Unpacking the Supreme Court's Decision in *United States v. Skrmetti*

Thursday, June 26, 2025

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[00:00:00.4] Jeffrey Rosen: On June 18th, the Supreme Court delivered its decision in *United States v. Skrmetti*. 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 nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. This week, we'll unpack the court's decision in *U.S. v. Skrmetti*, which upheld a Tennessee law prohibiting certain medical treatments for transgender minors. To help us explore the case, we have two of America's leading scholars on the equal protection clause of the 14th Amendment. William Eskridge is the Alexander Bickel Professor of Public Law at Yale Law School. Professor Eskridge co-wrote an amicus brief for the petitioners in *Skrmetti*. Professor Eskridge, it's wonderful to welcome you to We the People.

[00:00:57.9] William Eskridge: Thank you very much, Jeff. It's a delight to be here.

[00:01:00.7] Jeffrey Rosen: And Christopher Green is the Associate Director of the Chase Center for Civics, Culture, and Society at The Ohio State University. Professor Green wrote an amicus brief for the respondents in *Skrmetti*. Professor Green, it's wonderful to welcome you to We the People.

[00:01:14.7] Christopher Green: Great to have me on, and great to be on with Bill Eskridge, who's a wonderful friend to civic dialogue.

[00:01:22.0] Jeffrey Rosen: Well, let's just begin with the majority opinions and the dissents. Chris, if I may, what was the holding of the majority in *Skrmetti*?

[00:01:32.7] Christopher Green: Well, so *Skrmetti* is working against the background. So this is a challenge that did not win at the lower courts. So the Sixth Circuit said that Tennessee, so Tennessee and many other states, have essentially bans on puberty blockers and cross-gender hormones for minors. The Sixth Circuit said that's okay. And the Supreme Court says that's okay. So why would that be okay under the 14th Amendment? Well, essentially what they did was reaffirm a case from 1974. So in 1974, there's a case *Geduldig*. Now, *Geduldig* happened in the midst of the construction. So between 1971 and 1976, the Supreme Court cobbled together its sex discrimination jurisprudence. So it started off saying that a particular case, this *Reed* case in 1971, that there wasn't a rational basis for a particular gender distinction. 1976, in *Craig versus Boren*, it comes up with this system of intermediate scrutiny. But in between, this *Geduldig* case, the court said that whatever, so it's uncertain at the time, in 1974, exactly what they're going to

do with gender discrimination or sex discrimination. But what they say in 1974, and they reaffirmed last week, they said, whatever we do with sex discrimination, discrimination on the basis of pregnancy or specifically biologically rooted conditions, that doesn't count as sex discrimination.

[00:03:19.9] Christopher Green: So essentially what the court said was, well, telling people who have certain chromosomes that they can't have certain hormones, that is not treated as the kind of sex discrimination that gets ultimately intermediate scrutiny. So all that Tennessee needs to show is a rational basis, and this might be rational. So because the court reaffirms *Geduldig*, they get a very low level of scrutiny. All that Tennessee has to do is have a rational basis, rational connection to a legitimate interest, which they thought Tennessee did. So they affirm the law. That's essentially what they did.

[00:04:01.5] Jeffrey Rosen: Thank you so much for that. And Bill, what was the holding of the dissent in *Skrmetti*?

[00:04:08.6] William Eskridge: Well, thanks, Jeff and Christopher. I want to clarify a little bit the kind of issues that were decided by the Sixth Circuit. There were two kinds of claims that the Sixth Circuit evaluated. One was the equal protection claims on the part of the parents and the children who were denied this care. And that was based upon the idea that most puberty blockers and hormone treatments in Tennessee and other states are done for cisgender children, in other words, children who are not transgender. It's only children and their parents who are transgender who are denied these treatments. Okay. And so the argument was that this is a violation of equal protection as both a sex discrimination, which is intermediate scrutiny, and or discrimination against a discrete and insolent minority, i.e. Transgender kids and their parents, which is independently, according to the plaintiffs, a violation of the Equal Protection Clause. In addition, at the Sixth Circuit, the parents also argued that they were denied their fundamental right to the medical care of their own children. I might add a fundamental right explicitly recognized in Tennessee in an expansive statute Tennessee adopted in 2024, saying that they have a fundamental right to the control of the medical care of their children.

[00:05:47.7] William Eskridge: And the argument was that the SB1, the Tennessee 2023 statute, denies parents this fundamental right, which would trigger strict scrutiny under the Due Process Clause. The Sixth Circuit, as Christopher pointed out, rejected both lines of argument. The government, the Department of Justice was an intervening plaintiff, and its petition for review was granted, and the Supreme Court did limit review to the Equal Protection Clause. There were three arguments presented to the court under the Equal Protection Clause. One was the sex discrimination argument, as Christopher pointed out. The second was discrimination against transgender individuals, as it was an independent argument under the Equal Protection Clause. And then the argument that the amicus brief that I authored submitted was that the Supreme Court has repeatedly recognized that equal protection strict scrutiny applies when a fundamental right is denied to any group, doesn't have to be a racial group or even a sex group, but a fundamental right like voting or marriage is denied. And the Supreme Court for decades, if not centuries, has recognized parental rights as absolutely fundamental. The court did not reach that third equal protection argument. And indeed, the Department of Justice and the parents represented by the ACLU did not press it either.

[00:07:25.6] William Eskridge: So that argument remains open for future resolution in other cases. Now, the dissenting opinion, mainly by Sotomayor, Kagan wrote a short separate dissent. Essentially, Sotomayor, Jackson, and Kagan, the three Democrats on the court, dissented from the six Republican judgment that affirmed the Sixth Circuit and rejected the equal protection challenge to the Tennessee law. So Sotomayor responds to both of the claims. On the sex discrimination claim, Roberts relies on *Geduldig*, exactly as Christopher is pointing out, because Roberts says the Tennessee statute only discriminates based on age, i.e. Minors, and on medical purpose or medical procedure, i.e. The hormone, puberty blockers, and even, in some cases, surgeries. And the Chief Justice says, well, that's that. Well, you need to read the statute. If you actually read the statute, the statute under prohibitions 103A1 says a health care provider shall not knowingly perform, etcetera, on a minor, there's one, or administer, offer to administer a minor, a medical procedure, that's two, if the performance of the procedure is for the purpose of, this is all part of the statute, enabling the minor to identify with or live with a purported identity inconsistent with the minor's sex,

[00:09:04.2] William Eskridge: Aha, or treating purported discomfort or distress from a discordance between the minor's sex and asserted identity. If you read the statute, there are three bases for discrimination. One is age. You could say the other is medical procedure. But the third is clearly sex, that if you were a minor girl wanting puberty blockers, the state says, fine, fine, unless you are a minor girl who does not accept the sex the state has assigned to you at birth. Okay, that's sex discrimination, or so Sotomayor argues, and it is based on the statute. So that's one line of argument, that it's not just *Geduldig*, that it is also sex discrimination on its face, which was not the case of the California statute being evaluated in *Geduldig*. I might add that if you really take *Geduldig* seriously, and really Sotomayor invites your listeners not to take *Geduldig* seriously, can you seriously maintain that excluding pregnancy from state benefits is not a sex discrimination? Well, the Supreme Court did say that in *Geduldig*, and they repeated it in *Dobbs*, the abortion decision, and now they repeat it yet again in *Skrmetti*. So that was that basis. Secondly, Sotomayor argues that independent of the sex discrimination, which would of course be heightened scrutiny, intermediate scrutiny as Christopher pointed out, she also argued that transgender individuals are a discrete and insolent minority subject to pervasive discrimination, which would justify the court creating a new suspect classification, i.e. Something like gender identity or discrimination against transgender individuals.

[00:11:18.9] William Eskridge: The Chief Justice, as Christopher pointed out, responded mainly with *Geduldig* on that one. Justice Barrett and Justice Alito in separate concurring opinions responded more directly to Justice Sotomayor, and both of them felt that the court should not create a new suspect or quasi-suspect classification because transgender individuals were too heterogeneous. They're just all over the place, as though race and sex are not very heterogeneous classes. And then secondly, and kind of interestingly, Justice Barrett said, and Justice Alito pretty much the same, oh, well, transgender individuals are not really subject to de jure discrimination, in other words, state discrimination. And that is just simply false. That is false. Barrett asked the Solicitor General at oral argument, I was at the oral argument, what history of de jure discrimination there was. And the Solicitor General just was clueless. She had no idea. She had not researched it. She was simply unprepared. When Chase Strangio got up representing the ACLU, an openly transgender person, first time, Chase calmly answered the

question, yes, there's a lot of examples of de jure discrimination. Going back to the 19th century, there are cross-dressing laws. There are medical laws through the 19th and early and mid 20th century. There were criminal laws.

[00:12:56.1] William Eskridge: The military excluded these folks. There's bushels of de jure discriminations. And they're cited dutifully in Justice Sotomayor's dissent. So that's the argument that she makes. And of course, she argues that it should be intermediate scrutiny. And so the proper course would be to remand to the Sixth Circuit and the district court ultimately to reevaluate the Tennessee policy, give them a chance to show that they satisfy intermediate or strict scrutiny.

[00:13:30.0] Jeffrey Rosen: Many thanks for all that. Chris, talk more about the central significance of the *Geduldig* case. *Geduldig* said that discrimination on the basis of pregnancy was not sex discrimination because it discriminated between pregnant women and non-pregnant persons. This was a significant defeat for Justice Ruth Bader Ginsburg's anti-stereotyping principle. In the 1970s, Ruth Bader Ginsburg argued that the anti-stereotyping principle prohibited state action that reinforces traditional conceptions of men and women's roles. And this was the foundation of her argument that restrictions on abortion were sex discrimination because they reinforced traditional gender roles. The court rejected that in the *Dobbs* case where it reaffirmed the centrality of *Geduldig*. And here, as you suggest, the reaffirmation of *Geduldig* was central to the majorities' rejection of the idea that transgender discrimination was sex discrimination. Say more about this and what its implications are for the future of gender discrimination.

[00:14:44.6] Christopher Green: Right, so it is a little hard to say exactly what the future is going to be, but *Geduldig* has had surprisingly long legs. So, I mean, if you look at a biology textbook, just sort of people thinking in general, what does what is in a mammal if you're trying to figure, you've got some new species or something, and you're trying to figure out, well is there, are there, there seems like there's two kinds of this sort of new being, which is the male and the female, the one that become pregnant. So ability or kind of suitedness, a proper functioning related to pregnancy is literally what you'll find as the definition of being female. So, I mean, the way a lot of people think about *Geduldig* is it's a highly formalistic exception to a highly formalistic rule. So, *Geduldig*, it's interesting. So Justice Ginsburg was heavily involved in lots and lots of the '70s cases, very famous argument in the, I think, the *Frontiero* case just a year before. In 2012, there's a very interesting case, *Coleman*. It actually involved Section 5 of the 14th Amendment.

[00:16:13.0] Christopher Green: So the Family Medical Leave Act, one of the provisions, but Justice Ginsburg for four justices said "for 38 years, I've been really upset about this *Geduldig* case. And I think we should overrule it." Went into a good bit of detail about why she thought it should be overruled pursuant to thinking about Congress's power to enforce the 14th Amendment Section 1. Justice Kennedy, on behalf of the majority, said nothing at all. It was really quite a remarkable sort of ghosting of the dissent. Justice Kennedy, one of my, I was fascinated by this and I had a student look up when does this happen? When do majorities just completely, utterly fail to respond to something? And Justice Kennedy did it more than other justices. Justice Stevens, Justice Scalia, they would always, like if there's something to dissent, he's like, okay,

I'm going to give you some more. And they would go back and forth. It was, the professors would love it, having these dueling footnotes and whatnot. But Justice Kennedy did not. And then, but 10 years after that, it's interesting, very interesting, *Dobbs* has this footnote. So there's this argument, well, abortion rights, abortion regulations are discrimination on the grounds of pregnancy.

[00:17:26.0] Christopher Green: The majority says, well, no, it's not. See *Geduldig*, all three of the dissenters in *Dobbs* had been in that majority 10 years, been in that dissent 10 years before with Justice Ginsburg saying, hey, we want to get rid of *Geduldig*. They don't mention it. But then three years later, now they do want to reconsider *Geduldig*. So I find it mostly fascinating, kind of fascinating like a car wreck in terms of just the willingness to reconsider old opinions. And of course, *Dobbs*, right, in 2022 is reconsidering this case from 1973. So the dissenters there they were saying, well, we've got to reaffirm this case from 1973. It would not be the greatest look to say the reason why we have to do it is because we're overruling this case from 1974. Here you had a sort of similar question. Should the court reconsider the whole framework of intermediate scrutiny? *Craig versus Boren* from 1976. The court did not. So that's what I was pushing in my amicus brief, but the court didn't address this. Justice Thomas in a footnote said, well I still think maybe this whole system is wrong, but Tennessee didn't raise it.

[00:18:44.7] Christopher Green: So I'm not going to consider the dissent, though, didn't. I mean, so the petitioners didn't challenge *Geduldig* directly. The dissent didn't make any argument like that. But if they if the majority had gone on the Geduldig reconsideration route, they really would have had a question. Well, why aren't you reconsidering *Craig*? If the rationale for not reconsidering *Craig* is the parties didn't raise it. Well, the fact the parties didn't raise *Geduldig*, why is that such a problem? So so from the perspective of stare decisis, so sticking with old precedents that may or may not be right, according to the actual meaning of the Constitution, I think it's a fascinating area. I think the court probably doesn't have anything that can get five votes to say coherently on that question, which is why it's been so confusing. But they they certainly were willing three years ago to reconsider *Roe*, but they stuck with *Geduldig* then. And they they did again last week in *Skrmetti*.

[00:19:45.8] Jeffrey Rosen: Bill, Justice Sotomayor argued that *Geduldig* was egregiously wrong when it was decided. And she quoted Justice Ginsburg's dissenting opinion in the *Coleman* case. Does the majority's strong reaffirmation of *Geduldig* represent a rejection of a central achievement of Justice Ginsburg's gender discrimination vision and mean it will be difficult for this majority to recognize either restrictions on abortion or transgender discrimination as a form of sex discrimination in the future or not?

[00:20:20.1] William Eskridge: Well, the first thing I would say is that everybody is overreading *Geduldig*. If you actually read *Geduldig*, and I've also read the Justice's conference notes and so on and so forth, if you actually read it, the majority does seize upon footnote 20. That is a footnote. The main holding of *Geduldig* was that California claimed that its system of disability benefits would go bankrupt if pregnancy were included. And that was mainly what the majority talked about in *Geduldig*. But they do have that footnote exactly as Christopher is describing it. So *Geduldig* can be read narrowly or can be read broadly, and the Roberts Court is reading it as broadly as possible, if not beyond. So is this egregiously wrong? Well, of course it

is. How can you, with a straight face or a transgender face, say that discrimination based upon pregnancy is anything but sex discrimination? Hey, indeed, Tennessee recognized that in the statute we're talking about. Can we read the statute again? Section 101M as in Mary of the Tennessee statute says that this state has a legitimate, substantial, and compelling interest in protecting the ability of minors to develop into adults who can create children of their own.

[00:21:48.0] William Eskridge: What is that a reference to? Exactly what Christopher is talking about, that women are going to be the bearers of the children and men are going to be the inseminators. The statute goes on, read the statute, the state has a legitimate, substantial, and compelling interest in encouraging minors to appreciate their sex. That's the sex assigned at birth, particularly as they undergo puberty. So the whole point of the Tennessee statute is to reaffirm traditional gender roles associated with what it considers to be two biological assigned at birth sexes, male and female. So *Geduldig*, it seems to me, in footnote 20, and the decision is perfectly understandable without that footnote 20, yeah, I think that is egregiously wrong. Jeff, as your question does suggest, however, *Geduldig* has now emerged, and as Christopher says, as soon as *Dobbs*, and certainly in this case, *Geduldig* has now emerged as a workaround the Court's sex discrimination jurisprudence in the VMI case, Justice Ginsburg's opinion, *Craig v. Boren* and Justice Brennan's opinion, and other precedents of the court. So now you can just simply avoid sex discrimination arguments if you choose by ignoring the language of the statute and recharacterizing the statute as a age statute or a medical procedure statute, right?

[00:23:24.1] William Eskridge: And again, I will repeat, *Geduldig*, the California statute did not use the word sex. It simply said, here's what we're covering, and we're not covering pregnancy. It did not say sex. The Tennessee statute says sex, sex, sex, sex, sex, all over the place in 101 and 103, which are the findings and the prohibitions. So it seems to me that this is severely objectionable. Now, here's the news, and that is if you are a Republican legislator who wants to conduct a war on contraception, make it difficult for women without resources, persecute transgender people, persecute gay people, get political points for this, political points for that, the Roberts Court has given you a pathway to Margaret Atwood's *The Handmaid's Tale*. Okay? I'll give you an example. The Tennessee statute regulates birth control pills. Aha! How is that? Well, birth control pills, as I understand it, contain hormones. Hormones are forbidden to transgender youth under certain circumstances, so you'd have to figure that out. But they're perfectly okay under this statute for cisgender adolescents. I think there's another Tennessee statute that says you've got to get parental permission. But again, that would make it okay. So under the Roberts approach and *Geduldig*, you could say, hey, teenage girls generally cannot have access to birth control pills.

[00:25:14.7] William Eskridge: Make it a crime or a civil penalty like the Tennessee statute for a doctor or a pharmacist or anybody or a parent. Parents are covered by the statute as well to facilitate their teenage girls getting birth control pills. And you say, hold on, hold on, that's sex discrimination. No, you don't use the word girl. You just simply say birth control pills are now illegal for minors, right? And you say it's age and it's a medical product. It's a drug. They say, but yes, but only women use it. Doesn't matter. Not all girls use birth control pills, right? And then you make the same medical arguments that Tennessee is making here. And you can cite to journals and the same kind of nonsense that they cite to when they say, oh, well, medical experts have raised questions about that, experts in quote marks. Some women regret using birth control

pills. And I can give you citations where people have done exactly that. Well, okay, then it's a short step to what about adult women, right? So maybe adult women also cannot have access to birth control pills. You see how we're getting closer to Handmaiden's Tale, where you get the idea of compulsory pregnancy and the state imposes more and more regulations on women's control of their bodies?

[00:26:45.3] William Eskridge: So no abortions, so limit birth control, state-regulate the conditions of pregnancy. And again, you don't use the word sex. The Tennessee statute repeatedly uses the word sex. You avoid that, and *Geduldig* gives you a roadmap toward *The Handmaid's Tale*. Now, the Republican Party does not support *The Handmaid's Tale*. I'm just saying that the Roberts Court is laying out a path which is a very dangerous one. I'll make this other point. You literally cannot believe *Geduldig*. I'll give you an example. The state is an employer. States employ a lot of people. If the state says, we will not hire women, we will hire men. Christopher, Jeff, I hope we would all agree that's sex discrimination, intermediate scrutiny. But what if the state says, oh, we'll hire women and men, but not mothers, right? In other words, women with children, say, under the age of 18. Is that not sex discrimination? It's gotta be, but it's not under *Geduldig* because it just says mothers with children under 18. And under the *Skrmetti* argumentation, that is not sex discrimination. Justice Alito says so explicitly. Chief Justice Roberts does not say so explicitly, but that would be an implication of the kind of analysis that you get if you take *Geduldig's* footnote 20 seriously.

[00:28:19.3] William Eskridge: And I think the court probably would not press it in that direction, but I think the court is being inconsistent.

[00:28:27.6] Jeffrey Rosen: Let's talk about the debate about the scientific benefits or risk of gender-affirming care. Christopher, Justice Thomas, in his concurring opinion, dismissed the idea of deferring to so-called experts and said that the court should defer to the decisions of democratic legislatures. Tell us about Justice Thomas' view about the empirical evidence and the nature of the debate about the empirical evidence in the lower courts.

[00:29:07.6] Christopher Green: Sure. So I would say, I mean, deference to elected majorities, that's a little bit more a feature of the majority opinion. So Chief Justice Roberts, he doesn't really get into so reconsideration of some of these policies in Europe and some of the kind of retrenchment, rethinking of these policies that people have done in response to the Cass Report and such. He's so once he decides we're not at intermediate scrutiny, we're not at strict scrutiny, we're just at rational basis, well the line from that, from 1955, it might be thought rational. So you look at certainly the incidents of self-harm among this population is unbelievably high. These treatments do not look like they have solid evidence that they reduce it, and they might, in the view of many experts, many people who have studied it anyway, look like it is a form of self-harm. That's all that the majority thinks you need. Justice Thomas, in his concurrence, is really does get into the weeds of these studies and counter studies in response to the dissent. So Justice Sotomayor, she gets into quite a bit of the studies. And I should say, just looking at the amicus briefs, there were something like 100 amicus briefs, and Professor Eskridge and Professor Calabresi, they were two of the more prominent ones on their brief.

[00:30:50.6] Christopher Green: The Constitutional Accountability center, those two briefs on the petitioner side were the two main ones that really got into like 14th Amendment history that was directly relevant. My brief, Kurt Lash's brief, and I think the Alliance of Independent Freedom, one of the amicus briefs on the respondent side got into history. But all of the others, so the vast, vast, vast majority were getting into like lots and lots of dirt under the fingernails in terms of these studies and counter studies. So if you want to really get a sense for just how much dispute there is back and forth about the empirics, the amicus briefs have a huge amount of it. So if you think, oh my goodness, Justice Thomas is going on at length, you ain't seen nothing if you didn't go through all those amicus briefs, because there is quite a lot. But the majority basically says, well, it's not our job to do this. Very, very similar, I think, to Justice Holmes in 1905 saying if it were a question of whether I agreed with this, I would have to think a long, long, long time. So you might remember, Jeff, you of course remember Justice Taft took several years to decide one of these cases in the 1920s, *Myers*.

[00:32:00.2] Christopher Green: Well, if they really were going to pronounce, make a pronouncement that they had any confidence in about these back and forths of these empirical questions, they would not have decided this in 2025. They would have had to take several years. But the majority says, well, that's not our job. This is good enough to pass rational basis. We have this story about why intermediate scrutiny doesn't apply. We're just gonna go with that. But Justice Thomas, in order to respond, gets into more detail. And if you replace this whole system with something else, you really could come up with a level of scrutiny that's in between a rational basis and intermediate scrutiny. So I have pushed the idea that the precedence from administrative law. So anytime you have a big cost on a group, you might say, hey, government, you gotta explain what you're doing. So the case from 1971 about I-40 going through, going really close to the Memphis Zoo, cutting it off from Overton Park. You gotta explain why you're doing that. Just, we want I-40 to be straight is not enough of an explanation.

[00:33:15.0] Christopher Green: And that's just an impact on a zoo, okay? You don't need to have a suspect class. Any big impact on anything that matters to a lot of people ought to get some kind of explanation. So the court has been regularly, at least looking over the shoulder of administrators saying, are you giving some, making a decision that's reasonable and reasonably explained? That's something they said last week, I think, about administrative law decisions. You could use that in the 14th Amendment context, and you could use the concept of citizenship to rebuild that. But as the court is looking at it, it's not quite all or nothing, but it's really quite moosey scrutiny of intermediate scrutiny, or pretty close to nothing with rational basis. And the gap in between there, I just don't think there's a good justification for having a system with that huge kind of a gap. We should have more than rational basis scrutiny for discriminations you had in 1955 about people running an eyeglass cartel. If there's not really a good explanation for that, the state shouldn't be allowed to do that.

[00:34:26.7] Christopher Green: If there's not really a pretty substantial justification in terms of mental health and self-harm and these sorts of things, if there's not really a good empirical basis, the state shouldn't be allowed to do it. There, of course, was a huge, huge amount of literature on that that they could have gotten into if they had been conducting analysis like they do in administrative law, but they stuck with the old precedents. Future cases, they might

reconsider this, but they are not injecting themselves into it. Only if the parties come up with that kind of argument is it gonna be on the agenda.

[00:34:57.1] Jeffrey Rosen: Bill, what is your view of the empirical evidence? On June 19th, the New York Times published a remarkable piece by Nicholas Confessore arguing a Times examination shows how a landmark case about gender-affirming care for minors was built on flawed politics and uncertain science. It said some civil rights experts and veterans of the LGBTQ movement view the *Skrmetti* case as a tragic gamble built on flawed politics and uncertain science, and among the takeaways was the claim that just as the LGBTQ movement dug in on pediatric gender medicine, several European countries began moving away. Tell us your views about the empirical evidence and those claims.

[00:35:42.0] William Eskridge: Jeff, thanks. Let me start with this, and I think this is responsive to your question. Let me start with the stakes, and let me also start with the European evidence. The stakes of this case are very high, and they're completely obscured by the majority opinion. And again, I was thinking of the parents and the families, okay? If you look at it from the point of view of the parents and the families, it is documented, it is beyond debate that transgendered youth are at astronomically greater likelihood of having suicidal thoughts and actually attempting and committing suicide than cisgender youth. This is a huge problem. And that's on top of the emotional turmoil and other problems that one's sexual or gender identity that's different from the sex assigned at birth creates for young people. And parents grapple with this in many different ways. Some parents are very supportive of their kids but go slow. Some parents are resistant, which is their right. And other parents are gung-ho. Let's see a doctor immediately and let's follow the medical protocols wherever they might lead. That's point number one. Point number two, the statute makes it a prohibited action for parents to facilitate access to these needed medical treatments.

[00:37:15.0] William Eskridge: These are medical treatments. These are not addictive controlled substances. These are not dangerous in the sense that a lot of other things are dangerous, obviously dangerous anyway. And parents can be held civilly liable. The attorney general can sue them. The attorney general under section 106, again, the Chief Justice doesn't talk about this. Can sue parents who violate the chapter and they can receive an injunction and they can impose a civil penalty. So it's not a crime, it's a civil penalty, $25,000 per violation. And every time a parent helps the kid get a puberty blocker or a hormone, including birth control pills, by the way, in some circumstances, that is potentially $25,000, which middle-class families, of course, cannot afford. So this is open season, not just on transgender youth, but on the parents. Okay, does the European experience support that? Of course not, right? So the Cass Report, which is prominent in the Chief Justice's opinion and in Justice Thomas's concurring opinion, the United Kingdom responded to the Cass Report by imposing in the National Health Service some limitations on access to puberty blockers and hormones. There is no statute in the United Kingdom that prohibits parents from engaging in doctors and these medical treatments.

[00:38:52.4] William Eskridge: They might not be able to get all that they want out of the National Health Service, but many Britons use private health servers and that is not prohibited. Moreover, the age is 16 in the United Kingdom for access in the National Health Service for puberty blockers, etcetera, etcetera, and there are exceptions even before that. So if you look at

the comparative evidence, which the majority was obsessed with and Justice Thomas obsessed with, it does not support the draconian handmaiden tale kind of remedy that Tennessee is imposing upon families and only certain families, only a minority of families who actually use puberty blockers, hormone, surgery in the state of Tennessee. So the stakes are very different from what you would gather from reading the majority opinion. Now, as to the empirical evidence, in my opinion, what might have driven the court to a lot of legal nonsense about sex discrimination, etcetera, etcetera, was a reluctance on the part of Roberts and Kavanaugh and Barrett, the controlling three, to get engaged in the very messy weeds of the empirical debate, okay?

[00:40:22.5] William Eskridge: So it seems to me the cart was driving the horse in this case, that they did not want the courts to get involved in these kinds of issues and therefore they say, well, it's rational basis, which as I think Professor Green and the court would both say, rational basis is fairly easy to pass and it does require a great deal of deference on the part of judges to decisions that are made by legislatures. Now, having said that, I would say the best evidence that I think should have been looked at is Daniel Jackson's recent NIH publication, 2023. It's called Suicide-Related Outcomes Following Gender-Affirming Treatment, a Review. And that evidence is not much looked at by the majority and Justice Thomas. Yes, there are risks, there are side effects, there are side effects and risks taking aspirin, for goodness sakes. Do any of the justices drive a car? That is way more risky than having even gender-confirming surgery, which is very rare in any of these states before the age of 18 and way more risky than hormone therapy. Pregnancy, pregnancy is way more risky than any of this stuff. So yeah, if you wanted to talk about risk, the state can regulate pregnancy. That's another *Geduldig* workaround to discriminate against women without using the word sex. Again, the Tennessee statute does use that word.

[00:42:07.3] William Eskridge: So the science that I would focus on, I think there are risks, I think they've been documented. There are studies like the Cass Report, which is very flawed, which are on the high end of risk and other studies which are on the low end of it. Anne Alstott of the Yale Law School operates a website which is the authoritative examination of all this medical stuff. And I think the Jackson article is a good source for a balanced treatment of the fact, and this is so well documented, that not only do transgender teens commit suicide at higher rates, attempt suicide at higher rates, have suicidal thoughts at higher rates, but what the Jackson study strongly supports, though I don't think it's the final word, is that suicidal thoughts are ameliorated for the average transgender youth by some kind of gender-confirming medical treatment, very rarely surgery, it's usually puberty blockers and hormone treatment. Now, the evidence and the jury is still out on whether or not there is a firmly established causal link, because you do need much more sophisticated studies, I think, that have been done to this point. So the scientific evidence, while in many ways quite muddy, does deliver the following, I think, clear verdicts.

[00:43:39.7] William Eskridge: Number one, there are risks. There are risks to cisgender children having puberty blockers. There are risks to cisgender children having hormone treatment. Are there not risks to a cisgender boy receiving testosterone? There are risks, not only to that boy, but of sexual assault that that boy is statistically more likely to commit than any other group. It boggles the mind what the court ignored in its treatment. You're supposed to be a judge, and you're supposed to be balanced. You need to look at all sides of it, and that's a side

that's not been looked at. So there are risks for any kind of young person for these medical treatments. The medical protocols that have been developed are very slow, are very deliberate. They usually take the kid well past the age of majority in terms of the treatments, and they do have documented positive effects, at least on suicidal thoughts. And again, the point of my brief was parents should be the primary decision-makers. Tennessee recognizes that in its statutory law. The Supreme Court ignored the issue, which of course is their choice. But I think that was a disastrous and very bad decision.

[00:45:12.6] Jeffrey Rosen: Christopher, if you have anything more to share on the empirical debate, that would be great. And then tell us more about the debate in your brief. You argued that the court should embrace an argument rooted in the text and history of the 14th Amendment, namely the duty of the government to promote all similarly situated citizens' interests equally. Tell us more about why you believe the Tennessee law does indeed meet that standard.

[00:45:37.2] Christopher Green: Sure. So with respect to the empirics, as Bill says, it really is important to remember the causal question. So you have a huge amount of suicidality, lots of actual self-harm in this population. Following a lot of these treatments, you still have an awful lot of self-harm. It was quite just distressing to read all of these amicus briefs. It is just, it is heartbreaking. The question, I think, that generally we should be asking is, is this law a genuine effort to impartially promote the interests of all of the citizens of the state? So to be a citizen, Justice Harlan said in his civil rights cases, he says, to be a component part of the people for whose welfare government is ordained. That's what it means to be a citizen. So in terms of the empirics, I think there's a huge amount of reason to think that this is a genuinely compassionate effort to avoid the kinds of problems that these treatments can promote. This is a population that is heavily correlated with very, very poor mental health outcomes. And until there's good reason to think that these are really going to significantly help, the basic Hippocratic first principle, do no harm.

[00:47:27.7] Christopher Green: I think there's reason to think that the legislatures are genuinely concerned with the interests of the citizenry, including people with gender dysphoria, people who are seeking these treatments. Different minds can differ about whether they think Margaret Atwood is a prophet. I think most conservatives think when they see these protests of all these people in red dresses and whatnot, they just think that's, what political world are you living in? That's not, nobody's trying to do that. The worry that there's a road toward that, well, it's a road nobody's going to take anyway. Again, different people can have different risk tolerances with respect to different things. But I think most people who vote for the law are like, no, they would say that's not, that's not what we're up to at all. So in terms of the text of the 14th Amendment, one thing to always remember is the word protection is in the law. So it doesn't just say no state shall deny any person equal laws. Protection of the laws is actually a phrase with content.

[00:48:41.5] Christopher Green: And it means if you look at William Blackstone, if you look at *Marbury versus Madison*, it actually talks about the entitlement to receive the protection of the laws. That doesn't mean just equal laws in general. It means the entitlement to protection from violence. Paradigmatically during Reconstruction, Klan violence, protection from violence and the right to a remedy. Equality is a huge part, of course, of the 14th Amendment, but it's equality

based on citizenship. And the model that I promote, and actually it's very similar to what Bill says in his amicus brief, is trustees and beneficiaries. So if I'm a trustee, if I've been put in charge of a pot of money for a bunch of my nieces and nephews or something, I have a duty to give impartial attention to the interests of everybody concerned. So Bill's brief ends with this quote from Charles Sumner about very much striking that theme. And I read that and I thought, oh my goodness, I wish I'd read that quote a year ago when I was putting together an article on that topic, because it's perfect. It's like exactly the vision that Harlan had about what it means to be a citizen, lots of other definitions.

[00:49:53.1] Christopher Green: And that's the kind of basis for equality doctrine, equal citizenship, that the Court…they can go there. Nobody really has pushed back on that view of the 14th Amendment history at all. Both sides, amicus briefs, suggest this kind of approach. And what it would mean would mean something more than rational basis scrutiny. It would mean looking at the government the way a court would look at a trustee and say, look, you are a trustee for the public good. That means the good of everybody. Are you genuinely benevolently concerned with everybody's flourishing or are you out to get people? So and of course, it wouldn't solve all the problems. It wouldn't decide how much risk tolerance do we need to have about Margaret Atwood fears and the like. But the court would, I think, be justified and say, look, it's not our job to eliminate risks that are that low, politically speaking. As Bill says, everything has risks and allowing majorities to regulate medicine, which we have done for a long, long, long time, including medicine that is used by children that the parents might want.

[00:51:11.4] Christopher Green: You have had that ever since you've had a government coming in and making decisions about what kind of commerce you have. Birth control, alcohol, just any kind of drugs are always been subject to regulation. Parents can't just override those because it's for it's for children. Given that tradition, given the tradition of pursuing the common good through paternalistic legislation, it seems like this this would pass that that kind of test. But the court didn't really ask that kind of question. So I'm hoping that in future cases, they will give it give a little bit of thought to replacing the tears of scrutiny, the kind of formalistic exception to formalistic rules that they've got now with something that's a little more supple and able to deal with shades of gray a little bit better. They really want things to be black and white. And they put together a bit of a kludge. It looks like it has rules, but it has a lot of a lot of wiggle room about how you can can manipulate it. A citizenship based approach to equality, I think, would be a lot better.

[00:52:25.1] Jeffrey Rosen: Bill, Christopher argues that the court should ask, is the law looking out for the good of all or is it out to get people? And even the majority opinion of Chief Justice Roberts says that under rational basis review, you can't have a law that's based on animus or prejudice of a particular group. Do you believe that there's any way that this Tennessee law could pass that rational basis review with bite, given the debate about the medical evidence? Or do you believe that it has to be struck down as a form of animus?

[00:53:02.8] William Eskridge: That's a good point. I want to agree with Christopher, everything he said, really, including the quote from Sumner, which is one of my personal favorites. Jeff, I want to answer your question by another quotation, which I think dovetails with Christopher's approach. And that is one of the most famous conservative justices of the 20th

century was Robert Jackson, who very famously dissented on conservative grounds from *Korematsu*, the Japanese-American internment case. In *Railway Express*, a equal protection case and due process case in 1947, so 80 years ago, Justice Jackson wrote a little essay on what's the point of equal protection clause. And I think it dovetails with what Christopher is saying. And I'm quoting Justice Jackson, an extremely conservative justice. “There is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.”

[00:54:42.4] William Eskridge: I end the quote. And piling on a little bit, Justice Scalia, a very conservative justice, said in a concurring opinion in 1990, he was skeptical of the application of the due process clause in a case involving a person who was dying. But he said the Income Protection Clause, and here I quote Justice Scalia, "requires the democratic majority to accept for themselves and their loved ones what they impose on you and me," ending the quotation from Justice Scalia. Now under that test, the Tennessee statute, and I don't think we need to use words like out to get, prejudice, and all that stuff. It might well reflect that. But if you're a judge, your obligation is to look and see there are distinctions that are drawn. Your obligation is not to gerrymander those distinctions. Oh, it's just age. Oh, it's just medical procedure. It's also sex. It's on the face of a statute, right? And indeed, it defies logic. Justice Alito, I think, cogently points out, and I would agree, that religion is subject to heightened scrutiny when you discriminate based on the free exercise clause. And he says it would be an equal protection category if we didn't have free exercise.

[00:56:07.9] William Eskridge: I agree with all that. So if the government says we will not hire Catholics, surely, Jeff, you would agree, Christopher would agree, that's discrimination because of religion. But what if the government says we will hire Catholics but not converts? In other words, people baptized as Protestants and who convert to Catholicism later on. Would that not be religion discrimination? How about Mr. Plessy, one of the most famous plaintiffs of all time? His claim in *Plessy v. Ferguson*, that's the apartheid case, his main claim was, Plessy said, hey, I'm white. I'm biologically white, said he. The state said, no, no, no, no. You were assigned at birth colored and that's what you are. You can't wiggle out of it. Now, was that not race discrimination? The *Plessy* court doesn't really deal with that issue very much, but is that not race discrimination? So you can play these ridiculous little characterization games all you want, but the inquiry, it seems to me, is Justice Jackson's inquiry, Justice Scalia's inquiry, and that is a tiny percentage of the families in Tennessee that want to use purity blockers, hormone therapy, including birth control pills, for their transgender kids to try to avoid the distress and even suicidal thoughts that many of these kids have. Should they be picked on to have the apparatus of the state, civil penalties, lawsuits, prohibitions? You become anathema to doctors.

[00:58:01.5] William Eskridge: Doctors will shy away from you. The doctors will fear having to do anything for the transgender children out of fear that they're going to get some kind of legal liability because the state also, Roberts doesn't quote this, can deny you a license if you violate the statute. So they could really lower the boom on medical providers, civil liability, fines,

lawsuits, losing their license, attorney general, and parents as well, fewer of those. You know, is that really, I like Christopher's idea and Sumner's idea, the state is like a parent and the parent should have an equal concern for all of his children. That's literally out of Sumner. That's literally what's behind the Equal Protection Clause. If you care about original public meaning, which they don't, right? It shows that they don't. They're not curious about any of that. And it does seem to me that that's well reflected in what Christopher is talking about, what Robert Jackson is talking about, what Justice Scalia is talking about in the *Cruzan* case, which I quoted from. So yeah, I think if there were any bite to rational basis, the case would be much more like *Romer v. Evans*. That was the Colorado Initiative case.

[00:59:20.5] William Eskridge: And a central problem with that case, as Justice Kennedy pointed out, is that the regulation was way over-inclusive and way under-inclusive. And let me explain it as applied to the Tennessee case. So the prohibition on these medical procedures is way under-inclusive because the overwhelming majority of these medical procedures are not used for transgender children and their supportive families. They're used for cisgender children or people who just want to get their face fixed or want to delay puberty for whatever reason. And parents and doctors can make those decisions. So it's way under-inclusive, but it's also way over-inclusive because it affects children who medical authorities and any sane view desperately need these procedures. Yes, transgender children, as the majority points out, are very heterogeneous. Many of them, either they or their parents, don't want the procedures and the parents can veto it. But some of them do desperately need it and the parents recognize. Maybe the child has tried to commit suicide and the parents are like, we will do anything that's medically acceptable. So they go to recognized doctors following recognized protocols and that provides documented relief, at least against suicidal thoughts. And it also shows parents' willingness to be supportive and to work together in this triad.

1:01:00.5] William Eskridge: The young person, the parent, and the doctor. As parents, many of the justices, I think maybe all of them in the majority, are parents of some sort. As a parent, is it not compelling that you would want, where there are medically recognized protocols and where your child is in great distress, which again is not most of the cases, but some of them, and where you, the parent, are supportive, is that not an important moment in the human lives, this is what Christopher is talking about, the human lives of these citizens, where the state ought not to have an absolute bar, an absolute prohibition? Even in England, which they want to rely on, in England the parents would have that opportunity. In the United States, most states they would, Tennessee they do not, and now that is going to be the policy of Tennessee and a number of other states. So that is very sad. It's a sad day for law, it's a sad day for democracy, it's a sad day for the Equal Protection Clause.

1:02:16.9] Jeffrey Rosen: Well, it's time for closing thoughts in this important discussion. In just a few sentences, Christopher, tell We the People listeners why you believe the Tennessee law is consistent with the Constitution.

1:02:32.0] Christopher Green: Briefly, it just, if you look at the background, if you look at the mental health situation and the data, Tennessee is not picking on these folks. It really does not seem like that. It is quite sane to think that the way that people are constructed, working with that, is going to promote human flourishing. Reasonable people can disagree, but there's very

strong reason to think that these sorts of treatments, in fact, do not help people, and allowing people to harm themselves is not itself compassionate. The Sumner's principle, it's not the background of the Equal Protection Clause, but it is the background of citizenship and the Privileges and Immunities Clause. But I think Tennessee is genuinely impartially promoting the interests of all its citizens, at least to the extent that a court has judicially cognizable evidence to say otherwise. This is something that the legislature should be allowed to do.

1:03:37.9] Jeffrey Rosen: Thank you so much for that. Bill, last word to you. In just a few sentences, why do you believe the Tennessee law violates the U.S. Constitution?

1:03:45.9] William Eskridge: I would say the Sumner point is a background of the Equal Protection Clause. He was making a class legislation argument to the Massachusetts Supreme Court. The Equal Protection Clause was copied from the Ohio Constitution, which was a prohibition of class legislation. They used the word equal protection of the laws. So Sumner is directly on point. And for the reasons that I've suggested, the Tennessee statute does fail the Sumner test. And I would emphasize from the point of view of parents and families that most of the families that rely on hormones, puberty blockers, and even the surgery are for their cisgender children to conform with the sex assigned to them at birth. The only families that are singled out, and it's a tiny minority of them, are those families where the children do not identify with the sex the state assigned them at birth, and they have supportive parents and supportive doctors who want to provide the beginnings of medical treatment. There are always risks to medical treatment. The risks are just as high for the cisgender kids. The benefits are much lower because those kids are not at high risk of suicide.

1:05:14.3] William Eskridge: And that's what I would emphasize.

1:05:16.9] Jeffrey Rosen: Thank you so much, Christopher Green and Bill Eskridge, for a deep, thorough, and thoughtful discussion of *U.S. versus Skrmetti*. Chris, Bill, thank you so much for joining.

1:05:27.4] William Eskridge: Thank you both, Christopher and Jeff. Jeff, very expertly moderated and led.

1:05:33.8] Christopher Green: Thanks very much, Jeff and Bill.

1:05:39.3] Jeffrey Rosen: This episode was produced by Griffin Richie, Samson Mostashari, and Bill Pollack. It was engineered by Bill Pollack. Research was provided by Griffin Richie, Samson Mostashari, Cooper Smith, Gyuha Lee, and Tristan Worsham. Please recommend our show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional illumination and debate. Friends, I've mentioned the exciting interactive declaration that the NCC is launching in September. It convenes America's greatest historians and legal scholars to write about the big ideas of the Declaration and Constitution. I can't wait to share it. Sign up for the newsletter at constitutioncenter.org/connect. And always remember that the National Constitution Center is a private nonprofit. This podcast and all of our work is made possible thanks to the generosity of people across the country who are inspired by our nonpartisan mission of constitutional education and debate. Please consider supporting the efforts by

donating today at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.