



Can Tennessee Ban Medical Transitions for Transgender Minors?

Thursday, December 5, 2024

Visit our media library at constitutioncenter.org/medialibrary to see a list of resources mentioned throughout this program, listen to the episode, and more.

[00:00:00.0] Jeffrey Rosen: The Tennessee law prohibits transgender minors from receiving gender transition surgery and hormone therapy. The Supreme Court this week heard oral arguments in *US v. Skrmetti* asks whether the Tennessee bill violates the equal protection clause of the 14th Amendment.

[00:00:20.5] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to *We the People*, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan non-profit chartered by Congress to increase awareness and understanding of the Constitution among the American people. In this episode of *We the People* will explore whether or not the Tennessee Bill classifies on the basis of sex and is subject to heightened scrutiny under the 14th Amendment. Joining me are two leading constitutional scholars who filed briefs on opposite sides of the case. David Gans of the Constitutional Accountability Center, and Kurt Lash of the University of Richmond School of Law. David Gans is director of the Human Rights, civil Rights and Citizenship Program at the Constitutional Accountability Center. He joined the CAC after serving as program director of Cardozo Law School's Floersheimer Center for Constitutional Democracy. And he wrote on behalf of CAC a brief in support of the petitioner. David, it's wonderful to welcome you back to *We the People*.

[00:01:24.8] David Gans: Thanks so much, Jeff. Thanks for having me.

[00:01:27.1] Jeffrey Rosen: And Kurt Lash is the E. Claiborne Robins distinguished Professor of Law at the University of Richmond. He's the founder and director of the Richmond Program on the American Constitution. He's working on a forthcoming book, *A Troubled Birth of Freedom, the Struggle to Amend the Constitution in the aftermath of the Civil War*. Kurt wrote a brief in support of the respondent. Kurt congrats on the forthcoming book and wonderful to welcome you back to *We the People*.

[00:01:52.6] Kurt Lash: Thanks, Jeff. It's great to be back.

[00:01:55.2] Jeffrey Rosen: Let's begin with the constitutional arguments on both sides of this crucially important case. David, the solicitor General of the US Elizabeth Prelogar argued that the Tennessee bill was both a form of sex discrimination and discrimination against transgender people, and therefore was subject to heightened scrutiny under the 14th Amendment. Tell us about the core of her arguments.

[00:02:21.1] David Gans: Sure, Jeff. I mean, so let's start with the constitution, the text that the court is interpreting in this case is the equal protection clause of the 14th Amendment, which says no state shall deny to any person equal protection of the laws. Again, obviously the breadth of the clause is apparent. It protects all persons. It's long been understood as a basic guarantee of equality under law and equality of rights. And for decades now, the Supreme Court has said all sex-based laws, all sex-based classifications have to be subjected to heightened scrutiny. And really the question before the court is, is this a sex based law? And I think, the argument that it is, is very straightforward, and it's right in the text of the law. The law says no medical care, and we're talking about puberty blockers and hormones can be prescribed if they're inconsistent with the person sex so a boy is allowed to have access to these forms of medical care to affirm a male gender identity, someone who is born female is not.

[00:03:32.2] David Gans: So there's a clear sex based line. It's written directly into the law. And I think Prelogar did an admirable job, as she so often does, of sort of saying, look, this sex-based law, full stop. The lower court, which said it can be upheld under the lowest standard of scrutiny, is wrong. It requires heightened scrutiny. And that's really the issue before the court. It was a long argument. I actually heard very little pushback that this was not a sex-based law. And I think it's on the face of the statute. Tennessee chose to write this law in a way that is sex-based to its core.

[00:04:17.2] Jeffrey Rosen: Many thanks for that. Kurt, David just offered the argument for why this is a sex-based law. And the petitioner's brief similarly said, put simply 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, by contrast, the respondents disagree. They say that SB 1 contains no sex classification that warrants heightened review. It contains two groups, minors seeking drugs for gender transition and minors seeking drugs for other medical purposes. Each of these groups includes members of both sexes. So no facial sex classification exists. Tell us more about the respondent's argument that this is not a sex place classification.

[00:05:00.1] Kurt Lash: Well, that's right. You have Prelogar for the United States and the plaintiffs arguing that this is sex based because it has sex in the statute, whereas Tennessee is supporting its law by focusing on purpose. So I think it's helpful to kinda look at what the law says and what type of purposes are being forbidden. We're talking about SB 1 passed by

Tennessee in 2023, and it prohibits medical procedures performed on minors if the purpose of such procedures is to enable the child to live in a manner inconsistent with their biological sex. And the particular language of the statute prohibits, quote, all medical procedures whose purpose is, "enabling a minor to identify with or live as a purported identity, inconsistent with a minor's sex or treating purported discomfort or distress from a discordance between the minor's sex and asserted identity."

[00:06:00.0] Kurt Lash: The statute then goes further and defines sex. It defines sex as, "a person's immutable characteristics of the reproductive system that define the individual as male or female, as determined by the anatomy and genetics existing at the time of birth." And then, of course, the medical procedures that are forbidden involve surgically again, "surgically removing, modifying, altering, or entering into tissues, cavities, or organs of the human being or prescribing, administering or dispensing any puberty, blocker or hormone to a human being if for the forbidden purposes." So, as far as Tennessee is concerned, what they're doing is that this is not based on sex at all. They are seeking to protect children, both male and females from a certain procedure that places them at odds with their physical being, their biological systems. And they're doing that because they believe that at this particular point there simply is not enough evidence that the benefits justify the severe risks that are associated with these types of procedures which can include irreversible sterility and increased risk of disease and illness, or again, as the legislative findings pointed out a suffering adverse or sometimes fatal psychological consequences.

[00:07:26.5] Kurt Lash: The district court, when it was challenged by the plaintiffs and district court, the district court said, no, this is a sex-based law, and therefore it has to meet heightened scrutiny and under heightened scrutiny, they believe that the state exaggerated the risks and underplayed the benefits that accompany these procedures. The sixth Circuit reversed, the sixth Circuit, two to one decision by suddenly writing the majority opinion rule that this wasn't sex-based. This was no more sex-based than laws which target the reproductive systems of women that were at issue, of course, in the abortion cases and in an earlier case called *Geduldig*, that simply because of statute is attentive to biological, reproductive differences between males and females. That doesn't mean that it's the kind of sex-based classification that requires heightened scrutiny. And that was pressed by the lawyer yesterday before oral argument that that really is the crux of their argument.

[00:08:23.6] Jeffrey Rosen: Thank you so much for that, David, Kurt identifies the crucial *Geduldig* case and indeed, Justice Alito in the oral argument said the court has addressed the question of how unequal protection claim should be analyzed when the law in question treats a medical condition or procedure differently based on a characteristic that's associated with just one sex. That was *Geduldig* in 1974, reaffirmed in *Dobbs* in 2022. There's a lot packed in there. But basically in *Dobbs*, the court rejected an equal protection challenge to abortion citing the

Geduldig, which said that discrimination based on pregnancy is not sex based because it distinguishes between pregnant women and non-pregnant persons. And by trying to reject that distinction, justice Alito suggested that the challengers were trying to revisit the abortion question as well. Tell us about the significance of Geduldig, and is Justice Alito right, that as long as Geduldig remains on the books, that transgender discrimination is not a sex-based classification?

[00:09:24.2] David Gans: Well, so I will say Alito is the only one who kind of offered an argument pushing back, but I think he's wrong. And the reason why he's wrong and the reliance on the pregnancy discrimination case doesn't work is the kinds of medical care we're talking about, all sorts of people, both young men and young women can receive and have been receiving for some time. And instead of regulating access to these forms of medical care on a neutral basis, Tennessee wrote a law that says they are forbidden across the board if it is inconsistent with sex. And they said, they're doing this because they want Tennesseans to appreciate their sex and not seek out medical care that the legislature views as disdainful of sex. So sex is at the very core of this law. They wrote the law in a sex-based manner, and the court should treat it as such. And I think that's very different from the situation in Geduldig where they said pregnancy falls entirely on one group of people, and so therefore it's treated as sex-based here. This is a form of medical care that both young men and young women can receive and do receive. And Tennessee has written a sex-based statute to bar care for transgender individuals.

[00:11:05.0] Jeffrey Rosen: Kurt, Geduldig rejected Justice Ruth Bader Ginsburg's central argument in her advocacy that laws that reinforce traditional gender roles violate the equal protection clause, and that there's an anti-stereotyping core of the 14th Amendment. Here in the argument those who are defending the Tennessee law rejected the idea that the law protects people from not being forced into traditional gender roles. Did you get the sense that Justice Alito and other conservatives on the court reject the entire anti-stereotyping principle and don't agree with those Supreme Court cases that say that laws that reinforce traditional gender roles violate the 14th Amendment?

[00:11:50.9] Kurt Lash: Actually, I think all the members of the court are going to follow that line of jurisprudence. And I think what came out during oral arguments, I think this is particularly from chief Justice Roberts, he noted that past cases where the court had applied heightened scrutiny, the Virginia Case, the BMI case and Craig Barbour and others involved gender stereotypes and differential treatment of men and women and unequal distribution of benefits or privileges. And what he pointed out is that this case was different. This case didn't involve gender stereotyping, but instead was more akin to the situation of Geduldig and Dobbs, which had to do with reproductive systems, biological reproductive systems, which simply, as a matter of fact, are associated differently when it comes to male reproductive systems and female reproductive systems.

[00:12:52.7] Kurt Lash: It looks like he's thinking about drawing that kind of line that's currently under-theorized, but I think it's gonna be more theorized after this case that when the law is targeting medical realities and reproductive medical realities, that simply isn't in the same class of those cases that required heightened scrutiny. And I think that was the holding in *Geduldig* and *Dobbs* in terms of the law, David says, why didn't they legislate on a neutral basis? Well, in terms of how you look at the operation of the law, and this also came out in oral argument when it comes to the ban on puberty blockers, it's absolutely neutral. No one, no child and no minor can receive puberty blockers if the purpose is to place that person at odds with their physical reproductive system. And in terms of the degree that you have to the operation to recognize whether or not the purpose is permissible or not, you do have to take into consideration whether or not the child is receiving procedures to place 'em at odds with their underlying physical reality. Yes, that does require looking at the medical reality of binary sex that the male reproductive system is different from the female reproductive system. Testosterone in a female system operates differently than testosterone in a male system. And so there simply wasn't any way to address the transitioning issue at all without recognizing that binary difference in terms of physical function.

[00:14:29.2] Jeffrey Rosen: David, as Kurt suggests, the court may converge around the idea that real differences rooted in biology are not ones that the law can't take account of. And for that reason, Justice Kagan suggested in one of her questions, why should we think of this as a sex-based classification rather than discrimination against trans people? She said, what's really going on here? I'm wondering if this is a little formal. What's really going on here is a disregard for young people who are trans. Why shouldn't we think of the law in that way? Tell us about the challenges of Tennessee's argument that indeed this is discrimination against trans people and that that is entitled to heightened scrutiny under the law.

[00:15:13.5] David Gans: Right. So there was a second argument that was pressed, which was that, and they're, I think they're reinforcing arguments. But the argument was separate and independent of the sex discrimination argument, which was the main argument presented. Discrimination against trans people who are persons protected by the equal protection clause should require the same kind of hard look that applies in other circumstances when the court is dealing with marginalized, powerless communities. And the justices debated and discussed these kinds of these questions about powerlessness. I think that there was some interest both by Kagan and by justice Amy Coney Barrett in exploring these issues. I mean, in some ways I think I expect probably more focus on the sex discrimination issue because the court has laid out so much jurisprudence on that issue. But another way the court could say a hard look is required here is by saying, this counts as the quasi-suspect classification, and we're gonna require more than just the lowest form of rationality for, discrimination that denies access to drugs that means sort of the difference between a life well lived and one where you're struggling.

[00:16:52.2] David Gans: I think, Prelogar sort of ended bringing home the sort of situation of one of the plaintiffs who was seeking access to prohibited treatments, who was throwing up every day and couldn't go to school, couldn't function without the kinds of treatments that are at issue in this case. And, one way the court could tell when you're dealing with a statute that reflects, and as Kagan put it, kind of disregard for trans people of marginalized population, the court has to take a more skeptical look, which is what a number of the courts equal protection cases, including in the gender context say.

[00:17:40.5] Jeffrey Rosen: Kurt, the test for whether or not a class is entitled to heightened scrutiny include is the characteristic immutable? Is there a history of discrimination and is the characteristic relevant to ability to contribute to society? Justice Alito pressed Mr. Strangio on the question of whether transgender status is immutable. And Mr. Strangio replied that the discordance between a person's birth, sex, and gender identity has a strong biological basis and would satisfy an immutability test. Tell us more about that exchange, and did you see the court as sympathetic to the argument for heightened scrutiny for transgender status or not?

[00:18:17.9] Kurt Lash: Yes. I think that was a very important part of the oral argument. In fact, I think it may be the key portion of the oral argument. I have a different perspective than David regarding the court's approach to looking at these laws as sex-based classifications. I came away from the argument thinking that there will be no more than two votes that will view this as sex-based classification. I think there was very little, there was a lot of conversation along those lines, but ultimately I think that Kagan really represented the key, a fulcrum on the court when Kagan said, "Isn't this being, really formalistic by focusing on a particular word in the text of the statute and trying to make this about sex discrimination when nobody really thinks this is about sex discrimination at all."

[00:19:19.5] Kurt Lash: This is about transgender issues. This is about a new issue that's currently in debate and under discussion involves new medicine, new procedures, new understandings of risks on both sides, risks of having transition procedures and not having those procedures. And so I think most of the court really is very skeptical of the idea that this should be treated as sex discrimination. And in particular, I don't think that anyone who joined the Dobbs decision is going to undermine the Dobbs decision by treating this as a sex-based classification. So I actually think that there's a rock solid majority that is just gonna cite Geduldig and Dobbs on that particular point. So I think Kagan recognizes that and knows that if there's any leeway in a position that justice Kagan would believe would be more appropriate and more progressive, it would be to view this as indeed having to do with the transgender population and whether or not that population should be viewed as a protected class, a quasi protected class.

[00:20:37.8] Kurt Lash: And justice Barrett also wanted to talk about that as well, about whether or not transgender met the jurisprudential indicia of suspect classes. Had they faced jury discrimination in the past? Alito gets into conversations about political power, about immutability, very interesting exchange with lawyer Strangio and Alito on immutability with the plaintiff's lawyer again talking about, well, there do seem to be biological, stable biological immutable aspects to it, but Alito then pushed back and wanted to talk about gender fluidity, which is another classification under discussion, and is part of the debate around transgender issues where you would move back and forth and sometimes not occupy either male or female categories as socially constructed.

[00:21:45.4] Kurt Lash: And then there's also the issue of detransition, and I think people should be very attentive to a question that was asked over and over again. I think by both Alito and Justice Thomas, and maybe by Chief Justice Roberts as well, they pressed both lawyers for the plaintiffs as to whether or not they thought de-transitioners were real. And the lawyers that there really was a group who were transgender, but then de-transitioned or sought to live lives in accordance with their biological sex. And the lawyers conceded, yes, that is a group. And for Alito that kind of ended the discussion of immutability. And at that point he said, "Well, then it's not immutable." So all of those questions and all of those discussions were focused on whether or not the court should, even if they uphold the Tennessee law, whether or not they should do so in a manner that recognizes transgender's quasi-suspect group.

[00:22:55.3] Jeffrey Rosen: David, as Kurt says, there was skepticism on the part of Justice Alito and Chief Justice Roberts on questions ranging from immutability to de-transitioning. Justice Barrett, who was interested in the question, said there's no history of jury discrimination against transgender people 'cause the category hasn't been recognized for very long. Did you see anything close to a majority on the court for recognizing transgender status as a protected class entitled to heightened scrutiny or not?

[00:23:29.7] David Gans: So I think there were some interchanges about what the history of discrimination was. No and history shows both public and private discrimination. There was talk about military bans on trans people. There was talk about criminal cross-dressing bans that were directed at trans people. There was also talk of a kind of private animus and prejudice. And so will the court go down that road? I think it's hard to tell. To me, the biggest takeaway from the argument was, I think what I heard from most of the conservatives was a concern about sort of applying the equal protection jurisprudence and sort of saying, we just wanted to defer to the states. Roberts, Justice Kavanaugh sort of raised this question of, well, this is an issue where we should defer to legislatures.

[00:24:49.4] David Gans: And I guess [my response to a lot of that was, that's not really the way the 14th Amendment works. This was put into the Constitution to be a check on the states. And

we can look at our sort of long history of discrimination. And we've seen what happens when you defer to legislative majorities when it comes to the rights of marginalized groups. And Plessy was based on the idea that, oh, we should defer to legislatures. And, loving, which Justice Jackson talked about quite a bit, was another case where there was a discriminatory law, again, targeting a sort of conduct that was viewed as inconsistent with race. And the argument was you should leave this to the legislature. The court rejected that.

[00:25:48.7] David Gans: And so I think, I mean, we've seen this court kind of be willing to second guess a lot of different bodies and a lot of different circumstances. And I think it was interesting to see a number of the conservatives sort of saying, "Well, let's just leave this to the legislature rather than doing what the Equal Protection clause and the jurisprudence requires, which is when you have a sex-based classification. And I think, you read the statute, sex kind of permeates it." And although Kagan explored the transgender status as an independent basis, I think she had, when Tennessee's solicitor General Rice argued and said, this was based on medical purpose, Kagan pushed back and said this is sex-based to the core and those kinds of statutes require a hard look. They require the state to make a convincing, showing to put on evidence. And I think what happened in the trial court with the preliminary injunction was, there wasn't evidence that showed there was a differential risk between the persons who are allowed to obtain treatment under the law and those who are banned from doing so. So I think this case is kind of a test of the court's willingness to kind of enforce some sort of equal protection promise and to do it to protect the powerless and the marginalized, which was the whole purpose of writing the Equal Protection Clause in the 14th Amendment and writing it broadly to protect all persons.

[00:27:48.3] Jeffrey Rosen: Kurt, David mentioned the history of the 14th Amendment, and you filed a brief arguing that the text and original meaning of the 14th Amendment did not alter the reserved authority of the people of the states to reasonably regulate the local practice of medicine in a manner that distinguishes between two complimentary male and female human reproductive systems. Tell us about your brief and your conclusions about why the original understanding of the 14th Amendment permits Tennessee to regulate in this manner.

[00:28:17.6] Kurt Lash: Yes, and David has rightly raised the meaning of the 14th Amendment as removing certain subjects from the political process. I think he's exactly right. And certainly when it comes to race those amendments represent a national conclusion that Blacks had been unjustly treated unjustly enslaved, and unjustly denied equal civil rights on the basis of irrelevant stereotypes and assumptions about what comes with a difference of race. So we start with a constitution that reserves substantial police powers to the states. And of course, one of the things that was reserved to the States was the right to enslave another person. And we have a national conversation. We have a civil war, and then a conversation following the civil war. And thankfully removed that from any type of legislative imposition to enslave another individual.

[00:29:26.7] Kurt Lash: The question now becomes, well, what else did the 14th amendment accomplish in terms of rights? And here's where David and I have both addressed the text of the 14th Amendment and the meaning of the Equal Protection Clause. David's brief talk about an original understanding of the 14th Amendment when combined with the 19th Amendment should lead to the conclusion that the 14th Amendment forbids any kind of sex-based classification. And this is something that's called whether or not the 14th Amendment treats sex as a suspect class, or even a quasi-suspect class is something that has been debated among scholars for years. I think, and David, you can correct me if I'm wrong about this. I think the majority of both conservative and progressive scholars do not think that the original understanding of the 14th Amendment created sex or viewed sex as a suspect class.

[00:30:29.3] Kurt Lash: The framers of the 14th Amendment were focused on other aspects. They rejected efforts by Susan B. Anthony and Elizabeth Cady Stanton and others to give equal political rights to women. They placed Section 2 into the 14th Amendment, which provides pressure on the states to give Black males the right to vote and introduce the word male into the Constitution, despite the fact that that infuriated feminist advocates at the time, and the debates are full of discussions of Republicans saying, "This is not going to." These discussions started under the 13th Amendment and then under the 14th Amendment, that these amendments would not in fact create equal civil rights or provide claims of equal civil rights for women. So I think it's a hard argument to make.

[00:31:19.7] Kurt Lash: I appreciate the argument that David has made. I know that Stephen Calabrese has made a similar argument to try to combine the 14th Amendment with the political rights granted in the 20th century. I'm not convinced that there was enough of a public conversation regarding the public's understanding of those texts that would justify that type of conclusion. But even if it does, and here, I think this is the key point, even if it does, you then have to go further and say that that understanding of sex classifications would apply when it comes to this kind of statute. And again, what my brief explores is that these kinds of statutes simply at the time, both in the early 19th century and the later 19th century, simply were not treated as implicating sex classifications at all. You had Chief Justice Marshall talking about the reserve power of the states to pass health regulations of all kinds.

[00:32:19.6] Kurt Lash: You have the rise of state regulations of the practice of medicine and medical boards. You have developed medicine that involves sexual reproductive systems. The Dobbs case talked about 19th century laws targeting women seeking an abortion. And they would use the sex term in those particular statutes. And also I think my brief also points out that regulated medical practice was also dealing with bodily dysmorphia conditions such as anorexia. And none of those were viewed or described as having anything to do with sex-based classifications. They had to do with medical realities regarding physical processes within the

body. And I just want to just briefly say this is really why Chief Justice Roberts was saying, shouldn't we leave this to the states? Because cases where the court has engaged in heightened scrutiny in the past has had to do with legal treatment, invidious stereotypes that were offering opportunities to one sex or not the other sex.

[00:33:28.6] Kurt Lash: This case involves a new issue having to do with interfering with ongoing physical processes and new psychological conditions involving gender dysphoria that has only recently become the target of scientific investigation. The treatments themselves didn't really begin in any serious way until what, 1998, 1999. And since that time both the United States and other countries have grappled with what procedures are appropriate, at what age are they appropriate, what are the long-term effects of hormones puberty blockers, testosterone in a female reproductive system, estrogen in a male reproductive system. And both scientific organizations and countries themselves have changed their standards over and over again and continue to do so. And so Chief Justice Roberts is saying, "Listen, this is a medical issue. You're asking us to do something that would involve the court in an ongoing debate even within the scientific community. That's something that we generally are unwilling to do."

[00:34:43.7] Jeffrey Rosen: David, your response to Kurt's historical argument, in particular his claim that there's a history and tradition of a general practice of state level medical regulations that would've been familiar to the framers of the 14th Amendment. It's a version of the argument that Chief Judge Sutton made in his argument for the 6th Circuit, where he said that this country does not have a deeply rooted tradition of preventing governments from regulating the medical profession in general, or certain treatments in particular, whether for adults or their children. What are your thoughts?

[00:35:17.4] David Gans: I'd actually like to talk first about sort of the 14th and 19th amendment, 'cause I think that's very important. And it gets to kind of something that we see kind of over and over again in the court's sex discrimination cases, which is they don't really tell the whole constitutional story. And I think our brief did so because, when we're looking at sort of texts and history, we should look at all the relevant text. And I think with regard to sex equality, the 14th Amendment marks it a huge change from the declaration. The Declaration of Independence talks about all men are created equal. The 14th Amendment is written in very broad and sweeping terms that talks about all persons, which includes men as well as women.

[00:36:19.2] David Gans: No, I think there are, from framers, some affirmations that this means equal rights for all. It's balanced by, and Kurt references this when it comes to voting rights. The 14th Amendment in section 2 puts a penalty of reduced congressional representation on states that disenfranchise its male inhabitants. I mean the 14th and 19th Amendments are very much amendments in conversation. Women's rights advocates kind of cheer on the 14th Amendment's embrace of equality for all persons and affirm the ideal of equal rights that is very much front

and center in the 14th Amendment, and that we still cherish today, but they're outraged by writing the word mail into the Constitution. And you have half a century of debates at all levels in the States with a number of different constitutional amendments.

[00:37:36.9] David Gans: It ends up with the 19th Amendment being added to the Constitution in 1920. And essentially the women's rights activists talk about sort of taking male out of the Constitution with the 19th Amendment. So these two amendments are very much related. If you look at the text, the 14th Amendment does affirm equality for all persons, and the 19th Amendment I think kind of underscores that. I mean, one, it is about voting rights and it does really revolutionize our democracy. But when you talk about sort of sex stereotyping, it's very much about sex-based judgments about women and women's reproductive biology. And so the idea that if it's about biology, it's benign is really false from our constitutional history. There was the idea that you see in debates kind of stretching from the 14th Amendment through the 19th Amendment is this idea that women's proper roles because of their reproductive biology is to bear and raise children to perform the role of life and mother.

[00:38:56.0] David Gans: You have kind of the Supreme Court at least certain justices, including some of the justices who were ready to give the 14th Amendment a more fulsome reading in other contexts. Saying this sort of puts women in a place of second class citizenship, and I think the 19th Amendment is a response. So when you read the two amendments together, that is an affirmation of gender equality. And I think it supports what the court has done in its 14th amendment jurisprudence, which is to say that sex-based laws they're not forbidden in all circumstances, but they require the hard look of heightened scrutiny, which wasn't done here. I mean, in terms of deference to state medical regulation, I mean at the time of the 14th Amendment that was a huge issue. One of the things that Congress was concerned at the time was access to medical care for African-Americans freed from bondage in the context of huge outbreaks of smallpox. And so it wasn't that, I don't think there's any sort of constitutional history that sort of says when the state is regulating, medically, you get a free pass from constitutional rights and you're allowed to write into the law provisions that impose facial discriminations, which is what I think the statute does. So I don't think you can simply say, well, this is medical. They get a free pass.

[00:40:43.9] David Gans: And I think if you look at what the Roberts Court has done, there are many areas in which we are having evolving debates. And there are, I mean, you can see it in the 2nd Amendment context where the court is very willing to sort of second guess what states are doing. I think the question is, is the 14th Amendment gonna be treated as a poor relation in this case? And will the court sort of say, look, when it comes to this kind of explicitly sex based discrimination written into the face of law, will we just say, we defer to the states? And I hope the court doesn't go down that road because I think we've seen time and time again, that just

means that states are given permission to discriminate against the powerless and the marginalized. And that really cuts against the reasons we have the 14th Amendment.

[00:41:47.9] Jeffrey Rosen: Kurt Justice Gorsuch didn't ask any questions during the oral argument, and many observers are wondering about his views in light of his decision in the Bostock case. Justice Alito said there's a Bostock-like argument that a girl who wants to live like a boy cannot be administered testosterone, but a boy who wants to live like a boy can be administered testosterone. And he then asked, why should we look to Bostock here? Can you unpack for our listeners what Bostock said? If this case were analyzed under Bostock, who would win? And do you expect the court to say that the 14th Amendment doesn't reach disparate impact discrimination unlike Title VII as construed in Bostock?

[00:42:33.3] Kurt Lash: Well, I agree with you that, yeah Justice Gorsuch, who of course people were looking towards to engage the Bostock issue, and whether or not he thought it applied in this particular situation were somewhat disappointed, not to hear him say. In Bostock, you do have a statutory interpretation that involved a but for test for sex discrimination. 'cause It's in the statute itself. And what other members of the court have pointed out. And I think also what the Tennessee brief points out is that the language of the 14th Amendment, which is what this case is about, doesn't include that language, doesn't follow that particular jurisprudence. And Bostock itself tried to cabinet its particular holding to just one statutory interpretation. And whether or not Bostock would apply, of course, to a situation involving the 14th Amendment, would, from my perspective and from David's perspective too, would require an analysis of history and the original understanding of the 14th Amendment and whether or not Bostock reasoning reflects the historical understanding that as soon as something turns on sexual difference, then boom, you have a sex-based classification and here we have sexual reproductive difference.

[00:44:00.8] Kurt Lash: So maybe that's enough to trigger sex classification. But what I appreciate about what David is doing, whatever our disagreements are about the history of the 14th Amendment, both David and I are trying to make the court attentive to the history behind the 14th Amendment. And the court has not done so. The court has the jurisprudence of sex classifications has all been developed in the modern period of the latter half of the 20th century prior to the court's engagement of originalism or original understanding of the Constitution. And as I understand what David's Brief is doing in this particular case is recognizing that we do have a court that is more attentive to historical investigation. He and his team are rightly presenting evidence that an originalist court would want to look at, originalist information regarding both the 14th Amendment and the 19th Amendment.

[00:44:57.7] Kurt Lash: And I very much appreciate that even if I read the history differently, I don't think now that that's all prefaced to my answer that no, I don't think they're gonna rely on

Bostock because this particular court, at least a majority of the conservatives don't think the same rules of interpretation apply for a modern enacted statute and what the possible understanding of that statute was, and very different words that require a different type of analysis in the Constitution require different originalist analysis that is more historically based. So, no, I don't think that Bostock is going to apply here, and that might be another reason for Justice Gorsuch staying silent during that part about Bostock throughout oral arguments. One more thing. A light pushback on David's point about federalism and the problem of leaving things to the states of course, first of all, you have a court that is, if it isn't a textual right, like a second Amendment right, if it's something like the right to privacy or the right to abortion, that isn't particularly in the text.

[00:46:06.5] Kurt Lash: Then in cases like Dobbs, you have the court returning the issue to political debate in the States. And we see the states going different directions, some creating stronger abortion rights and others being more protective of life in the womb. It's interesting to compare that situation with women's rights after Susan B. Anthony and Elizabeth Cady Stanton failed to get the national recognition of political rights. They wanted to continue to push for national recognition. And it led to a split within women's advocacy groups with Lucy Stone and others saying, "You know what? We need to take this to the states. If we don't have enough support at the national level yet then let's try to do this incrementally on a grassroots level." And so for the remainder of the 19th century they began to pursue the right to get a vote on a state level, and they succeeded. One by one You had the Western states, slowly but surely, and you can be cynical about it, but they wanted to attract a greater population to the Western states.

[00:47:08.0] Kurt Lash: And they created momentum for granting equal political rights. So by the time you get to the 19th Amendment, federalism and federalist development of women's rights on a state level ultimately translated into the momentum for the 19th Amendment. And I think that's what the court's gonna do when it comes to transgender issues as well. They're gonna treat it the same way that they have abortion, that this is something that the people themselves have not constitutionalized at a national level, let this develop and be debated and proceed more carefully on a state level.

[00:47:42.0] Jeffrey Rosen: David, a final beat before we close on this question of deference to the States and the medical evidence. Justice Jackson expressed grave concern about deference to contested medical evidence citing the Loving v. Virginia decision, where claims about the effects of interracial marriage were rejected by the court who, and judges engaged in an independent fact finding by contrast, many of the justices said that they shouldn't jump in in the face of disagreement among doctors. How do you see that debate playing out?

[00:48:19.6] David Gans: I mean, I do have to say, I mean, we're not talking, Kagan meant sort of wants to treat sort of protections against discrimination as an enumerated right? So the

Constitution says, no state shall deny any person equal protection of the laws. So that's a right just like other rights that are explicitly written down in the Constitution. So I don't think you can sort of say, "Well, this isn't really there, so we'll just let the states figure it out." This is a right now, there's a longer story about substantive fundamental rights that are unenumerated, but I don't think there's really time to get into that. But this is a case about protection of equality under law and equal rights under law, which is really kind of the root idea that the 14th Amendment provides.

[00:49:24.2] David Gans: I don't think you can sort of say the answer is we defer, especially when we're dealing with a sex-based statute, which whether you look at sort of constitutional text and history, or you look at precedent sex-based laws and sex-based laws that I think like Tennessee, is that sort of says, this is the way young men and young women are, and they have to act that even when there are certain individuals who have a general identity that differs from the one they were born with and need treatments to kind of live and flourish and enjoy the promise of equal citizenship. I think the right answer is not, we're just gonna let the state sort of figure this out. The constitution promises equality and sort of says, "Well, there's a transgender exception," so that is very troubling, and I think really does violence to the sort of promise of equality for all that is in the 14th Amendment. And as I mentioned, we've seen throughout history that sort of broad deference to states to discriminate against marginalized ends with more discrimination. And that's exactly what the equal protection clause was meant to combat.

[00:51:17.8] Jeffrey Rosen: Kurt, how do you see the court resolving this question of how much of any deference to give to doctors and contested medical evidence and might the question of parental rights, which Judge Sutton invoked in his opinion come into play? Judge Sutton said parental rights don't alter this conclusion 'cause parents don't have a constitutional right to get reasonably banned treatments for their children. How might the court resolve all this?

[00:51:44.0] Kurt Lash: Well, I think the court is going to be attentive to the concerns that David just raised. I think that in terms of equal protection, and my brief does go into this third, obviously, there are questions about the meaning of equal protection of the laws. There's a lot of scholarship regarding that, about whether or not the court has appropriately interpreted that particular guarantee of protection. I've written that much of the equality jurisprudence should be viewed under the citizenship clause and what it means to have equal rights as a citizen for all similarly situated persons. That then turns into a discussion of what does it mean to be similarly situated? And that then turns into the discussion of, did they understand men and women are similarly situated? Would they have been understood as persons suffering from gender dysphoria as similarly situated?

[00:52:44.4] Kurt Lash: It turns into a very difficult kind of historical argument about what the meanings of those words were. But at the end of the day, both David and I think the state

legislatures very much want to pursue the best route for the living and flourishing of young people, in particular minors. And this is what's being debated. Are we dealing with procedures that are actually going to advance the living and flourishing of minors into adulthood? Or are we dealing with untested procedures that are actually interfering with the living and flourishing of individuals? And that is a hotly disputed issue. That again, countries who moved in one direction for a while, the UK, the cast report, which I've read out of the UK talks about the difficulty of finding reliable evidence regarding the risks and benefits of these particular treatments.

[00:53:47.5] Kurt Lash: I think this is what Chief Justice Roberts wants to be very careful with. This is a new issue and exactly what is going to lead to the flourishing of individuals who's still under dispute. And it would probably be a bad idea to constitutionalize one particular approach or establish certain requirements and constraints on what legislatures can do in terms of their investigation and trying different approaches to this very complicated medical issue. In terms of parental parental rights, again that was addressed in the lower court by the 6th Circuit. It was not granted cert, that particular issue wasn't granted cert. And Justice Barrett was very careful to say, "We're not saying anything about parental rights right now." So that'll have to be fleshed out and in the lower courts, there will be additional challenges where parents will say, "We should have the right to choose medical procedures for our children."

[00:54:48.9] Kurt Lash: The 6th Circuit said, "Listen, there isn't any particular constitutional right to medical procedures for adults." We established that in *Glucksberg* and in *race* when it came to medical use of marijuana, even when doctors in California had authorized the use of that particular treatment. So the 6th Circuit didn't believe the parental rights went further for children than they would go for the parents themselves. I think that probably will be what they hold down the road, but they're not gonna talk about it here. I think at this point, they're simply gonna uphold the 6th Circuit in a very brief opinion that says the 6th Circuit was right to treat this as, not as a sex-based classification, but one that has to do with medicine in an area traditionally reserved to the states.

[00:55:35.4] Jeffrey Rosen: Well, it's time for closing arguments in this excellent, wide ranging and comprehensive discussion. Just a few sentences from each of you about your positions would be great to help We the People listeners continue their learning and their exploration in this important case. David, first to you, why do you believe that the Tennessee law violates the equal protection clause of the Constitution?

[00:56:00.8] David Gans: I mean, so this is a sex-based law that I think can't, I mean, it doesn't pass the sort of the hard look of heightened scrutiny. I mean in some ways, the issue is, is a hard look required or are we gonna have something that just defers to whatever the states do? I think the district court in this case got it right when it did take a hard look and said the state hasn't produced evidence that justifies these lines. And I guess, the question in this case is when you

look at the medical evidence and there is a lot of it, is there a medical basis for this or does this reflect, disregard for trans people as Justice Kagan put it during the argument? The fight here is, is a court required to take that close look? The only court that did that in this case said, Tennessee hasn't substantiated its interests here. I think that's the approach that the Constitution requires, and I think the court should reverse the 6th Circuit and say we're not going to tolerate discrimination simply based on what legislatures say is rational.

[00:57:34.9] Jeffrey Rosen: Kurt, last word in this great discussion is to you, why do you believe that the Tennessee law does not violate the equal protection clause of the Constitution?

[00:57:43.1] Kurt Lash: Thank you, Jeff. Well, first of all, I want to thank David, and I wanna thank David and his team for submitting a brief that wanted to bring our attention to the history of the 14th Amendment and other amendments, the 19th Amendment as well. I share his desire that the court take that history more seriously, whatever our disagreements are. I was very glad to see that brief submitted to the court in terms of why I think the court should affirm the 6th Circuit. I actually would say that what David just said, kind of explains why the plaintiffs are going to lose. David points out that what the District Court did in this particular case is apply heightened scrutiny and applied heightened scrutiny to the state's conclusion that the risks outweigh the benefits and that concerns about possible outcomes simply didn't justify going forward with allowing these types of procedures to take place.

[00:58:43.9] Kurt Lash: The district court weighed the medical evidence and weighed the scientific evidence and came to a different conclusion about how strong the scientific studies were. Came to a different conclusion about the rate of Detransitioners and desistors came to a different conclusion about the suicide rates and suicidality and all of these issues. So the court simply said, I'm convinced that the plaintiffs are right. I don't think that the court weighed the scientific evidence, right? And the Supreme Court, a majority of the Supreme Court's gonna look at that and see what they would face if they'd agreed with the district court and applied heightened scrutiny. They would place themselves in a position of having to evaluate medical studies that are themselves in dispute with one another and are in the middle of changing on an almost monthly basis. So the court does not want to engage in that type of argument. That's a legislative argument. That's an argument that should be left to the states to continue to grapple with, and it simply is not part of what the court ought to be doing.

[00:59:52.7] Jeffrey Rosen: Thank you so much, David Gans and Kurt Lash for a superb, thoughtful, and wide ranging discussion of United States v. Skrmetti. David, Kurt, thank you so much for joining.

[01:00:06.8] Kurt Lash: Thank you, Jeff. Thank you, David.

[01:00:08.7] David Gans: Thanks Jeff and Kurt, and I appreciate the kind words about our brief. And I will say I've enjoyed lots of your scholarship, even if I don't agree with all of it.

[01:00:19.7] Kurt Lash: Thank you.

[01:00:23.8] Jeffrey Rosen: Today's episode was produced by Samson Mostashari and Bill Pollock. It was engineered by Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith, Gyuha Lee, and Yara Daraiseh. Please recommend the show to friends, colleagues, or anyone anywhere whose eager for an illuminating and exhilarating feast of constitutional debate and learning in light. What a great show that was, and what a great discussion. Check out the wonderful new Constitution 101 course that the NCC has created with Khan Academy. Take the constitutional quiz and let me know what you think. Sign up for the newsletter @constitutioncenter.org/connect. We will be sending out to all of our great NCC supporters and end of year highlights of some of the great books we've been discussing all year on We the People. So if you're not yet a Constitution Center member or supporter, sign up @constitutioncenter.org/membership or give a donation of any amount to support the work, including the podcast @constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.