LEGALIST VERSUS REALIST ACCOUNTS OF UNITED STATES V. SKRMETTI

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Although the Supreme Court is increasingly adopting an understanding of sex discrimination that is biologically focused and/or formalistic, this Article argues that the Court does not consistently apply that conception when doing so benefits transgender Americans. The Court's conclusion in United States v. Skrmetti *that no facial sex classification exists in Tennessee's law banning gender-affirming care for transgender—but not cisgender—minors is irreconcilable with its conclusion five years earlier in* Bostock v. Clayton County *that Title VII's prohibition on sex discrimination prohibits employers from firing employees just because they are transgender. Perhaps tellingly, only Justice Gorsuch, Bostock's author, and Chief Justice Roberts were in the majority in both cases. After explaining why a legalist account cannot persuasively distinguish* Skrmetti *from* Bostock*, this Article develops a realist one that fares better. In 2020, the year* Bostock *was decided, President Donald Trump did not condemn transgender Americans; in his re-election campaign, he did not mention them. In 2024, by contrast, Trump and the Republican Party won control of the political branches in part by riding a wave of hostility to transgender Americans that began in conservative state legislatures in 2021. Given current Republican Party politics, even a limited decision in* Skrmetti *in favor of the transgender plaintiffs likely would have elicited harsh political attacks on those Republican-appointed Justices who had enabled such a decision. As with the Court's stated allegiance to originalism and textualism, so too its commitment to a biologically centered and/or formalistic understanding of sex discrimination can be trumped when the political pressure seems too strong for some Justices to resist.*

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I. INTRODUCTION

This is an Article about methodological inconsistency and, relatedly, about the ability of a realist account to persuasively explain a Supreme Court decision where a legalist account falters. A realist account explains legal doctrine by looking to considerations external to law, such as political pressure placed on the Justices or changes in public opinion.[1] By contrast, a legalist account looks to considerations internal to law, such as the constitutional text or the legal reasoning embodied in judicial precedent.[2] The doctrinal focus of this Article is on the future of equal protection law in the context of sex, sexual orientation, and gender identity. But the force of a realist, as opposed to a legalist, account of at least part of that area of constitutional doctrine appears to be a particular instance of a broader concern.

For example, in 2024, the U.S. Supreme Court decided *United States v. Rahimi*.[3] The Court there held that the Second Amendment permits someone found by a court to pose a credible threat to the physical safety of another to be temporarily disarmed.[4] In addition to joining the majority opinion, Justice Neil Gorsuch wrote a concurrence opining on the proper method of constitutional interpretation.[5] "Come to this Court with arguments from text and history," he declared, "and we are bound to reason through them as best we can."[6] He likened judges who are not bound by textualism and originalism to kings and queens: "Allow judges to reign unbounded by those materials, or permit them to extrapolate their own broad new principles from those sources, and no one can have any idea how they might rule. (Except the judges themselves.)"[7] He added for good measure that "[f]aithful adherence to the Constitution's original meaning may be an imperfect guide, but I can think of no more perfect one for us to follow."[8]

1. *See infra* Part IV.
2. *See infra* Part III.
3. 602 U.S. 680 (2024).
4. *Id.* at 702.
5. *Id.* at 711 (Gorsuch, J., concurring).
6. *Id.* at 712.
7. *Id.*
8. *Id.* at 712.

In writing those words, Justice Gorsuch appeared unconcerned about their apparent inconsistency with the reasoning of several consequential majority opinions that he joined that term—none of which appeared to have a tenable basis in the text or original meaning of the Constitution or of the statute at issue.[9] Instead, both *Trump v. United States* (concerning the scope of the President's criminal immunity)[10] and *Trump v. Anderson* (concerning whether states can enforce the Fourteenth Amendment's bar on insurrectionist presidential candidates)[11] were based on structural inferences, consequentialist considerations, and analogies to precedent.[12] As the conservative originalist scholar William Baude opined, "*Trump v. Anderson*'s holding lacked any real basis in text and history," and "[t]he court's reasoning [in *Trump v. United States*] went well beyond any specific part of the Constitution or any determinate constitutional tradition."[13] As for *Fischer v. United States* (concerning the scope of a federal criminal law used to prosecute many January 6 defendants, including Donald Trump), Justice Amy Coney Barrett wrote powerfully in dissent that the Court "does textual backflips to find some way—*any* way—to narrow the reach" of the criminal provision in question.[14]

There is a lesson here, and it is not limited to situations in which President Trump benefits from the Court's deviations from originalism in constitutional interpretation and textualism in statutory interpretation. In cases with political stakes, most of the conservative Justices cannot be counted on to be methodologically consistent—to be principled.[15] By "principled," this Article means a

9. *See* Trump v. United States, 603 U.S. 593, 659–60 (2024) (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting); Trump v. Anderson, 601 U.S. 100, 121–22 (2024) (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment); Fischer v. United States, 603 U.S. 480, 506 (2024) (Barrett, J., dissenting). For a defense of *Anderson* on structural and consequentialist grounds not offered by the Court, see Neil S. Siegel, *Narrow But Deep: The* McCulloch *Principle, Collective-Action Theory, and Section Three Enforcement*, 39 CONST. COMMENT. 219, 221–25 (2024).

10. *Trump*, 603 U.S.

11. *Anderson*, 601 U.S.

12. *See, e.g.*, Curtis A. Bradley & Neil S. Siegel, *Court-Stripping, Court-Packing, and Court-Defying: Revisiting the Supreme Court's Essential Functions*, 104 TEX. L. REV. 1159, 1162–63 (2026) (noting the structural reasoning in those two decisions).

13. William Baude, *A Principled Supreme Court, Unnerved by Trump*, N.Y. TIMES (July 5, 2024), https://www.nytimes.com/2024/07/05/opinion/supreme-court-trump.html [https://perma.cc/K92Z-TMCJ].

14. Fischer v. United States, 603 U.S. 480, 506 (2024) (Barrett, J., dissenting). The Sarbanes-Oxley Act of 2002 imposes criminal liability on anyone who "corruptly . . . alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. § 1512(c)(1). The next subsection imposes criminal liability on anyone who "otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so." *Id.* § 1512(c)(2). In *Fischer*, the Court held that proving a violation of § 1512(c)(2) does not require the government simply to show that the defendant "obstruct[ed] . . . any official proceeding" or attempted to do so, which is what the subsection provides, but rather requires the government to establish that the defendant impaired the availability or integrity for use in an official proceeding of records, documents, objects, or other things used in an official proceeding, or attempted to do so. *See Fischer*, 603 U.S. at 506 (Barrett, J., dissenting) (writing that the Court "simply cannot believe that Congress meant what it said" because "Section 1512(c)(2) is a very broad provision," even though "statutes often go further than the problem that inspired them, and under the rules of statutory interpretation, we stick to the text anyway").

15. This Article focuses on the conservative Justices because they are the ones who wield power on the current Court. The Article does not imply or presuppose that the liberal Justices are more principled than their

commitment to resolve cases only in virtue of announced reasons for decision or theories of interpretation, and to be bound by those reasons or theories in all future cases to which they fairly apply.[16] In constitutional cases, most of the current Justices purport to assign first-class interpretive status to relatively strict versions of originalism and second-class interpretive status to structural, consequentialist, and doctrinal modalities of interpretation.[17] But those same Justices do not appear to mean it when the consequences of applying that proclaimed interpretive hierarchy are politically unacceptable to them.

The Court can be methodologically inconsistent not only at the level of interpretive theory, but also at the level of doctrinal reasoning. One area of doctrine in which a similar dynamic is playing out is the Court's understanding of sex discrimination. Generally speaking, its conception of sex inequality is increasingly biologically focused and/or formalistic, to the detriment of many women as well as sexual-orientation minorities and transgender individuals. For example, even after the Court held in *Obergefell v. Hodges* that the constitutional right to marry includes same-sex marriage,[18] Justice Gorsuch wrote a dissenting opinion joined by Justices Thomas and Alito (that likely would have been a majority opinion had later changes in the Court's composition occurred sooner) defending "a birth registration regime based on biology" that denied married same-sex couples the same legal recognition as married opposite-sex couples.[19] Moreover, in *Dobbs v. Jackson Women's Health Organization*, Justice Alito reasoned formalistically for the conservative majority that "[t]he regulation of a medical procedure [such as abortion] that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other.'"[20] The Court thereby reaffirmed (or, depending on one's point of view, rehabilitated)

conservative colleagues. For example, one could wonder whether their embrace of legal formalism in the sex discrimination cases discussed in this Article was opportunistic. *See infra* Part V.

16. "In theory, at least," Professor Paul Mishkin wrote more than forty years ago, "the Court—as distinguished from other agencies of government—must rest its decision on an analytically sound principle." Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 930 (1983). By "an analytically sound principle," Professor Mishkin meant a judicial opinion that satisfies basic "demands of generality and fidelity—requiring sincere efforts to reason in terms of precepts that transcend the individual case and that are conscientiously seen as governing in all cases within their stated terms." *Id.* at 909. According to Mishkin, principle "transcends the particular case, is rationally defensible in those general terms, and is analytically adequate to support the result." *Id.* at 929.

17. United States v. Rahimi, 602 U.S. 680, 712 (2024) (Gorsuch, J., concurring); *id.* at 715 (Kavanaugh, J., concurring) ("The first and most important rule in constitutional interpretation is to heed the text—that is, the actual words of the Constitution—and to interpret that text according to its ordinary meaning as originally understood.").

18. 576 U.S. 644, 675–76 (2015).

19. *See, e.g.*, Pavan v. Smith, 582 U.S. 563, 568 (2017) (Gorsuch, J., joined by Thomas & Alito, JJ., dissenting). By contrast, the Rehnquist Court had generally asked whether sex classifications reflected or reinforced traditional sex-role stereotypes. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 534 (1996) (emphasizing that "[sex] classifications may not be used, as they once were[,] to create or perpetuate the legal, social, and economic inferiority of women" (citation omitted)). *But see generally* Nguyen v. Immigr. & Naturalization Serv., 533 U.S. 53 (2001) (upholding a sex classification in federal immigration law that was arguably based on traditional sex-role stereotypes about the roles of mothers and fathers in raising children).

20. 597 U.S. 215, 236 (2022) (quoting Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974)).

the Court's (in)famous conclusion in *Geduldig v. Aiello* that pregnancy discrimination was rarely sex discrimination because women were on both sides of the pregnancy line.[21] But when a biological and/or formalistic conception of sex discrimination occasionally helps women, sexual-orientation minorities, or transgender individuals win important cases, the Court does not consistently stick with the conception.

The first purpose of this Article is to substantiate that contention by explaining why the Court's reasoning about sex discrimination in *United States v. Skrmetti*[22] is inconsistent with its reasoning about sex discrimination five years earlier in *Bostock v. Clayton County*.[23] In *Bostock*, Justice Gorsuch held for six Justices, including Chief Justice Roberts, that the ban on sex discrimination in federal employment discrimination law includes a ban on gender-identity discrimination because an employer cannot discriminate against transgender employees without taking their sex assigned at birth into account.[24] Gorsuch so concluded over vigorous dissents by Justices Alito and Kavanaugh, who insisted that sexism was different from homophobia or transphobia.[25] By contrast, the Court held in *Skrmetti* that a Tennessee law did not use a sex classification to discriminate against transgender teenagers even though the law on its face took their sex assigned at birth into account in denying them access to certain medications to treat their gender dysphoria.[26] That is, under the Tennessee statute in question, transgender teenagers would have access to the exact same medications—puberty blockers and hormone therapy—to treat the exact same physical phenomena in their bodies (for example, the presence or absence of testosterone or facial hair) if their sex assigned at birth had been the opposite of what it was.[27] Indeed, the statute permits access to those medications for any medical reason other than addressing a discrepancy between a teenager's sex assigned at birth and their gender identity.[28]

After establishing the insufficiency of a legalist account to explain the different outcomes in *Bostock* and *Skrmetti*, this Article turns to its second purpose: offering a realist explanation that appears to fare better. Although the first administration of President Donald J. Trump took various actions that harmed transgender Americans,[29] Trump did not condemn them in 2020; in his re-

21. 417 U.S. at 496 n.20.

22. *See generally* 605 U.S. 495 (2025) (holding that a Tennessee statute prohibiting healthcare practitioners from administering puberty-blocking drugs or hormone therapy to minors when the goal is to support identification with a gender different from their sex assigned at birth is not subject to heightened scrutiny under the Equal Protection Clause and satisfies rational basis review).

23. *See generally* 590 U.S. 644 (2020) (holding that firing an individual for being gay or transgender violates Title VII).

24. *Id.* at 683.

25. *Id.* (Alito, J., joined by Thomas, J., dissenting); *id.* at 780 (Kavanaugh, J., dissenting).

26. 605 U.S. at 518–19 (majority opinion).

27. *Id.*

28. *Id.*

29. *See Look Back: Trump-Pence Administration Timeline*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/resources/trump-pence-administration-timeline [https://perma.cc/J33B-39X5] (last visited April. 16, 2026)

election campaign, he did not mention them much, if at all. In 2024, by contrast, Trump and the Republican Party won control of the political branches in part by riding a wave of hostility to transgender Americans that had begun in conservative state legislatures in 2021. Trump and his party spent "nearly $215 million on television ads fanning fear and hatred of trans people," a "figure that doesn't include cable or streaming ads."[30] Given current Republican Party politics, any decision in *Skrmetti* in favor of transgender teenagers as well as their parents and doctors likely would have elicited strident criticisms of those Republican appointees to the Court who had enabled such a decision. As with the Court's stated allegiance to originalism and textualism,[31] so too its commitment to a biologically centered and/or formalistic understanding of sex discrimination can be trumped when the political pressure seems too strong for some Justices to resist.

Part II briefly recounts the Court's holdings and reasoning in *Bostock*. Part III discusses the *Skrmetti* litigation at some length and explains why a legalist attempt to reconcile the two decisions is strained. Part IV provides a realist account of *Skrmetti* that emphasizes conservative backlash politics. Part V anticipates objections, first by identifying the limitations of an alternative realist account that features public opinion more generally, and then by explaining why the descriptive account offered here is normatively troubling. The Conclusion distinguishes the sort of political attacks that potentially faced the conservative Justices in *Skrmetti* from past political threats that endangered the Court's existence as an effective governmental institution changed with protecting the Constitution and the rule of law.

II. *BOSTOCK*

The question presented in *Bostock* was whether the prohibition on employment discrimination "because of . . . sex" in Title VII of the Civil Rights Act of 1964 includes a prohibition on discrimination because of an employee's gender identity or sexual orientation.[32] Fracturing six to three, the Court said yes, holding that an employer who fires an employee just for being gay or transgender violates Title VII.[33] Justice Gorsuch's majority opinion, which Chief Justice Roberts joined in full, "proceed[ed] on the assumption that 'sex'" in 1964, when Title VII was enacted, "referr[ed] only to biological distinctions between male and female."[34] After defining the term "sex" in a way that he deemed sufficient

(providing an archived time-line that identifies the "pivotal actions, policy changes, and milestones regarding LGBTQ+ rights and equality" during the Trump-Pence administration).

30. *See* Jennifer Bendery, *Trump Downplays Trans Bathroom Debate After Spending Millions on Anti-Trans Ads*, HUFFPOST (Dec. 13, 2024, at 14:32 ET), https://www.huffpost.com/entry/donald-trump-transgender-bathroom-bans_n_675c6956e4b01e3eb18e461e [https://perma.cc/5VBP-8PMX].

31. *See, e.g.*, United States v. Rahimi, 602 U.S. 680, 712 (2024) (Gorsuch, J., concurring).

32. Title VII makes it "unlawful . . . for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

33. Bostock v. Clayton Cnty., 590 U.S. 644, 662 (2020).

34. *Id.* at 655. Gorsuch merely proceeded on the assumption that the term "sex" in Title VII means "biological sex" without actually deciding what "sex" means, because he regarded that assumption as adequate to

for purposes of resolving the case, Gorsuch engaged in logical reasoning, using what is sometimes referred to as the "comparative method" or the test of "but for" causation.[35] Considering the case of "an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female," Gorsuch reasoned that "[i]f the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth."[36]

Gorsuch used the same formalistic analysis to conclude that Title VII's ban on sex discrimination includes a ban on sexual-orientation discrimination. According to Gorsuch, an employer who fires an employee just for being gay will not tolerate male employees who date men but has no problem with female employees who date men.[37] "If the employer fires the male employee for no reason other than the fact he is attracted to men," Gorsuch reasoned, "the employer discriminates against him for traits or actions it tolerates in his female colleague."[38] In other words, if changing the employee's sex assigned at birth makes the adverse employment action disappear, then according to Gorsuch, the employer has discriminated on the basis of sex. "[T]he employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge."[39]

The point for present purposes is not that Gorsuch's method of reasoning for the Court in *Bostock* was entirely sound. It was not. Among other problems, there would seem to be something wrong with a method that, as a logical matter, produces the result that Title VII prohibits employers from firing employees just for being gay or lesbian but not for being bisexual. (A hostile employer would still fire a bisexual employee if the employee's biological sex were different.) Only an understanding of Title VII focused on traditional sex-role stereotypes, including stereotypes concerning who men and women are "supposed" to desire as romantic partners, would compel the result that bisexual employees (like gay and lesbian employees) are protected by Title VII. As the U.S. Court of Appeals for the Seventh Circuit wrote before *Bostock* in a case involving sexual-

decide the case. *See id.* The opinion's formal logic did not depend on adopting a trans-exclusive definition of sex. A transgender woman can be the subject of discrimination because of the sex she was assigned at birth, which some people believe is a discoverable fact about the human body called "biological sex," and other people do not. *See id.* The opinion also used language—namely, "identified at birth," *id.* at 660, 669, 673—that could be interpreted as a halfway point between those two positions.

35. *See, e.g.*, Hively v. Ivy Tech Cmty. Coll., 853 F. 3d 339, 345 (7th Cir. 2017) (describing "the tried-and-true comparative method in which we attempt to isolate the significance of the plaintiff's sex to the employer's decision: has she described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way?"); *Bostock*, 590 U.S. at 661 ("When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—both the individual's sex and something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.").

36. *Bostock*, 590 U.S. at 660.

37. *Id.*

38. *Id.*

39. *Id.*

orientation discrimination in the workplace, "[v]iewed through the lens of the gender non-conformity line of cases, Hively [the plaintiff] represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual."[40] Concerns about sex-role stereotyping in the workplace were absent from Gorsuch's majority opinion in *Bostock*, even though they animate some of the Court's most important prior decisions interpreting Title VII.[41]

The point for purposes of this Article is the nature of Gorsuch's method of reasoning in *Bostock*, not its soundness. Gorsuch used a formalistic understanding of sex discrimination. Given the composition of the Court in 2020, it is unlikely that the case would have come out the way it did if a formalistic approach had not been available to Gorsuch. Judging from his enthusiasm for that approach at oral argument,[42] it is possible (albeit speculative to suggest) that Gorsuch was the fifth vote in favor of the gay or transgender employees and Roberts was the sixth, even though the Chief Justice typically votes first at the Justices' Conference held after oral argument.

III. *SKRMETTI*

Due in part to the crafting of model legislation and the dissemination of legislative findings by advocacy groups,[43] Tennessee, along with more than half the state legislatures in the nation at present, prohibits gender-affirming medical care for minors.[44] In 2023, Tennessee passed the Prohibition on Medical Procedures Performed on Minors Related to Sexual Identity, Senate Bill 1 (SB1).[45] As relevant here, SB1 prohibits healthcare providers from "[p]rescribing, administering, or dispensing any puberty blocker or hormone" to a minor,[46] even with the consent of the minor's parents, for the purpose of: (1) "[e]nabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex"; or (2) "[t]reating purported discomfort or distress from a discordance between the minor's sex and asserted identity."[47] SB1 defines the term "[s]ex" as the "immutable characteristics of the reproductive system that define the individual as

40. *Hively*, 853 F.3d at 346.

41. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (holding that the practice of gender stereotyping contravenes Title VII's prohibition of sex discrimination); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998) (holding that Title VII prohibits sexual harassment in the workplace regardless of whether the sex of the sexual harasser is the same as the sex of the victim of the harassment). Justice Scalia wrote the opinion for a unanimous Court in *Oncale*.

42. *See* Transcript of Oral Argument at 44–47, Bostock v. Clayton Cnty., 590 U.S. 644 (2020) (No. 17-1618).

43. Brief for the Petitioner at 7, United States v. Skrmetti, 605 U.S. 495 (2025) (No. 23-477) [hereinafter Brief for the Petitioner].

44. *See, e.g.*, Amy Harmon, *27 States Have Restricted Gender-Transition Treatments for Minors Since 2021*, N.Y. TIMES (June 18, 2025), https://www.nytimes.com/2025/06/18/us/politics/states-trans-treatments-scotus.html [https://perma.cc/SR45-53YQ].

45. TENN. CODE ANN. §§ 68-33-101 to 110 (2025).

46. *Id.* § 68-33-102(5)(B).

47. *Id.* § 68-33-103(a)(1)(A).

male or female, as determined by anatomy and genetics existing at the time of birth."[48] In passing SB1, the Tennessee legislature declared that "[t]his state has a legitimate, substantial, and compelling interest in," among other things, "protecting minors from physical and emotional harm"; "encouraging minors to appreciate their sex, particularly as they undergo puberty"; and "protecting the integrity of the medical profession, including by prohibiting medical procedures . . . that might encourage minors to become disdainful of their sex."[49]

Importantly, Tennessee does not generally prohibit healthcare providers from administering puberty blockers or hormones to minors.[50] Because SB1's prohibition applies only when puberty blockers or hormones are prescribed to permit a transgender teenager to live in alignment with a gender identity inconsistent with their sex assigned at birth,[51] the statute does not limit the medical provision of puberty blockers or hormones for any other purpose. In addition, and perhaps to underscore the limited scope of the statute's prohibition on the administration of puberty blockers and hormones, SB1 expressly exempts those medications from its prohibition when medical providers prescribe them "to treat a minor's congenital defect, precocious puberty, disease, or physical injury[.]"[52] The statute defines the terms "[c]ongenital defect" and "disorder" to include an "abnormality present in a minor that is inconsistent with the normal development of a human being of the minor's sex."[53] SB1 excludes from the definitions of "[c]ongenital defect" and "disease" the medical conditions of "gender dysphoria, gender identity disorder, [and] gender incongruence."[54] Although the statute does not put it this way, SB1 reflects the reality that cisgender minors—that is, minors who identify with the sex they were assigned at birth—frequently obtain gender-affirming care.[55] SB1 makes clear that it does not interfere with their ability to do so.

In *United States v. Skrmetti*, three transgender minors, their parents, and a doctor challenged SB1 under the Equal Protection Clause.[56] The Biden administration intervened on the side of the challengers.[57] The primary question presented was whether SB1 uses a facial sex classification, thereby triggering

48. *Id.* § 68-33-102(9).
49. *Id.* § 68-33-101(m).
50. *Id.* § 68-33-104.
51. *Id.* § 68-33-103(a)(1)(A).
52. *Id.* § 68-33-103(b)(1)(A).
53. *Id.* §§ 68-33-102(1), 68-33-103(b)(2).
54. *Id.*
55. *See* Brief of Experts on Gender Affirming Care as *Amici Curiae* in Support of Petitioner and Respondents in Support of Petitioner at 2, United States v. Skrmetti, 605 U.S. 495 (2025) (No. 23-477) (explaining that cisgender minors also require gender affirming care because they "often find that their bodies do not conform to their internal sense of gender," including when "cisgender boys . . . find that they have an unwelcome buildup of breast tissue, or atypically high-pitched voices," and when "[c]isgender girls . . . encounter the unwelcome growth of facial and body hair, problems with menstruation, and underdevelopment of breast tissue").
56. 605 U.S. 495, 507 (2025).
57. The United States intervened under 42 U.S.C. § 2000h–2, which authorizes intervention in a private lawsuit raising an equal protection challenge "if the Attorney General certifies that the case is of general public importance."

intermediate scrutiny, or whether the statute does not discriminate on the basis of sex, thereby warranting only deferential, rational basis review.[58]

According to *Bostock*'s logic, which the Solicitor General spelled out for the Court, there is a strong argument that SB1 uses a facial sex classification. "Put simply," the Solicitor General explained, "an adolescent assigned female at birth cannot receive puberty blockers or testosterone to live as a male, but an adolescent assigned male at birth can."[59] Likewise, "an adolescent assigned male at birth cannot receive puberty blockers or estrogen to live and present as a female, but an adolescent assigned female at birth can."[60] Indeed, under the comparative method, *Bostock*'s requirement of but-for causation would appear to be satisfied: changing a minor patient's sex assigned at birth determines whether a medical provider in Tennessee may lawfully prescribe the minor puberty blockers or hormone therapy to treat a particular physiological condition in the minor's body. In the language of *Bostock*, "changing the [minor patient's] sex would have yielded a different" result.[61] As Justice Gorsuch also wrote for the Court in *Bostock*, if a law "intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in [a person] identified as female at birth," then the person's "sex plays an unmistakable and impermissible role."[62]

Moreover, the state legislature made plain on the face of SB1 that it had not inadvertently or merely technically employed a facial sex classification; rather, it was focused at least in part on enforcing gender conformity with sex assigned at birth. To repeat, in addition to declaring that "[t]his state has a legitimate, substantial, and compelling interest in protecting minors from physical and emotional harm," the Tennessee legislature separately announced that it "has a legitimate, substantial, and compelling interest in encouraging minors to appreciate their sex" and in "prohibiting medical procedures . . . that might encourage minors to become disdainful of their sex."[63] The district court agreed with the foregoing constitutional arguments against SB1; concluded that the law was unlikely to survive the relatively demanding means/ends analysis of intermediate scrutiny;[64] and preliminarily enjoined the statute.[65]

58. Under longstanding equal protection law, sex classifications trigger intermediate scrutiny, meaning that they are presumptively unconstitutional and that the government bears the burden of demonstrating that the classification is substantially related to an actual, important governmental interest. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 516 (1996). By contrast, under rational basis review, the law is presumed to be constitutional, and the challenger bears the burden of showing that the classification is not rationally related to a conceivable (not necessarily an actual), legitimate state interest. *See, e.g.*, Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487–88 (1955).

59. Brief for the Petitioner, *supra* note 43, at 15–16.

60. *Id.* at 21–22.

61. Bostock v. Clayton Cnty., 590 U.S. 644, 659 (2020).

62. *Id.* at 660.

63. TENN. CODE ANN. § 68-33-101(m) (2025).

64. In addition to adopting a sex-discrimination rationale, the district court held that SB1 triggers intermediate scrutiny because it discriminates on the basis of transgender status. *See* Brief for the Petitioner, *supra* note 43, at 12. The Supreme Court did not decide that question, however, and this Article does not address it because it is beyond the scope of *Bostock*'s formalist, sex-discrimination logic.

65. SB1 also prohibits a healthcare provider from "[s]urgically removing, modifying, altering, or entering into tissues, cavities, or organs of a human being," TENN. CODE ANN. § 68-33-102(5) (2025), for the gender-

The district court's judgment was reversed by a divided panel of the U.S. Court of Appeals for the Sixth Circuit. Writing for the majority, Chief Judge Jeffrey Sutton denied that the state law included a facial sex classification and, applying only deferential scrutiny, upheld it as rational.[66] Sutton distinguished *Bostock* as a case involving Title VII, not the Equal Protection Clause, which, he said, has different language.[67] He further distinguished *Bostock* as a case in which "the employers fired adult employees because their behavior did not match stereotypes of how adult men or women dress or behave."[68] To repeat, however, valid concerns about sex-role stereotyping were absent from the majority opinion in *Bostock*, even though they were present in the briefing submitted to the Court.[69] And, in any event, as explained above, such stereotyping was present in *Skrmetti* on the face of the law.[70] It is apparently the official position of the government of Tennessee that minors in the state are supposed to identify with their sex assigned at birth.[71]

Even so, at oral argument, Chief Justice Roberts seemed to generally agree with Sutton's view of the case.[72] Justice Gorsuch—who is typically not shy at oral argument—sat silent for almost two-and-one-half hours. He did not ask a single question.[73]

The Supreme Court affirmed the judgment of the Sixth Circuit in a majority opinion written by the Chief Justice and joined by Gorsuch.[74] Roberts concluded that SB1 does not discriminate on the basis of sex; rather, it discriminates (1) on the basis of age—that is, the law restricts access to gender-affirming care only to minors—and (2) on the basis of medical purpose—that is, the law restricts access

affirming purposes prohibited by the statute. But the district court held that the plaintiffs lacked standing to challenge that ban on surgical procedures performed for prohibited purposes, so the court did not enjoin it. L.W. by & through Williams v. Skrmetti, 679 F. Supp. 3d 668, 681 (M.D. Tenn. 2023), rev'd and remanded, 83 F.4th 460 (6th Cir. 2023), aff'd sub nom. United States v. Skrmetti, 605 U.S. 495 (2025).

66. *L.W.*, 83 F.4th at 460, aff'd sub nom. *Skrmetti*, 605 U.S. at 495.

67. *Id.* at 484–85.

68. *Id.* at 485.

69. *See, e.g.*, Brief for Respondent Aimee Stephens at 28–36, Bostock v. Clayton County, 590 U.S. 644 (2020) (No. 18-107) (arguing that the employer violated Title VII by firing the transgender employee for departing from sex-based stereotypes about men and women).

70. *See, e.g.*, Brief for the Petitioner, *supra* note 43, at 33 (observing that "the State has never tried to argue that an interest in discouraging people from being transgender or encouraging them to present as their sex assigned at birth is an important governmental objective," and contending that Tennessee could not "make that showing, because this Court has recognized that a statutory objective that rests on stereotypic notions about gender is itself illegitimate") (internal quotation marks omitted); *id.* at 34 ("Because one of SB1's two declared objectives is illegitimate, the State must justify SB1 based on its asserted interest in protecting the health and safety of adolescents.").

71. *See, e.g.*, David Cole, *Gender-Affirming Care & the Courts*, THE N.Y. REV. (Dec. 19, 2024), https://www.nybooks.com/articles/2024/12/19/gender-affirming-care-the-courts-david-cole/?lp_txn_id=1659912 [https://perma.cc/P4XZ-TLAD] ("A law that tells people they cannot obtain treatment to live in a way 'inconsistent' with how they were identified as newborns is nothing more than a rule requiring conformity to a [sex-based] stereotype.") (quoting SB1).

72. *See* Transcript of Oral Argument at 12–13, United States v. Skrmetti, 605 U.S. 495 (2025) (No. 23-477).

73. *See id.* at 40.

74. United States v. Skrmetti, 605 U.S. 495, 526 (2025).

to puberty blockers and hormone therapy to all minors, regardless of sex, for the purpose of treating certain medical conditions and not others.[75] Unlike Sutton, Roberts did not decide whether *Bostock* was limited to the context of Title VII,[76] and Roberts did not assert that *Bostock*'s reasoning does not apply in equal protection cases just because Title VII and the Equal Protection Clause have different language.[77] That assertion is dubious: the Supreme Court has long interpreted both Title VII and the Equal Protection Clause to prohibit insufficiently justified disparate treatment of individuals on the basis of certain protected characteristics (including sex), and the Court in *Bostock* offered an analysis of what such treatment logically entails.[78] Also unlike Sutton, Roberts did not misread *Bostock* as a decision that turned on the presence of gender stereotypes.

Instead, Roberts argued that *Bostock* was distinguishable because SB1 did not satisfy the comparative method's requirement of but-for causation:

> If a transgender boy seeks testosterone to treat his gender dysphoria, SB1 prevents a healthcare provider from administering it to him. 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—such as a congenital defect, precocious puberty, disease, or physical injury. 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.[79]

"Under the reasoning of *Bostock*," Roberts concluded, "neither his sex nor his transgender status is the but-for cause of his inability to obtain testosterone."[80]

Accordingly, Roberts avoided the bite of *Bostock* by introducing a third variable—medical diagnosis—in addition to (1) the patient's sex assigned at birth and (2) the physiological condition in the human body that the sought medication is administered to address (for example, the presence or absence of a certain amount of testosterone or facial hair).[81] That is, Roberts acknowledged that, in Tennessee, a (cisgender) teenager assigned female at birth can receive puberty blockers or hormone therapy to remove facial hair, but that a (transgender) teenager assigned male at birth cannot. He likewise conceded that a (cisgender) teenager assigned male at birth can receive testosterone therapy to address a deficiency and thereby enable the individual to live as a young man, but that a

75. *Id.* at 511 ("On its face, SB1 incorporates two classifications. First, SB1 classifies on the basis of age. . . . Second, SB1 classifies on the basis of medical use.").

76. *Id.* at 520 ("We have not yet considered whether *Bostock*'s reasoning reaches beyond the Title VII context, and we need not do so here.").

77. *See, e.g.*, *id.* at 527 (Thomas, J., concurring) ("The Equal Protection Clause includes none of this [Title VII] language."); *supra* note 67 and accompanying text (summarizing one of Chief Judge Sutton's arguments).

78. Like the Court in *Skrmetti*, this Article assumes for purposes of analysis that *Bostock*'s reasoning extends to the Equal Protection Clause. If it does not, it is for reasons other than the language of the clause, which the Court continues to interpret as prohibiting unjustified disparate treatment of individuals on the basis of, *inter alia*, sex. Bostock v. Clayton County, 590 U.S. 644, 660 (2020).

79. *Skrmetti*, 605 U.S. at 498 (statutory citation omitted).

80. *Id.* at 521.

81. *Id.* at 520–21.

(transgender) teenager assigned female at birth cannot.[82] So far, *Bostock*'s but-for causation test is concededly satisfied. But, Roberts insisted, sex assigned at birth is not a but-for cause of the denial of medication access to the transgender teenagers in the above hypotheticals because a third variable is also changing along with sex assigned at birth—namely, the medical diagnosis.[83] Roberts observed that male-pattern hair growth (also known as hirsutism) is not the same diagnosis as gender dysphoria, nor is a testosterone deficiency in an adolescent male the same diagnosis as gender dysphoria.[84]

The difficulty with Roberts's reasoning, as Justice Sotomayor observed in dissent, is that SB1 does not include a sex-neutral list of diagnoses that are permissible or impermissible to treat with puberty blockers and hormones.[85] On the contrary, whether a diagnosis is treatable with those medications turns entirely on whether the medical intervention is consistent with the patient's sex assigned at birth.[86] Recall that SB1 expressly exempts the administration of puberty blockers and hormone therapy from its prohibition when medical providers prescribe them "to treat a minor's congenital defect, precocious puberty, disease, or physical injury."[87] The statute defines the terms "[c]ongenital defect" and "disease" to include an "abnormality present in a minor *that is inconsistent with the normal development of a human being of the minor's sex*."[88] SB1 excludes from the definitions of "[c]ongenital defect" and "disease" the medical conditions of "*gender dysphoria, gender identity disorder, [and] gender incongruence*."[89] Therefore, under SB1, the medical diagnosis that a teenager receives is not a third independent variable with many possible values independent of sex assigned at birth. Rather, the medical diagnosis is defined by statute as binary and in terms of sex assigned at birth: a diagnosis is treatable with puberty blockers and hormones if the medicines will promote consistency with sex assigned at birth, and the diagnosis is not treatable with those medications if their administration will promote inconsistency with sex assigned at birth.[90]

This point is worth restating for emphasis because, analytically, the existence of a sex classification under *Bostock* turns on it. In *Skrmetti*, Roberts insisted that a variable (medical diagnosis) that is a function of sex assigned at birth (as

82. *See id.* at 520.

83. *Id.* at 520–21.

84. *Id.* at 521–22.

85. United States v. Skrmetti, 605 U.S. 495, 596 (2025) (Sotomayor, J., dissenting) ("[T]he majority's recharacterization of SB1 is impossible to reconcile with the statute's plain terms. SB1 allows physicians to prescribe hormones and puberty blockers to treat not just some defined category of cancers and rashes, but any 'physical or chemical abnormality present in a minor that is inconsistent with the normal development of a human being of the minor's sex.'") (quoting TENN. CODE ANN. § 68-33-102(1) (2025)).

86. *See id.* ("In other words, SB1 makes explicit that the very reason why a doctor can treat an adolescent female for 'hirsutism (male-pattern hair growth),' but not gender dysphoria is that the former will promote consistency with sex, while the latter does the opposite.").

87. TENN. CODE ANN. § 68-33-103(b)(1)(A) (2025).

88. *Id.* §§ 68-33-102(1), 68-33-103(b)(2) (emphasis added).

89. *Id.*

90. *See* Kate Redburn, Skrmetti *Beyond Scrutiny*, 139 HARV. L. REV. 167, 185 (2025) ("The statute does not turn on diagnosis—it turns on the patient's relationship to the sex they were assigned at birth.").

far as the availability of puberty blockers and hormone therapy is concerned) is independent of sex assigned at birth and so can validly be thought to block sex assigned at birth from ever being an independent variable—that is, from ever being a but-for cause of a denial of medical care.[91] That is how the Court distinguished *Bostock* away and concluded that a statute permitting medications intended to enable cisgender men to live as men, but not to enable transgender men to live as men—and to enable cisgender women to live as women, but not to enable transgender women to do the same—does not discriminate on the basis of sex.[92]

A more promising way of distinguishing SB1 from Title VII would be to emphasize that only SB1 regulates part of the practice of medicine in an area of at least some medical uncertainty and disagreement. That argument appears to have at least some force, even if the most passionate ideologues on both sides of the debate over gender-affirming care might deny it,[93] and even if *Skrmetti* reinforces the unfortunate reality that medical professional self-governance now exists at the sufferance of politicians.[94] The Court in *Skrmetti* emphasized medical uncertainty. "This case carries with it the weight of fierce scientific and policy debates about the safety, efficacy, and propriety of medical treatments in an evolving field," Roberts wrote, insisting that "[t]he voices in these debates raise sincere concerns; the implications for all are profound."[95] He declared that "[t]he Equal Protection Clause does not resolve these disagreements."[96]

The medical-uncertainty argument may help to distinguish SB1 from Title VII, but it does not persuasively distinguish *Skrmetti* from *Bostock* because the

91. *Skrmetti*, 605 U.S. at 522.

92. A quick-and-dirty way of potentially discerning a Justice's level of confidence that a prior decision supports their view of a current case is to observe where in their opinion the Justice either distinguishes that decision or invokes it as authority. Roberts did not distinguish *Bostock* until the very end of his analysis of whether SB1 uses a sex classification. *See id.* at 519 ("Finally, *Bostock v. Clayton County* does not alter our analysis.") (citation omitted). By contrast, Sotomayor invoked *Bostock* as authority toward the beginning of her analysis of that question. *See id.* at 590 (Sotomayor, J., dissenting) ("This Court's decision in *Bostock v. Clayton County* confirms the [sex] classification on SB1's face.") (citation omitted).

93. *See, e.g.*, Adam Liptak, *Supreme Court Upholds Tennessee Ban on Transgender Care for Minors*, N.Y. TIMES (June 18, 2025), https://www.nytimes.com/2025/06/18/us/politics/supreme-court-trans-children.html [https://perma.cc/M7BL-9R9J] ("Systematic reviews commissioned by international health bodies have consistently found that the evidence of the benefits of the treatments is weak, as is the evidence on the potential harms.").

94. For decades, calling a determination "medical" implied substantial deference by courts to professional judgment, whether directly to medical science or indirectly through state medical boards and similar self-regulatory bodies. Now the "medical" designation appears to mean that legislatures and government officials can do as they please. *See, e.g.*, Kennedy v. Braidwood Management, Inc., 606 U.S. 748, 753–54 (2025) (rejecting an Appointments Clause challenge to the appointment of an expert advisory body—the United States Preventive Services Task Force—which possesses discretion under the Affordable Care Act to determine the preventive services that private health plans must cover without cost sharing by patients, but doing so only by confirming that Task Force members can be appointed and removed at will and that their recommendations can be modified or delayed by the federal Secretary of Health and Human Services); *see also* William M. Sage & Keegan D. Warren, *Health Truth to Power: Professional Collaboration to Bolster Trust Against Misinformation*, 25 HOUS. J. HEALTH L. & POL'Y 115, 127 (2025) ("[T]he Court has signaled that Congress may not insulate administrative agencies or their officers from 'unitary executive' control, however ill-informed or political.").

95. *Skrmetti*, 605 U.S. at 525.

96. *Id.*

argument does not speak to the question of whether a sex classification exists. Rather, the argument speaks to the follow-on question of whether, if a sex classification in Tennessee's ban exists, the classification survives intermediate scrutiny—that is, whether Tennessee can show, in the crucible of trial, that SB1 is substantially related to an actual, important governmental interest.[97] Perhaps the Court was sufficiently concerned about a potentially negative answer to the second question that it insisted on a negative answer to the first one, thereby disabling the judiciary from reaching the second. Analytically, such a move cannot be justified.

In sum, from a legalist perspective—a perspective that takes legal reasoning seriously—the Court did not offer a principled distinction between *Bostock* and *Skrmetti*. The reasons offered by the Court in *Bostock* to explain why discrimination against transgender individuals logically involves sex discrimination under Title VII also explain why the Tennessee law at issue in *Skrmetti* creates a facial sex classification under the Equal Protection Clause. Yet, the Court in *Skrmetti* did not follow those reasons to their logical conclusion. From the perspective of legality, the fundamental point is not that *Bostock* reached a pro-trans-rights outcome while *Skrmetti* did not. The point, rather, is that Roberts and Gorsuch failed to recognize that *Skrmetti* was doing something methodologically inconsistent with *Bostock*. One can credit the Court for its relative moderation in *Skrmetti*—distinguishing *Bostock* rather than deeming it irrelevant in equal protection cases or overruling it—while still observing that the Court declined to follow *Bostock*'s logic where it leads. The next Part seeks to understand why.

IV. A REALIST ACCOUNT OF *SKRMETTI*

What changed between *Bostock* in 2020 and *Skrmetti* in 2025? The Supreme Court's doctrine had not changed. After *Bostock*, the Court did not decide a statutory or constitutional case involving alleged discrimination against transgender Americans until *Skrmetti*. Nor had the Court's composition changed in a dispositive way. Although Justice Barrett replaced Justice Ginsburg after the Court ruled in *Bostock*, and although those two Justices likely would not have voted the same way in either *Bostock* or *Skrmetti* had they served on the Court together, *Bostock* had a six-Justice majority that (to repeat) included both Chief Justice Roberts and Justice Gorsuch.[98] The question, therefore, is why Roberts and Gorsuch switched their votes between 2020 and 2025. No other Justice on the Court for both cases—Thomas, Alito, Kagan, Sotomayor, and Kavanaugh—perceived a decisive legal difference between the two cases.[99] Justices Ginsburg, Breyer (who was on the Court for *Bostock*), Barrett, and Jackson (who was on

97. *See supra* note 58 and accompanying text (defining the intermediate scrutiny standard in equal protection litigation).

98. *See* Bostock v. Clayton Cnty., 590 U.S. 644 (2020)

99. *Compare Bostock* 590 U.S. at 648 (2020) ("Gorsuch, J., delivered the opinion of the Court, in which Roberts, C. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined."), *with Skrmetti*, 605 U.S. at 499 ("Roberts, C. J., delivered the opinion of the Court, in which Thomas, Gorsuch, Kavanaugh, and Barrett, JJ., joined, and in which Alito, J., joined as to Parts I and II–B.").

the Court for *Skrmetti*) likely would not have perceived such a difference either. Roberts and Gorsuch were the only potential surprises in either case.[100]

One obviously cannot know with certainty the answer to the question of what, if anything, changed for Roberts and Gorsuch. They may not know themselves. People's ultimate motives may at times be shielded even from themselves. One need not assume or assert that Roberts and Gorsuch acted in bad faith by ignoring their best understanding of the law and responding instead to extra-legal concerns. They presumably were persuaded that there were outcome-determinative legal differences between *Bostock* and *Skrmetti*. Again, judges are people, and people often genuinely believe their own rationalizations. Accordingly, the search for an extra-legal explanation for the different responses of Roberts and Gorsuch to *Bostock* and *Skrmetti* is not best understood as an inquiry into the nefarious motives of failed judges. The Author would not place either Roberts or Gorsuch in that category.

A truth that constitutional law scholars and political scientists who study judicial politics have long established is that the voting behavior of Supreme Court Justices can be affected at times by their concerns about a political backlash against the Court generally or themselves personally.[101] In 2025, cases involving the lawfulness of regulations impacting the lives of transgender Americans have greater political and cultural salience than most of the cases that the Court decides on the merits docket each term. It would not be shocking if a Justice's responses to such cases were affected, at least in part and perhaps unconsciously, by the political context in which the Court was deciding them. It is therefore worth asking whether there were any differences in the political contexts of *Bostock* and *Skrmetti*—more specifically, any reasons to think that a conservative Justice might be more loath to vote in favor of a transgender plaintiff in one case as opposed to the other.

It seems unlikely that either Roberts or Gorsuch felt substantial political pressure from the ideological right in *Bostock*. The case was more associated with gay rights than trans rights both at the Court and in the public imagination, and gay rights were substantially more popular than trans rights in 2020.[102]

100. The shift is all the more striking because the Court seemed to reaffirm *Bostock* earlier in the same term that it decided *Skrmetti*. In *Aimes v. Ohio Dep't of Youth Servs.*, 605 U.S. 303, 309 (2025), the Court unanimously rejected, as irreconcilable with the text of Title VII and the Court's precedents, the "background circumstances" rule that had been articulated by the U.S. Court of Appeals for the Sixth Circuit. That rule had required members of a majority group to satisfy a heightened evidentiary standard to prevail on a Title VII discrimination claim. Justice Jackson's opinion for the Court quoted *Bostock* two times. *See id.* at 310.

101. There are voluminous literatures in law and political science. For prominent examples, see LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE xiii (1998); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 251 (1962); ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 54–55 (Daniel J. Boorstin ed., 1960).

102. For example, Justice Kavanaugh's dissent in *Bostock* focused on sexual-orientation discrimination. "The Court has previously stated, and I fully agree," he underscored at the outset, "that gay and lesbian Americans 'cannot be treated as social outcasts or as inferior in dignity and worth.'" Bostock v. Clayton Cnty., 590 U.S. 644, 780 (2020) (Kavanaugh, J., dissenting) (quoting Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617, 631 (2018)). Kavanaugh did not make the same point about transgender Americans. Instead, in his first footnote, he made only an analytical observation: "Although this opinion does not separately analyze discrimination on the basis of gender identity, this opinion's legal analysis of discrimination on the basis of sexual

Notably, when the Court decided *Bostock*, there was not strong pushback against the Court by many Republican members of Congress notwithstanding a blistering dissent from Justice Alito.[103] True, the decision likely set off alarm bells in quarters of the Republican Party that have become more powerful since 2020. For example, Senator Josh Hawley savaged *Bostock* as "represent[ing] the end of the conservative legal movement."[104] But a number of Republican members of Congress at the time publicly approved of the decision.[105]

In 2020, during his re-election campaign, President Donald Trump did not condemn transgender Americans. He barely, if at all, even mentioned them despite having taken a series of actions that harmed them during his term.[106] A search of his campaign speeches has failed to produce a single reference.[107] Notably, *Bostock* was decided in June 2020, several months before the November 2020 presidential election. In writing the majority opinion in *Bostock*, Justice Gorsuch was his usual, confident self in writing the majority opinion in *Bostock*, exuberantly explaining why—textually, formalistically, and logically—discriminating against an employee just for being gay or transgender necessarily entails discriminating against the employee at least in part because of the employee's sex.[108]

Five years later, to repeat, Gorsuch said nothing at oral argument in *Skrmetti*—even though the argument lasted two hours and twenty-one minutes.[109] As also noted, such silence is unusual for Gorsuch.[110] As the author of *Bostock*, Gorsuch seemed especially uncomfortable. Again, it is worth asking what there was for him to be uncomfortable about. If *Bostock* were readily distinguishable, he could have just distinguished it in his questioning of counsel.

In the years following *Bostock*, and likely in at least partial response to *Bostock*, the political landscape changed significantly. Beginning in 2021, roughly half the states enacted categorical or near-categorical bans on gender-

orientation would apply in much the same way to discrimination on the basis of gender identity." *Id.* at 781 n.62 (Kavanaugh, J., dissenting).

103. *Id.* at 683 (Alito, J., joined by Thomas, J., dissenting).

104. Sen. Josh Hawley, *Was It All for This? The Failure of the Conservative Legal Movement*, PUB. DISCOURSE (June 16, 2020), https://www.thepublicdiscourse.com/2020/06/65043/ [https://perma.cc/BLS2-QULF].

105. *See, e.g.*, Ted Barrett, Manu Raju & Lauren Fox, *Key GOP Senators Have No Qualms with Supreme Court's Decision to Ban LGBTQ Discrimination in the Workplace*, CNN (June 15, 2020, at 19:29 ET), https://www.cnn.com/2020/06/15/politics/gop-senators-reaction-supreme-court-ruling/index.html [https://perma.cc/6W94-LEL2] (describing the different reactions of Republican senators to *Bostock*, many of whom were positive about the decision, some of whom were negative, and some of whom expressed no opinion).

106. *See Look Back: Trump-Pence Administration Timeline*, *supra* note 29 (citing an archived timeline of harmful actions taken by the first Trump administration against LGBTQ+ Americans).

107. For a standard Trump stump speech during the 2020 presidential campaign (which did not mention transgender Americans or issues related to gender identity or sexual orientation), see *Donald J. Trump, Remarks at a "Make America Great Again" Rally in Mosinee, Wisconsin*, THE AM. PRESIDENCY PROJECT (Sep. 17, 2020), https://www.presidency.ucsb.edu/documents/remarks-make-america-great-again-rally-mosinee-wisconsin-0?utm_source [https://perma.cc/3LMB-DXJC].

108. *See supra* Part II (discussing the majority opinion in *Bostock*).

109. *See* Oral Argument of United States v. Skrmetti, 605 U.S. 495 (2025) (No. 23-477), https://www.supremecourt.gov/oral_arguments/audio/2024/23-477 [https://perma.cc/9P34-AJ6K].

110. *See supra* Part II.

affirming medical care for transgender adolescents,[111] even though such care had previously been available for decades.[112] Moreover, Trump and the Republican Party saw the wave of anti-trans statutes that had been enacted by conservative state legislatures over the prior several years and decided to ride it during the 2024 presidential election campaign. For example, the 2024 Republican Party Platform vowed that "Republicans Will End Left-wing Gender Insanity" and declared culture war:

> We will keep men out of women's sports, ban Taxpayer funding for sex change surgeries, and stop Taxpayer-funded Schools from promoting gender transition, reverse Biden's radical rewrite of Title IX Education Regulations, and restore protections for women and girls.[113]

If one asks from whom the Republican Party believed that women and girls needed to be protected, the most likely answer would seem to be transgender women and girls in the contexts of sports and bathrooms. Noticeably absent from the Republican Party Platform was any expression of concern about the health and safety of transgender girls, boys, women, and men. Many of them live in frequent fear of being physically assaulted and even murdered.[114] Moreover, like most Americans, they find it difficult to access adequate healthcare.[115]

As noted in the Introduction, Trump and his party won control of the political branches in 2024 after spending "nearly $215 million on television ads fanning fear and hatred of trans people," a "figure [that] doesn't include cable or streaming ads."[116] Trump's most politically potent campaign advertisement condemned Democratic presidential nominee Kamala Harris for supporting the rights of transgender Americans.[117] The thirty-second advertisement made this memorable assertion:

> Kamala is for they/them. President Trump is for you.[118]

Trump "reportedly aired this ad more than 30,000 times in every swing state and spent more money on it than on all the other ads in his campaign

111. *See, e.g.*, Jessica A. Clarke, *Sex Assigned at Birth*, 122 COLUM. L. REV. 1821, 1825 (2022) ("In the wake of *Bostock*, there has been an unprecedented onslaught of federal and state legislation aimed at curtailing transgender rights, almost all of it directly invoking the idea of 'biological sex.'") (footnotes omitted); *id.* at 1846–50 (citing and quoting that state legislation); Liptak, *supra* note 93 (noting that "[SB1] was part of a sweeping national pushback to expanding rights for transgender people").

112. *See* Brief for the Petitioner, *supra* note 43, at 7 (noting that puberty blockers have been used to treat gender dysphoria for twenty years and that hormone therapy has been used to treat gender dysphoria in adults for at least sixty years and in adolescents for at least twenty years); *id.* (noting that, from 2021 to 2024, twenty-two states "adopted a wave of bans on gender-affirming care for minors based on model legislation and legislative findings circulated by advocacy groups," and that two other states adopted bans with limited exceptions).

113. *2024 GOP Platform: Make America Great Again!*, THE AM. PRESIDENCY PROJECT (July 8, 2024), https://www.presidency.ucsb.edu/documents/2024-republican-party-platform [https://perma.cc/53GJ-HXGD].

114. *See* United States v. Skrmetti, 605 U.S. 495, 601 (2025) (Sotomayor, J., dissenting) ("Transgender people have long been subject to discrimination in healthcare, employment, and housing, and to rampant harassment and physical violence.").

115. *See id.*

116. Bendery, *supra* note 30.

117. *Id.*

118. *Id.*

combined."[119] One might ask what legitimate, public-regarding interest is served by attacking pronouns associated with transgender Americans—and of the nonbinary population, which perhaps is even less understood. The advertisement was so effective presumably because it expressed hostility toward transgender Americans, not because it merely contested the efforts of the trans rights movement to alter language usage, let alone because it expressed any interest in protecting transgender people from physical or emotional harm.

Repeatedly during the 2024 presidential campaign, Trump claimed publicly, provocatively, and falsely that children were undergoing gender transition surgeries during the school day with the encouragement of educators and without their parents' consent.[120] At a campaign rally in Scranton, Pennsylvania, he declared to cheers and applause that "[w]e will get critical race theory and transgender insanity the hell out of our schools immediately, and we will keep men out of women's sports."[121] One could go on about Trump's assertions and promises with respect to transgender people during the 2024 campaign, but this Article will not belabor the point.[122]

Adam Liptak reported in the *New York Times* that, since taking office in January 2025, President Trump has made "[h]ostility to transgender rights" and "debates about military service, athletics, bathrooms and pronouns" a central part of his agenda for his second term.[123] "At his inauguration," Liptak continued, "he announced that 'it will henceforth be the official policy of the United States government that there are only two genders: male and female.'"[124] Trump then took actions that spoke louder than his words, issuing executive orders that

119. *Id.*

120. *See* Matt Lavietes, *Trump Repeats False Claims That Children Are Undergoing Transgender Surgery During the School Day*, NBC NEWS (Sep. 9, 2024), https://www.nbcnews.com/nbc-out/out-politics-and-policy/trump-false-claims-schools-transgender-surgeries-rcna170217 [https://perma.cc/K85E-WUJK]; Interview by Joe Rogan with Donald J. Trump, President U.S., in Austin, Tex. (Oct. 25, 2024), https://www.presidency.ucsb.edu/documents/interview-the-joe-rogan-experience [https://perma.cc/XG6X-CM2Q]. In that interview with Joe Rogan, Trump invoked "the transgender operations, where they're allowed to take your child when he goes to school and turn them into a male, to a female without parental consent." *Id.*

121. Donald J. Trump, *Remarks at a Campaign Rally in Scranton, Pennsylvania*, THE AM. PRESIDENCY PROJECT (Oct. 9, 2024), https://www.presidency.ucsb.edu/documents/remarks-campaign-rally-scranton-pennsylvania [https://perma.cc/6CV2-6B39].

122. For additional statements or promises that Trump made during the 2024 presidential campaign regarding transgender individuals, see David Crary, *Transgender-rights Advocates Say the Election of Trump and His Allies Marks a Major Setback*, ASSOCIATED PRESS (Nov. 15, 2024, at 16:37 CT), https://apnews.com/article/election-2024-transgender-rights-lgbtq-donald-trump-3bb3ace81ff32b6dec382b486ec6a772 [https://perma.cc/6Y9W-CX9U]; Sara Dorn, *Trump Promises Rollback on Trans Rights: Here's What He Said*, FORBES (May 10, 2024, at 16:19 ET), https://www.forbes.com/sites/saradorn/2024/05/10/trump-promises-rollback-on-trans-rights-heres-what-hes-said/?sh=51549ef4dae0 [https://perma.cc/XMC3-CQFV]; Jill Colvin, *Trump's Plans If He Returns to the White House Include Deportation Raids, Tariffs and Mass Firings*, ASSOCIATED PRESS (Nov. 12, 2023, at 07:10 CT), https://apnews.com/article/trump-policies-agenda-election-2024-second-term-d656d8f08629a8da14a65c4075545e0f [https://perma.cc/T4VQ-29JG]; Tommy Christopher, *'Bad Things Are Happening! Mom I'm Sorry!' Trump Does Bizarre Skit at Rally in Rant Against Trans Athletes*, MEDIAITE (Nov. 3, 2023, at 14:41 CT), https://www.mediaite.com/media/news/bad-things-are-happening-mom-im-sorry-trump-does-bizarre-skit-at-rally-in-rant-against-trans-athletes/ [https://perma.cc/LD5N-4CMF].

123. Liptak, *supra* note 93.

124. *Id.*

defined the word "sex" as applied across federal programs and services in biological and binary terms;[125] withdrew federal support for gender transition healthcare;[126] and banned transgender Americans from military service.[127]

In short, *Skrmetti* involved the asserted rights of transgender Americans—and only transgender Americans, not also gay Americans—at a time of severe political backlash against transgender people.[128] Having written *Bostock*'s formalism into law in 2020, the good lawyer in Gorsuch may have hesitated to publicly deny *Bostock*'s relevance in *Skrmetti*. But given the many condemnations of transgender Americans by Trump and the Republican Party, Gorsuch may have also been loath to publicly endorse the same logic five years later. Facing a no-win situation from his own point of view, Gorsuch decided not to speak—or write. He just quietly joined Roberts's majority opinion in *Skrmetti*.

Roberts, by contrast, was not silent in *Skrmetti*. As noted, he spoke at oral argument in addition to writing the Court's opinion. Having merely joined Gorsuch's majority opinion in *Bostock* potentially as the sixth vote, as opposed to the fifth, Roberts may never have been as strongly committed as Gorsuch was to following the Court's reasoning in *Bostock* wherever it led in future cases.

Roberts was, however, strongly committed to the notion that SB1 is only a health and safety measure. His opinion in *Skrmetti* effectively denied the existence of the political context in which he was writing it. As discussed, Roberts insisted that Tennessee had "sincere" concerns about the health and welfare of the minors—including the transgender minors—who live in the state.[129] In so insisting, he had to strain to explain some of the state legislature's findings in the text of the statute that are most naturally read to suggest a less benign legislative purpose.[130] As explained, SB1 provides that "[t]his state has a legitimate, substantial, and compelling interest in protecting minors from physical and emotional harm."[131] That interest does seem benign on its face. But SB1 also provides that "[t]his state has a legitimate, substantial, and compelling interest in encouraging minors to appreciate their sex" and in "prohibiting medical procedures . . . that might encourage minors to become disdainful of their sex."[132] Those interests do not seem benign on their face; to repeat, they seem to reflect a motivation on the state's part to enforce traditional gender stereotypes—specifically, to promote gender conformity among its population of teenagers. That is a

125. *See* Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, Exec. Order No. 14,168, 90 Fed. Reg. 8615, 8615 (2025).

126. *See id.* at 8616.

127. *See* Prioritizing Military Excellence and Readiness, Exec. Order No. 14,183, 90 Fed. Reg. 8757, 8757 (2025).

128. U.S. v. Skrmetti, 605 U.S. 495, 495 (2025).

129. *Id.* at 525.

130. *See id.* at 514–15.

131. TENN. CODE ANN. § 68-33-101(m) (2025).

132. *Id.*

constitutionally forbidden purpose,[133] which is presumably why Tennessee declined to defend SB1 on that ground.[134]

Roberts disagreed that Tennessee wants individuals assigned male at birth to look and act like boys and wants individuals assigned female at birth to look and act like girls. "[T]he statutory findings to which the plaintiffs point do not themselves evince sex-based stereotyping," he wrote.[135] "The plaintiffs fail to note," he explained, "that Tennessee also proclaimed a 'legitimate, substantial, and compelling interest in protecting minors from physical and emotional harm,'" and "they similarly fail to acknowledge that Tennessee found that the prohibited medical treatments are experimental, can lead to later regret, and are associated with harmful—and sometimes irreversible—risks."[136] With that state interest and those legislative findings in mind, Roberts reasoned, it becomes clear that "Tennessee's stated interest in 'encouraging minors to appreciate their sex' and in prohibiting medical care 'that might encourage minors to become disdainful of their sex,' . . . simply reflect the State's concerns regarding the use of puberty blockers and hormones to treat gender dysphoria, gender identity disorder, and gender incongruence."[137]

The most straightforward way to express a concern about protecting minors from physical and emotional harm, however, is to express a concern about protecting minors from physical and emotional harm—which Tennessee had already done before asserting that the state had an interest in encouraging minors to appreciate their sex and in discouraging them from becoming disdainful of their sex. Moreover, the legislature presented its interest in encouraging minors to appreciate their sex and in discouraging them from becoming disdainful of their sex as an additional state interest justifying SB1, not as a repetition of, or a mere fleshing out of, its previously stated interest in safeguarding the physical and mental health of Tennessee minors.[138] Roberts recast Tennessee's interest in preventing teenagers from *becoming* transgender as an interest in protecting teenagers who *are* transgender.[139]

Roberts's sanitized recharacterization of Tennessee's interests cannot easily survive an encounter with other statutes passed by the state that impact transgender youth. Roberts did not acknowledge the existence of that legislation any more than he acknowledged the targeting of transgender Americans by the Trump administration. Two months after passing SB1, Tennessee enacted a statute declaring that public school teachers in the state need not refer to students by their preferred pronouns if those pronouns are inconsistent with the students' sex

133. *See* United States v. Virginia, 518 U.S. 515, 559 (1996).

134. *See* Brief for the Petitioner, *supra* note 43, at 33 (noting Tennessee's decision not "to argue that an interest in discouraging people from being transgender or encouraging them to present as their sex assigned at birth is an important governmental objective") (internal quotation marks omitted).

135. *Skrmetti*, 605 U.S. at 516.

136. *Id.* at 516–17 (quoting TENN. CODE ANN. § 68-33-101(m) (2025) and §§ 68-33-101(b) to (e), (h) (2025)).

137. *Id.* (quoting TENN. CODE ANN. § 68-33-101(m) (2025)).

138. *See* Tenn. Code Ann. § 68-33-101(m) (2025).

139. *Skrmetti*, 605 U.S. at 516–17.

assigned at birth.[140] That statute seems most naturally described as intended to protect teachers who refuse to recognize the gender identity of students who are transgender, rather than as intended to protect transgender youth from physical or psychiatric harm—unless Tennessee is of the view that being transgender is itself the cause of the harm, a proposition that Roberts did not, and presumably would not, endorse. It is difficult to credit Roberts's insistence that the Tennessee legislature, in passing SB1, simply had the health and welfare of transgender youth in mind when the legislature acted nearly simultaneously to insulate teachers from civil liability or adverse employment actions for refusing to call their students by pronouns that reflect their gender identities.

The month after passing SB1, in March 2023, Tennessee enacted a statute that restricts students to competing in interscholastic athletic events "only in accordance with the student's sex" assigned at birth.[141] Of course, that law, like SB1, can also be justified as advancing constitutionally permissible purposes. But the sincerity of any asserted state interest in preserving the integrity and fairness of athletic competitions given different testosterone levels based on sex assigned at birth would presumably depend in part on the age of the students and the level of athletic competition. A state that cared *both* about its transgender youth *and* the fairness of athletic competitions might distinguish between, say, younger students and older students, or between junior varsity athletics and varsity athletics. Tennessee makes no such distinctions.

Again, one would not know it from Roberts's opinion or those of any of the conservative Justices,[142] but SB1 was enacted as part of a surge in state legislation expressing hostility toward transgender Americans.[143] In the terms ahead, the Court's docket may increasingly reflect the backlash politics that Roberts's opinion in *Skrmetti* denied. In litigation, the federal government and conservative states can be expected to offer benign explanations for denying transgender Americans access to athletic competitions,[144] positions in the U.S. military,[145]

140. TENN. CODE ANN. § 49-6-5102(b)(1)(B) (2025). This law was enacted on May 17, 2023. *Id.*

141. *Id.* § 49-50-805(a). This law was enacted on April 28, 2023. *Id.*

142. For example, Justice Alito's opinion was unusually respectful for him. He even acknowledged that "transgender persons have undoubtedly experienced discrimination." *Skrmetti*, 605 U.S. 575 (Alito, J., concurring in part and concurring in the judgment). Perhaps he was genuinely trying to be conciliatory. Or perhaps, like Roberts, he was trying to rhetorically distance himself from the backlash politics that he was substantively validating.

143. *See supra* note 111 and accompanying text (discussing the state legislation that was enacted in 2021 and subsequent years).

144. *See* Petition for a Writ of Certiorari at i, Little v. Hecox, 104 F.4th 1061 (2024) (No. 24-38) (presenting the question of whether the Equal Protection Clause is violated by state legislation that limits participation in women's and girls' sports to individuals assigned female at birth); Petition for a Writ of Certiorari at I–II, West Virginia v. B.P.J., 98 F.4th 542 (2024) (No. 24-43) (presenting the questions of whether the Equal Protection Clause or Title IX of the Education Amendments of 1972 is violated by state designations of boys' and girls' sports teams based on sex assigned at birth).

145. *See* Memorandum Decisions at 2695, United States v. Shilling, 773 F. Supp. 3d 1069 (2025) (No. 24A1030) (granting, by a vote of six Republican appointees to three Democratic appointees, the government's emergency application for a stay of the district court's injunction barring the Department of Defense from enforcing its policy of generally disqualifying from military service individuals who have gender dysphoria or have undergone medical interventions for gender dysphoria).

and bathrooms that correspond to their gender identities. Perhaps the Court will be called upon to decide whether it is consistent with equal protection principles for the Trump administration to withdraw federal funding from schools and nonprofits that express support for transgender Americans.[146] It would be a positive development for equal protection law if a conservative Justice or two became willing to ask why states that purport to care about the health and safety of transgender individuals in the context of gender-affirming care do not seem to care about their health and safety in those other contexts.

V. A DESCRIPTIVE AND A NORMATIVE OBJECTION

The issues at stake in *Bostock* and *Skrmetti* were different in a way that relates to public opinion generally, not just to conservative backlash politics specifically. Whereas most Americans have long supported employment nondiscrimination for LGBTQ+ people, the public is substantially more divided (even among Democrats) over the question of gender-affirming care for minors.[147] Accordingly, one could argue that the different outcomes in *Bostock* and *Skrmetti* are not primarily attributable to (perhaps unconscious) fear of political attacks but to a desire on the part of Roberts and Gorsuch to track public opinion on contested social issues.

The "public opinion" explanation is, however, partially entangled with this Article's "Republican Party politics" explanation. That is because part of what public opinion is tracking is conservative backlash politics. In addition, the public opinion theory does not appear to persuasively explain Gorsuch's perceived need to remain silent at oral argument in *Skrmetti*. Nor does it account for his apparent indifference to public opinion on abortion rights in *Dobbs*.[148] Abortion is, of course, a more divisive social issue than is gender-affirming care for minors.[149]

In the case of Roberts, it is more challenging to demonstrate the superiority of the partisan politics theory to the public opinion alternative. He seems more attentive to public opinion than Gorsuch is. For example, Roberts's opinion

146. *See* Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, *supra* note 125.

147. *See Americans Have Grown More Supportive of Restrictions for Trans People in Recent Years*, PEW RSCH. CTR. (Feb. 26, 2025), https://www.pewresearch.org/short-reads/2025/02/26/americans-have-grown-more-supportive-of-restrictions-for-trans-people-in-recent-years/ [https://perma.cc/E5VK-JSWY] (finding, *inter alia*, that 56% of U.S. adults favor both "protect[ing] trans people from discrimination in jobs, housing and public spaces such as restaurants/stores" and "mak[ing] it illegal for health care professionals to provide minors with medical care for a gender transition").

148. In *Dobbs*, Gorsuch joined Justice Alito's majority opinion ending constitutional protection for the abortion right. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 222 (2022). Gorsuch voted to end constitutional protection of abortion notwithstanding supermajority support for the right that was expressed in public opinion polls both at the time of the decision and in the years following it. *See Broad Public Support for Legal Abortion Persists 2 Years After* Dobbs, PEW RSCH. CTR. (May 13, 2024), https://www.pewresearch.org/politics/2024/05/13/broad-public-support-for-legal-abortion-persists-2-years-after-dobbs/ [https://perma.cc/WQ2K-9BF7] (reporting, *inter alia*, that 63% of Americans "say abortion should be legal in all or most cases").

149. *See Americans Have Grown More Supportive of Restrictions for Trans People in Recent Years*, *supra* note 147; *Broad Public Support for Legal Abortion Persists 2 Years After Dobbs*, *supra* note 148.

concurring in the judgment in *Dobbs* did seem potentially responsive to public opinion on abortion, if only to some extent.[150] Moreover, he previously exhibited a willingness to seriously disappoint the political party that appointed him, especially in the three cases challenging the lawfulness of the Patient Protection and Affordable Care Act.[151] It is possible that Roberts's vote in *Skrmetti* is best explained by the public opinion account (which, to repeat, partially reflects the backlash story), and that Gorsuch's vote in *Skrmetti* is best explained by the backlash story in unmediated fashion. If that is right, then Justice Barrett's replacement of Justice Ginsburg in 2020 looms large in comparing causal accounts, because that change in the Court's composition would then be a primary reason why, from *Bostock* to *Skrmetti*, Gorsuch and Roberts potentially switched seats as the median Justice and the sixth Justice in the majority.

Even in the case of Roberts, however, the public opinion theory may be less persuasive than the backlash theory. To uphold SB1 under rational basis review, he did not need to underscore the sincerity of the concerns on both sides of the debate over gender-affirming care for minors. Rational basis scrutiny requires only that a legitimate state interest be conceivable, not that it actually exist.[152] In going out of his way to insist that Tennessee was acting in good faith, Roberts may have been protesting too much. If he was, he was likely concerned to deny that SB1 was the product of the Republican Party's hostility towards transgender individuals to a greater extent than he was determined to deny that one part of divided public opinion had motives that were less than pure.

Another objection might dispute that the backlash phenomenon described in this Article, even if descriptively accurate, is normatively problematic. For example, living constitutionalist approaches to constitutional interpretation characteristically counsel the Justices, in deciding constitutional cases, to credit enduring changes in public opinion.[153] Moreover, most critics of *Skrmetti* would likely approve of the conduct of any Justices who updated their priors, or even buckled in the face of steadily increasing pro-LGBTQ+ sentiment, in writing or

150. *See, e.g.*, *Dobbs*, 597 U.S. at 353 (Roberts, C.J., concurring in judgment) ("Here, there is a clear path to deciding this case correctly without overruling *Roe* all the way down to the studs: recognize that the viability line must be discarded, as the majority rightly does, and leave for another day whether to reject any right to an abortion at all.").

151. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 520–30 (2012) (upholding, in a controlling opinion written by Chief Justice Roberts, most of the Patient Protection and Affordable Care Act, colloquially known as "the ACA" or "Obamacare"). Roberts also rejected a conservative attempt to defeat the ACA through narrow statutory interpretation in *King v. Burwell*, 576 U.S. 473, 499 (2015), where the Court held, in a majority opinion written by Roberts, that the ACA Section 36B's tax credits are available to individuals who buy health insurance on an exchange established by the federal government. Then, after Justice Gorsuch joined the Court, Roberts joined Justice Breyer's majority opinion for seven Justices in *California v. Texas*, 593 U.S. 659, 669 (2021), which held that the plaintiffs lacked Article III standing to challenge the ACA's minimum essential coverage provision (informally known as the "individual mandate"). Justice Gorsuch was the only member of the Court to join Justice Alito's dissent, which would have invalidated the entire ACA. *See id.* at 685 (Alito, J., dissenting).

152. *See supra* note 58 (explaining the minimal requirements of rational basis review).

153. *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 277 (2011); DAVID A. STRAUSS, THE LIVING CONSTITUTION 153 (2010).

joining the majority opinion in *Obergefell v. Hodges*, which held that the fundamental right to marry includes same-sex marriage.[154]

The question of when the Court should and should not take account of public sentiment in its constitutional rights decisions is complex. A comprehensive answer to the question requires a theory that this Article cannot provide, although it can offer several observations that are relevant to assessing the performance of Justice Gorsuch and the Chief Justice in *Skrmetti*. The first is Professor Paul Freund's distinction between judicial sensitivity to "the weather of the day," which he opposed, and judicial recognition of "the climate of the era," which he deemed inevitable, and which is closer to what living constitutionalist theories typically endorse.[155] The relatively short time that passed between *Bostock* and *Skrmetti*—five years—seems closer to weather than climate.

Second, as discussed in the Introduction, Justice Gorsuch and, to some extent, Chief Justice Roberts self-identify as legal formalists, not as living constitutionalists. Formalist approaches to legal interpretation are not supposed to be sensitive to changes in cultural sentiment.[156] It is therefore unlikely that their views of the law moved as a result of the backlash against transgender Americans that began in 2021.

Finally, the objection under consideration asserts an equivalence between the constitutional relevance of pro- and anti-LGBTQ+ popular beliefs that appears difficult to sustain given all the case law that even the current, conservative Court is likely not prepared to repudiate.[157] Notably, Roberts did not write or even intimate in *Skrmetti* that it would be permissible for Tennessee to have been motivated by moral opposition to transgender Americans. On the contrary, he (as noted) emphasized Tennessee's sincere concerns about the health and safety of adolescents in the state.[158]

VI. CONCLUSION

It has been said that the current version of the Roberts Court is principled, a tribunal that follows the law wherever it leads a majority of the Court's Justices. Writing just after the end of the 2023-2024 term, for example, Professor Baude opined that "[m]ost of the Court's decisions are principled and sound."[159] According to Baude, the only decisions from the term that did not warrant such

154. 576 U.S. 644, 681 (2015).

155. *See, e.g.*, Michael M. Bowden & Edward Fitzpatrick, *"You Can't Help Being in Awe,"* ROGER WILLIAMS UNIV. L. SCH. (Jan. 30, 2018), https://law.rwu.edu/news/news-archive/you-cant-help-being-awe [https://perma.cc/TVL5-XRS5] (quoting Associate Justice Ruth Bader Ginsburg as saying that "[t]he great constitutional scholar Paul Freund once said 'the Court should never be influenced by the weather of the day, but inevitably they will be influenced by the climate of the era,' and that's what happened with the gay rights movement"). Throughout her career, Ginsburg invoked that Freund quote in various settings.

156. *See* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 180–81 (1986).

157. *See* Bostock v. Clayton Cnty., 590 U.S. 644, 683 (2020); Obergefell v. Hodges, 576 U.S. 644, 681 (2015); Lawrence v. Texas, 539 U.S. 558, 578 (2003); Romer v. Evans, 517 U.S. 620, 635 (1996).

158. United States v. Skrmetti, 605 U.S. 495, 523–25 (2025).

159. Baude, *supra* note 13.

praise were the two constitutional cases directly involving President Trump discussed in the Introduction to this Article.[160] "When dealing with Mr. Trump in particular," Professor Baude wrote in accounting for the Court's deviations from legality, "the court is so sure that our other institutions cannot be trusted that it fails to look in the mirror."[161]

It is unlikely, however, that the Court or individual Justices would be sensitive to political considerations only in cases directly involving Donald Trump. This Article has identified an important equal protection ruling from the Court's 2024-2025 term that did not directly involve Trump but that seems better explained by an external, realist account than by an internal, legalist one. In *United States v. Skrmetti*, Chief Justice Roberts and Justice Gorsuch did not publicly reason and vote like they were bound in principled fashion to their prior rationale in *Bostock v. Clayton County*. The backlash politics of trans equality had changed significantly between 2020 and 2025, due in large part to an upsurge in hostile state legislation that began in 2021, as well as to Trump's condemnations of transgender Americans during the 2024 presidential election campaign.[162] At least one, and possibly two, Justices in *Skrmetti* likely experienced and responded to political pressure from certain parts of the Republican Party that they did not experience to nearly the same extent in *Bostock*. As a result, the future of equal protection doctrine now appears different than it otherwise might have been.

A response to political pressure, if that is what happened in *Skrmetti*, would have been more understandable, and potentially even justified, if the Justices had been faced with the prospect of successful defiance by the State of Tennessee or nonenforcement by the Trump administration of any decision in favor of the transgender plaintiffs. A compliant response to political pressure would likewise have been more understandable and potentially justified if the Justices had been viably threatened with impeachment, jurisdiction-stripping, or Court-packing. Then it might have been necessary for the Justices to consider whether it was regrettably prudent as a matter of judicial self-protection to underenforce federal constitutional rights for the time being.[163] But the Court in *Skrmetti* was not under political threat in any of those existential ways. Rather, Republican-appointed Justices—and only Republican-appointed Justices—risked being branded as traitors, called terrible names, and accused of harming innocent children by certain segments of the political right if they had enabled a holding that the Tennessee law employs a facial sex classification under *Bostock* and the

160. *See id.* (discussing *Trump v. Anderson* and *Trump v. United States*).

161. *Id.* "[I]n these cases," Baude argued, "the court sees itself as trying to save the country from other institutions' disproportionate responses to Mr. Trump. It believes that lower courts and the [Biden] Justice Department have succumbed to a version of Trump derangement syndrome, which is said to afflict so many liberal elites and even Never-Trump conservatives." *Id.*

162. *See* ACLU, *Legislation Affecting LGBTQ Rights Across the Country 2021* (Dec. 17, 2021), https://www.aclu.org/documents/legislation-affecting-lgbtq-rights-across-country-2021 [https://perma.cc/5TCF-J7XZ].

163. For discussion of past instances in which the Supreme Court was faced with real threats of defiance or nonenforcement of its rulings, as well as of impeachment of individual Justices or stripping of the Court's appellate jurisdiction, see Curtis A. Bradley & Neil S. Siegel, *The Supreme Court Under Threat: Early Lessons in Judicial Self-Protection*, 139 HARV. L. REV. 1769 (2026).

Court's longstanding equal protection doctrine, and then voted to remand for the lower courts to apply intermediate scrutiny in the first instance. Supreme Court Justices are supposed to be able to withstand that kind of political pressure, even though it is deeply unpleasant for most human beings to experience such pressure. The tenure and salary protections of Article III exist to help them withstand it.[164]

164. *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").