> Many states have redefined sex to regulate bathrooms, sports, identity documents, and access to healthcare.<sup>271</sup> Sixteen states have changed the definitions of male, female, or sex across all state law.<sup>272</sup>

<sup>267</sup> See Noa Ben-Asher, *Transforming Legal Sex*, 102 N.C. L. REV. 335, 384 (2024); Laura Lane-Steele, *Sex-Defining Laws and Equal Protection*, 112 CALIF. L. REV. 259, 262 (2024); Clarke, *supra* note 158, at 1828.

<sup>268</sup> These states include Alabama, ALA. CODE § 26-26-4 (2025) (effective May 8, 2022); Arkansas, ARK. CODE ANN. § 20-9-1502(a) (2025) (effective July 28, 2021); Florida, FLA. ADMIN. CODE ANN. r. 64B8-9.019 (2025); Georgia, GA. CODE ANN. § 31-7-3.5 (2025) (effective July 1, 2023); Idaho, IDAHO CODE § 18-1506C (2025) (effective with amendment as of July 1, 2024); Indiana, IND. CODE § 25-1-22-13 (2025) (effective July 1, 2023); Iowa, IOWA CODE § 147.164 (2025) (effective with amendment as of June 1, 2023); Kansas, Help Not Harm Act, ch. 1, 2025 Kan. Sess. Laws 1 (effective Feb. 20, 2025); Kentucky, KY. REV. STAT. ANN. § 311.372(2) (West 2025) (effective June 29, 2023); Louisiana, LA. STAT. ANN. § 40:1098.2 (2025) (effective Jan. 1, 2024); Mississippi, MISS. CODE ANN. § 41-141-5 (2025) (effective Feb. 28, 2023); Missouri, MO. ANN. STAT. § 191.1720 (West 2025) (effective Aug. 28, 2023); Montana, MONT. CODE ANN. § 50-4-1004 (2025) (effective Oct. 1, 2023); Nebraska, NEB. REV. STAT. §§ 71-7301 to -7307 (2025) (effective Oct. 1, 2023); North Carolina, N.C. GEN. STAT. § 90-21.151 (2025) (effective Aug. 1, 2023); North Dakota, N.D. CENT. CODE § 12.1-36.1-02 (2025) (effective Apr. 21, 2023); Ohio, OHIO REV. CODE ANN. § 3129.02 (West 2025) (effective Apr. 24, 2024); Oklahoma, OKLA. STAT. tit. 63, § 2607.1 (2025) (effective May 1, 2023); South Carolina, S.C. CODE ANN. § 44-42-320 (2025) (effective May 21, 2024); South Dakota, S.D. CODIFIED LAWS § 34-24-34 (2025) (effective July 1, 2023); Tennessee, TENN. CODE ANN. § 68-33-103 (2025) (effective July 1, 2023); Texas, TEX. HEALTH & SAFETY CODE ANN. § 161.702 (West 2025) (effective Sep. 1, 2023); Utah, UTAH CODE ANN. §§ 58-68-502(1)(g), 58-1-603 to -603.1 (West 2025) (effective Jan. 28, 2023); West Virginia, W. VA. CODE § 30-3-20(b) (2025) (effective July 11, 2025); and Wyoming, WYO. STAT. ANN. § 35-4-1001 (2025) (effective July 1, 2024). See also MOVEMENT ADVANCEMENT PROJECT, HEALTHCARE LAWS AND POLICIES: BANS ON BEST PRACTICE MEDICAL CARE FOR TRANSGENDER YOUTH 3 (2025), <https://www.lgbtmap.org/img/maps/citations-youth-medical-care-bans.pdf> [<https://perma.cc/P25D-WAEZ>].

<sup>269</sup> Maggie Astor, *G.O.P. State Lawmakers Push a Growing Wave of Anti-Transgender Bills*, N.Y. TIMES (June 20, 2023), <https://www.nytimes.com/2023/01/25/us/politics/transgender-laws-republicans.html> [<https://perma.cc/F56F-SQ5W>].

<sup>270</sup> Clarke, *supra* note 158, at 1825; see also *id.* at 1847 n.144, 1849 nn.147-49 (collecting state laws that restrict trans rights by reference to biological sex).

<sup>271</sup> See *id.* at 1849 nn.147-49.

<sup>272</sup> Current as of June 25, 2025; Act of Feb. 13, 2025, § 3, 2025 Ala. Legis. Serv. 2025-3 (West) (to be codified at ALA. CODE § 1-1-1); Act of Apr. 9, 2024, ch. 322, § 2, 2024 Idaho Sess. Laws 1063, 1063-65 (codified at IDAHO CODE § 73-114(2)); Ind. Exec. Order No. 25-36 (Mar. 4, 2025); Act of Feb. 28, 2025, ch. 1, § 1, 2025 Iowa Legis. Serv. (West) (codified at IOWA CODE § 4.1A); KAN. STAT. ANN. § 77-207 (2025) (effective July 1, 2023); Women’s Safety and Protection Act, § 58, 2024 La. Sess. Law Serv. Act 436 (West) (codified at LA. STAT. ANN. § 9:58); MISS. CODE ANN. § 1-3-83 (2025) (effective May 13, 2024); Act of May 19, 2023, ch. 685, § 1, 2023 Mont. Laws 2184, 2184-85 (codified at MONT. CODE ANN. § 1-1-201), *invalidated by* Reagor v. Montana, No. DV-23-1026 (Mont. 4th Jud. Dist. Ct. Feb. 18, 2025), [https://statecourtreport.org/sites/default/files/2025-03/missoula\\_county\\_district\\_court-order.pdf](https://statecourtreport.org/sites/default/files/2025-03/missoula_county_district_court-order.pdf) [<https://perma.cc/LC9F-HXPU>]; Neb. Exec. Order No. 23-16 (Aug. 30, 2023); Act of May 8, 2023, ch. 66, § 1, 2023 N.D. Laws 293, 293-95 (codified at N.D.

Lawmakers claim that these acts are necessary to address “[i]nconsistencies in court rulings and policy initiatives,”<sup>273</sup> and “[c]onfusion and ambiguities,”<sup>274</sup> asserting that they bring “clarification,”<sup>275</sup> “clarity, certainty, and uniformity”<sup>276</sup> to legal sex by linking it to “biological truth.”<sup>277</sup> Despite these aims, the laws locate sex in a range of biological places.<sup>278</sup> The plurality of healthcare bans define sex by “reproductive potential or capacity,”<sup>279</sup> in addition to genetics, hormones, and physical features.<sup>280</sup> Others, like South Dakota, say nothing about reproduction, instead finding sex in chromosomes, hormones, gonads, and “internal and external genitalia.”<sup>281</sup> Meanwhile Alabama, Indiana, North

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CENT. CODE § 1-01-49); Women’s Bill of Rights, ch. 365, § 2, 2024 Okla. Sess. Law Serv. (West) (codified at OKLA. STAT. tit. 25, § 16); Act of May 17, 2023, ch. 486, § 1, 2023 Tenn. Pub. Acts 1, 1 (codified at TENN. CODE ANN. § 1-3-105); Act of June 20, 2025, ch. 543, § 2, 2025 Tex. Sess. Law Serv. (West) (to be codified at TEX. GOV’T CODE § 311.005); Act of Jan. 30, 2024, ch. 2, § 17, 2024 Utah Laws 5, 18–21 (codified at UTAH CODE ANN. § 68-3-12.5); Act of Mar. 12, 2025, ch. 207, § 5-32-3, 2025 W. Va. Adv. Legis. Serv. (LexisNexis) (codified at W. VA. CODE § 5-32-3); What Is a Woman Act, ch. 146, 2025 Wyo. Sess. Laws 335, 336 (codified at WYO. STAT. ANN. § 8-1-110).

<sup>273</sup> Act of Feb. 13, 2025, 2025 Ala. Legis. Serv. 2025-3 (West) (to be codified at ALA. CODE § 1-1-1); Act of June 20, 2025, ch. 543, § 1(7), 2025 Tex. Sess. Law Serv. (West) (to be codified at TEX. GOV’T CODE § 311.005) (similar language).

<sup>274</sup> Act of Apr. 9, 2024, ch. 322, § 1(7), 2024 Idaho Sess. Laws 1063, 1063.

<sup>275</sup> Neb. Exec. Order No. 23-16 (Aug. 30, 2023); Act of June 20, 2025, ch. 543, § 1(7), 2025 Tex. Sess. Law Serv. (West) (to be codified at TEX. GOV’T CODE § 311.005) (same language).

<sup>276</sup> Women’s Bill of Rights, ch. 365, § 1(b), 2024 Okla. Sess. Law Serv. (West) (codified at OKLA. STAT. tit. 25, § 16); Act of Mar. 12, 2025, ch. 207, § 5-32-1(a)(3), 2025 W. Va. Adv. Legis. Serv. (LexisNexis) (codified at W. VA. CODE § 5-32-1) (same language).

<sup>277</sup> Act of Apr. 9, 2024, ch. 322, § 1(6), 2024 Idaho Sess. Laws 1063, 1063.

<sup>278</sup> See Clarke, *supra* note 158, at 1828 (arguing that this inconsistency is evidence of anti-transgender motivation); Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 775 (2008); PAISLEY CURRAH, SEX IS AS SEX DOES: GOVERNING TRANSGENDER IDENTITY 41–42 (2022).

<sup>279</sup> See, e.g., Act of Mar. 30, 2023, ch. 104, § 1(C)(1), 2022 Ariz. Sess. Laws 583, 584 (codified at ARIZ. REV. STAT. ANN. § 32-3230).

<sup>280</sup> Act of Mar. 30, 2022, ch. 104, § 1(C)(1), 2022 Ariz. Sess. Laws 583, 584 (codified at ARIZ. REV. STAT. ANN. § 32-3230); Arkansas Save Adolescents from Experimentation (SAFE) Act, § 3(1), 2021 Ark. Acts 2819, 2824 (codified at ARK. CODE ANN. § 20-9-1501); Act of May 17, 2023, ch. 2023-90, § 4, 2023 Fla. Laws 1081, 1083 (codified at FLA. STAT. § 456.001); Act of Mar. 22, 2023, ch. 9, § 1(1)(d), 2023 Iowa Acts 18, 18 (codified at IOWA CODE § 147.164); Help Not Harm Act, ch. 1, § 1(b)(9), 2025 Kan. Sess. Laws 1, 1 (codified at KAN. STAT. ANN. § 65-2837); Stop Harming Our Kids Act, § 1098.1(3), 2023 La. Sess. Law Serv. (West) (codified at LA. REV. STAT. § 40:1098.1(3)); Missouri Save Adolescents from Experimentation (SAFE) Act, § 191.1720(2)(1), 2023 Mo. Laws 885, 885 (codified at MO. REV. STAT. § 191.1720); Regulate Experimental Adolescent Procedures (REAP) Act, ch. 303, § 2(a), 2023 Miss. Laws 401, 402 (codified at MISS. CODE ANN. § 41-141-3); Act of Aug. 16, 2023, ch. 111, § 1, 2023 N.C. Adv. Legis. Serv. (LexisNexis) (West) (codified at N.C. GEN. STAT. § 90-21.150(1)); Let Them Grow Act, § 16(1), 2023 Neb. Laws 332, 332 (codified at NEB. REV. STAT. § 71-7303); Saving Ohio Adolescents from Experimentation (SAFE) Act, File 16, 2024 Ohio Laws (codified at OHIO REV. CODE ANN. § 3129.01); Act of May 21, 2024, § 1, 2024 S.C. Acts 1634, 1635 (codified at S.C. CODE ANN. § 44-42-310); Act of Mar. 29, 2023, ch. 233, 2023 W. Va. Acts 1676, 1676, 1679 (codified at W. VA. CODE §§ 30-3-20(a), 30-14-17(a)).

<sup>281</sup> S.D. CODIFIED LAWS § 34-24-33(2) (2025) (defining “[s]ex” as “the biological indication of male and female, as evidenced by sex chromosomes, naturally occurring sex hormones, gonads, and nonambiguous internal and external genitalia present at birth”); *accord* Youth Health Protection Act, MONT. CODE ANN. § 50-4-1003(1), (5), (9) (2023).

Dakota, Kentucky, Texas, Wyoming, and Utah take genitalia out of the mix, defining sex by “sex organs, chromosomes, and endogenous hormone profiles.”<sup>282</sup> Three of these “sex-defining” laws<sup>283</sup> invoke “biological sex” without defining it at all.<sup>284</sup> Some states now define sex in multiple, contradictory ways<sup>285</sup>: For example, Kentucky’s Act Relating to Children<sup>286</sup> includes two different definitions of sex within a single statute.<sup>287</sup>

The same dynamic is repeating at the federal level, where President Trump has made redefining sex a priority for his Administration.<sup>288</sup> On inauguration day, the President issued an Executive Order defining sex as “an individual’s immutable biological classification as either male or female,” and then defining male and female by the presence of gametes “at conception.”<sup>289</sup> He explained the need for a federal sex definition as

<sup>282</sup> IND. CODE § 25-1-22-12 (2025); see state laws cited *supra* note 272.

<sup>283</sup> Lane-Steele, *supra* note 267, at 262.

<sup>284</sup> See Act of July 19, 2024, ch. 213, 2024 N.H. Laws 253, 254–56 (codified at N.H. REV. STAT. ANN. § 332-M:2); Act of Mar. 23, 2023, 2023 Ga. Laws 6 (codified at GA. CODE ANN. §§ 31-7-3.5, 43-34-15); Act of May 1, 2023, 2023 Okla. Sess. Law. Serv. (West) (codified at OKLA. STAT. tit. 63, § 2607.1); see also Lane-Steele, *supra* note 267, at 262; Clarke, *supra* note 158, at 1847 (noting a trend in state laws invoking “biological sex” in sex-defining sports bans against transgender women in sports); Maayan Sudai, *Toward a Functional Analysis of “Sex” in Federal Antidiscrimination Law*, 42 HARV. J.L. & GENDER 421, 456–57 (2019) (noting various definitions of “biological sex” in state bathroom bills).

<sup>285</sup> Using different definitions for different contexts is not inherently problematic, but it undermines the states’ assertions that the purpose of such legislation is to clarify the meaning of sex. Scholars have long suggested that “contextual” and “functional” definitions of sex may benefit sex- and gender-minorities. Cf. Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. 747, 830 (2015); Lane-Steele, *supra* note 267, at 266–67; Sudai, *supra* note 284, at 462.

<sup>286</sup> Act of Mar. 29, 2023, ch. 132, 2023 Ky. Acts 775 (codified at KY. REV. STAT. ANN. §§ 158, 311).

<sup>287</sup> *Id.* §§ 3(1)(a), 4(1)(b), 2023 Ky. Acts at 777–78 (codified at KY. REV. STAT. ANN. §§ 158.189(1)(a), 311.372(1)(b)) (defining “[s]ex” as the “biological indication of male and female” via one’s chromosomes, sex hormones, and genitalia and “[b]iological sex” as the “physical condition of being male or female” determined primarily through chromosomes).

<sup>288</sup> President Trump’s reelection campaign directed enormous energy toward attacking transgender people. See, e.g., Bill Barrow, *Trump and Vance Make Anti-Transgender Attacks Central to Their Closing Argument Before Election Day*, PBS NEWS (Nov. 1, 2024, at 14:27 ET), <https://www.pbs.org/newshour/politics/trump-and-vance-make-anti-transgender-attacks-central-to-their-closing-argument-before-election-day> [<https://perma.cc/8YGW-T75B>]; Susan Davis, *GOP Ads on Transgender Rights are Dominating Airwaves in the Election’s Closing Days*, NPR (Oct. 19, 2024, at 05:00 ET), <https://www.npr.org/2024/10/19/g-si-28932/donald-trump-transgender-ads-kamala-harris> [<https://perma.cc/2S67-URZS>].

<sup>289</sup> Exec. Order No. 14,168, 90 Fed. Reg. 8615, 8615 (Jan. 20, 2025). Biologists responded by reminding the public that embryos do not have sex. See, e.g., Corky Siemaszko, *When Is a Person’s Sex Determined? Trump Has No Conception, Experts Say*, NBC NEWS (Jan. 27, 2025, at 15:24 ET), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/trump-executive-order-sex-gender-conception-rcna189189> [<https://perma.cc/7TF9-3PFL>]; see also INST. OF MED. (U.S.) COMM. ON UNDERSTANDING THE BIOLOGY OF SEX & GENDER DIFFERENCES, EXPLORING THE BIOLOGICAL CONTRIBUTIONS TO HUMAN HEALTH: DOES SEX MATTER? 45 (Theresa M. Wizemann & Mary-Lou Pardue eds., 2001) (“During early development the gonads of the fetus remain undifferentiated; that is, all fetal genitalia are the same and are phenotypically female. After approximately 6 to 7 weeks of gestation, however, the expression of a gene on the Y chromosome induces changes that result in the development of the testes.”).

a defense of the “biological reality of sex”<sup>290</sup> and “[r]estoring [b]iological [t]ruth.”<sup>291</sup> The Department of Health & Human Services (HHS),<sup>292</sup> Department of Defense, EEOC, and other agencies acted quickly on the order, issuing guidance to prevent trans athletes from obtaining travel visas if their applications did not list their sex assigned at birth,<sup>293</sup> expelling transgender service members from the military,<sup>294</sup> and stripping back anti-discrimination law enforcement on behalf of LGBT people.<sup>295</sup>

<sup>290</sup> Exec. Order No. 14,168, 90 Fed. Reg. at 8615.

<sup>291</sup> Exec. Order No. 14,201, 90 Fed. Reg. 9279, 9279 (Feb. 5, 2025).

<sup>292</sup> See Press Release, U.S. Dep’t of Health & Hum. Servs., *HHS Takes Action on President Trump’s Executive Orders Defending Women and Children* (Feb. 19, 2025), <https://www.hhs.gov/press-room/eo-defending-women-and-children.html> [<https://perma.cc/9UCU-39W3>].

<sup>293</sup> Memorandum from Marco Rubio, U.S. Sec’y of State, Re: Guidance for Visa Adjudicators on Executive Order 14201 “Keeping Men Out of Women’s Sports” (Feb. 24, 2025), [https://iip-production.s3.amazonaws.com/media/documents/2025.2.24\\_DOS\\_Guidance\\_for\\_Visa\\_Adjudicators\\_EO\\_14201\\_22Keeping\\_Men\\_Out\\_of\\_Wom\\_VhPairS.pdf](https://iip-production.s3.amazonaws.com/media/documents/2025.2.24_DOS_Guidance_for_Visa_Adjudicators_EO_14201_22Keeping_Men_Out_of_Wom_VhPairS.pdf) [<https://perma.cc/TF7B-ZS9Q>]. The Department of State also changed its policy to require passports to list the individual’s sex assigned at birth, which has been enjoined as of September 4, 2025. *Orr v. Trump*, No. 25-cv-10313, 2025 WL 1145271, at \*2 (D. Mass. Apr. 18, 2025).

<sup>294</sup> U.S. Dep’t of Def., Memorandum on Prioritizing Military Excellence and Readiness (Feb. 7, 2025), [https://www.defense.gov/Portals/1/Spotlight/2025/Guidance\\_For\\_Federal\\_Policies/Prioritizing\\_Military\\_Excellence\\_and\\_Readiness/Prioritizing\\_Military\\_Excellence\\_and\\_Readiness\\_OSD\\_Guidance.pdf](https://www.defense.gov/Portals/1/Spotlight/2025/Guidance_For_Federal_Policies/Prioritizing_Military_Excellence_and_Readiness/Prioritizing_Military_Excellence_and_Readiness_OSD_Guidance.pdf) [<https://perma.cc/K3CX-QSLE>].

<sup>295</sup> See Press Release, U.S. Equal Emp. Opportunity Comm’n, *Removing Gender Ideology and Restoring the EEOC’s Role of Protecting Women in the Workplace* (Jan. 28, 2025), <https://www.eeoc.gov/newsroom/removing-gender-ideology-and-restoring-eeocs-role-protecting-women-workplace> [<https://perma.cc/6F3X-HYNP>]. The Administration has taken several actions that seem to interpret Title IX to require discrimination against transgender people, including an EEOC enforcement action against a Denver high school for providing some gender-neutral bathrooms, strong-arming the University of Pennsylvania and Brown University to change the way the universities define “male” and “female,” as well as imposing limitations on healthcare and athletics participation. Press Release, U.S. Dep’t of Educ., U.S. Department of Education’s Office for Civil Rights Finds Denver Public Schools Violated Title IX (Aug. 28, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-educations-office-civil-rights-finds-denver-public-schools-violated-title-ix> [<https://perma.cc/8HFY-HES2>]; Alan Blinder, *Penn Agrees to Limit Participation of Transgender Athletes*, N.Y. TIMES (July 2, 2025), <https://www.nytimes.com/2025/07/01/us/penn-title-ix-transgender-swimmer-trump.html> [<https://perma.cc/LA3X-HEMD>]; Christopher Wiggins, *Brown University Is “Functionally Inaccessible” to Transgender Students After Trump Settlement*, ADVOCATE (Aug. 5, 2025, at 15:20 ET), <https://www.advocate.com/news/transgender-students-unsafe-brown-university> [<https://perma.cc/S7YH-VWHH>]. Advocates have sued the EEOC for failing to enforce transgender civil rights protections. See Brooke Migdon, *Federal Agency Sued for Failing to Enforce Employment Protections for Transgender Workers*, THE HILL (July 29, 2025, at 18:05 ET), <https://thehill.com/homenews/administration/5426571-transgender-discrimination-lawsuit-eeoc> [<https://perma.cc/TE3V-LA98>]. For an illuminating discussion of the ways anti-discrimination law has been inverted to challenge its intended beneficiaries, see generally Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 SUP. CT. REV. 257 (2019). For one history of how conservative movement lawyers developed this inversion, see generally Kate Redburn, *The Equal Right to Exclude: Religious Speech and the Road to 303 Creative LLC v. Elenis*, 112 CALIF. L. REV. 1879 (2024).

Again, where agencies have promulgated new definitions of sex, they are not the same as the definition in the Executive Order.<sup>296</sup>

The point of all this is not to pin down the location of sex in the body. Biologists contest that possibility as a matter of science,<sup>297</sup> and the legal definitions are too diverse to support that reading. As Professor Jessica Clarke has argued, these redefinition laws “lend a veneer of objectivity and scientism” to anti-transgender politics.<sup>298</sup> When Acting EEOC Chair Andrea Lucas announced that “[b]iology is not bigotry,”<sup>299</sup> HHS Secretary Robert Kennedy Jr. espoused “common sense and restoring biological truth,”<sup>300</sup> and Attorney General Pam Bondi warned against teaching children to “deny biological reality,”<sup>301</sup> they enlisted biology in a political project, disconnected from biological sciences, to make transgender life more difficult.

*Skrmetti* raises the possibility that in *Hecox* and *B.P.J.*, the Court will defer to sex-redefining statutes as restatements of scientific expertise, ignoring the animus toward transgender people that motivates states to redefine sex in particular ways. It could again exacerbate this mistake by subjecting the statutes to maximally deferential review. If the Court does expand double deference into *Hecox* and *B.P.J.*, it could render anti-transgender discrimination presumptively constitutional.

### B. *Separate Spheres Beyond Scrutiny*

The transgender rights cases could also be the leading edge of the spear to eviscerate constitutional sex equality by validating sex-based generalizations, stereotypes, and even open animus when they come disguised as natural qualities. The Supreme Court has long struggled to

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<sup>296</sup> Compare, e.g., *Sex-Based Definitions*, U.S. DEP’T OF HEALTH & HUM. SERVS., OFF. ON WOMEN’S HEALTH (Aug. 21, 2025), <https://womenshealth.gov/article/sex-based-definitions> [<https://perma.cc/MBJ9-C3S2>] (defining female by reference to reproductive biology “at maturity” which produces “eggs”), with Exec. Order No. 14,168, 90 Fed. Reg. 8615, 8615 (Jan. 20, 2025) (defining female by ability “at conception” to “produce[] the large reproductive cell”).

<sup>297</sup> See, e.g., KATRINA KARKAZIS, *FIXING SEX: INTERSEX, MEDICAL AUTHORITY, AND LIVED EXPERIENCE* 11 (2008); REBECCA M. JORDAN-YOUNG, *BRAIN STORM: THE FLAWS IN THE SCIENCE OF SEX DIFFERENCES* 20 (2010); AGUSTÍN FUENTES, *SEX IS A SPECTRUM: THE BIOLOGICAL LIMITS OF THE BINARY* 3–4 (2025); ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 17–18 (2000).

<sup>298</sup> Clarke, *supra* note 158, at 1859 (citing Katrina Karkazis, *The Misuses of “Biological Sex,”* 394 *THE LANCET* 1898, 1898–99 (2019)).

<sup>299</sup> Press Release, U.S. Equal Emp. Opportunity Comm’n, *supra* note 295 (quoting Andrea Lucas, Acting Chair of the U.S. Equal Emp. Opportunity Comm’n).

<sup>300</sup> Press Release, *supra* note 292 (quoting Robert F. Kennedy Jr., U.S. Sec’y of Health & Hum. Servs.).

<sup>301</sup> Memorandum from Pamela Jo Bondi, Att’y Gen. of the U.S., to Select Component Heads, Re: Preventing the Mutilation of American Children (Apr. 22, 2025), <https://www.justice.gov/ag/media/1402396/dl> [<https://perma.cc/WZJ7-AHS6>]. *But cf.* BEANS VELOCCI, *SEX ISN’T REAL: THE INVENTION OF AN INCOHERENT BINARY* (forthcoming 2026) (manuscript at 23) (on file with the Harvard Law School Library) (“What is often now referred to as ‘biological sex’ is more of a cultural product than a scientific one. ‘Biological sex’ is far more conceptually unified than what scientists themselves enact.”).

reconcile the social and cultural meanings of sex with the material reality of the body. First-year constitutional law students read Justice Bradley's concurrence in *Bradwell v. Illinois*<sup>302</sup> to learn that the Justices once justified sex discrimination because "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman."<sup>303</sup> In *Muller v. Oregon*,<sup>304</sup> those differences included women's supposedly lower capacity for hard work, lack of self-reliance, and essential dependence on men.<sup>305</sup> According to the common sense of that period, biological qualities dictated the social and political subjugation of women.<sup>306</sup>

The Court developed equal protection law to confront this kind of biological mystification. Professor Reva Siegel calls the underlying approach "physiological naturalism," or the idea that inherent differences between men and women cannot mask invidious stereotypes about sex and the body.<sup>307</sup> Although the Court has validated biological explanations for sex distinctions,<sup>308</sup> once it established that sex classifications warrant intermediate scrutiny in 1976, it always evaluated biological justifications for sex-based lines using that standard — until *Skrmetti*.

Perhaps the strongest repudiation of separate-spheres ideology was in *United States v. Virginia*.<sup>309</sup> Writing for the majority, Justice Ginsburg explained that heightened scrutiny was designed to prevent state actors from perpetuating stereotypes about women and generalizations about women's bodies.<sup>310</sup> The suit challenged the Virginia Military Institute for refusing to admit women into its program. Virginia justified its policy by suggesting that the school's "adversative" pedagogy and difficult "physical training" would have to change to accommodate women as students.<sup>311</sup> It had also introduced expert findings on such

<sup>302</sup> 83 U.S. (16 Wall.) 130 (1873).

<sup>303</sup> *Id.* at 141 (Bradley, J., concurring in the judgment).

<sup>304</sup> 208 U.S. 412 (1908).

<sup>305</sup> *Id.* at 421.

<sup>306</sup> *See id.* ("That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious.")

<sup>307</sup> Siegel, *supra* note 25, at 172.

<sup>308</sup> *See, e.g.,* Michael M. v. Superior Court, 450 U.S. 464, 466–67 (1981) (plurality opinion) (upholding California statutory rape law that made only male perpetrators criminally liable); *Nguyen v. INS*, 533 U.S. 53, 60–61 (2001) (sustaining immigration regulations imposing a higher burden on unmarried fathers than unmarried mothers). *See generally* Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2295 (2016) (discussing differences in the legal status of unmarried fathers and unmarried mothers); Eyer, *supra* note 230 (similar).

<sup>309</sup> 518 U.S. 515 (1996); *see also* Siegel, *supra* note 25, at 212; Franklin, *supra* note 24, at 168 n.448.

<sup>310</sup> *See VMI*, 518 U.S. at 531–34.

<sup>311</sup> *Id.* at 540.

supposed “gender-based developmental differences” as the idea that “[f]emales tend to thrive in a cooperative atmosphere.”<sup>312</sup>

The Court dismissed the idea that biological reasoning was rooted in a truth beyond stereotypes. The state’s reliance on “real” “psychological and sociological differences,”<sup>313</sup> it explained, could not “justify denying opportunity to women whose talent and capacity place them outside the average description.”<sup>314</sup> This was true even though the majority expressed in dicta that “[p]hysical differences between men and women . . . are enduring.”<sup>315</sup> The Court believed that only women could become pregnant, making pregnancy a context where the body is relevant,<sup>316</sup> but it did not think that biological differences justified legal classifications as a general matter.<sup>317</sup>

By the twenty-first century, biological essentialism in sex-based equal protection was on the brink of extinction.<sup>318</sup> Opponents of gay rights notably failed to revive it in the early 2000s, when many states banned same-sex marriage by statute.<sup>319</sup> The effect was remarkably similar to the pattern in anti-transgender legislation today — redefine a legal term to erase the minority group, and then regulate benefits according to that new definition. As Professor Cary Franklin explained at the time, gay marriage opponents claimed that marriage was about procreation, so that the state had an interest in binding fathers to the women who gave birth to their children and ensuring that children have two opposite-sex parents.<sup>320</sup> Legal challenges to marriage bans objected

<sup>312</sup> *Id.* at 541 (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1434 (W.D. Va. 1991) (alteration in original)).

<sup>313</sup> *Id.* at 549.

<sup>314</sup> *Id.* at 550.

<sup>315</sup> *Id.* at 533.

<sup>316</sup> See Clarke, *supra* note 23, at 78–79. The Court shared the then-current understanding that only women could get pregnant.

<sup>317</sup> See Schoenbaum, *supra* note 128, at 968–70 (describing and critiquing this misreading of *Virginia*). *Geduldig* did not hold otherwise. The Court ruled that pregnancy discrimination was not a sex classification in that situation, but because women were the only people negatively affected by the policy, Justice Stewart explained that heightened scrutiny could apply on a showing “that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other.” *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974). For analyses of recent misreadings of *Geduldig*, see Cahill, *Irreconcilable Differences*, *supra* note 21, at 1095; Eyer, *supra* note 23, at 475.

<sup>318</sup> See Siegel, *supra* note 25, at 203.

<sup>319</sup> *States with Voter-Approved Constitutional Bans on Same-Sex Marriage, 1998–2008*, PEW RSCH. CTR. (Nov. 13, 2008), <https://www.pewresearch.org/religion/2008/11/13/states-with-voter-approved-constitutional-bans-on-same-sex-marriage-1998-2008> [<https://perma.cc/4JWX-6R6W>].

<sup>320</sup> See Franklin, *supra* note 24, at 165 (discussing *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006)); *Hernandez*, 855 N.E.2d at 7 (reasoning that “[i]ntuition and experience suggest” that opposite-sex couples are better role models); see also, e.g., Ryan T. Anderson, *Marriage: What It Is, Why It Matters, and the Consequences of Redefining It*, BACKGROUND, Mar. 11, 2013, at 1, 2; Sherif Girgis, Robert P. George & Ryan T. Anderson, *What Is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245, 256 (2010). But see Kenji Yoshino, *The Best Argument Against Gay Marriage*, SLATE (Dec. 13, 2010, at 16:34 ET), <https://slate.com/news-and-politics/2010/12/robert-p-george-s-argument-against-gay-marriage-fails.html> [<https://perma.cc/F9UT-6MLV>] (critiquing the appeal to biology).

to the way these laws reflected “a thickly gendered conception of sex roles and what it means to be a ‘husband’ or a ‘wife.’”<sup>321</sup> And many scholars drew explicit connections between histories of legal discrimination against women and gay people rooted in gender stereotypes.<sup>322</sup> Gay rights advocates educated the public and the courts about non-biological families, making the case that they should have equal access to the benefits and obligations of formal recognition.<sup>323</sup>

*Obergefell v. Hodges*<sup>324</sup> helped to vindicate this understanding. In its own sex equality precedents, the Court noticed that “new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”<sup>325</sup> When states claimed that their beliefs about women’s social role and racial hierarchy were justified by science, the Court had rejected them,<sup>326</sup> and it was required to do so again. Marriage already included couples without children, so it could not justify excluding same-sex couples by reference to heterosexual reproduction.<sup>327</sup> Subsequent cases extended this thinking into sex-based equal protection even more directly, repudiating the state’s reliance on the purportedly biological basis of parentage in rules about birth certificates and immigration.<sup>328</sup>

As *Obergefell* acknowledged, the story of sex-based equal protection dovetails with an evolving conversation about sex stereotypes at the Court.<sup>329</sup> Anti-stereotyping doctrine took notice of changing sexual and

<sup>321</sup> Franklin, *supra* note 24, at 172; see also Ariela R. Dubler, *From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1171 (2006).

<sup>322</sup> See, e.g., Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 230; Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 199 (1994); Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 463 (2007).

<sup>323</sup> See, e.g., Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 104–08 (2014) (recounting this history).

<sup>324</sup> 576 U.S. 644 (2015).

<sup>325</sup> *Id.* at 673.

<sup>326</sup> See, e.g., *VMI*, 518 U.S. 515, 534 (1996); Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 FORDHAM L. REV. 21, 23 (2013).

<sup>327</sup> See Franklin, *supra* note 129, at 188 (“[A]n ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State.’ Older people and infertile people have never been barred from marrying . . . .” (footnote omitted) (quoting *Obergefell*, 576 U.S. at 669)).

<sup>328</sup> *Id.* at 175–76 (making this argument about *Pavan v. Smith*, 582 U.S. 563 (2017), and *Sessions v. Morales-Santana*, 582 U.S. 47 (2017)). For an account of the interrelationship between biological reasoning about parentage masking norms of heterosexuality, see generally Douglas NeJaime, *Marriage, Biology, and Gender*, 98 IOWA L. REV. BULL. 83 (2013). In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), Chief Justice Rehnquist reconciled pregnancy discrimination with the *Virginia* framework, minimizing *Geduldig*’s biological essentialism even further. See *id.* at 728–29, 736–37; Siegel, *supra* note 24, at 1886.

<sup>329</sup> See *Obergefell*, 576 U.S. at 673.

gender norms by design, to ensure that states did not limit access to important resources by reference to outdated ideas about social life. As legal advocates raised the salience of other groups facing sex marginalization, like unwed fathers,<sup>330</sup> gay parents,<sup>331</sup> and same-sex couples,<sup>332</sup> they created a jurisprudence capacious enough to assimilate the wide variety of harms individuals suffer because of assumptions about what kind of meaning they should impute to their bodies.

Transgender people have been part of this story for a long time.<sup>333</sup> In recent litigation, defendants have frequently claimed that the Constitution is agnostic about state action reinforcing “real” biological differences, and courts have frequently disagreed.<sup>334</sup> Generations of equal protection jurisprudence rejected common assumptions about sex, including the notion that “the female [is] destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas,”<sup>335</sup> and the notion that “women are ‘the weaker sex’ or are more likely to be child-rearers or dependents.”<sup>336</sup> State actors may not draw lines to produce “self-fulfilling prophec[ies]” by relying on stereotypes to channel individuals into particular social positions.<sup>337</sup> The Constitution intervenes to disrupt “the role-typing society has long imposed.”<sup>338</sup> Coming to appreciate stereotypes in LGBT rights cases had shaped the way courts considered biological reasoning, so that they began to see, as Professor Courtney Cahill observes, that “biologically rationalized sex discrimination *is* a sex stereotype.”<sup>339</sup>

The conflicts in *Skrametti*, *Hecox*, and *B.P.J.* make visible a contemporary ideology of separate spheres, which claims that people are naturally destined to be only male or female, and that once this administrative designation is stamped at birth, it cannot change. The athlete bans legislate “generalizations about ‘the way women are,’ estimates of what is appropriate for *most women*,” and “deny[] opportunity to women whose talent and capacity place them outside the average description.”<sup>340</sup> The bans legislate a generalization that is true for many people,

<sup>330</sup> See, e.g., Franklin, *supra* note 129, at 176 (discussing *Morales-Santana*, 582 U.S. 47); Courtney Megan Cahill, *The New Maternity*, 133 HARV. L. REV. 2221, 2245–50 (2020).

<sup>331</sup> See, e.g., Franklin, *supra* note 129, at 189 (discussing *Pavan*, 582 U.S. 563); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2293 (2017); Cahill, *supra* note 330, at 2248, 2276.

<sup>332</sup> See, e.g., *supra* notes 327–28.

<sup>333</sup> See Jennifer L. Levi & Kevin M. Barry, *Transgender Tropes & Constitutional Review*, 37 YALE L. & POL’Y REV. 589, 596–97 (2019); Shannon Price Minter, “*Déjà Vu All Over Again*”: *The Recourse to Biology by Opponents of Transgender Equality*, 95 N.C. L. REV. 1161, 1187 (2017).

<sup>334</sup> See Eyer, *supra* note 21, at 1440–42.

<sup>335</sup> *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975).

<sup>336</sup> *Califano v. Webster*, 430 U.S. 313, 317 (1977) (per curiam).

<sup>337</sup> *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982) (policy advancing “the old view that women, not men, should become nurses” turned “the assumption that nursing is a field for women” into “a self-fulfilling prophecy”).

<sup>338</sup> *Califano*, 430 U.S. at 317 (quoting *Stanton*, 421 U.S. at 15).

<sup>339</sup> Cahill, *Irreconcilable Differences*, *supra* note 21, at 1073.

<sup>340</sup> See *VMI*, 518 U.S. 515, 550 (1996).

but not for all. Recognizing that transgender people are defined by more than a medical diagnosis, as the Court did in *Skrametti*, is a step toward ensuring that they can exercise equal autonomy to decide what kind of body feels like home.

Like the separate spheres of the Victorian Era, our version is rooted in normative claims about sex — that it is wrong to move away from sex assigned at birth, and that being transgender is a bad outcome. And as before, biology is not doing the work attributed to it. It is being invoked to anchor constitutional law in an old social order.<sup>341</sup>

Today’s separate-spheres ideology threatens to reverse the work of several feminist generations to liberate women from the stereotypical assumption that their bodies make them naturally feminine, domestic, heterosexual, and reproductive. Left unchecked, double deference could send equal protection law back to the era of *Bradwell* and *Muller*, drawing other kinds of sex-related regulation into the ambit of a widening “medical context,” subject only to rational basis review.

The Fourth and Ninth Circuits in *B.P.J.* and *Hecox* both noticed that the states had defined sex by generalizations that do not apply to trans people. The Ninth Circuit observed that “[a]ppellants suggest that ‘biological sex’ is a neutral and well-established medical and legal concept, rather than one designed precisely by the Idaho legislature to exclude transgender and intersex people.”<sup>342</sup> It found that “the Act’s definition of ‘biological sex’ is likely an oversimplification of the complicated biological reality of sex and gender” that cherry-picks biological features because they are difficult for transgender people to change, not because they play a particularly important role in athletic skill.<sup>343</sup>

The Fourth Circuit was even more adamant that “[t]he undisputed purpose — and the only effect — of [West Virginia’s] definition is to exclude transgender girls from the definition of ‘female’ and thus to exclude them from participation on girls sports teams.”<sup>344</sup> As these courts understood, categorizing individuals by sex, and conditioning access to

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<sup>341</sup> Cf. Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL’Y 19, 33 (2022) (describing justifications for women’s disenfranchisement in the Founding era); Reva B. Siegel, *Foreword: Democratizing Constitutional Memory*, 123 MICH. L. REV. 1011, 1021 (2025) (explaining how the *Dobbs* Court “located ‘constitutional authority in imagined communities of the past . . .’” (quoting Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism — And Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1196 (2023))); Jack M. Balkin, *Constitutional Memories*, 31 WM. & MARY BILL RTS. J. 307, 358 (2022) (describing “the originalist account of Framers and Founders[,] who . . . sat atop [and] also enforced a system of racial and sexual hierarchy”).

<sup>342</sup> *Hecox v. Little*, 104 F.4th 1061, 1076 (9th Cir. 2024), cert. granted, No. 24-38, 2025 WL 1829165 (U.S. July 3, 2025).

<sup>343</sup> See *id.*

<sup>344</sup> *B.P.J. ex rel. Jackson v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 556 (4th Cir. 2024), cert. granted, No. 24-43, 2025 WL 1829164 (U.S. July 3, 2025).

resources on it, is precisely the sort of harm that our constitutional sex discrimination law condemns.<sup>345</sup>

It is not inevitable that the Court will resort to double deference again. *Skrmetti* preserves significant alternative paths.<sup>346</sup> But remaining clear-eyed about the open legal avenues to challenge anti-transgender discrimination is not an excuse to ignore the enormous harm that *Skrmetti* will do to transgender youth, their families, and the cause of equality. The litigants in this case, known as L.W., Ryan Roe, and John Doe, and hundreds of thousands of trans kids in America<sup>347</sup> deserved better. Placing the harms they suffered beyond scrutiny invites more discrimination against transgender people, and strikes at the foundation of sex equality for all.

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<sup>345</sup> I intend to elaborate this point more fully in a forthcoming project.

<sup>346</sup> *Skrmetti* confirmed that sex stereotypes are relevant at the threshold analysis of whether a classification exists, and if one is found, in the application of heightened scrutiny. See *Skrmetti*, 145 S. Ct. at 1828 (citing *Sessions v. Morales-Santana*, 582 U.S. 47, 62 (2017)). Where a statute does not classify by sex on its face, it may “mask” a sex classification by “proscrib[ing] generally accepted conduct if engaged in by” people of different sexes. *Id.* at 1831 (quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967)). These kinds of “equal application” rules formally regard individuals equally, but serve to reinforce social hierarchy. The majority explained that a law banning interracial marriage — like the one in *Loving v. Virginia* — could not be saved by prohibiting “any person from marrying an individual of a different race.” *Id.* The Court reaffirmed that this principle remains active in the sex context too. See *id.* Although the majority and dissent in *Skrmetti* did not agree on whether SB 1 qualifies as an “equal application” law, the dissent agreed that a legal line with people of different sexes on both sides could still be a sex classification if it is “policing a sex stereotype.” *Id.* at 1874 n.8 (Sotomayor, J., dissenting).

Once a sex classification is found, *Skrmetti* still requires courts to apply heightened scrutiny because “sex-based lines too often reflect stereotypes or overbroad generalizations.” *Id.* at 1828 (majority opinion) (citing *Morales-Santana*, 582 U.S. at 62; *VMI*, 518 U.S. 515, 533 (1996)). And where laws do not classify on protected bases, they may still fail if they were “motivated by an invidious discriminatory purpose.” *Id.* at 1832 (citing *Pers. Adm’r v. Feeney*, 442 U.S. 256, 271–74 (1979); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–66 (1979)). In bringing *Geduldig*’s illogic back from the dead, see *id.* at 1833, the majority left open anti-stereotyping pathways to send it and *Skrmetti* back to the anticanon where they belong. See generally Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011) (exploring the role of anticanonical cases in American constitutional law).

On sex stereotyping, see Cahill, *Irreconcilable Differences*, *supra* note 21, at 1071; Case, *supra* note 144, at 1451; Franklin, *supra* note 24, at 83.

<sup>347</sup> See JODY L. HERMAN & ANDREW R. FLORES, HOW MANY ADULTS AND YOUTH IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 2 (2025), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Aug-2025.pdf> [<https://perma.cc/X3YS-EGQF>].