DUE CARE IN A CONSERVATIVE COURT

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Statutory bans on providing necessary treatments to trans minors are already in place in about half of the nation's states. Although many courts have found such treatment bans unconstitutional, the Sixth Circuit affirmed bans enacted by Tennessee and Kentucky in *L.W. v. Skrmetti*. The decision rejected two separate constitutional challenges under the Equal Protection Clause and the Due Process Clause. However, when the challengers petitioned for the Supreme Court's review, the Court only agreed to consider the argument—made by the Government as an intervening plaintiff—that the treatment bans discriminate on the basis of sex and transgender status in violation of the Equal Protection Clause. It took no action on the private plaintiffs' petitions—minors, parents, and doctors—who argued that the treatment bans not only discriminate but also infringe on parental rights in violation of the Due Process Clause.

This Article is the first to analyze the adverse ramifications of such a selective review of the treatment bans. It argues that deciding *Skrmetti* without considering parental rights is a flawed way to adjudicate the constitutionality of the bans. Far from being merely a procedural issue, narrow consideration stands to skew the substantive outcome of the litigation, allowing the bans to survive despite their striking conflict with the Constitution. This is a possible result not due to a weakness of the legal arguments regarding discrimination: The bans explicitly target transgender adolescents, preventing only them from undergoing treatments that cisgender minors are permitted to receive. Rather, as this Article shows, it is the conservative orientation of the Court that makes the invalidation of the bans under the Equal Protection Clause an unlikely result.

Yet, this Article offers more than an analysis of how selective consideration begets injustice. Because it acknowledges that treating trans youth touches ideological nerves that impact adjudication, it takes on an original task: uncovering arguments that would justify invalidating the bans

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outside of the liberal framework. By uniquely examining the issue from a conservative perspective, this Article aspires to help persuade enough Republican appointees on the Court that the treatment bans are unconstitutional for reasons independent of their discriminatory intent and content. It canvasses multiple resources to show how conservatives are less united with regard to state intrusion into parental rights than they are in their resistance to gender identity issues. Based on this study, the Article argues that the main path to saving minors' access to gender-affirming care is to find an ad hoc common ground between liberals and some conservatives on the Court around the bans' impact on the fundamental rights of parents to direct the upbringing, including healthcare needs, of their children free of government intervention.

Delving even deeper in search of such a pragmatic coalition, this Article highlights conflicting priorities on the right side of the political map, analyzing how the treatment bans contradict key principles of the libertarian and neoliberal strands within the conservative movement. This nuanced understanding might persuade some Justices, who are more committed to limiting state power than to promoting religious values, to be more skeptical of the bans and join their liberal colleagues in invalidating them as a display of unprecedented government overreach.

Therefore, there might currently be a narrow window of opportunity to invalidate the bans and resume trans minors' access to the treatments their doctors recommend and their parents agree they need. This insight should lead the Court to broaden its review and consider the threat to parental rights *before* deciding *Skrmetti*. Yet, if this does not transpire due to excessive partisanship, the Article's long-term contribution is identifying—for future litigation—how the treatment bans clash not only with trans rights but also with conservative principles. As this Article shows, due care for all minors, regardless of their gender identity, could and should be within reach even in a conservative Court.

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INTRODUCTION: DUE CARE UNDER ATTACK

> *There is nothing conservative about interposing the state between a child and their parents and physicians who know best how to care for that child.*[1]

Leading organizations in the conservative movement have launched a multilayered assault on the LGBTQ+ community, directing much of the fire at trans life and the concept of gender identity.[2] A central part of the battle takes place in the legal arena, where Republican legislatures in "red" states have weaponized their power to pass an unbearable amount of anti-transgender laws.[3] Among those laws are legal bans on providing due care in the form of necessary treatments to trans minors, enacted by about half of the states around the country in just the span of a few years.[4]

1. Sean P. Madden, *I'm the Parent of a Trans Daughter. There's Nothing Conservative About Blocking Her Care*, USA TODAY, https://www.usatoday.com/story/opinion/voices/2024/06/24/trans-kids-gender-affirming-care-parents-rights/740901310007/ [https://perma.cc/GNM3-X9SL] (June 25, 2024, 1:53 PM) (making the above statement as someone who "was a registered Republican for decades" and "as the proud father of a courageous, kind and empathetic 24-year-old transgender daughter").

2. As this Article documents, the objection to gender identity often appears as intentional avoidance of the term, replacing it with derogatory references to "gender ideology" or attaching to it doubting descriptors such as "purported," "claimed," "desired," and "asserted." These rhetorical choices are highlighted in this Article to reveal ideological choices made by legislatures regarding the treatment bans, jurists reviewing them, and advocacy groups involved in the battles. *See, e.g.*, *infra* Section I.B.

3. *See, e.g.*, *2025 Anti-Trans Bills Tracker*, TRANS LEGIS. TRACKER, https://translegislation.com/ (last visited Jan. 25, 2025) (tracking anti-transgender legislation). *See also* Katie Eyer, *Anti-Transgender Constitutional Law*, 77 VAND. L. REV. 1113 (2024) (discussing anti-transgender litigation that draws on constitutional claims); Scott Skinner-Thompson, *Trans Animus*, 65 B.C. L. REV. 965 (2024) (describing these laws as "product[s] of animus violating the Equal Protection Clause").

4. Selena Simmons-Duffin & Hilary Fung, *In Just a Few Years, Half of All States Passed Bans on Trans Health Care for Kids*, NPR (July 3, 2024, 6:00 AM), https://www.npr.org/sections/shots-health-news/2024/07/03/nx-s1-4986385/trans-kids-health-bans-gender-affirming-care (offering a time-lapse map of the states that adopted treatment bans through July 2024). For updated data, see *Map: Attacks on Gender Affirming Care by State*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map (Dec. 4, 2024).

According to the most recent data available, more than 118,000 minors—at least 39.4% of trans youth aged thirteen to seventeen in the United States—live in states that passed such legislation.[5] This Article focuses on these statutes, calling them *the treatment bans*.

While this Article concentrates on anti-trans treatment bans, it remains necessary to respond fiercely to the broader abhorrent assault on trans youth. There is, of course, a pressing need to act socially, educationally, and legally to protect and improve the life of the entire LGBTQ+ community, with careful attention to the special obstacles faced by trans minors.[6] However, when it comes to the treatment bans, not only is the risk of severe physical and psychological harm particularly high, but we are also running out of time—which is why this Article offers a dire intervention.

The special urgency of seeking a pragmatic way to invalidate the treatment bans comes from the latest events in the nationwide litigation regarding their validity. At the end of its 2023–24 Term, the Supreme Court agreed to consider—for the first time—challenges to the constitutionality of the treatment bans when it decided to review the Sixth Circuit's decision in *L.W. v. Skrmetti*.[7] Oral arguments of the case, now named *United States v. Skrmetti*, took place in December 2024,[8] and a decision is anticipated by the close of the Term in Summer 2025. Therefore, there is currently a narrow window of opportunity to invalidate the bans and resume without delay trans minors' access to the treatments they need.

Defining how such an opportunity may exist and proposing a path to seizing it before the Court decides *Skrmetti* is the most immediate task taken up in this Article. Yet, if the Court ends up affirming the treatment bans,[9] the Article's longer-term contribution is illuminating how access to necessary treatments could be regained and protected in future litigation.

The most evident obstacle to the Court's invalidation of the treatment bans is the dominance of Justices holding conservative views that, to various degrees, might already be influenced by anti-trans

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5. *See Map: Attacks on Gender Affirming Care by State*, *supra* note 4.

6. For clarity, this Article uses the term transgender or trans in an inclusive manner that is sometimes broader than some individuals' self-definition of their gender identity and is not limited to those who have fully committed to a process of physical transitioning. Further, while not all trans minors seek medical treatment before adulthood, this Article concentrates on those who do.

7. 83 F.4th 460 (6th Cir. 2023), *cert. granted sub nom. United States v. Skrmetti*, 144 S. Ct. 2679 (2024). The change relates to the Court's decision to grant the Government's petition for review without taking action on the private plaintiffs' petition.

8. *See* Transcript of Oral Argument, *United States v. Skrmetti*, No. 23-477 (U.S. argued Dec. 4, 2024) [hereinafter *Skrmetti* Transcript].

9. The ways in which this might happen are discussed *infra* Section I.B.3.

misconceptions that are increasingly rampant on the right side of the political map. It is thus crucial to the success of any effort to invalidate the bans to acknowledge that any split along partisan lines will take away trans minors' access to gender-affirming treatments in red states.

The risk of an ideological split in *Skrmetti* is particularly high because the Court has problematically agreed to consider only one out of two compelling arguments against the constitutionality of the treatment bans. While it opened the door to the claim that the bans discriminate against trans minors on the basis of sex and transgender status in violation of the Equal Protection Clause, it did not invite discussion of the argument that they also infringe on parental rights protected under the Due Process Clause. Accordingly, at oral arguments, the Court considered whether the bans violated the Equal Protection Clause without reviewing their possible violation of the Due Process Clause.[10]

While some commentators have recognized that this partial posture of the case was odd and wasteful,[11] this Article is the first to analyze how damaging it is to minors' access to necessary care and explain why the Court must refrain from making a final decision based solely on the narrow arguments it heard.[12] The Article's most immediate call is thus for a comprehensive review of both pillars of the Sixth Circuit's approval of the bans—one that considers, rather than ignores, how they violate parental rights protected under the Due Process Clause.

As it argues that the Court should not selectively ponder the bans' constitutionality, this Article also develops tools specially designed to respond to the obstacle of persuading a *conservative* Court to keep decisions regarding medical treatments for minors in the hands of parents and doctors, protected from governmental agendas. Developing those tools requires unorthodox thinking from advocates of trans rights. For the sake of saving access to treatments, we must try to find some common ground between the liberal Justices, who predictably have expressed unrelenting support for trans youth during oral arguments, and at least a few conservative Justices, who might be persuaded that the bans also do not align with the broader judicial philosophy they hold.

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10. The procedural background leading to this situation is further explained below. See *infra* text accompanying notes 36–38.

11. *See* Chris Geidner, *SCOTUS Takes Up Trans Care Case—as Key LGBTQ Civil Rights Lawyers Face Scrutiny in Alabama*, LAW DORK (June 25, 2024), https://www.lawdork.com/p/scotus-takes-up-trans-care-case-as [https://perma.cc/5KWX-82AE].

12. *See* Hila Keren, *Parental Rights Face a Surprising Moment of Truth at the Supreme Court*, SLATE (Sept. 19, 2024, 5:45 AM) [hereinafter Keren, *Moment of Truth*], https://slate.com/news-and-politics/2024/09/supreme-court-term-trans-rights-parental-rights.html [https://perma.cc/GS89-SNKH] (calling to expand the discussion before the oral arguments).

In search of such an ad hoc coalition, the Article makes its main contribution by combing and analyzing numerous resources to unearth conservative approaches and principles that could lead to a nonpartisan and equitable decision. Such a decision could help secure access to needed treatments by either directly invalidating the bans or at least sending the case back to the Sixth Circuit, ordering it to reconsider the bans' validity, this time under adequate standards of review. And, even if the Court fails to do that this time around, this Article proposes how advocates should continue to fight the treatment bans by insisting not only on their discriminatory core but also on their severe violation of parental rights.

To contextualize this contribution, consider some necessary background regarding what the treatment bans seek to prohibit and how they have fared in courts so far. It is valuable to start by emphasizing that the bans forbid providing trans minors with puberty blockers and hormone therapies—treatments designed to help adolescents handle the difference between their sex assigned at birth and their gender identity.[13] Practically, these treatments have long been restricted without any connection to what motivated the current legal bans, and their provision has always depended on a medical diagnosis of a condition called gender dysphoria and parental consent to treat it as recommended by doctors.[14]

The condition of gender dysphoria is listed in the Diagnostic and Statistical Manual (DSM).[15] It is "characterized by clinically significant distress and anxiety resulting from the incongruence between an individual's gender identity and birth-assigned sex."[16] As the dissenting judge in the Sixth Circuit decision in *Skrmetti* emphasized: "If untreated, gender dysphoria may result in severe anxiety and depression, eating disorders, substance-use issues, self-harm, and suicidality."[17]

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13. *See generally* JACK TURBAN, FREE TO BE: UNDERSTANDING KIDS & GENDER IDENTITY (2024) (explaining the use of puberty blockers in chapter five and hormone therapy in chapter six); Mayo Clinic Staff, *Puberty Blockers for Transgender and Gender-Diverse Youth*, MAYO CLINIC (June 13, 2023), https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/in-depth/pubertal-blockers/art-20459075 [https://perma.cc/XYY9-DFGW]. The treatment bans typically also forbid surgeries, but those are rarely performed on adolescents, were not disputed in *Skrmetti*, and lie outside of the scope of this Article.

14. *See* Mayo Clinic Staff, *supra* note 13.

15. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5, at 451 (5th ed. 2013). Importantly, many adolescents experiencing disagreement between their gender identity and sex assigned at birth are not diagnosed with gender dysphoria and, therefore, are *not* eligible for the treatments forbidden by the bans. Transgender rights that are not related to treating gender dysphoria, *e.g.*, the right to change one's name or use a bathroom that fits one's gender identity, lie outside this Article's scope.

16. *Kadel v. Folwell*, 100 F.4th 122, 136 (4th Cir. 2024).

17. *L.W. v. Skrmetti*, 83 F.4th 460, 492 (6th Cir. 2023) (White, J., dissenting).

To begin to appreciate how necessary the forbidden treatments are, consider the experience of one adolescent from Tennessee. As retold by the dissent in *Skrmetti*, in September 2023, Ryan Roe (pseudonym) is a fifteen-year-old transgender boy who "became depressed and anxious" when puberty commenced.[18] Ryan "had a panic attack when he had his first period," and although he was treated with anti-anxiety medication, he "often vomited from anxiety in the morning before school," "stopped talking in public," and "began engaging in self-harm."[19] Finally, after years in therapy, Ryan was diagnosed with gender dysphoria.[20] By then, it was too late to treat Ryan, who had already begun menstruation, with puberty blockers, so—following an endocrinologist's advice and months of deliberation—Ryan and his parents decided "to undergo hormone therapy."[21] Thanks to this treatment, Ryan "has returned to his vocal, outgoing self, raises his hand in school, and willingly joins in family photographs."[22]

Although Ryan's experiences reflect significant anguish, having access to healthcare and undergoing medical treatment offered him and his parents some relief and hope. Alas, in March 2023, Tennessee enacted the Prohibition on Medical Procedures Performed on Adolescents Related to Sexual Identity, effectively banning such treatment.[23] The Act, often referred to as SB1, prevents young patients like Ryan from receiving puberty blockers and hormone therapies to affirm their gender and alleviate, or at least delay, some of the distress entailed in gender dysphoria.[24]

Terrified of the consequences of losing access to treatments, Ryan and others sued to block SB1 from taking effect. The U.S. District Court for the Middle District of Tennessee enjoined the ban,[25] finding it exposes adolescents to the "irreparable harm" of suffering "actual and imminent injury in the form of emotional and psychological harm as well as unwanted physical changes if they are deprived access to treatment of

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18. *Id.* at 494 (White, J., dissenting).

19. *Id.* (White, J., dissenting).

20. *Id.* (White, J., dissenting).

21. *Id.* (White, J., dissenting).

22. *Id.* (White, J., dissenting).

23. TENN. CODE ANN. §§ 68-33-101 et seq. (2023).

24. Like many other treatment bans, SB1 also forbids surgeries but those are rarely performed on adolescents, were not discussed in *Skrmetti,* and lie outside of the scope of this Article. For further statistics on the rarity of surgeries performed on adolescents, see Dannie Dai et al., *Prevalence of Gender-Affirming Surgical Procedures Among Minors and Adults in the US*, JAMA NETWORK OPEN, June 2024, at 1, 1–2 ("The rate of undergoing a gender-affirming surgery . . . [was] 2.1 per 100,000 minors aged 15 to 17, 0.1 per 100,000 minors aged 13 to 14 years, and 0 procedures among minors aged 12 years or younger.").

25. *L.W. v. Skrmetti*, 679 F. Supp. 3d 668, 716 (M.D. Tenn. 2023) (granting a statewide preliminary injunction against SB1).

their gender dysphoria under SB1."[26] In making this determination, the district court relied on "medical evidence on the record" showing that "leaving gender dysphoria untreated can result in severe anxiety, depression, self-harm, and suicidal ideation."[27] It also cited several other courts that "have found similar imminent harms."[28]

Like other courts around the country, the district court in Tennessee based its preliminary injunction on two different constitutional challenges. The first is that the treatment bans violate the Equal Protection Clause of the Fourteenth Amendment because they discriminate on the basis of sex and transgender status. The second is that the bans violate the Due Process Clause of the Fourteenth Amendment because they infringe on the liberty rights of parents to direct their children's upbringing, including their healthcare needs, free of government intervention.[29]

In September 2023, however, the Sixth Circuit ruled that Tennessee's SB1 and a similar treatment ban, enacted by Kentucky and discussed in a similar case that the court consolidated with the Tennessee case,[30] violated neither the Equal Protection Clause nor the Due Process Clause of the Constitution.[31] Critically, because the court found no infringement of constitutional rights, the Sixth Circuit refused to review the pair of treatment bans under either heightened (intermediate) scrutiny or strict scrutiny. Instead, it subjected the bans only to the minimal rational basis review, opining that the state had reasonably used its power to regulate the medical field when enacting them.[32] Using this deferential standard, the court found that legislatures in states like Tennessee and Kentucky could have rationally determined that the treatment bans are needed in light of allegations regarding the effectiveness and safety of administrating puberty blockers and providing hormone therapies to minors.[33]

Directly harmed by the Sixth Court's rejection of all their claims, the Tennessee and Kentucky plaintiffs—minors, parents, and doctors—

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26. *Id.* at 713.

27. *Id.*

28. *Id.* at 713–14 (first citing *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1150 (M.D. Ala. 2022); then citing *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 892 (E.D. Ark. 2021); and then citing *Doe v. Ladapo*, 676 F. Supp. 3d 1205, 1225–26 (N.D. Fla. 2023)).

29. *See infra* Section I.A (analyzing this decision with regard to the Equal Protection challenge) and Section II.A (same with regard to the Due Process challenge).

30. *Doe 1 v. Thornbury*, 679 F. Supp. 3d 576 (W.D. Ky. 2023) (granting a preliminary injunction against Kentucky Senate Bill 150).

31. *L.W. v. Skrmetti*, 83 F.4th 460, 491 (6th Cir. 2023), *cert. granted sub nom. United States v. Skrmetti*, 144 S. Ct. 2679 (2024).

32. For an explanation of how this conclusion turns constitutional analysis on its head, see *infra* Section II.A.

33. *Skrmetti*, 83 F.4th at 488–89.

petitioned for Supreme Court review.[34] They have asked the Court to reconsider *both* bases of the *Skrmetti* decision: the rejection of their Equal Protection challenge and the denial of their Due Process challenge.[35] The United States, which previously intervened in the proceedings to support the availability of treatments to trans minors, also petitioned for a review.[36] However, the Government's petition was limited to the Equal Protection challenge and did *not* include Due Process Clause arguments.[37] The Government explained it has limited authority to intervene in suits "seeking relief from the denial of equal protection of the laws," but not due process claims.[38]

Without further explanation, the Court only granted the Government's petition while taking no action on the petitions submitted by the Tennessee and Kentucky private plaintiffs. At the time of finalizing this Article, those petitions are still pending,[39] although after the election of President Trump, the new Department of Justice has counseled the Court to dismiss them.[40] As a result, the oral arguments in *Skrmetti* were limited at best, narrowly contemplating the issue of discrimination while expressly ignoring the bans' clear conflict with parents' ability to decide how to care for their children's needs. The Court's resolve to disregard parental rights became even more apparent during oral arguments when Justice Amy Coney Barrett made special efforts to clarify that those rights were not under consideration and could be brought to the Court in the future.[41]

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34. Petition for a Writ of Certiorari, *L.W. v. Skrmetti*, No. 23-466 (Nov. 1, 2023) [hereinafter *L.W.* Cert. Petition]; Petition for a Writ of Certiorari, *Doe 1 v. Kentucky ex rel. Coleman*, No. 23-492 (Nov. 3, 2023).

35. *L.W.* Cert. Petition, *supra* note 34, at i.

36. Petition for a Writ of Certiorari, *United States v. Skrmetti*, No. 23-477 (Nov. 6, 2023) [hereinafter *United States* Cert. Petition].

37. *Id.* at I.

38. *See id.* at 12 n.4. The Government also opined there is no justification for a review of the Due Process challenge, but the circumstances leading to its opinion have changed. This point is discussed later in this Article. *See infra* text accompanying notes 456–61.

39. *See Search Results: No. 23-466*, SUP. CT., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-466.html (last visited Jan. 26, 2025) (pertaining to Tennessee private plaintiffs); *Search Results: No. 23-492*, SUP. CT., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-492.html (last visited Jan. 26, 2025) (Kentucky).

40. Letter from Curtis E. Gannon, Deputy Solicitor General, to Hon. Scott. S. Harris, Clerk of the Supreme Court, *United States v. Skrmetti*, No. 23-477 (U.S. Feb. 7, 2025) [hereinafter DOJ Letter to the Supreme Court].

41. *Skrmetti* Transcript, *supra* note 8, at 64, 142; *see also* Hila Keren, *Parental Rights May Be Only Path To Save Gender-Affirming Care,* BLOOMBERG L. (Dec. 10, 2024, 3:30 AM), https://news.bloomberglaw.com/us-law-week/parental-rights-may-be-only-path-to-save-gender-affirming-care.

This Article sounds the alarm regarding this partial treatment of the case, arguing that deciding *Skrmetti* without considering parental rights is a flawed way to adjudicate the dispute. Far from a mere procedural issue, a selective consideration of the treatment bans' constitutional validity stands to skew the substantive outcome of the litigation. If left to depend solely on the Equal Protection Clause, the bans might survive despite their striking conflict with the Constitution. This is possible not due to a weakness of the legal arguments regarding discrimination: The bans explicitly target transgender adolescents by preventing them, and only them, from undergoing treatments while simultaneously permitting cisgender minors to receive the same treatments. Rather, as this Article substantiates, it is the conservative orientation of the Court that makes it unlikely that it will invalidate the bans relying exclusively on the Equal Protection Clause.[42]

First, it is fairly predictable that the Court's conservative Justices would be indisposed to recognize transgender persons as a quasi-suspect class protected under the Equal Protection Clause.[43] Second, even those among them who penned or agreed to *Bostock v. Clayton County*,[44] finding discrimination on the basis of gender identity to be a strand of sex-based discrimination, might be reluctant to apply their reasoning to the treatment bans.[45] Therefore, this Article adds to previously developed equality-based arguments against the treatment bans[46] by arguing that the first step towards securing treatments for trans minors is *expanding* the constitutional review beyond the issue of discrimination.

Yet, this Article offers more than an analysis of how selective consideration begets injustice. Because it acknowledges that treating trans youth touches ideological nerves that impact adjudication, it takes on a project never before given much scholarly attention—uncovering arguments that would justify invalidating the bans *outside* of the liberal framework. By uniquely examining the issue from a conservative perspective, this Article aspires to help persuade enough conservative Justices that the treatment bans are unconstitutional for reasons independent of their discriminatory intent and content. By canvassing multiple conservative resources, it shows how the bans contradict not only liberal values but also core conservative principles.

For example, this Article introduces new evidence demonstrating signs of an internal conservative divide regarding the treatment bans. It

42. *See infra* Section I.B.

43. *Cf.* Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1405 (2023) (presenting a generally more optimistic analysis of cases related to transgender rights).

44. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

45. *But see infra* Section I.B.2 (discussing *Bostock*).

46. *See, e.g.*, Jessica A. Clarke, *Sex Discrimination Formalism,* 109 VA. L. REV. 1699 (2023).

reveals that despite their Republican affiliation, some federal and state judges, organizations, advocates, and politicians have increasingly questioned the legitimacy and desirability of government intrusions into the family sphere and state interventions with parental authority. Significantly, conservatives who object to the treatment bans have repeatedly cautioned that affirming a government repudiation of parental rights for anti-trans purposes would create a slippery slope. Some have even specifically warned that such a confirmation might risk concrete conservative interests such as vaccination policies or homeschooling.[47]

For the same purpose, this Article documents the rise of a new parental rights campaign on the right. In a wave of legislative initiatives, legal actions, and academic publications, parents' fundamental rights under the Due Process Clause have recently been used to promote *conservative* views of gender identity. Tracing these massive efforts exposes how, even from a conservative perspective, the reasoning of the Sixth Circuit's majority in *Skrmetti* is deeply flawed. One critical misstep that comes to the fore in this way concerns the court's chosen standard of review. While the majority in *Skrmetti* erroneously subjected the treatment bans to a minimal review despite their infringement on parental rights, conservatives have consistently argued that state disregard of parental authority calls not just for an intermediate standard of review but for strict scrutiny.[48]

Moreover, this recent conservative project of *resisting* state influence on minors' gender identity issues in the name of parental rights protected under the Due Process Clause is on its way to the Supreme Court. Indeed, the Court recently considered Wisconsin parents' petition for a review of their loss at the Seventh Circuit.[49] The parents challenged school policies designed to protect and support students coping with issues related to their gender identity.[50] Such policies, the parents argued, infringe on their parental rights to control their children's upbringing.[51] Although the Court denied this petition, based on an agreement between the three liberals and three of the six conservatives on the Court, the three remaining conservative Justices wrote to clarify that they would have granted it.[52] Several weeks later, the Court granted a related petition[53] of Maryland parents represented by the conservative Becket

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47. *See infra* Section II.B.

48. *See infra* Section II.C.

49. Petition for Writ of Certiorari, *Parents Protecting Our Child., UA v. Eau Claire Area Sch. Dist.*, No. 23-1280 (U.S. June 5, 2024) [hereinafter *Parents Protecting* Cert. Petition].

50. *Id.* at 1.

51. *Id.* at 5.

52. *Parents Protecting Our Child.*, No. 23-1280 (U.S. Dec. 9, 2024). For a discussion of Justice Thomas and Justice Alito's approach, see *infra* Section II.C.2.

53. *Mahmoud v. Taylor*, No. 24-297, 2025 WL 226842 (U.S. Jan. 17, 2025).

Fund.[54] Although this petition does not directly raise parental rights under the Due Process Clause and instead highlights parents' rights under the Free Exercise Clause, it still relies on parents' right to "direct the religious upbringing of their children."[55] These latest developments following the oral argument in *Skrmetti* are relevant: Since parental rights in the domain of gender identity either exist or do not exist, some conservative Justices should be open to preserving such rights across the board.

Beyond this novel study of a possible coalition to protect parental rights, this Article is also the first to delve deeper and analyze how the treatment bans contradict key principles of the libertarian and neoliberal strands of the conservative movement. This inquiry suggests that some Republican appointees on the Court ought to realize that affirming the treatment bans conflicts with their broader judicial approach and could generate a precedent that would be difficult to cabin in the future. For example, some conservative Justices have devoted significant parts of their careers to restricting government regulation and federal agencies' authority in a project that culminated in the recent overturning of *Chevron*.[56] The fact that the Sixth Circuit's majority decision in *Skrmetti* relied heavily on the state's regulative power in general, and the work of the Food and Drug Administration in particular,[57] could and should concern those conservative Justices.

For all those reasons, this Article argues that an expanded Supreme Court review of *Skrmetti*, covering the severe limitation that the treatment bans impose on parental rights, is necessary *and* could change the result of the litigation. However, while such consideration is essential and can offer a solution to many families, it is necessary to recognize that reliance on parental rights entails some risks, especially in situations in which parents *disagree* with their children on gender identity issues. This Article considers those perils and proposes how to prevent the misuse of parental rights arguments from impeding state efforts to protect and support vulnerable transgender youth.

Before proceeding, several clarifications regarding this Article's method are needed. For one, the Article's original focus on the conservative side of the debate responds to the current structure of the Supreme Court and should not be interpreted as doubting any of the progressive arguments against the treatment bans and in support of trans lives. Relatedly, this Article's references to gender dysphoria do not reflect an adaptation of a medicalized approach to gender identity issues.

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54. Petition for a Writ of Certiorari, *Mahmoud*, No. 24-297 (U.S. Sept. 12, 2024).

55. *Id.* at 3, 24, 29, 31.

56. *Loper Bright Enters. v Raimondo*, 144 S. Ct. 2244, 2273 (2024) (overturning *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

57. *See infra* Section III.A.2.

Rather, the fact that treatments require examination and diagnosis does not allow ignoring the term. Awareness that gender dysphoria is a recognized problem also serves as a reminder of the weakness of red states' claim that by prohibiting treatment, they seek to protect trans minors.

Still, to avoid excessive medicalization,[58] this Article refrains as much as possible from using medical terms and minimizes engagement with claims that the therapies forbidden under the treatment bans are somehow unsafe.[59] Legally, no medical arguments should be able to save the treatment bans if the Court reviews them under any standard higher than the minimal one. The treatment bans cannot survive because while arguing that they legitimately forbid treatments due to safety concerns, red states made sure to permit the treatments as long as the minor patients are cisgender.[60]

Last, because words can wound,[61] this Article's deep dive into conservative resources sometimes requires quoting or discussing language that disrespects the fact that people's gender identity can differ from their sex assigned at birth or distrusts the argument that treatments are necessary. In fact, the treatment bans themselves use such problematic rhetoric. This Article's mentions of and engagements with such poor rhetorical choices *do not* reflect an acceptance of their use.

This Article's contributions to the heated debate around the treatment bans are developed in three parts. Part I explains the urgent need to go beyond the Equal Protection challenge and review the Sixth Circuit's decision through the lens of the Due Process Clause. Part II introduces the due process argument and critiques its rejection by the

58. *See, e.g.*, Ruth Colker, *Overmedicalization?*, 46 HARV. J.L. & GENDER 205 (2023); Austin H. Johnson, *Rejecting, Reframing, and Reintroducing: Trans People's Strategic Engagement with the Medicalisation of Gender Dysphoria*, 41 SOCIO. HEALTH & ILLNESS 517 (2019).

59. *See, e.g.*, MEREDITHE MCNAMARA ET AL., AN EVIDENCE-BASED CRITIQUE OF "THE CASS REVIEW" ON GENDER-AFFIRMING CARE FOR ADOLESCENT GENDER DYSPHORIA 3 (2024), https://law.yale.edu/sites/default/files/documents/integrity-project_cass-response.pdf [https://perma.cc/V7JW-KX3T] (presenting an interdisciplinary paper authored by researchers and clinicians who jointly have "86 years of experience in caring for more than 4800 transgender youth and have published 278 peer-reviewed studies, 168 of which are in the field of gender-affirming care"). The paper responds to "The Cass Review," *see* HILARY CASS, INDEPENDENT REVIEW OF GENDER IDENTITY SERVICES FOR CHILDREN AND YOUNG PEOPLE: FINAL REPORT (2024), https://cass.independent-review.uk/wp-content/uploads/2024/04/CassReview_Final.pdf [https://perma.cc/JXH7-55G5].

60. The medical views regarding the necessity of the treatments were a core issue in recent litigation regarding healthcare coverage to trans employees in *Kadel v. Folwell*, 100 F.4th 122 (4th Cir. 2024).

61. *See generally* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (a frequently cited source for the idea that words can create injury).

Sixth Circuit in *Skrmetti*. It includes novel evidence revealing conservative support for the value of parental rights in the context of responding to children's gender identity issues. Part III dives into conflicting priorities within the conservative movement. Its findings illuminate additional reasons that should persuade some conservative Justices to join their liberal colleagues in invalidating the treatment bans, if not because they are discriminatory, at least because they display an unprecedented form of government overreach.

All in all, examining the constitutionality of the treatment bans without considering their impact on parental rights is an improper process that stands to yield devastating results. Since only four votes are needed to grant a certiorari petition, a single conservative Justice can enable a resolution by agreeing to grant the private plaintiffs' petitions that are still pending while allowing additional briefing and arguments as necessary.[62] If this does not transpire, the Court should take up the question of parental rights as soon as the next petition arrives at the Court.

Either way, even in a conservative Court, the treatment bans that have rapidly spread across the country should not be allowed to prevent trans minors from accessing treatments they, their parents, and their doctors all agree they genuinely need. This Article shows how, by focusing on parental rights, the Court has an opportunity to put culture wars aside and unite around supporting access to medical care for all minors who need it.

I. THE EQUAL PROTECTION CHALLENGE

Nationwide, and now at the Supreme Court, plaintiffs have challenged the treatment bans targeting trans youth and denying them needed care while allowing doctors to provide similar treatments to cisgender minors.[63] They have argued that the bans violate the Fourteenth Amendment's Equal Protection Clause, which provides that "[n]o State

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62. This step recently became pragmatically necessary given the change of position of the new Trump Administration. *See* DOJ Letter to the Supreme Court, *supra* note 40 (notifying the Court that the Government has reversed its position but also counseling the Court to decide the case without granting the private plaintiffs' petitions or allowing additional briefing); *see also* Hila Keren, *Trump's DOJ Is Trying To Sabotage Trans Kid Plaintiffs at the Supreme Court*, SLATE (Feb. 13, 2025, 6:14 PM), https://slate.com/news-and-politics/2025/02/supreme-court-analysis-trump-doj-sabotage-trans-kids.html (criticizing the position taken by the Trump Administration and arguing the Court should grant the private plaintiffs' petitions).

63. *Cf.* Theodore E. Schall & Jacob D. Moses, *Gender-Affirming Care for Cisgender People*, HASTINGS CTR. REP., May-June 2023, at 15.

shall . . . deny to any person within its jurisdiction the equal protection of the laws."[64]

This Part introduces the equal protection arguments against the bans and briefly explains why the Sixth Circuit was wrong to dismiss them. As a matter of law, the argument of unconstitutional discrimination is highly compelling and should be accepted under all relevant precedents and any reasonable legal analysis. However, this Part also introduces reasons to worry about how the Constitution's clear demand for equality might be executed in a Court controlled by conservatives. This apprehension is especially acute after the 6–3 overruling of *Roe v. Wade*[65] in *Dobbs v. Jackson Women's Health Organization*.[66]

Fully recognizing the risk that discrimination claims might fail due to the Court's structure is essential to any effort to secure healthcare for trans minors, but it by no means reflects any substantive weakness in the arguments made under the Equal Protection Clause. Rather, the purpose of illuminating the pragmatic limits of discrimination claims is to highlight how no adequate review of *Skrmetti* is possible if the Court selectively considers only arguments that are unlikely to be accepted.

A. The Equal Protection Arguments

Since the treatment bans do not prohibit providing puberty blockers and hormone therapies to cisgender youth, regardless of diagnosis, and only target trans minors who need the treatments to handle diagnosed gender dysphoria, plaintiffs have argued that the bans are discriminatory, both on the basis of sex and transgender status. For example, the Tennessee ban under review in *Skrmetti*, SB1, prohibits the provision of puberty blockers and hormone therapy not in general but only if the treatments are offered "for the purpose" of "[e]nabling a minor to identify with, or live as," what the ban problematically calls "a purported identity inconsistent with the minor's sex."[67] SB1 also continues to ban "[t]reating purported discomfort or distress from a discordance between the minor's sex and asserted identity."[68]

Particularly if "we're all textualists now,"[69] it is notable that SB1's explicit text clearly exhibits both its discriminatory nature and the

64. U.S. CONST. amend. XIV, § 1.

65. 410 U.S. 113 (1973).

66. 142 S. Ct. 2228, 2279 (2022).

67. TENN. CODE ANN. § 68-33-103(a)(1) (2024).

68. § 68-33-103(a)(1)(B).

69. Harvard L. Sch., *The 2015 Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 08:29 (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg&t=509s. Justice Kagan rescinded her statement later in *West Virginia v. EPA*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting).

intention to discriminate for ideological/religious reasons. First, the discrimination is evident by the clarification that the ban does not cover treatments of cisgender minors for "congenital defect, . . . disease, or physical injury."[70] Or, as the Government's petition to the Supreme Court explained it:

> 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. . . . And vice versa, an adolescent assigned male at birth cannot receive puberty blockers or estrogen to live as a female, but an adolescent assigned female at birth can.[71]

Second, the ban's text repeatedly refers to "the minor's sex,"[72] treating sex as a given rather than a determination made at birth. The law also persistently expresses doubts about the existence of gender identity by calling it a "purported"[73] or "asserted"[74] type of identity. Worse, the ban's language projects objections to the problem of gender dysphoria itself by reducing severe distress, which is part of the scientific definition of the diagnosis,[75] to mere "discomfort"[76] and by referring to the suffering as merely "purported," although it is an actual condition fully experienced by patients, witnessed by their parents, and carefully examined and confirmed by their doctors.

Moreover, as it minimizes the severity of gender dysphoria, SB1 also misleadingly inflates the risks of treating it. For example, it states that treatments "can lead to the minor becoming irreversibly sterile."[77] But, if that is the magnitude of the risk, why does Tennessee allow using similar treatments to treat cisgender minors when they experience, for example, precocious (early) puberty or delayed puberty?[78]

Most significantly, the Tennessee Legislature did not only demonstrate its intention via textual choices but also made a direct statement on the issue. SB1 declares that its enactment serves Tennessee's "compelling interest in encouraging minors to appreciate

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70. § 68-33-103(b)(1)(A).

71. *United States* Cert. Petition, *supra* note 36, at 19 (citation omitted).

72. *See, e.g.*, § 68-33-103(a)(1).

73. *See, e.g.*, *id.*

74. *See, e.g.*, *id.*

75. *See supra* note 15.

76. § 68-33-103(a)(1)(B).

77. § 68-33-101(b).

78. In making this point, the aim is not to delve into the arguments regarding the safety of the banned treatments. Such discussion lies outside of the focus of this Article. Instead, the goal here is to trace the unmistakable marks of discrimination against trans youth. For a review of the medical arguments, see, for example, MCNAMARA ET AL., *supra* note 59.

their sex" by forbidding treatments "that might encourage minors to become disdainful of their sex."[79]

Therefore, reading the texts of treatment bans such as SB1 should leave little doubt that they cannot be considered facially neutral. Instead, the bans explicitly focus and turn on patients' sex as assigned at birth compared to their gender identity. When patients' assigned sex and gender identity align, treatments are allowed. By contrast, the same treatments are forbidden when patients' assigned sex and gender identity are "inconsistent."[80] Such opposite results for identical medical procedures are facially discriminatory for two reasons: They rely on sex-based classifications *and* unequal treatment of transgender adolescents who belong to a quasi-suspect class. Either way, once the bans are suspected as discriminatory, they should be subject to heightened scrutiny rather than enjoy the deferential rational review awarded to them by the Sixth Circuit.

This straightforward two-step analysis was adopted by the district court in *Skrmetti*. First, despite being appointed by President Trump,[81] Judge Richardson had no difficulty in concluding that SB1 "subjects individuals to disparate treatment based on transgender status" and deciding, citing numerous other courts, that "transgender individuals constitute a quasi-suspect class."[82] Judge Richardson similarly found that "SB1 discriminates on the basis of sex."[83] For each of these reasons, he explained, the law must be subject to intermediate scrutiny and should be invalidated if Tennessee cannot show that it is "substantially related to an important state interest."[84]

Next, properly applying heightened scrutiny, Judge Richardson found—based on a "voluminous" record—that Tennessee has "failed to demonstrate an important interest" in preventing the treatment of trans minors.[85] After reviewing the medical evidence, he found that "the weight of the evidence . . . does not support" the allegation that puberty blockers and hormone therapy "pose serious risks to the minors receiving these treatments for gender dysphoria."[86] Moreover, Judge Richardson added that even if the law reflected an important state interest, it would not have survived intermediate scrutiny because it is not "substantially

79. § 68-33-101(m).

80. *See, e.g.*, § 68-33-103(a)(1).

81. *Richardson, Eli Jeremy*, FED. JUD. CTR., https://www.fjc.gov/history/judges/richardson-eli-jeremy [https://perma.cc/TVW5-2AP4].

82. *L.W. v. Skrmetti*, 679 F. Supp. 3d 668, 689–90 (M.D. Tenn. 2023), *rev'd*, 83 F. 4th 460 (6th Cir. 2023), *cert. granted sub nom. United States v. Skrmetti*, 144 S. Ct. 2679 (2024).

83. *Id.* at 692.

84. *Id.* at 712.

85. *Id.* at 702, 709.

86. *Id.* at 708.

related" to the interest asserted by Tennessee—the protection of adolescents from allegedly unsafe procedures.[87] This is so, because SB1 only applies to "a tiny fraction of minors," and Tennessee has not attempted to similarly protect nontransgender minors from receiving the treatments it claims to be unsafe, which makes the ban "severely underinclusive" and necessarily unable to serve the interest that allegedly justifies its enactment.[88]

Even though Judge Richardson adhered to the appropriate and conventional structure of analysis—which many other courts, including the Eighth Circuit, similarly followed[89]—the Sixth Circuit reversed his decision. Ignoring the language and clear goal statement of treatment bans in Tennessee and Kentucky, two out of three judges on the panel did not find any suspect classification, neither on the basis of sex nor based on transgender status. For example, the majority found that the treatment bans regulate "evenhandedly"[90] because they forbid "sex-transition treatments for all minors, *regardless of sex*."[91] Never mind that, as explained above, the entire law turns on patients' sex as assigned at birth, allowing, for instance, the use of puberty blockers only when patients' sex assigned at birth aligns rather than conflicts with their gender identity.

Perhaps due to this obvious flaw in its analysis, the majority also attempted to carve out an exception to the special review that must follow sex-based classifications. It opined that not "all" such classifications "receive heightened review" because the Constitution only demands such review when a sex-based classification "perpetuates invidious stereotypes or unfairly allocates benefits and burdens," which it claimed is not the case "in the context of laws that regulate medical procedures unique to one sex or the other."[92]

This overly narrow presentation of the application of the Equal Protection Clause to sex-based classification is not only unfounded, it also cannot release Tennessee from heightened scrutiny even if the Supreme Court were to adopt such an unprecedently narrow view. First, unlike treatments related to pregnancy or prostate problems, the use of puberty blockers or hormones like testosterone or estrogen is not "unique to one sex or the other."[93] Second, SB1 directly "perpetuates invidious stereotypes" when it allows only treatments that make those assigned

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87. *Id.* at 710.

88. *Id.* at 712.

89. *Brandt v. Rutledge*, 47 F.4th 661, 669 (2022) ("Because the minor's sex at birth determines whether or not the minor can receive certain types of medical care under the law, [the law] discriminates on the basis of sex.").

90. *L.W. v. Skrmetti*, 83 F.4th 460, 479 (6th Cir. 2023).

91. *Id.* at 480 (emphasis added).

92. *Id.* at 483–84.

93. *Id.* at 484.

female at birth appear more feminine and those assigned male at birth appear more masculine.

Because it denied that the treatment bans under review make sex-based distinctions that are presumptively unconstitutional, the Sixth Circuit erroneously subjected them to the most deferential standard of review. Having applied rational basis review, the court decided that the bans could survive because the forbidden treatments were not completely risk-free.[94] As it attributed rationality to the bans, the majority disregarded the fact that the treatments are considered safe enough to be offered to a much larger group of adolescents—cisgender minors. It also held that the bans satisfy deferential review because they adopt a "reasonable approach" of "waiting to use potentially irreversible treatments until the child becomes an adult."[95] However, as it branded this wait-and-see approach "reasonable," the majority ignored the fact that SB1 includes a ban on puberty blockers.[96] These blockers are similar to wait-and-see because they allow adolescents and their parents and doctors more time for deliberation.[97] Still, unlike passively waiting, blockers help alleviate some of the intensified pain that comes with puberty when gender identity and sex assigned at birth differ.[98]

The Government's petition to the Supreme Court offers a full and highly compelling explanation of the alarming distance between the Sixth Circuit's majority decision and any adequate application of the Equal Protection Clause to the treatment bans. In purely legal terms, the Government's arguments should have sufficed for the invalidation of the bans by the Supreme Court, even given the general difficulty faced by those arguing discrimination.[99]

That said, the coming section offers evidence that the majority in the Sixth Circuit has not simply applied the law but instead has let ideological general objection to the notion of gender identity sway its analysis. This section further traces the recent rise of an ideological effort to block the effect of *Bostock*—which unambiguously classified discrimination on the basis of gender identity as sex-based discrimination—outside of the case's narrowest circumstances. This attempt aims to deprive trans persons of any equality rights outside of the context of workplace hiring or firing decisions. Because of such

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94. *Id.* at 489.

95. *Id.* at 480.

96. *See id.*

97. *See, e.g.*, MCNAMARA ET AL., *supra* note 59, at 27.

98. *Id.*

99. *See generally* Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275 (2012) (presenting empirical data showing that plaintiffs claiming discrimination are less likely to win compared to every other category of litigants and offering explanations for this documented difficulty).

evidence—not because of any doubt regarding the strength of the Equal Protection challenge—exclusive reliance on this challenge, without consideration of parental rights based on the Due Process challenge, can distort the outcome of the litigation. And as documented below, some early signs of such distortion have already appeared during the oral arguments.

B. Gender Identity and Conservative Ideology

On the topic of gender identity, the conservative movement in the United States by and large follows—with important exceptions discussed in Part II—the views of those on the Christian Right that believe the term sex reflects an "immutable" human feature, or a "biological" fact that must fit into one of the two biblical categories created by God: a man or a woman.[100] Consider, for example, the approach of the Alliance Defending Freedom (ADF), a leading conservative legal advocacy group depicted as the "largest legal force of the religious right."[101] The ADF's published *Statement of Faith*, which newly hired employees must accept, declares in relevant part the following: "We believe God creates each person with an immutable biological sex—male or female—that reflects the image and likeness of God."[102] This approach thus refuses to accept the notion of gender identity as an actual experience, framing it instead as something individuals "claim" rather than truly live through.

For example, The Heritage Foundation, a research and educational institution whose mission is to build and promote conservative public

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100. Indeed, at least according to one study, while seventy-nine percent of liberal Democrats "say a person's gender can be different from sex at birth," ninety-two percent of conservative Republicans "say gender is determined by sex at birth." Kim Parker, Juliana Menasce Horowitz & Anna Brown, *Americans' Complex Views on Gender Identity and Transgender Issues*, PEW RSCH. CTR. (June 28, 2022), https://www.pewresearch.org/social-trends/2022/06/28/americans-complex-views-on-gender-identity-and-transgender-issues/ [https://perma.cc/WY3D-5A8V]. *See generally* WENDY BROWN, IN THE RUINS OF NEOLIBERALISM: THE RISE OF ANTIDEMOCRATIC POLITICS IN THE WEST (2019) (highlighting the impact of the religious right within the conservative movement); DANIEL BENNETT, DEFENDING FAITH: THE POLITICS OF THE CHRISTIAN CONSERVATIVE LEGAL MOVEMENT (2017) (exploring the influence of the Christian legal movement and its affiliated organizations).

101. Nicole Hemmer, *Explainer: What Are the Heritage Foundation and the Alliance Defending Freedom?*, CONVERSATION (Jan. 31, 2016, 6:48 PM) (quoting Erik Eckholm, *Legal Alliance Gains Host of Court Victories for Conservative Christian Movement*, N.Y. TIMES (May 11, 2024), https://www.nytimes.com/2014/05/12/us/legal-alliance-gains-host-of-court-victories-for-conservative-christian-movement.html), https://theconversation.com/explainer-whatare-the-heritage-foundation-and-the-alliance-defending-freedom-53867 [https://perma.cc/LS9E-BBRH].

102. *Statement of Faith*, ALL. DEFENDING FREEDOM, https://adflegal.org/about-us/careers/statement-of-faith (last visited Jan. 26, 2025).

policies,[103] published a legal memorandum dedicated to the treatment bans. The memorandum opens with the statement that the forbidden treatments prioritize "a person's *claimed* 'gender identity' over his or her sex," with the intention "to facilitate an individual's movement . . . toward a *desired* gender identity."[104] The doubting descriptors "claimed" and "desired" correlate with the usual language of the treatment bans. Recall here how Tennessee's ban similarly uses "purported" and "asserted" to undercut the realness of gender identity.[105]

Accordingly, the leading conservative approach assigns minimal importance to evidence that a gap between one's sex assigned at birth and gender identity can be stressful for personal and social reasons, sometimes to the point of developing a serious medical condition. For instance, the same Heritage Foundation memorandum also asserts that "gender dysphoria is an inherently subjective or impressionistic diagnosis, based as it is on an individual's 'psychological sense of [his or her] gender.'"[106] In this conservative retelling, many gender dysphoria cases result from a trend created by social, cultural, and/or political pressures. The Heritage Foundation's memorandum, for instance, depicts a "precipitous rise in the number of minor children expressing sudden onset gender dysphoria."[107] Some other conservatives have dubbed this the "transgender craze."[108]

For those reasons, conservatives have launched a bitter and broad anti-trans fight against what they refer to as "gender ideology," a phrase aimed at minimizing and even denying the existence of a personal and

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103. *About Heritage*, HERITAGE FOUND., https://www.heritage.org/about-heritage/mission [https://perma.cc/RQ3A-9UE5].

104. SARAH PARSHALL PERRY & THOMAS JIPPING, HERITAGE FOUND., LEGAL MEMO. NO. 344, STATES MAY PROTECT MINORS BY BANNING "GENDER-AFFIRMING CARE" 1 (2023) [hereinafter HERITAGE STATE BANS MEMO] (emphasis added), https://www.heritage.org/gender/report/states-may-protect-minors-banning-gender-affirming-care [https://perma.cc/7R9W-2XAD].

105. *See supra* text accompanying notes 73–74.

106. HERITAGE STATE BANS MEMO, *supra* note 104, at 7 (quoting *What Is Gender Dysphoria?*, AM. PSYCH. ASS'N., https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria [https://perma.cc/Y8WL-AS6J]).

107. *Id.*

108. *Id.* (quoting ABIGAIL SHRIER, IRREVERSIBLE DAMAGE: THE TRANSGENDER CRAZE SEDUCING OUR DAUGHTERS (2020)).

social reality that necessitates solutions.[109] The treatment bans are part of this larger, organized, and well-funded battle against gender ideology.[110]

Accordingly, conservative religious organizations such as the ADF and The Heritage Foundation have been involved in phrasing, funding, passing, and defending the bans' validity in courts, including by funding research doubting the safety of the treatments.[111] The coming subsections describe the impact these concerted efforts have already had on the legal debate regarding the treatment bans. Ultimately, this impact might mean that not enough conservative Justices would be willing to join their liberal peers in invalidating the treatment bans based on the Equal Protection Clause. This is so because accepting that discrimination on the basis of gender identity is unconstitutional requires admitting, even more loudly than *Bostock* did, a principle that the current anti-trans campaign resists.

1. Conservative Ideology in *Skrmetti*

On the question of discrimination, the 2–1 decision in *Skrmetti* was split along ideological lines. The majority's opinion was penned by Chief Judge Jeffrey Sutton, with whom Judge Amul Thapar agreed.[112] Both judges were appointed to the Sixth Circuit by Republican presidents, the

109. *See, e.g.*, Jay W. Richards, *What Is Gender Ideology?*, AM. CONSERVATIVE (July 3, 2023, 12:05 AM), https://www.theamericanconservative.com/what-is-gender-ideology/ (arguing that gender ideology is the source of the belief that children can be born in the wrong body and defining it as "the theory that the sex binary doesn't capture the complexity of the human species, and that human individuals are properly described in terms of an 'internal sense of gender' called 'gender identity' that may be incongruent with their 'sex assigned at birth'").

110. *See, e.g.*, *Group Dynamics and Division of Labor within the Anti-LGBTQ+ Pseudoscience Network: The Funding*, S. POVERTY L. CTR. (Dec. 12, 2023), https://www.splcenter.org/captain/defining-pseudoscience-network#funding [https://perma.cc/EAJ9-B3VD] (documenting the operation of the organizations active in funding, producing, and disseminating anti-LGBTQ+ arguments through research, legal advocacy, and the media).

111. R.G. Cravens, *Documents Reveal ADF Requested Anti-Trans Research from American College of Pediatricians*, S. POVERTY L. CTR.: HATEWATCH (June 5, 2023), https://www.splcenter.org/hatewatch/2023/06/05/documents-reveal-adf-requested-anti-trans-research-american-college-pediatricians [https://perma.cc/WLH7-TR8F]; Maya Henson Carey, *Anti-LGBTQ+ Rallies Buoyed by Right Wing Money*, S. POVERTY L. CTR.: HATEWATCH (Oct. 20, 2023), https://www.splcenter.org/resources/hate-watch/anti-lgbtq-rallies-buoyed-big-right-wing-money/ [https://perma.cc/R5WY-MZWE].

112. *L.W. v. Skrmetti*, 83 F.4th 460, 466 (6th Cir. 2023).

former by President George W. Bush and the latter by President Donald Trump.[113] By contrast, Judge Helene White, a Democrat, dissented.[114]

Chief Judge Sutton's majority opinion in *Skrmetti* reflects and perpetuates the leading conservative approach to conflicts between sex assigned at birth and gender identity. In line with the views expressed by organizations such as the ADF and The Heritage Foundation, the majority systematically refrains from fully recognizing gender identity as an independent construct distinguished from sex assigned at birth. It similarly reflects suspicion and underappreciation of the reality of gender dysphoria. The opinion opens with the following statement: "Before gender dysphoria had a name, the medical profession offered a variety of treatments for individuals suffering from a lack of alignment between their biological sex and perceived gender."[115] In this way, it projects right from the beginning key conservative views: That sex is always a clear "biological" fact, gender identity is "perceived" at best, and gender dysphoria is merely a recent trend. This message persists throughout the majority's analysis.

For example, the phrase "gender identity" never appears in the independently written (as opposed to cited) opinion parts.[116] To appreciate the meaningfulness of this rhetoric, consider the fact that the term appears eight times in the independently written parts of the dissent's opinion.[117] In the same vein, the majority's opinion describes the minor plaintiffs as individuals who were "born a biological male" or "born a biological female" and have "identified" either "*as* a girl" or "*as* a boy," respectively.[118] Such introduction of the minor plaintiffs to the opinion's readers repeats two central themes of the conservative playbook: sex as an uncontroversial biological matter and gender identity as aspirational at best (the plaintiffs are not really what they identify as). For comparison, the dissent describes the same plaintiffs as either a "transgender girl" or a "transgender boy,"[119] never referring to sex as

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113. *Sutton, Jeffrey S.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/sutton-jeffrey-s [https://perma.cc/E6TH-TD5M]; *Thapar, Amul Roger*, FED. JUD. CTR., https://www.fjc.gov/history/judges/thapar-amul-roger [https://perma.cc/JUB4-T3JF].

114. *Skrmetti*, 83 F.4th at 466; *see* Neil A. Lewis, *White House and Democrats Move on Ohio Court Plan*, N.Y. TIMES (May 8, 2008), https://www.nytimes.com/2008/05/08/washington/08judges.html (recognizing Judge White as "a liberal Democrat"); *White, Helene N.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/white-helene-n [https://perma.cc/6DER-V3TJ].

115. *Skrmetti*, 83 F.4th at 466.

116. In total, the term appears five times when citing other resources, four of which are by reference to the "Standards of Care for Gender Identity Disorders" published by the World Professional Association for Transgender Health—an organization that is supportive of trans youth. *Id.* at 466–467, 479.

117. *Id.* at 492–94, 502 (White, J., dissenting).

118. *Id.* at 469 (emphasis added).

119. *Id.* at 494 (White, J., dissenting).

"biological." Instead, the dissent consistently discusses the gap between "gender identity" and "assigned sex."[120]

Additionally, the majority repeatedly perpetuates the moral panic around gender identity by referring to the minor plaintiffs and other similarly situated minors as children, insinuating a level of immaturity that is not only irrelevant to the dispute but could also generate discomfort about the treatments.[121] For example, while plaintiffs John and Ryan[122] are twelve and fifteen years old, respectively,[123] the majority frequently refers to them as children.[124] The impression of early childhood that is seemingly inapposite to discussions of sexuality is further reinforced through a series of rhetorical choices. The majority describes the general problem as "the physical mismatch between the *child's* perceived gender and biological sex,"[125] frames the legal issue as "the use of drug treatments that change or modify a *child's* sex characteristics,"[126] depicts the treatments at issue as "medical treatments for *childhood* gender dysphoria,"[127] and engages in justifying what it calls a "fair-minded" legislative "approach to *child* welfare."[128] Compare this artificial childhood narrative to the dissent's careful explanation that while gender dysphoria can arise in "childhood, adolescence, or adulthood,"[129] under the accepted guidelines for its professional treatment, "providers do not consider [medical] interventions until the onset of puberty."[130]

Another way the majority aligns itself with the conservative campaign against gender identity is by presenting the issue at hand as part of a recent and rapidly developing phenomenon, including claims that "[t]he percentage of youth identifying as transgender has doubled" and "2021 saw three times more diagnoses of gender dysphoria among

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120. *Id.* at 492 (White, J., dissenting).

121. *See generally* JUDITH BUTLER, WHO'S AFRAID OF GENDER? 5 (2024) (exploring how and why "gender" "has become a phantasm with destructive powers, one way of collecting and escalating multitudes of modern panics"). *See also* Holning Lau & Barbara Fedders, *Scrutinizing Transgender Healthcare Bans Through Intersex Exceptions*, 36 YALE J.L. & FEMINISM (forthcoming 2024) (manuscript at 1–2) (analyzing the exceptions in all treatment bans that allow surgeries in intersex children as "consistent with sentiments behind bans on gender-affirming care: a deep-seated fear of and discomfort with children who do not conform to traditional sex stereotypes").

122. A fuller description of Ryan's circumstances was included in the Introduction.

123. *Skrmetti*, 83 F.4th at 469.

124. *Id. passim.*

125. *Id.* at 480 (emphasis added).

126. *Id.* at 472 (emphasis added).

127. *Id.* at 486 (emphasis added).

128. *Id.* at 488 (emphasis added).

129. *Id.* at 492 (White, J., dissenting).

130. *Id.* at 492–93 (White, J., dissenting).

minors than 2017 did."[131] The majority further suggests the newness and suspicious nature of the forbidden treatments by labeling them "unsettled, developing, in truth still experimental"[132] and calling the issue "a vexing and novel topic of medical debate."[133]

All told, the denial of discrimination arguments by the *Skrmetti* majority is justified in a manner that completely differs from how most judges in lower courts and at the Eighth Circuit have discussed the bans thus far—regardless of their political affiliation, those judges have generally recognized that the treatment bans are discriminatory and have accordingly applied heightened scrutiny.[134]

The majority's opinion also differs from judicial opinions regarding other disputes in which transgender plaintiffs have argued sex-based discrimination. For example, one recent study has shown that most courts that considered the issue of restroom usage have found sex discrimination in denying transgender people access to facilities that align with their gender.[135] Notably, the study clarifies that even when the Eleventh Circuit decided to reject a discrimination claim of a transgender boy who was not allowed to use the boys' restroom, it still recognized that the refusal was based on a suspect classification, although it eventually (and oddly) found it justified under heightened scrutiny.[136]

The refusal of the *Skrmetti* majority to see a suspect classification or reliance on sex, although the treatment bans are openly and explicitly distinguishing between transgender and cisgender patients, represents an emerging argument in the leading conservative view that refuses to accept the results of a transition process as reality. This approach denies discrimination because it declines to see transgender girls and women as similar and thus equal to individuals assigned female at birth and likewise denies that transgender boys and men are similar and thus equal to individuals assigned male at birth.

Such resistance to the outcomes of transition is at the core of the Sixth Circuit's holding that treating transgender minors with puberty blockers is different from treating cisgender minors the same way. It also led the Eleventh Circuit to hold that a transgender boy seeking to use the boys' bathroom is not "similarly situated to biological boys" because, despite the transition, the plaintiff "remained both biologically and anatomically identical to biological females—not males."[137]

131. *Id.* at 468.

132. *Id.* at 488.

133. *Id.* at 471.

134. *See, e.g.*, *Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022); *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131 (M.D. Ala. 2022).

135. Clarke, *supra* note 46, at 1732.

136. *Id.* at 1735–37 (discussing *Kasper ex rel. Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (en banc)).

137. *Adams*, 57 F.4th at 804 n.6.

Finally, the refusal to accept discrimination on the basis of gender identity as sex-based discrimination also directly conflicts with the language, reasoning, and logic of the Supreme Court's decision in *Bostock*, according to which "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[138] Due to this conflict, the Sixth Circuit in *Skrmetti* had to join another recent conservative campaign: the efforts to roll back *Bostock*.

2. Ideological Efforts To Roll Back *Bostock*

The majority in *Skrmetti* rejected the plaintiffs' argument that the Supreme Court's decision in *Bostock* should straightforwardly lead to the invalidation of the treatment bans due to sex-based discrimination. In doing so, the majority disregarded the many courts that have applied *Bostock*'s words and reasoning to protect those discriminated against due to their gender identity or sexual orientation. Instead, the court adopted a line of arguments made by conservative advocacy groups, both in and outside of courts.

First, as its starting point, the court amplified the meaning of the Supreme Court's statement in *Bostock* that it only decided the question at hand regarding the termination of gay and transgender employees. The majority in *Skrmetti* read this statement to mean that *Bostock*'s "text-driven reasoning applies only to Title VII."[139] However, *Bostock* did not state, or even imply, that its textual analysis is uniquely tailored to the circumstances it considered and thus inapplicable in other contexts. Instead, it merely left "other policies and practices [that] might or might not qualify as unlawful discrimination . . . for future cases."[140] This is a conventional disclaimer included in many prominent Supreme Court decisions; it cannot possibly stop the naked logic of *Bostock*—that it is impossible to discriminate based on gender identity without engaging in sex-based discrimination—from influencing similar disputes outside of the workplace.

Second, the majority in *Skrmetti* asserted that *Bostock* "bears minimal relevance" to the discussion of treatment bans because its analysis is related to Title VII's language, which is different from the Equal Protection Clause's wording.[141] To support this irrelevancy theory, the court relied on a concurrence by no other than *Bostock*'s author,

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138. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020).

139. *L.W. v. Skrmetti*, 83 F.4th 460, 484 (6th Cir. 2023).

140. *Bostock*, 140 S. Ct. at 1753.

141. *Skrmetti*, 83 F.4th at 485 (citing *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1229 (11th Cir. 2023)).

Justice Neil Gorsuch,[142] in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*),[143] which invalidated affirmative action in higher education.[144] But Justice Gorsuch's reasoning in this case, which is based on the textual difference between Title VI and the Equal Protection Clause, only proves the Sixth Circuit's mistaken application of the idea to the treatment bans. One distinction that Justice Gorsuch highlighted in *SFFA* is that, unlike Title VI, the Equal Protection Clause's phrasing means it "operates on States."[145] However, because the treatment bans are state acts, Justice Gorsuch's emphasis makes *Bostock* more, not less, relevant to the interpretation of the Clause's demand for equality.

Likewise, in *SFFA*, Justice Gorsuch also explained that in an important respect, the Equal Protection Clause is broader, not narrower, than other antidiscrimination norms: It "addresses *all manner of distinctions* between persons."[146] At the same time, the Clause does not make every distinction unlawful, applying instead "different degrees of judicial scrutiny for different kinds of classifications."[147] This constitutional scheme requires an "intermediate scrutiny for classifications based on sex," reserving rational basis review, such as the one applied by the majority in *Skrmetti*, for "classifications based on more *prosaic* grounds."[148] Justice Gorsuch's distinction between meaningful sex-based classifications and those he called "prosaic" makes it hard to believe he would have considered a classification based on gender identity for purposes of medical care as falling within the latter category of banal matters. This is especially true in light of his finding in *Bostock* that firing employees due to their gender identity was far from an everyday act that should be tolerated. Accordingly, it is difficult to see how Justice Gorsuch's analysis in *SFFA* could possibly support *Skrmetti*'s thesis that *Bostock* does not require subjecting the treatment bans to intermediate scrutiny.

Third, the *Skrmetti* majority cites other courts that rejected applying *Bostock* outside of Title VII, both generally and with regard to treatment bans in particular.[149] However, missing from the majority's opinion are many opposing decisions in which courts did not hesitate to cite *Bostock* as applying broadly to gender identity disputes, including in the contexts

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142. *Id.* at 484 (citing *SFFA*, 143 S. Ct. 2141, 2220 (2023) (Gorsuch, J., concurring)).

143. 143 S. Ct. 2141 (2023).

144. *Id.* at 2166.

145. *Id.* at 2220 (Gorsuch, J., concurring).

146. *Id.* (Gorsuch, J., concurring) (emphasis added).

147. *Id.* (Gorsuch, J., concurring).

148. *Id.* (Gorsuch, J., concurring) (emphasis added).

149. *L.W. v. Skrmetti*, 83 F.4th 460, 484 (6th Cir. 2023).

of treatment bans and insurers' refusals to cover gender-affirming care for transgender minors and adults. Most critically, in *Skrmetti*, the majority (but not the dissent) neglected to mention the most relevant decision of the Eighth Circuit in *Brandt*. In this decision, a unanimous court, including a Republican appointee, cited *Bostock* as justifying a permanent injunction against Arkansas's treatment ban.[150]

In contrast to the majority's presentation of *Bostock*'s relevance, a recent study by Professor Jessica Clarke found that "most courts" followed *Bostock*'s logic, broadly applying "anticlassifcation reasoning" and accordingly finding limitations on health care for transgender people to be based on forbidden sex-based and sometimes also status-based classifications.[151]

Significantly, after Clarke published her study, the Fourth Circuit followed *Bostock* in *Kadel v. Folwell*,[152] explicitly rejecting the *Skrmetti* view that *Bostock* was limited to Title VII claims.[153] In an en banc decision written by Judge Roger Gregory,[154] the Fourth Circuit reviewed two healthcare plans, the North Carolina State Health Plan and the West Virginia Medicaid Program, which refused to cover certain treatments for patients with diagnosed gender dysphoria.[155] Stressing that gender dysphoria is "a diagnosis unique to transgender patients,"[156] the court discussed *Bostock* and, based on this key precedent, concluded that those healthcare plans "discriminate on the basis of gender identity and sex in violation of the Equal Protection Clause."[157]

Because of the palpable flaws of *Skrmetti*'s narrow reading of *Bostock*, it is possible that some conservatives on the Court, and particularly Justice Gorsuch, might disagree with the Sixth Circuit and find that the treatment bans rely on sex-based and even status-based classifications that require intermediate scrutiny. However, such hope—while justified as a matter of law—should not obscure the risk that conservative ideology would create a willingness to block *Bostock* from applying to medical treatments needed by transgender individuals. Such

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150. *Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022) (affirming the district court's decision in the preliminary injunction proceedings). The Eighth Circuit later granted and held an en banc hearing to review the same issue after the district court granted a permanent injunction. The decision in these proceedings is still pending and would likely await the Supreme Court's decision in *Skrmetti*. *See Brandt v. Griffin*, No. 23-2681 (8th Cir. Oct. 6, 2023).

151. Clarke, *supra* note 46, at 1742–43 & nn.233–35 (collecting cases).

152. 100 F.4th 122 (4th Cir. 2024).

153. *Id.* at 164.

154. *Gregory, Roger L.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/gregory-roger-l [https://perma.cc/XF6C-KJER].

155. *Kadel*, 100 F.4th at 133–34.

156. *Id.* at 133.

157. *Id.* at 164.

risk is indicated by a recent wave of conservative advocacy groups and red states' efforts to prevent reliance on *Bostock* in the healthcare setting via Title IX.[158]

In May 2024, the U.S. Department of Health and Human Services (HHS) issued a new final rule under section 1557, which is "the non-discrimination provision of the Affordable Care Act (ACA)."[159] The new rule generally aims at "advancing protections against discrimination in health care" and specifically at "standing up for LGBTQI+ Americans nationwide."[160] Because the new rule interprets the ACA, which in turn addresses sex discrimination by incorporating Title IX, the rule reads Title IX's prohibition on discrimination "on the basis of sex" in light of *Bostock*. As a result, the rule includes discrimination on the basis of sexual orientation and gender identity as forms of sex-based discrimination.

As HHS explained, courts extended *Bostock* to Title IX long before the issuance of the new rule,[161] and the Supreme Court *refused* to review the issue.[162] Yet, as the new rule's effective date approached, the ADF launched a series of lawsuits to block it, which it submitted on behalf of seven red states and several other conservative medical organizations such as the American College of Pediatricians.[163]

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158. *Cf.* Chris Geidner, *Appeals Courts Keep New Title IX Rule Blocked in Ten States During Appeals*, LAW DORK (July 17, 2024), https://www.lawdork.com/p/sixth-circuit-title-ix-rule-stay-denial [https://perma.cc/G95U-3GL4] (describing a recent wave of lawsuits against a similar rule by the U.S. Department of Education that applies directly to Title IX and operates in the educational setting).

159. *Section 1557 Final Rule: Frequently Asked Questions*, U.S. DEP'T HEALTH & HUM. SERVS., https://web.archive.org/web/20250131092336/https://www.hhs.gov/civil-rights/for-individuals/section-1557/faqs/index.html (Oct. 9, 2024).

160. *HHS Issues New Rule To Strengthen Nondiscrimination Protections and Advance Civil Rights in Health Care*, U.S. DEP'T HEALTH & HUM. SERVS., https://web.archive.org/web/20240925052312/https://www.hhs.gov/about/news/2024/04/26/hhs-issues-new-rule-strengthen-nondiscrimination-protections-advance-civil-rights-health-care.html.

161. Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37522, 37573 (May 6, 2024) (codified at 45 C.F.R. pt. 92) (citing as examples, among others, *Doe v. Snyder*, 28 F.4th 103, 113–14 (9th Cir. 2022); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021) (mem.); but also listing the conflicting decision in *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020), *vacated*, 3 F.4th 1299 (11th Cir. 2021), *rev'd en banc*, 57 F.4th 791, 811–15 (11th Cir. 2022)), https://www.govinfo.gov/content/pkg/FR-2024-05-06/pdf/2024-08711.pdf [https://perma.cc/PYD5-FEWZ].

162. *Grimm*, 972 F.3d at 616.

163. *ADF Files Third Lawsuit Challenging Biden Administration's Attempt To Hijack Medicine*, ALL. DEFENDING FREEDOM (July 10, 2024) [hereinafter *ADF Files Third Lawsuit*], https://adflegal.org/press-release/adf-files-third-lawsuit-challenging-biden-admins-attempt-hijack-medicine. *See, e.g.*, Complaint at 1, *Missouri v. Becerra*, No. 24-cv-00937 (E.D. Mo. July 10, 2024).

In all those instances, the ADF shaped and disseminated the conservative argument against allowing *Bostock* to protect LGBTQ+ people in the healthcare arena.[164] Critically, this argument is the same one that found its way into the majority's opinion in *Skrmetti*. According to this new anti-*Bostock* claim, *Bostock* was limited to employers firing LGBTQ+ employees, and it thus cannot justify the new HHS rule or any other regulation that forbids discrimination in healthcare treatments and services.[165] Under this view, the same equal treatment that *Bostock* required of *private* employers, HHS could not require from *public* or *semi-public* entities (states and health care providers supported by federal money).

The latest anti-*Bostock* campaign, as mobilized around HHS's new final rule, has already led to several court decisions that prevented the rule, or parts of it, from going into effect. Of particular interest is a July 2024 decision of a district court in Mississippi that, at the request of fifteen states, including Tennessee, stayed the effective date of the new rule and issued a *nationwide* preliminary injunction.[166] This injunction prohibits HHS and the Centers for Medicare and Medicaid Services "from enforcing, relying on, implementing, or otherwise acting pursuant to the [rule's] challenged provisions."[167] On the same day, an ADF lawsuit in Florida led to a similar order to prevent enforcement of the new rule in Florida.[168]

In addition to the litigation to block the new rule, conservative advocacy groups now seek to undo *Bostock* even within the employment setting. For example, in April 2024, the ADF submitted an amicus brief in an appeal to the Ninth Circuit[169] of a district court decision that, while citing *Bostock*, interpreted § 1557 and Title IX as prohibiting discrimination on the basis of sexual orientation and gender identity as

164. *See ADF Files Third Lawsuit*, *supra* note 163.

165. The conservative battle against *Bostock* is not limited to the healthcare setting. Similar arguments against reading Title IX as prohibiting discrimination on the basis of sexual orientation and gender identity have been long made in the education context, including with regard to bathroom usage and participation in sports. While the battles in the education context lie outside of this Article, Part II discusses some of them in as much they rely on parental rights. *See generally* Geidner, *supra* note 158.

166. *Tennessee v. Becerra*, No. 24cv1612024, 2024 U.S. Dist. LEXIS 119525 (S.D. Miss. July 3, 2024).

167. *Id.* at *5–6.

168. *Florida v. HHS*, No. 24-cv-1080, 2024 U.S. Dist. LEXIS 117619 (M.D. Fla. July 3, 2024).

169. Brief of Christian Employers Alliance as Amicus Curiae in Support of Appellants and for Reversal, *Pritchard ex rel. C.P. v. Blue Cross Blue Shield of Ill.*, No. 23-4331 (9th Cir. Apr. 19, 2024) [hereinafter Christian Employers Alliance Amicus Brief].

part of their ban on sex-based discrimination.[170] Curiously, the ADF submitted this brief on behalf of *employers*—a group called the Christian Employers Alliance.[171] Despite being the direct addressees of *Bostock*, these employers now claim that applying *Bostock* to healthcare services will prevent them from limiting their employees to health insurance plans that do not cover gender-affirming care for transgender patients.[172] In other words, the ADF now argues that while under *Bostock* employers may not be allowed to fire LGBTQ+ employees, they still should be allowed to prevent those employees from getting the health treatments they need by keeping discriminatory health plans available.

The concerted attacks on *Bostock* within and outside the healthcare arena are echoed in the Sixth Circuit decision in *Skrmetti* and are highly relevant to its review in a Court controlled by conservatives. They reflect the pressure that conservative organizations have put on courts all over the country to deny both the reality in which gender identity differs from sex assigned at birth *and* the fact that the difference sometimes requires medical treatment. It is possible that Justice Gorsuch, as *Bostock*'s author, and (to a lesser degree) Chief Justice John Roberts, who joined him, might resist this pressure and protect the integrity of their heavily cited decision.[173] However, Justices Samuel Alito, Brett Kavanaugh, and Clarence Thomas, who emphatically dissented, and Justice Amy Coney Barrett, who was not yet on the Court, might be more susceptible to this conservative pressure, and at least some of them might welcome the opportunity to narrow *Bostock*'s impact as much as possible.

The reelection of Donald Trump in November 2024 adds particular pressure to undo as much of *Bostock*'s legacy as possible, as recommended in the 920-page book published by leading conservative groups, commonly called Project 2025.[174] The document takes an explicit anti-*Bostock* position, very similar to the one adopted in *Skrmetti*. "The new Administration," it states, "should restrict *Bostock*'s application of sex discrimination protections to sexual orientation and transgender status in the context of hiring and firing."[175] Further, according to Project 2025, "[t]he President should direct agencies to withdraw unlawful 'notices' and 'guidances' purporting to apply *Bostock*'s reasoning broadly outside

170. *Pritchard ex rel. C.P. v. Blue Cross Blue Shield of Ill.*, No. 20-cv-06145, 2022 WL 17788148, at *5–6 (W.D. Wash. Dec. 19, 2022).

171. Christian Employers Alliance Amicus Brief, *supra* note 169.

172. *See id.* at 20–28.

173. *See* Clarke, *supra* note 46, at 1705 (reporting that "[i]n just over three years, *Bostock* has been cited by almost a thousand cases").

174. THE HERITAGE FOUND., MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE xi–xii, 333–34, 584 (Paul Dans & Steven Groves eds., 2024) [hereinafter PROJECT 2025], https://static.project2025.org/2025_MandateForLeadership_FULL.pdf [https://perma.cc/QA3N-8PH5].

175. *Id.* at 584.

hiring and firing," and "rescind regulations interpreting sex discrimination provisions as prohibiting discrimination on the basis of sexual orientation, gender identity, transgender status, sex characteristics, etc."[176]

The position taken by Project 2025 proves that all the leading conservative organizations are united in a wish to roll back *Bostock* and that this wish animated the majority's opinion in *Skrmetti*. Now that the case is at the Supreme Court, the plan to undo most of *Bostock* becomes even more influential, as the oral arguments were heard while knowing that a change of administration was coming, and the Court's decision will be made under a Trump presidency and a wholly different Department of Justice. At the time of finalizing this Article, it is still unclear how the Supreme Court might respond to the new administration's notification that the Government reversed course and now approves rather than condemns Tennessee's treatment ban.[177] Adding to the confusion is a new executive order that threatens to deprive providers of gender-affirming care to people under the age of nineteen of federal funding while demonstrating outright hostility towards trans youth.[178] Regardless of how the situation further unfolds, the following subsection shows that some of the ideological resistance to gender identity issues that guided the *Skrmetti* majority before the election already surfaced during the oral arguments at the Supreme Court.

3. Conservative Viewpoints and the Oral Arguments

All the conservatives on the Court except Justice Gorsuch actively raised questions that aligned with Tennessee's denial that its treatment ban draws lines on the basis of sex and thus should be subject to heightened scrutiny. Much of their questioning ignored the evidentiary record established by the trial court and infused the discussion with myths about sex, gender, gender-affirming treatments, and transgender lives that are often disseminated by leading conservative organizations.

First, providing gender-affirming care to minors was portrayed as dangerous experimentation, echoing the Sixth Circuit branding it as "a vexing and novel topic of medical debate."[179] Justice Alito, for example, introduced information from other countries that did not even exist when Tennessee enacted its treatment ban or when the trial court created the record upon which the Sixth Circuit based its decision. His stream of updates suggested that "the judgment at the present time of the health authorities in the United Kingdom and Sweden is that the risks and

176. *Id.*

177. *See* DOJ Letter to the Supreme Court, *supra* note 40.

178. *See* Exec. Order No. 14187, 90 Fed. Reg. 8771 (Jan. 28, 2025).

179. *L.W. v. Skrmetti*, 83 F.4th 460, 471 (6th Cir. 2023).

dangers greatly outweigh the benefits" associated with the treatments.[180] This line of questioning was so unusual that even the highly knowledgeable Solicitor General Elizabeth Prelogar admitted: "I haven't myself confirmed everything that you just cited, which wasn't before the district court in this case."[181]

Similarly, Justice Kavanaugh added to the panic effect by asserting that other countries are "pumping the brakes on this kind of treatment because of concerns about the risks," which should serve as a "heavy yellow light, if not red light, for this Court to come in."[182] And both he and Chief Justice Roberts enhanced the impression of uncertainty by repeatedly calling the issue an "evolving" situation or debate.[183]

Second, and directly from the playbook of undoing *Bostock*, Justice Alito attempted to compel Solicitor General Prelogar to admit her argument is based on "*Bostock*-like reasoning."[184] When she denied the need to rely on *Bostock* in light of SB1's explicit sex-based line drawing,[185] Justice Alito kept insisting that the Government was trying to apply *Bostock*, which allowed him to add a comment that was no longer necessary but sounded awfully similar to Project 2025 messaging: "*Bostock* involved the interpretation of particular language in a particular statute. And this is not a question of statutory interpretation. It's a question of the application of the Equal Protection Clause of the Fourteenth Amendment."[186]

Third, the discussion was infused with conservative claims aimed at undermining the authenticity of transitioning by inflating narratives of "detransition" and regret and linking them to patients' young ages. For example, Justice Kavanaugh, who led this line of comments, stated: "[S]ome kids will suffer who get the treatment and later wish they hadn't and want to detransition."[187] Both regret and undoing a transition process are rare.[188] The phenomena are often unrelated and conflated by opponents because people stop treatments and re-identify in alignment with their assigned sex, not due to remorse but because of other factors such as social pressure, harassment, and economic constraints.[189] And,

180. *Skrmetti* Transcript, *supra* note 8, at 16.
181. *Id.* at 18.
182. *Id.* at 50.
183. *See, e.g.*, *id.* at 49 (Kavanaugh, J.) and 91 (Roberts, C.J.).
184. *Id.* at 20.
185. *Id.* at 20–21.
186. *Id.* at 21.
187. *Id.* at 103.
188. *Id.* at 47, 49.
189. *See, e.g.*, *Detransitioning aka Retransitioning - Q&A*, GENDERGP, https://support.gendergp.com/portal/en/kb/articles/detransitioning-retransitioning-q-a [https://perma.cc/88R8-WXQK] (collecting studies that have "found that around 90% of

to the extent these phenomena occur, they are also not necessarily associated with being treated before adulthood. Yet, the claim that transitioning is an unnatural process that people often regret and undo is a common theme in the conservative anti-trans campaign.[190] This position helps portray the treatment bans as protective of minors rather than hostile to them. In this telling, the bans are needed, to use Justice Alito's words, "to make sure that the future of these minors is properly respected even though they personally cannot make mature judgments about potentially irreversible procedures."[191]

Fourth, several Justices attempted to deny that the trans community deserves the Constitution's protection. Justice Barrett suggested there is not enough de jure history of institutional discrimination against trans people,[192] holding this position even after Mr. Chase Strangio, who argued on behalf of the private plaintiffs, reminded her of legal bans on cross-dressing and military service.[193] Along the same lines, Justice Alito pressed the point of immutability as necessary for protecting a minority group.[194] When Mr. Strangio replied that transition has roots in biology, which "would satisfy an immutability test,"[195] Justice Alito disagreed. He pointed to "individuals who are gender fluid" that, to him, prove that "it's not an immutable characteristic,"[196] insinuating that transitioning is a choice one can avoid to escape discrimination or even that transness itself is illusive.

Fifth, and probably the most indicative of the impact of conservative ideology on the discrimination question, was Justice Gorsuch's surprising silence. When he first skipped his turn during the seriatim questioning of the Government,[197] there was still a possibility that it was because the argument aligned with his reasoning in *Bostock*. However, Justice Gorsuch then remained quiet in the face of Tennessee's tenacious refutation of any suspect classification related to sex.[198] While reticence is generally difficult to decode, this was a signal that even Justice Gorsuch, who once believed it was impossible to target trans people

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people who return to their assigned genders at birth in the United States do not do so because of regret or dissatisfaction, but rather because of pressure from family, school, work, or society to conform to cis gender norms").

190. *See, e.g.*, Grant Atkinson, *Preventable Tragedies: Why De-Transitioners Are Suing Doctors*, ALL. DEFENDING FREEDOM (Oct. 14, 2024), https://adflegal.org/article/preventable-tragedies-why-de-transitioners-are-suing-doctors/.

191. *Skrmetti* Transcript, *supra* note 8, at 85 (cleaned up).

192. *Id.* at 59–60.

193. *Id.* at 89–90, 109–10.

194. *Id.* at 89.

195. *Id.* at 96.

196. *Id.* at 97–98.

197. *Id.* at 102.

198. *Id.* at 145–48.

without engaging in sex-based discrimination, might be willing to align himself with the rising anti-trans campaign on the right.

Overall, the conservative Justices seemed united in their willingness to turn a blind eye to the evident distinction that the treatment bans make between trans and cisgender adolescents, one that cannot be made without relying on their birth sex. Justice Thomas, for example, went as far as proposing that Tennessee's ban is "simply a case of age classification."[199] All that while, as Justice Kagan phrased it: "The whole thing is imbued with sex," making it a "dodge to say that this is not based on sex."[200]

The conservative blunt denial of clear discrimination during oral arguments also raises the specter that *Skrmetti* will become an enhancement of the attack on gender equality in *Dobbs*.[201] Recall that in *Dobbs,* Justice Alito engaged in a brief effort to resurrect the 1974 decision in *Geduldig v. Aiello*, which found no sex-based discrimination in denying disability benefits due to pregnancy.[202] When he directed questions to Solicitor General Prelogar in *Skrmetti*, Justice Alito relied on this *Dobbs* moment, challenging her with what he started calling "the *Geduldig*/*Dobbs* Standard."[203] He then suggested that this "standard"—created out of an old case and a brief later comment referring to it—can remove the equal protection problem not only from laws that, like in *Dobbs*, do not mention sex but also from those laws that, like Tennessee's treatment ban, explicitly make distinctions based on sex.[204]

4. Beyond Equal Protection

While this Article raises the high marks of conservative ideology in the *Skrmetti* majority's analysis and during the oral arguments at the Supreme Court, it does not suggest that every judge with a conservative viewpoint would or should reach a similar conclusion. Indeed, Judge Richardson, whose decision in *Skrmetti* was reversed by the Sixth Circuit, is not the only one on the bench who, despite being a Republican appointee, applied *Bostock* and found a treatment ban discriminatory and

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199. *Id.* at 6.

200. *Id.* at 125–26.

201. I thank Professor Melissa Murray for this insight.

202. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245-46 (2022) (rejecting the claim that the Equal Protection Clause can be a basis for an abortion right and, while quoting *Geduldig v. Aiello*, 417 U.S. 484 (1974), stating that "[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other'").

203. *Skrmetti* Transcript, *supra* note 8, at 22.

204. *Id.* at 25-27; *see also* Katie Eyer, *Transgender Equality and* Geduldig *2.0*, 55 ARIZ. ST. L.J. 475 (2023).

thus unconstitutional. For example, in another litigation regarding a treatment ban in Alabama, another Trump appointee, Judge Liles Burke,[205] found the ban to present a sex-based classification unlikely to survive heightened scrutiny review.[206]

Instead, the point made in this section is more nuanced. Discrimination claims present a unique analytical tension between the law, on the one hand, and the conservative approach to gender identity, on the other. The Equal Protection Clause clearly demands courts identify suspect classifications and apply heightened scrutiny to them. However, this straightforward legal task requires conservative judges to work against their movement's organized campaign to block what it calls "gender ideology" and to admit that "gender identity is real."[207]

More particularly, to carry out a discrimination analysis of the treatment bans, judges need to consider whether treatments for gender dysphoria should be available because they are offered to *similar others*. Yet, such an undertaking involves an admission that transgender and cisgender individuals are, in fact, similar, which conflicts with the leading conservative position on the issue. While these two conclusions, of realness and similarity, are legally merited and also essential from a liberal perspective, they present more difficulty for jurists politically affiliated with the conservative movement.

Fully recognizing the deep tension illuminated in this section between equal protection claims and conservative ideology has two practical consequences. First, in a Court tasked with reviewing a decision that rejected two, not one, constitutional challenges, this tension makes it not only legally incorrect but also highly consequential and inherently unjust to selectively focus only on the one challenge that has diminished chances to succeed. The only way to avoid such a biased posture and the injustice it stands to produce is to refrain from deciding the matter on such partial grounds.

There is still a way for the Court to overcome the problem it created in *Skrmetti* when it initially granted only the Government's petition and then heard only the discrimination challenge. While the Trump Administration changed course in handling the case, it is not too late to correct the mistake. Indeed, a single conservative Justice could join the liberals on the Court to enable the granting of the still-pending petitions of the private plaintiffs. Relatedly, during the oral arguments, Justice

205. *Burke, Liles Clifton*, FED. JUD. CTR., https://www.fjc.gov/history/judges/burke-liles-clifton [https://perma.cc/RGM7-9VH7].

206. *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1138, 1147–48 (M.D. Ala. 2022).

207. Several courts discussing the treatment bans explicitly made this statement in response to counterclaims. *E.g.*, *Doe v. Ladapo*, No. 23cv114, 2024 U.S. Dist. LEXIS 105334, at *12 (N.D. Fla. June 11, 2024).

Barrett made Tennessee explicitly agree when asking: "[T]he parental rights question is not before the Court, so it would be open to parents to continue to press that point in other cases?"[208] However, it is difficult to see what might justify waiting for "other cases" and why Justice Barrett's clear awareness of relevant claims would not lead her to support considering this key issue instead of artificially and harmfully avoiding it. Perhaps Justice Barrett highlighted the option of future litigation because she wanted to affirm SB1 but conceal the cruelty of such a decision with a hollow consolation that not all is lost. However, even before the decision in *Skrmetti* is written, it should be clear that the two challenges should have never been separated, and there is no justification for keeping one of them for another day when actual parents of minors harmed by the ban are currently appealing for the Court's protection of their rights.

Second, realizing that ideology will probably not allow conservative Justices to admit that a suspect classification on the basis of sex and transgender status underlies the treatment bans requires trans advocates to urgently shift their focus. Regardless of how high the liberal belief in the strength of the equality claims is, it is pragmatically crucial to find alternative ways to ensure transgender minors can get the healthcare they sorely need. While there are some important alternatives to explore at the state level,[209] this Article focuses on one that is particularly relevant to the Supreme Court in its current structure. It proposes that it might be possible to convince at least *some* of the conservative Justices to save healthcare for gender dysphoria without having to reach the question of discrimination. While it is true that the conservatives on the Court could exercise their joint power to write a decision that conflicts with decades of constitutional analysis of sex-based classifications, it is also possible that such a decision "won't write,"[210] or that, at the very least, some of them would prefer to avoid writing it. To advance this possibility (or for the more troubling option of separate and delayed litigation), the coming Part offers a thorough examination of the Due Process challenge not from a liberal perspective but from a conservative one.

208. *Skrmetti* Transcript, *supra* note 8, at 142.

209. *See, e.g.*, Morgan Munroe & Kathrina Szymborski Wolfkot, *State Constitutional Protections for Transgender People After* Skrmetti, ST. CT. REP. (Dec. 11, 2024), https://statecourtreport.org/our-work/analysis-opinion/state-constitutional-protections-transgender-people-after-skrmetti [https://perma.cc/9TTW-HFV8].

210. Michael C. Dorf, *The* Skrmetti *Opinion the SCOTUS Conservatives Seem To Want "Won't Write,"* DORF ON L. (Dec. 9, 2024), https://www.dorfonlaw.org/2024/12/the-skrmetti-opinion-scotus.html [https://perma.cc/N656-Q74P].

II. THE DUE PROCESS CHALLENGE

The private plaintiffs in *Skrmetti* are trans minors and their supportive parents and doctors. Critical to the discussion in Parts II and III is the alignment of interests among them as they seek to invalidate the treatment bans: The plaintiffs are *united* in their evaluation that the minors' health will be best served by assisting them in handling their gender dysphoria by using puberty blockers and hormone therapy, without delaying care until adulthood. When parents and their children agree on a course of treatment that was recommended and approved by medical professionals, there is no one better to make the decisions of whether and when to undergo treatments. Therefore, the parents' argument that the Due Process Clause protects their fundamental right to decide how to respond to their children's diagnosed gender dysphoria is uniquely sound.

This Part focuses on the Due Process challenge and the role of parental rights in deciding the constitutional validity of the treatment bans. Starting from the *Skrmetti* litigation, it details the plaintiffs' argument and offers a critique of its rejection by the Sixth Circuit's majority. It then presents new evidence of conservative disagreement regarding the conflict between the bans and parental rights. The following two sections show that the due process discussion must be part of any proper review of *Skrmetti* by the Supreme Court, that no one on the conservative side denies the constitutional status of parental rights, and that at least some conservatives have already expressed the belief that those rights should not be compromised even if they are reluctant to recognize transgender rights or admit the importance of gender-affirming care.

A. Due Process and Parental Rights in Skrmetti

Even before it analyzed the plaintiffs' equal protection arguments, the majority in *Skrmetti* discussed at length their claim that the treatment bans are unconstitutional because they violate the Fourteenth Amendment's guarantee that "[no] State [shall] deprive any person of life, liberty, or property, without due process of law."[211] It accepted that, despite its name and wording, the Clause is not merely procedural and has for more than a century included "substantive protections 'against government interference with certain fundamental rights and liberty interests.'"[212] Citing the Supreme Court's decision in *Troxel v.*

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211. U.S. CONST. amend. XIV, § 1.

212. *L.W. v. Skrmetti*, 83 F.4th 460, 472 (6th Cir. 2023) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

Granville,[213] it further agreed that, in general, these fundamental rights have long included parents' right "to make decisions concerning the care, custody, and control of their children."[214]

The majority even partially embraced the 2019 unanimous Sixth Circuit decision in *Kanuszewski v. Michigan Department of Health & Human Services*,[215] thereby accepting that it previously specifically recognized "parents' rights 'to make decisions concerning the *medical care* of their children.'"[216] However, the majority eliminated an important part of the sentence it cited, thus blurring some of its constitutional meaning. As only the dissent cared to fully cite and highlight,[217] what the original decision in *Kanuszewski* established was that "[p]arents possess *a fundamental right* to make decisions concerning the medical care of their children."[218]

So, if all this is undisputed, how could the treatment bans *not* infringe on parents' right to make decisions concerning the medical care of their children? The majority in *Skrmetti* attempted to answer this question by artificially slicing parental rights vis-à-vis their children's medical care into two types: negative rights to refuse medical care "compelled" by the state versus "affirmative" rights to seek needed medical treatments.[219] The majority asserted that constitutional parental rights to make decisions regarding children's medical care are limited to the first (negative) half of rights. Under this bifurcated view, the other half of rights, the affirmative ones, are "new" parental rights that should not "*expand* the concept of substantive due process."[220] The majority thus concluded that the treatment bans do not conflict with parents' constitutional rights and are hence not subject to heightened scrutiny.

This last-minute turn away from undisputed parental rights in the healthcare sphere is unfounded for at least eight reasons. Combined, these deep flaws portray the majority's analysis as outcome-driven, aimed at saving the treatment bans while disregarding the conventional legal analysis of parental rights.

First, the new distinction between negative and affirmative rights has very little meaning in practice, and as such, it cannot support the constitutionality of the treatment bans. When the state removes *all* treatment options other than its own, it effectively *compels* its own

213. 530 U.S. 57 (2000).

214. *Skrmetti*, 83 F.4th at 475 (quoting *Troxel*, 530 U.S. at 66).

215. 927 F.3d 396 (6th Cir. 2019).

216. *Skrmetti*, 83 F.4th at 475–76 (emphasis added) (quoting and discussing *Kanuszewski*, 927 F.3d at 418).

217. *Id.* at 508–11 (White, J., dissenting) (quoting the sentence four times).

218. *Kanuszewski,* 927 F.3d at 418 (emphasis added).

219. *Skrmetti*, 83 F.4th at 476.

220. *Id.* at 473 (emphasis added).

favored treatment. Namely, by enacting the treatment bans, red states impose on parents and minor patients their preferred method of handling gender dysphoria before adulthood—waiting. To prove the point, this compelled response to the suffering of trans minors was even given a medicalized name: "the watchful waiting approach."[221] The approach has also been persistently promoted by conservative doctors and advocacy groups, including some that participated in the *Skrmetti* litigation.[222] As a result of those promotion efforts, the watchful waiting approach has been named and discussed in several court decisions related to the treatment bans, including that of the Eleventh Circuit that affirmed Alabama's ban.[223]

Although the phrase "watchful waiting" does not appear in *Skrmetti*, the medical approach it captures was acknowledged and even branded reasonable. The court explained that the state's preferred "answer" to gender dysphoria is "*to treat the condition* without physical interventions . . . until the patient reaches 18," or, in short, "waiting."[224] Therefore, the treatment bans do more than limit access to specific treatments and take away so-called affirmative rights. In fact, they also implicate "negative" rights because they force—against parents' judgment—the watchful waiting approach. This reality counts as a

221. *See, e.g.*, Jason Rafferty, Am. Acad. of Pediatrics Comm. on Psych. Aspects of Child & Fam. Health, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, PEDIATRICS, Oct. 2018, at 1, 4 (criticizing the watchful waiting approach to gender dysphoria); James M. Cantor, *Transgender and Gender Diverse Children and Adolescents: Fact-Checking of AAP Policy*, 46 J. SEX & MARITAL THERAPY 307 (2020) (countering the American Academy of Pediatrics' approach as presented by Rafferty and defending the watchful waiting approach). The term "watchful waiting" is broadly used to describe a medical approach regarding various health issues. *See, e.g.*, *Watchful Waiting*, NAT'L CANCER INST.: NCI DICTIONARY CANCER TERMS, https://www.cancer.gov/publications/dictionaries/cancer-terms/def/watchful-waiting [https://perma.cc/38NF-5ZPW] (defining the approach as "[c]losely watching a patient's condition but not giving any treatment unless signs or symptoms appear or change"). However, in the context of the treatment bans discussed in this Article, the approach typically does *not* include the active part of turning to other treatments if "symptoms appear or change." An exception is mentioned in Dr. James Cantor's article, where the approach is described as including, rather than excluding, puberty blockers. Cantor, *supra*, at 309–10. However, in *Skrmetti*, the court explicitly excluded puberty blockers from such an approach. *See Skrmetti*, 83 F.4th at 480.

222. *See, e.g.*, Brief of Alliance Defending Freedom as Amicus Curiae in Support of Appellants & for Reversal, *L.W. v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023) (No. 23-5600) [hereinafter Alliance Defending Freedom Amicus Brief] (referencing the approach by Dr. Cantor). *See also* HERITAGE STATE BANS MEMO, *supra* note 104, at 9 (advancing the approach by The Heritage Foundation).

223. *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1217 (11th Cir. 2023) (describing the testimony of Dr. James Cantor as "a clinical psychologist and neuroscientist who was called as an expert on psychology, human sexuality, research methodology, and the state of research on gender dysphoria," who opined, on behalf of Alabama, that "gender dysphoria *can be treated* with a 'watchful waiting approach'" (emphasis added)).

224. *Skrmetti*, 83 F.4th at 480 (emphasis added).

constitutional infringement on parents' fundamental rights even accepting *arguendo* that those include only negative rights to block unwanted government intrusions. If parents have a constitutional right to refuse the *harmless* storage of blood samples, as held in *Kanuszewski* and as *Skrmetti* affirms,[225] they surely should have a right to refuse watchful waiting when the approach entails risks to their children.

Second, none of the cases cited by the majority support its new distinction between negative and thus protected parental rights, on the one hand, and affirmative and thus vulnerable parental rights, on the other. All the cases presented as relating to patients' affirmative choices support, at best, a lack of constitutional right to receive *a particular* treatment when such treatment is *not available* to others.[226] By contrast, the treatment bans forbid *all* medical treatments other than the previously discussed watchful waiting approach, and they do so while the same treatments *are available* to others.

Third, limiting parents' rights to negative rights to object to government intrusion betrays the legal history of parental rights. In a fascinating reflection on over a century of recognizing parental rights as constitutional rights, Professor Ira Lupu describes the legacy of a duo of cases, *Meyer v. Nebraska* and *Pierce v. Society of Sisters*.[227] In both, the Supreme Court recognized, a hundred years ago, "parents' rights to control their children's upbringing,"[228] affirming parents' rights to make *certain choices* that the state cannot simply eliminate as a way to impose its own preferences.[229] As Professor Lupu explains, in both *Meyer* and *Pierce* and in later cases that followed them, courts emphasized that "[*a*]*nimus* toward part of the population . . . cannot justify interference with parent[s'] choice[s]."[230]

Significantly, *Meyer* and *Pierce* are comparable to the treatment bans of our time. They both challenged educational bans: one forbidding the study of foreign languages (*Meyer*) and the other prohibiting the attendance of private or parochial schools (*Pierce*).[231] The Supreme Court struck down both bans, affirming parents' right to select their children's

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225. *Id.* at 475–76 (discussing *Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396 (6th Cir. 2019)).

226. *Id.* at 473–75.

227. Ira C. Lupu, *The Centennial of* Meyer *and* Pierce*: Parents' Rights, Gender-Affirming Care, and Issues in Education*, J. CONTEMP. LEGAL ISSUES (forthcoming 2025) (manuscript at 3, 24), https://ssrn.com/abstract=4682886 (analyzing the legacy of *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)).

228. *Id.* at 3.

229. *Id.*

230. *Id.* at 11 (emphasis added).

231. *Id.* at 2–3.

content and place of education.[232] The legacy of *Meyer* and *Pierce* hence teaches us that parental rights have always included a right to choose from a range of legitimate options, which the state cannot limit without presenting compelling justification and narrowly tailored measures. *Skrmetti*'s reasoning completely contradicts this well-established understanding.

Fourth, despite the majority's effort to deny the relevance of the Supreme Court's decision in *Parham v. J.R.*,[233] this decision is a crucial precedent. Properly read, it does not allow for the severe undermining of parental rights permitted in *Skrmetti*. *Parham* focused on parents' ability to choose to hospitalize minors in response to their mental health struggles.[234] In this medical context, the Court stated that although parents' rights to pursue medical care are not "absolute," parents "retain *plenary* authority *to seek* such care for their children, subject to a physician's independent examination and *medical judgment*."[235]

Notably, the parental right that *Parham* recognized back in 1979—the right "to seek" medical care based on "medical judgment"—is precisely the right at issue in *Skrmetti*—the one the court classifies as affirmative and thus unprotected. There is, therefore, no basis for the majority's presentation of a recognition of a right to seek medical care according to doctors' counsel as an expansion of the concept of substantive due process "to new areas."[236] In truth, there is nothing "new" about parents seeking medical care according to doctors' recommendations; the Supreme Court recognized their right to do so many decades ago.

Fifth and related, *Parham* is not only a relevant precedent, it should also apply to the treatment bans with an enhanced force. In *Parham*, the Supreme Court recognized parents' right to choose medical treatment despite their children's objections. In *Skrmetti*, by contrast, the parents seek treatments that their children *request* and that are recommended by doctors, placing the state alone in its objection to the treatment. Since parental rights were acknowledged even in the presence of a conflict between parents and their children, they surely should be protected when consensus rather than conflict exists.

Sixth, in *Skrmetti*, the majority stated that the 2019 Sixth Circuit decision in *Kanuszewski* "does not alter" its analysis because it relates

232. *Id.*

233. *L.W. v. Skrmetti*, 83 F.4th 460, 476–77 (6th Cir. 2023) (discussing *Parham v. J.R.*, 442 U.S. 584 (1979) and denying its relevance because it related to procedural, rather than substantive, due process rights). Limiting *Parham* to procedural due process is as ideological of a move as the effort to roll back *Bostock* previously discussed. *See supra* Section I.B.2.

234. *Parham*, 442 U.S. at 585.

235. *Id.* at 604 (emphasis added).

236. *Skrmetti*, 83 F.4th at 473.

only to the negative parental right to veto a state's action in the medical context.[237] Alas, this presentation is misleading. As the dissent pointed out, "[t]he court in *Kanuszewski* never framed the right as solely to deny unwanted care."[238] Instead, untouched by ideological debates regarding gender, the unanimous decision in *Kanuszewski* substantiated parental rights in the medical context by fully embracing *Parham*'s broad version of rights. Remarkably, the decision repeated *Parham*'s entire emphasis regarding parents' "plenary authority to seek" medical care for their children,[239] when it is unmistakable that seeking care is an affirmative, not negative, act. Therefore, *Kanuszewski* should have altered the majority's analysis in *Skrmetti*, preventing the sudden birth of a baseless distinction between negative and affirmative rights.

Seventh, the majority in *Skrmetti* pointed to the lack of precedents that pointedly articulate parents' "affirmative right to specific treatments" for their children.[240] However, if *Parham* and *Kanuszewski* are the most relevant precedents available, it is only because the treatment bans themselves are "totally unprecedented."[241] Indeed, never before have states tried to limit *some* parents, but not others, from seeking medical treatments recommended by doctors for their children.

Eighth, when the *Skrmetti* majority turned to policy justifications, it revealed another major flaw in its reasoning. The court cautioned that recognizing a constitutional parental right to seek medical care for children "would mean that the state and federal legislatures would lose authority to regulate the healthcare industry" each time medical professionals disagree that regulation is justified.[242] The problem with this argument, and with the majority's broader celebration of the state's regulative power in the medical field,[243] is that it turns constitutional analysis on its head. Instead of starting by asking whether the treatment bans implicate a constitutional right and only then proceeding to search for possible justifications under the corresponding level of scrutiny, the court *reversed* the order.

The court opened with justifications for regulation, concluding that states have "broad power" to regulate the medical field,[244] which they

237. *Id.* at 475–76.

238. *Id.* at 510 (White, J., dissenting).

239. *Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396, 418 (6th Cir. 2019) (quoting *Parham*, 442 U.S. at 604).

240. *Skrmetti*, 83 F.4th at 476.

241. Lupu, *supra* note 227, at 31.

242. *Skrmetti*, 83 F.4th at 477–78.

243. *Id.* at 473 ("State and federal governments have long played a critical role in regulating health and welfare, which explains why their efforts receive 'a strong presumption of validity.'" (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993))).

244. *Id.*

adequately used when they enacted the treatment bans.[245] It then relied on this conclusion to find that "parents do not have a constitutional right to obtain *reasonably banned* treatments for their children."[246] However, this sequence vastly departs from conventional constitutional review because it purports to decide whether constitutional rights are implicated *after* (instead of before) applying the proper standard of review. Worse, such a reversed order also creates circular reasoning: No constitutional right is implicated and requires special review because none exists. But why does none exist? Because it was already decided—without *any* review—that the statute under challenge is a reasonable regulation. In short, while no one has disputed the state's power to regulate the medical field, the question now pending at the Supreme Court is whether this power was exercised appropriately. The Sixth Circuit erred when it decided that the treatment bans were reasonable *before* considering their possible conflict with constitutional rights.

Critically, this inverted analysis led the majority in *Skrmetti* to subject the treatment bans to the wrong standard of review. While the court applied a rational basis review, this is not the proper standard for considering whether there was a violation of a right as fundamental as the right of parents to seek medical care for their children. Instead, when fundamental rights are at stake, a significantly more stringent level of scrutiny is required: intermediate (heightened) or strict. The question of which of the two standards should apply to the treatment bans will be discussed in Part III. Still, be the elevated standard as it may, the reality is that the Sixth Circuit used the wrong standard when it applied rational basis review to the treatment bans despite their evident impact on constitutionally recognized parental rights. According to any standard that is more stringent than the minimal one, the treatment bans cannot possibly survive constitutional review. As explained in the discussion of the Equal Protection challenge in Part I, the bans' broad and total nature, together with the fact that the treatments are safe enough to be offered to cisgender minors, must lead to their invalidation.[247]

All told, the goal of exposing those severe flaws in the *Skrmetti* decision's analysis of parental rights is not merely doctrinal. Rather, these problems should concern the Justices regardless of ideological affiliation, encouraging them to carefully consider the due process issue before deciding whether to affirm SB1 as constitutional. Yet, conservative Justices should particularly welcome such consideration beyond the general judicial aspiration for legal accuracy and the judiciary's duty to adhere to the Constitution. Instead, as Part III will

245. *Id.* at 473–75 (citing decisions affirming regulation of medical treatments and stating "[a]s in these cases, so in this one, indeed more so in this one").

246. *Id.* at 475 (emphasis added).

247. *See supra* Part I.

further explain, some conservative Justices have deep ideological reasons to be critical of *Skrmetti*'s conceptualization of the relationship between parents, doctors, and states. Before turning to this discussion, the coming section introduces evidence that some conservatives, in and outside of courts, already openly acknowledge the stark conflict between the treatment bans and parental rights.

B. Conservatives Divided

As treatment bans have been spreading in red states, and as minors, parents, and doctors have asked courts to strike them down, some conservatives have started to express concerns. By and large, their qualms centered on the bans' rare level of intervention in parental rights. This section traces leading examples of this line of conservative thinking within the judiciary, among advocacy groups, and even in the polity. Far from suggesting that this is currently the dominant tone in the conservative moment, this section describes the rise of internal disagreements to explain and advance the *possibility* that some conservative Justices would attribute constitutional significance to the tension between the treatment bans and long-recognized fundamental rights of parents.

On the judiciary, several judges who issued preliminary injunctions against the treatment bans or dissented from decisions approving them are Republican appointees. These judges emphasized the importance of the family unit, the autonomy of parents, and the hazards of state overreach. Indeed, this happened even in the *Skrmetti* district court litigation. Judge Richardson, a Trump appointee, fully adopted broad parental rights. He stated that "parents have a fundamental right to direct the medical care of their children, which naturally includes the right of parents to request certain medical treatments on behalf of their children."[248] At the same time, he also set clear boundaries for the regulative state and its intervening powers. He wrote: "If Tennessee wishes to regulate access to certain medical procedures, it must do so in a manner that does not infringe on the rights conferred by the United States Constitution, which is of course supreme to all other laws of the land. With regard to SB1, Tennessee has likely failed to do just this."[249]

Remarkably, Judge Richardson alluded to the political dimension of his decision, foretelling that his position "will likely stoke the already controversial fire regarding the rights of transgender individuals in American society."[250] He also predicted that as a result of his ruling,

248. *L.W. v. Skrmetti*, 679 F. Supp. 3d 668, 684 (M.D. Tenn. 2023).
249. *Id.* at 718.
250. *Id.*

"many will be disappointed" while "many others will be pleased."[251] Although Judge Richardson did not elaborate on this point, the context elucidates that those who will be disappointed are on the conservative side of the controversy. To which he responded, almost apologetically, with an emphasis that his decision follows the relevant case law and evidence while also aligning with other courts' decisions.[252]

Similarly, in litigation regarding a treatment ban in Alabama, another Trump appointee, Judge Liles Burke, cited the Supreme Court's precedent in *Troxel* with special insistence on the constitutional status of parental rights. He stated: "A parent's right 'to make decisions concerning the care, custody, and control of their children' is one of '*the oldest of the fundamental liberty interests*' recognized by the Supreme Court."[253] For that reason, Judge Burke, like Judge Richardson, subjected the treatment ban before him to the most stringent standard of review: strict scrutiny.[254] As he applied this standard, he expressed reluctance to expand government power at parents' expense, just like Judge Richardson did. Citing the Supreme Court in *Parham*, he emphasized: "[T]he fact that a pediatric treatment 'involves risks does not automatically transfer the power' to choose that treatment 'from the parents to some agency or officer of the state.'"[255] He then added that "[p]arents, pediatricians, and psychologists—not the State or this Court—are best qualified to determine whether transitioning medications are in a child's best interest on a case-by-case basis."[256]

Another jurist who took a similar position is Justice Debra Lehrmann, an elected Republican sitting on the Supreme Court of Texas.[257] Only a few days after the U.S. Supreme Court agreed to hear *Skrmetti*, the Texas Supreme Court reversed a temporary injunction that blocked Senate Bill 14, a Texas treatment ban, from taking effect.[258] Eight Justices rejected challenges by minors, parents, and doctors who argued that the treatment ban violates the Texas Constitution.[259] The plaintiffs raised three constitutional challenges: infringement of parental rights, deprivation of physicians' property interest in their medical licenses, and discrimination against transgender individuals.[260]

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251. *Id.*
252. *Id.* at 718–19.
253. *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1144 (M.D. Ala. 2022) (emphasis added) (quoting *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000)).
254. *Id.* at 1145.
255. *Id.* (quoting *Parham v. J.R.*, 442 U.S. 584, 603 (1979)).
256. *Id.* at 1146.
257. *Supreme Court Justice Debra Lehrmann*, TEX. TRIB., https://www.texastribune.org/directory/debra-lehrmann/ [https://perma.cc/VM7K-DA63].
258. *State v. Loe*, 692 S.W.3d 215, 225, 239 (Tex. 2024).
259. *Id.* at 215–16, 222.
260. *Id.* at 227.

Against eight of her colleagues who rejected all three challenges, Justice Lehrmann wrote a lengthy dissent in which she focused exclusively on *one* aspect of the majority's decision—fundamental parental rights. She explained being "compelled" to dissent because the majority "puts *all* parental decisions at risk of being overruled by the government."[261] This statement seems to reflect more explicitly than many others the primary concern of conservatives who disagree with the treatment bans: that allowing the government into the family sphere and permitting it to intrude on parents' rights in the context of gender dysphoria treatments would create a slippery slope, which before too long would invite additional intrusions, including in matters that mean more to conservatives.

Accordingly, Justice Lehrmann's analysis focused on the issue of state-parent conflict. "At its core," she wrote at the opening of her dissent, "this case presents a foundational issue: *whether the State can usurp parental authority* to follow a physician's advice regarding their own children's medical needs."[262] While she accepted the majority's position regarding the government's general authority to regulate the practice of medicine, she highlighted that this authority is always limited by the Constitution, stressing that "limiting the *State's intrusion into private action* is the very reason for the Bill of Rights."[263]

Further, as she turned to defend broad parental rights that include the right to have minors be treated for gender dysphoria, Justice Lehrmann continued to highlight the risks of government "surveillance,"[264] "unreasonabl[e]" interference,[265] and "overreach."[266] She explained that allowing a "State's interests to supersede a fundamental right subject only to a rational-basis review" not only "has no support in precedent" but also "renders 'parental autonomy' illusory."[267] Instead, she emphasized that "[t]he State may legitimately interfere with family autonomy" only "in limited circumstances, such as 'to protect children from genuine abuse and neglect by parents who are unfit.'"[268]

Justice Lehrmann also openly decried the political partiality that motivated both the Texas legislation and the majority's opinion. The legislature, she stated, adopted "a crude and *politically expedient*

261. *Id.* at 261 (Lehrmann, J., dissenting) (emphasis added).

262. *Id.* at 259 (Lehrmann, J., dissenting) (emphasis added).

263. *Id.* at 260 (Lehrmann, J., dissenting) (emphasis added).

264. *Id.* at 267–68 (Lehrmann, J., dissenting).

265. *Id.* at 268 (Lehrmann, J., dissenting).

266. *Id.* (Lehrmann, J., dissenting).

267. *Id.* (Lehrmann, J., dissenting).

268. *Id.* at 269 (Lehrmann, J., dissenting) (quoting *In re A.M.*, 630 S.W.3d 25, 26 (Tex. 2019) (mem.) (Blacklock, J., concurring in denial of review)).

categorical prohibition" that "supersedes the autonomy of parents,"[269] "forcing [its] views on these families."[270] Then, the Texas Supreme Court approved this prohibition without explaining "why or how it distinguishes between the parental decisions that are constitutionally protected and those that are not," taking an approach of "*parental rights for me but not for thee*."[271] Such an approach relies on "ad hoc dissection" of parental rights,[272] which displays "outcome-driven decision-making."[273] Worse, as Justice Lehrmann reiterated, the problem with such an approach is that it "puts *all* parental rights in jeopardy."[274]

Critical to the focus of this Article, Justice Lehrmann even hinted at which conservative interests might be at risk when *all* parental rights are weakened. She reminded her colleagues and readers that objections to vaccines and homeschooling are also parental rights issues that might conflict with state policies and regulations.[275] Alluding again to ideological partiality, she forewarned: "Surely, whether a parent's decision will be constitutionally protected does not depend on whether the Court agrees with that decision *on personal or policy grounds*."[276]

Beyond the judiciary, several conservative groups have also departed from the conservative leading organizations that strongly support the treatment bans. For example, a group of "Conservative Officials, Advisors, and Activists," which defined its members as "Republicans and political conservatives from diverse backgrounds who have served as federal, state, and local officeholders," submitted an amicus brief to the Supreme Court *supporting* the families and *opposing* Tennessee's treatment ban.[277] The amici stated they "share the conservative principle of a commitment to limited government and respect for families and the crucial role of parents—in particular, the rights of parents to make weighty decisions about the upbringing and medical care of their own children."[278]

Accordingly, the conservative amici insisted that "[t]he State's effort to usurp the parental role and responsibility is directly contrary to the sphere of authority the Constitution reserves for parents."[279] Citing the

269. *Id.* at 262 (Lehrmann, J., dissenting) (emphasis added).

270. *Id.* at 262 n.7 (Lehrmann, J., dissenting).

271. *Id.* at 262 (Lehrmann, J., dissenting) (emphasis added).

272. *Id.* at 270–71 (Lehrmann, J., dissenting).

273. *Id.* at 261 (Lehrmann, J., dissenting).

274. *Id.* at 262 (Lehrmann, J., dissenting) (emphasis added).

275. *Id.* at 266 (Lehrmann, J., dissenting).

276. *Id.* (Lehrmann, J., dissenting) (emphasis added).

277. Brief of Conservative Officials, Advisors & Activists as Amici Curiae Supporting Petitioner at 1, *United States v. Skrmetti*, No. 23-477 (U.S. Sept. 3, 2024) [hereinafter Conservative Officials Amicus Brief].

278. *Id.*

279. *Id.* at 7–8.

former Republican Governor of Arkansas who vetoed his state's treatment ban, they maintained that "[l]aws like Tennessee's are nothing less than 'a vast government overreach.'"[280] They also shared a long list of other conservative officials who "publicly defended parental rights from legislation akin to Tennessee's."[281]

Most importantly, like Justice Lehrmann, the conservative amici also cautioned that the affirmation of treatment bans that infringe on parental rights would create a slippery slope that threatens *conservative* interests. Within the gender-identity context, they highlighted that allowing states that oppose gender-affirming care to "impose their will on parents" would lead to allowing other states that support it "to shut parents out of discussions regarding their child's gender expression."[282] The risk, they added, goes further beyond this debate because "there is no end to the kinds of parental decisions that local, state, or federal officials could hijack whenever they think they know better than parents."[283] To demonstrate how "[t]he principle of state control that Tennessee and other states espouse"[284] stands to "open Pandora's box,"[285] the amici shared examples from "jurisdictions on the other side of the culture war"[286] "that would offend" traditional conservative preferences.[287] Once deployed to prevent treating gender dysphoria, they warned, this type of government overreach would "stretch far beyond the context of transgender identity and medical care and could easily be multiplied."[288]

Critically, the conservative amici submitted their brief while knowing that the Court only agreed to hear the challenge under the Equal Protection Clause. However, much in line with this Article's argument, they claimed that parental rights cannot be separated from the discussion, even under the narrow framing ordered by the Court. In their words: "State's infringement on parental rights also violates the Equal Protection Clause," as the Court previously recognized that "'due process and equal protection principles converge' in certain contexts."[289] This happens in this case because Tennessee's ban "interferes with the fundamental right

280. *Id.* at 1 (quoting Asa Hutchinson, *Why I Vetoed My Party's Bill Restricting Health Care for Transgender Youth*, WASH. POST. (Apr. 8, 2021), https://www.washingtonpost.com/opinions/asa-hutchinson-veto-transgender-health-bill-youth/2021/04/08/990c43f4-9892-11eb-962b-78c1d8228819_story.html).

281. *Id.* at 2 & n.5.

282. *Id.* at 4–5.

283. *Id.* at 5.

284. *Id.* at 13.

285. *Id.* at 11.

286. *Id.* at 14.

287. *Id.* at 11.

288. *Id.* at 15.

289. *Id.* at 8 (quoting *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996)).

of some parents (the parents of children with gender dysphoria) . . . but not the right of other parents (*i.e.*, those with children seeking these treatments for a statutorily permissible reason)."[290]

While all these internal doubts were in legal proceedings, similar voices have also risen outside of courts. At least one major conservative organization seems to avoid direct support of the treatment bans. Americans for Prosperity (AFP), a conservative advocacy group closely associated with the Koch family,[291] has participated and submitted supportive briefs in many conservative battles against government overreach, including in cases promoting Christian interests at the expense of LGBTQ+ rights.[292] Yet, unlike most conservative advocacy groups, the AFP currently does not list any brief submitted to defend legal bans on gender care.[293]

Tellingly, in at least some of its hiring policies, the AFP explicitly commits to avoiding discrimination on the basis of gender, "gender identity," or "gender expression,"[294] thereby openly accepting gender identity as a concept and the fact it may differ from individuals' sex assigned at birth. For comparison, such acceptance is nowhere to be found in the published hiring policies of other leading organizations on the right. For example, the ADF, which is heavily involved in defending the treatment bans in courts, is far from similarly committing to refrain from gender identity discrimination in its hiring process. Quite the contrary: The ADF declares that promoting a "Christ-centered" version of "religious freedom" is its main goal, and, as mentioned earlier, it requires candidates to make a statement of faith hostile to the idea of gender identity.[295]

Internal doubts regarding state intervention in parental rights have also appeared among conservative politicians. For example, Ohio's Republican Governor, Mike DeWine, vetoed a treatment ban[296] (which

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290. *Id.* at 9.

291. Bill Allison, *Charles Koch-Tied Group Seeks To Block Trump from GOP Nomination*, BLOOMBERG, https://www.bloomberg.com/news/articles/2023-07-31/charles-koch-linked-group-raises-78-million-to-stop-trump (July 31, 2023, 3:34 PM).

292. *See, e.g.*, Brief for Amicus Curiae Americans for Prosperity Foundation in Support of Petitioners, *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023) (No. 21-476). This case involved a business refusing—for religious reasons—to sell a wedding website to same-sex couples. *303 Creative*, 143 S. Ct. at 2303.

293. *See Amicus Briefs*, AMS. FOR PROSPERITY FOUND., https://americansforprosperityfoundation.org/amicus-briefs/ (last visited Jan. 28, 2025).

294. *See, e.g.*, *Careers: Grassroots Coordinator, Iowa*, AMS. FOR PROSPERITY FOUND., https://careers.americansforprosperity.org/careers/?id=fd4044f1-f91b-4cf1-ab87-5aa4342a69a0 [https://perma.cc/TW64-S5W2].

295. *See supra* text accompanying note 102.

296. Kathryn Watson, *Ohio Gov. Mike DeWine Vetoes Bill Banning Gender-Affirming Care for Transgender Minors*, CBS NEWS (Dec. 29, 2023, 8:33 PM),

Republicans later managed to override[297]). Despite his awareness that "many Republicans will disagree with his decision," Governor DeWine expressed his belief that "gender-affirming care is a decision families should make, not the government."[298] Similarly, in Kansas, Republicans failed to get the two-thirds majority needed to override the veto of a treatment ban by a Democratic governor.[299] This happened because, at the last minute, two Republicans refused to support the ban.[300] After initially voting for the ban, Representative Susan Concannon explained her change of heart: "As a Republican, I support smaller government and parental rights. This just seems like it goes against core Republican beliefs."[301]

Moreover, and still in the political arena, when Republican ex-presidential candidate Chris Christie was asked to clarify his opposition to state restrictions on gender-affirming care during a presidential debate, he rejected the claim he was "way too out of step on this issue to be the Republican nominee." He emphasized that "Republicans believe in less government, not more," stressing: "I trust parents and . . . we should empower parents to be teaching values that they believe in in their homes without the government telling them what those values should be, and yet we want to take other parental rights away." Christie then adamantly stated that putting children's health decisions in the hands of government bureaucrats "is a very very dangerous thing to do."[302] Like Justice Lehrmann and the conservative amici in *Skrmetti*, Mr. Christie reasoned that once states are allowed in the familial sphere, it will be difficult to stop them from taking away rights that matter to the conservative movement. He warned: "You start to turn over just a little bit of this authority, the authority they're going to take from you next, you're not going to like."[303]

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https://www.cbsnews.com/news/ohio-gov-mike-dewine-vetoes-bill-banning-gender-affirming-care-for-transgender-minors/ [https://perma.cc/W5WA-GNLE].

297. *Ohio Bans Gender-Affirming Care for Minors, Restricts Transgender Athletes over Gov. Mike DeWine's Veto*, CBS NEWS, https://www.cbsnews.com/news/ohio-gender-affirming-care-ban-transgender-athletes-restrictions-mike-dewine/ [https://perma.cc/J58K-SW9J] (Jan. 24, 2024, 5:07 PM).

298. Watson, *supra* note 296.

299. Orion Rummler, *A Kansas Republican Voted for a Gender-Affirming Care Ban. But Then She Flipped*, 19TH (May 7, 2024, 9:31 AM), https://19thnews.org/2024/05/kansas-republican-veto-gender-affirming-care/ [https://perma.cc/4KM3-XHFJ].

300. *Id.*

301. *Id.*

302. For a recording of Chris Christie's answer during the debate, see The Daily Signal, *Christie Explains Views on Allowing Child Gender Transition*, YOUTUBE (Dec. 6, 2023), https://www.youtube.com/watch?v=uq6F1xdTwIY. *See also* Caitlin Yilek & Melissa Quinn, *Four Highlights from the Fourth Republican Presidential Debate in Tuscaloosa*, CBS NEWS, https://www.cbsnews.com/news/fourth-republican-debate-2023-tuscaloosa/ [https://perma.cc/DZ5T-42BS] (Dec. 7, 2023, 1:32 AM).

303. Yilek & Quinn, *supra* note 302.

Although all the above conservative voices are not dominant in a movement highly committed to opposing anything related to gender identity, their surfacing while the issue is debated in courts, especially among Republican jurists, is meaningful. It signals the special place of parental rights in conservative thinking, which might open the door for shared efforts to prevent excessive state interventions. Indeed, in the family policing context such bipartisan coalitions have already emerged to limit the state's power to police families while relying on parental rights.[304] Moreover, as the coming section reveals, opponents of the treatment bans are not the only conservatives who highly emphasize parental rights.

C. Conservatives' New Use of Parental Rights

While some conservatives have found the treatment bans an unwarranted intervention in parental rights, others have increasingly weaponized the same rights to resist what they have called "gender ideology."[305] In a new wave of statutes, lawsuits, and publications, conservatives have raised parents' constitutional rights to direct their children's navigation of various issues related to trans life. Because it relies on parental rights in the specific context of gender identity, this latest campaign undermines arguments made by defenders of the treatment bans that parents of trans adolescents do not have a constitutional right to seek adequate care for their children. Notably, as detailed below, some conservative members of the Supreme Court have recently also joined the campaign, while perplexingly persisting in their resistance to attend to parental rights in *Skrmetti*.

1. Legislation

In Congress, Republicans have recently introduced several bills embracing parental rights.[306] For example, in March 2023, the House passed House Resolution 5,[307] the Parents Bill of Rights Act, to ensure "the rights of parents are honored and protected in the Nation's public

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304. *See* Cynthia Godsoe, *Racing and Erasing Parental Rights*, 104 B.U. L. REV. 2061 (2024) (documenting and analyzing the recent rise of bipartisan coalitions to promote legal reforms that constrain states' power to intervene and punish parents who allegedly abuse or neglect their children).

305. *See supra* note 109 and accompanying text.

306. PROJECT 2025, *supra* note 174, at 345 ("H.R. 8767, the Empowering Parents Act, sponsored by Representative Bob Good (R-VA); H.R. 6056, the Parents' Bill of Rights Act, sponsored by Representative Julia Letlow (R-LA); and H.J.Res. 99, proposing an amendment to the Constitution relating to parental rights, sponsored by Representative Debbie Lesko (R-AZ)." (cleaned up)).

307. 169 Cong. Rec. H1425 (daily ed. Mar. 24, 2023).

schools."[308] The bill explicitly protects parents' rights in the context of social transitioning, including a right "to know if a school employee or contractor acts to—(i) change a minor child's gender markers, pronouns, or preferred name; or (ii) allow a child to change the child's a sex-based accommodations, including locker room or bathrooms."[309] The bill further requires schools to obtain parental consent *before* engaging in the above acts.[310]

Additionally, with relevance to gender identity issues, the bill establishes parents' right to know if a school employee or contractor acts to "treat, advise, or address a student's mental health, suicidal ideation, or instances of self-harm."[311] Although the bill does not address the provision of treatments for gender dysphoria, its recognition of parental rights vis-à-vis gender identity in the domain of education should substantiate the claims made by parents seeking gender-affirming care for their children. This is particularly true since the denial of medical treatments is more consequential than, say, the usage of pronouns.

Moreover, with a gaze to the future, the so-called Project 2025, the wish list of the conservative movement, maintains that the next administration should "[w]ork to pass a federal Parents' Bill of Rights that restores parental rights to a 'top-tier' right."[312] With special relevance to the use of a rational basis review in *Skrmetti*, and like many on the conservative side, the drafters recommend that the bill "would require the government to satisfy 'strict scrutiny'—the highest standard of judicial review—when the government infringes parental rights."[313]

Similarly, but at the state level, a rising number of red states have recently worked to enact statutes purporting to secure parental rights, including rights to resist the impact of (so-called) gender ideology in the education and healthcare spheres.[314] For this Article's purposes, the most relevant legislative effort is the one made by Tennessee because, in the *Skrmetti* litigation, the state denied parents' rights *in the same healthcare context*. Tennessee's Senate Bill 2749, entitled the Families' Rights and Responsibilities Act,[315] declares that "[t]he liberty of a parent to the care, custody, and control of the parent's child, including the right to direct

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308. Parents Bill of Rights Act, H.R. 5, 118th Cong. (as referred to S. Comm. on Health, Educ., Lab. & Pensions, Mar. 23, 2023).

309. *Id.* at 7, 9.

310. *Id.* at 30.

311. *Id.* at 9.

312. PROJECT 2025, *supra* note 174, at 344.

313. *Id.*

314. *See* Bella DiMarco, *Legislative Tracker: 2023 Parent-Rights Bills in the States*, FUTUREED (Mar. 16, 2023), https://www.future-ed.org/legislative-tracker-2023-parent-rights-bills-in-the-states/ [https://perma.cc/A5E7-FACW].

315. S.B. 2749, 113th Leg., Reg. Sess. (Tenn. 2024) (enacted).

the upbringing, education, *health care, and mental health of the child*, is *a fundamental right*."[316]

Beyond codifying long-recognized parental rights, Senate Bill 2749 defines the standard of review that state acts facially interfering with parental rights would be subject to, setting it—unlike *Skrmetti*—at the stringent level of strict scrutiny.[317] It also strengthens parental rights by adding new and enhanced enforcement measures and remedies. Those include a civil cause of action against healthcare providers, a risk to their license, and access to compensatory damages and legal costs and fees,[318] all taken from the anti-abortion playbook.

Most notably, the Tennessee Legislature has revealed awareness that its latest act to bolster broad parental rights would have directly applied to Tennessee's treatment ban, which is under Supreme Court review. To try to avoid this logical result, Senate Bill 2749 circularly states, "[t]his act does not give parents a right to medical treatments for their children that have been prohibited by state law."[319] By creating this exception, the Tennessee Legislature seeks to recognize parental rights for all parents except for those who support their transgender children—precisely the approach that Republican Justice Lehrmann aptly branded "parental rights for me but not for thee."[320] If the Supreme Court continues to ignore the parents' petitions in *Skrmetti* and lets the treatment ban stand in a state like Tennessee that also decided to strengthen the rights of all other parents, it would be perpetuating an unprecedently discriminatory allocation of parental rights.[321]

Instead, the Court should hold Tennessee to statements made by conservative proponents of parental rights. For example, in a press release celebrating the signing of Senate Bill 2749, the ADF made the following sweeping declaration: "The government should *never* intrude

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316. TENN. CODE ANN. § 36-8-103(a) (2024) (emphasis added).

317. § 36-8-103(b) (requiring government entities that substantially burden parental rights to demonstrate "a compelling governmental interest of the highest order and is the least restrictive means of furthering that compelling governmental interest").

318. *Compare* § 36-1-173(f)–(g), *with* S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021) (enacted) (becoming first to add such measures to enforce the Texas ban on abortion). *See also* Hila Keren, *Texas Anti-Abortion Law's Fear Factor Could Backfire*, BLOOMBERG L. (Sept. 23, 2021, 3:00 AM), https://news.bloomberglaw.com/us-law-week/texas-anti-abortion-laws-fear-factor-could-backfire.

319. § 36-8-104(3).

320. *State v. Loe*, 692 S.W.3d 215, 262 (Lehrmann, J., dissenting).

321. One brief submitted to the Court in *Skrmetti* has compellingly shown, based on a line of precedents, how selective protection of the rights of some parents but not others raises not only a due process issue but also "implicates equal protection rights." *See* Brief for Family Law & Constitutional Law Scholars as Amici Curiae Supporting Petitioner & Respondents in Support of Petitioner at 12, *United States v. Skrmetti*, No. 23-477 (U.S. Sept. 3, 2024). This line of argument, which could have brought parental rights back into consideration, was not discussed during the oral arguments. Instead, as mentioned, Justice Barrett emphasized that parental rights are not before the Court.

on parenting choices just because it disagrees with the parents."[322] These words should directly and forcefully apply to the treatment bans that are imposed on parents because Tennessee opposes transition and the idea of gender identity and prefers to compel parents to do nothing to help their children. Those parents, too, deserve to make "parenting choices," even if the state "disagrees" with them.

Finally, and critically, just before finalizing this Article, several Republican Senators have introduced nationwide federal legislation with a title identical to and content similar to Tennessee's Senate Bill 2749.[323] Yet, the proposed bill also adds an explicit finding that embraces *Parham*—the same precedent the Sixth Circuit found irrelevant in *Skrmetti*.[324] Notably, the bill does not include the circular exception adopted by Tennessee, limiting parental rights only when using them "would result in serious physical injury to the child or that would end life."[325] On its part, the ADF responded again with loud commands and repeated its sweeping statement: "The government should *never* intrude on parenting choices just because it disagrees with the parents' viewpoints."[326] In light of this recent development, continuing to ignore SB1's parental rights problem in *Skrmetti* is more than inconsistent; it is outright discriminatory.

2. Litigation

The project of strengthening parental rights for conservative parents who resist gender identity is further mobilized through courts. In numerous cases filed nationwide, conservative advocacy groups, such as the ADF, represent parents who raise constitutional claims grounded in parental rights to challenge school policies related to gender identity. Of particular significance for this Article's focus is one of these cases that arrived at the Supreme Court and then ended in a manner that sheds some light on the status of parental rights in this conservative Court. In *Parents Protecting Our Children, UA v. Eau Claire Area School District*,[327] a

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322. Matt Sharp, *TN Governor Signs Key Legislation To Protect Parental Rights*, ALL. DEFENDING FREEDOM (May 28, 2024) (emphasis added), https://adfmedia.org/press-release/tn-governor-signs-key-legislation-protect-parental-rights.

323. Families' Rights and Responsibilities Act, S. 204, 119th Cong. (2025).

324. S. 204 § 2(a)(6)(E).

325. § 4(b). For a discussion of why such an exception is too narrow to handle conflicts between children and their parents, as opposed to disputes between the state and parents united with their children, see *infra* Part III(B)(2).

326. Matt Sharp, *ADF Commends Congress For Introducing Key Parental Rights Bill*, ALL. DEFENDING FREEDOM (Jan. 23, 2025) (emphasis added), https://adflegal.org/press-release/adf-commends-congress-introducing-key-parental-rights-bill/.

327. 95 F.4th 501 (7th Cir. 2024), *cert. denied*, No. 23-1280 (U.S. Dec. 9, 2024).

group of parents challenged a school district's policy, but the case was dismissed by the Seventh Circuit for lack of standing, bringing the group to petition for a writ of certiorari.[328]

According to the conservative petitioners—all parents of students attending public schools within the Eau Claire Area School District in Wisconsin—the district's policy regarding "gender identity transitions" violates their parental rights.[329] They asserted that school districts across the country have adopted policies "to facilitate minor students, often of any age, changing their gender identity at school (names, pronouns, and bathroom use) in secret from their parents."[330] The petitioners further emphasized that the "Transgender - Gender Nonconforming Student Policies" they have collected "have already generated over two dozen lawsuits."[331]

Most important for grasping the conservative approach to parental rights *in the specific context of gender identity* is the fact that the parents forcefully argued for the constitutional high status of those rights while insisting they were deeply rooted in history and tradition. Due to its particular relevance to the debate in *Skrmetti*, the parents' argument is quoted below. Of special note is the heavy reliance on the *same* leading precedents that the *Skrmetti* plaintiffs have cited but the Sixth Circuit tried to distinguish—*Parham* and *Troxel*. The conservative parents argued:

> As this Court has recognized, parents have a "fundamental constitutional right to make decisions concerning the rearing of [their] own [children]," *Troxel v. Granville*, 530 U.S. 57, 70 (2000) (plurality op.), and any attempt by a government body to "supersede parental authority" is both unconstitutional and "repugnant to American tradition." *Parham v. J. R.*, 442 U.S. 584, 603 (1979). Parental rights are "perhaps *the oldest of the fundamental liberty interests recognized by this Court*," Troxel, 530 U.S. at 65 (plurality op.), having long been "established beyond debate," *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).[332]

Also significant in this line of conservative litigation is the use of *Dobbs*. Recall that the Sixth Circuit majority in *Skrmetti* analyzed the Supreme Court's decision in *Dobbs* as operating to *limit* parental rights because it framed the dispute narrowly as related to a specific treatment

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328. *Id.* at 506.
329. *Parents Protecting* Cert. Petition, *supra* note 49, at i (question presented).
330. *Id.* at 1.
331. *Id.* at 1 & n.1. *See also id.* at 13 n.12 (citing cases).
332. *Id.* at 1 (emphasis added).

and also categorized this treatment as "new" and thus excluded by *Dobbs*.[333] By contrast, the ADF has used *Dobbs* in an expansive manner that *supports* parents' rights in general, regardless of any novelty that might be associated with the gender identity issues the parents raised. In a Sixth Circuit case similar to *Eau Claire*, the ADF made the following *Dobbs*-based argument:

> Our institutions presuppose—indeed, our entire society presupposes—that parents will act on behalf of their children, not the state. See *Troxel*, 530 U.S. at 66 (plurality op.) (tracing the Court's "extensive precedent" on this point). Perhaps no right, therefore, is more "essential to our Nation's 'scheme of ordered liberty'" than parents' right to make decisions for their children. *Dobbs*, 597 U.S. at 237–38.[334]

Between the two conflicting applications of *Dobbs* to the protection of parental rights, the ADF's version is the only one that aligns with the long history of those rights. *Skrmetti*'s version, on the other hand, betrays this history by merely playing what Professor Reva Siegel recently called "[t]he levels of generality game."[335]

Moreover, with much relevance to the challenges of the treatment bans in *Skrmetti* and other cases, the conservative parents in *Eau Claire* highlighted how they are "injured by the loss of control—the loss of their exclusive decision-making authority—over whether a gender identity transition is in their child's best interest."[336] The parents further stressed that the school district took the parents' authority for itself, preventing them "from saying 'no' to a transition because the District will always say 'yes.'"[337] This is, of course, precisely what the parents in *Skrmetti* have been arguing in their petitions about the treatment bans: that the state took parents' exclusive authority to itself, preventing them from saying "yes" to treatment because the state will always say "no."

Only a few days after it heard oral arguments in *Skrmetti*, the Court released its decision to deny the parents' petition in *Eau Claire*.[338] While Chief Justice Roberts and Justices Gorsuch and Barrett joined the liberal

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333. *L.W. v. Skrmetti*, 83 F.4th 460, 473 (6th Cir. 2023).

334. Brief of Tammy Fournier, a Wisconsin Mother, as Amica Curiae in Support of Plaintiffs-Appellants & Reversal, *Doe 1 v. Bethel Loc. Sch. Bd. of Educ.*, No. 23-3740 (6th Cir. Feb. 21, 2024).

335. Reva Siegel, *The Levels-of-Generality Game: "History and Tradition" in the Robert's Court*, 47 HARV. J.L. & PUB. POL'Y (forthcoming 2025).

336. *Parents Protecting* Cert. Petition, *supra* note 49, at 19.

337. *Id.*

338. *Parents Protecting Our Child., UA v. Eau Claire Area Sch. Dist.*, No. 23-1280, slip op. at 1 (U.S. Dec. 9, 2024).

Justices in this denial,[339] Justice Kavanaugh wrote that he would have granted the petition.[340] Justices Alito and Thomas dissented while adding reasoning that should matter to any judicial consideration of parental rights in the case of the treatment bans.[341] The two most conservative Justices on the Court, who saw no parental rights issue that would justify granting petitions by parents who cannot secure gender-affirming care for their children, wrote to decry the harm to the rights of conservative parents.

Critically, Justices Alito and Thomas embraced the constitutionality of parental rights in the gender identity context without any reservation. They explicitly relied on the precedent of *Troxel v. Granville* to affirm "parents' 'fundamental constitutional right to make decisions concerning the rearing of' their children."[342] They also went as far as criticizing lower courts' insistence on standing requirements, framing it as "a way of avoiding some particularly contentious constitutional questions."[343] In other words, they wanted the Supreme Court to relax procedural rules to affirm conservative parents' preferences, all while they themselves "avoid" even more "contentious constitutional questions" raised by the parents in *Skrmetti*.

The hypersensitivity to parental rights that Justices Alito and Thomas expressed in *Eau Claire* conflicts with the indifference they, and their conservative peers, have so far shown toward the rights of parents in *Skrmetti*. This is particularly astonishing given that, unlike the Wisconsin parents in *Eau Claire*, the Tennessee parents in *Skrmetti* have children who already have been injured and will continue to suffer from losing access to medical care advised by doctors. Those conflicting approaches demonstrate a position of "parental rights for me but not for thee,"[344] where only conservative parents' views on gender identity issues are respected, while parents who decide to support their trans children are completely disregarded. As I noted elsewhere: "If our Constitution protects parents' autonomy regarding their children's upbringing, how can the protection apply only to parents who oppose responsiveness to gender-identity issues?"[345]

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339. *See id.*

340. *Id.*

341. *Id.* (Alito, J., dissenting).

342. *Id.* (Alito, J., dissenting) (quoting *Troxel v. Granville*, 530 U.S. 57, 70 (2000)).

343. *Id.* at 2 (Alito, J., dissenting).

344. Recall again Justice Lehrmann's criticism, see *supra* note 271 and accompanying text.

345. Hila Keren, *Alito and Thomas Have Already Taken the Most-Contradictory Positions of the Supreme Court Term,* SLATE (Dec. 16, 2024, 5:40 AM) [hereinafter Keren, *Alito and Thomas Contradictory Positions*], https://slate.com/news-and-

There is, however, a possible silver lining. As mentioned earlier, during the oral arguments in *Skrmetti*, both Justices Barrett and Kavanaugh showed some awareness of and interest in parents' rights.[346] While Justice Barrett's comments in *Skrmetti* can be interpreted as anything between procrastination and a fig leaf, Justice Kavanaugh's later position in *Eau Claire* suggests he might be open to a comprehensive consideration of parents' rights in the gender care setting. After all, Justice Kavanaugh chose not to join Justices Alito and Thomas' suggestion in *Eau Claire* that parents' rights are only implicated when school policies "[encourage students] to transition to a new gender or assists in that process."[347] Only time will tell if Justice Kavanaugh will show consistency and support granting the still-pending petitions of the *Skrmetti* parents or any forthcoming similar petitions that Justice Barrett seemingly invited during the oral arguments.

There is only one point that Justices Alito and Thomas were right about in *Eau Claire*: When parents' constitutional rights are at risk, courts have a duty to "carry out their 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'"[348] Nevertheless, these words cannot be limited to conservative parents; they "should be forcefully applied to *Skrmetti*, in which children's well-being and parents' duty to care for them are on the chopping block."[349]

Going back to conservative parents' lawsuits challenging school policies related to gender identity, it is notable that so far, they have failed.[350] Many, like *Eau Claire*, were dismissed for lack of standing because the parents' children were cisgender and thus were not impacted by the policies.[351] Other cases were dismissed as moot because the parents moved their children out of the challenged school district.[352] Importantly, neither of these procedural problems is relevant to the parents in *Skrmetti*, whose children were severely injured by the treatment bans and who also have not moved their children to another state.[353]

In any case, regardless of the results of the conservative parental rights cases, what matters most is that under the rule of law properly

politics/2024/12/alito-thomas-supreme-court-term-hypocrisy.html [https://perma.cc/NAM3-Z98U].

346. *See supra* Section I.B.3.

347. *Parents Protecting Our Child.*, slip op. at 1 (Alito, J., dissenting).

348. *Id.* at 2 (Alito, J., dissenting) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

349. Keren, *Alito and Thomas Contradictory Positions*, *supra* note 345.

350. *Parents Protecting* Cert. Petition, *supra* note 49, at 2.

351. *Parents Protecting Our Child. v. Eau Claire Area Sch. Dist.*, 95 F.4th 501, 503 (7th Cir. 2024).

352. *Parents Protecting* Cert. Petition, *supra* note 49, at 2.

353. *L.W.* Cert. Petition, *supra* note 34, at 1. As noted earlier, moving to avoid further injury is especially difficult when half of the country has adopted treatment bans.

applied, there should be *one* set of constitutional rights that protects all parents who are handling their children's gender identity issues, regardless of the parental approach they adopt. Subject to important standing requirements,[354] courts should first recognize that the constitutional rights of parents are implicated when their children are impacted and then prudently review the state's interest in limiting these rights.

Indeed, in some cases (discussed in Part III below), courts may, and should, find compelling interests that justify setting carefully tailored limits on parental rights, which—although fundamental—are undisputably not absolute. However, the legal actions taken by conservative parents and the opinions of Justices Alito and Thomas in *Eau Claire* firmly confirm that no one—on either side of the aisle—agrees with what the majority in *Skrmetti* did: finding that no parental rights were implicated and no heightened scrutiny was merited when the government imposed on parents its preferred approach to handling gender identity issues.[355] For that reason, the Court must find a way to attend to the argument that the treatment bans are unconstitutional due to their infringement on parental rights.

3. Publications

In addition to legislative and advocacy efforts, conservatives also engaged in disseminating the importance of parental rights via various publications. In one of them, an article titled *Parental Rights in the Age of Gender Ideology*,[356] the author, who also holds a senior position at the ADF,[357] argues that an "expansive" view of parental rights—which he

354. Having transgender children (as the term is inclusively defined in this Article) should be a standing condition. Parents of cisgender children should not be able to challenge policies that do not directly apply to their children. Nevertheless, recent litigation challenged school district policies that classify misgendering and other anti-transgender behaviors as harassment. In this case, in which the suing parents did not raise parental rights, the district court refused to enjoin the policies, but the Sixth Circuit vacated the decision and agreed to hear the case en banc. *See Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd.*, 109 F.4th 453 (6th Cir.), *reh'g en banc granted*, 120 F.4th 536 (2024) (mem.).

355. For this reason, it is difficult to argue that conservative parents do not have a right to know when their child, unlike the students in *Eau Claire*, is handling a gender identity issue. It might be justified to limit such right to know, for example, if the child is suffering from mental health issues caused or enhanced by the parents' rejection of their child's identity. However, the argument that parents' rights are not even implicated seems problematic from liberal and conservative perspectives alike. That said, the child's wellbeing, not the parents' ideology, should be the center of analysis of such parental rights. *See infra* Section III.B.2.

356. Ryan Bangert, *Parental Rights in the Age of Gender Ideology*, 27 TEX. REV. L. & POL. 715 (2023).

357. *Id.* at 715 n.*.

calls "a parent-centric approach"—ought to "control in cases pitting state power against parental authority, *including in cases where children's gender identity is at stake.*"[358] Although the author's goal is to serve the interests of conservative parents, his argument directly applies to and justifies the invalidation of the treatment bans.

Regarding public school policies, and without mentioning the treatment bans, the author describes clashes in courtrooms "as parents challenge attempts by state actors to substitute the state's judgment for that of parents with respect to children struggling with gender identity."[359] He then contends that "courts should apply a parent-centric model when determining where decision-making authority lies with respect to childhood gender-identity questions."[360] While this conclusion concerns school policies, it straightforwardly explains why, even taking a conservative approach, the Supreme Court should invalidate the treatment bans.[361]

The author also emphatically adopts leading precedents that the Six Circuit majority of *Skrmetti* tried to distinguish. Supreme Court decisions like *Parham*, he maintains, recognized that parents "have a 'substantial, if not the dominant, role' in making decisions about their children's mental health care."[362] Significantly, while celebrating *Parham*, the author does not even hint at the argument made by proponents of the treatment bans, including in *Skrmetti*, that this critical precedent only applies to "procedural" due process rights.

When the author considers the specific context of treating minors' gender dysphoria, he does it only from the perspective of parents who *resist* treatments like "puberty blocking" and "hormone therapy."[363] Those parents, he argues, must be the ones to decide how to respond to their children's gender identity struggles, which cannot be handled by "institutions such as the state" that take a "one-size-fits-all" approach.[364] It is hard to miss how this argument would apply to the treatment bans, which impose on all trans minors the "one-size-fits-all" approach of "wait-and-see."

Finally, having established constitutional rights for conservative parents handling gender identity issues, the author has no doubt which standard of review should apply to state attempts to abrogate such rights:

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358. *Id.* at 715–17 (emphasis added).

359. *Id.* at 724.

360. *Id.*

361. Yet, this is not to say that this conservative view is justified when applied to school policies that *protect* transgender minors. *See infra* Section III.B.2.

362. Bangert, *supra* note 356, at 727 (quoting *Parham v. J.R.*, 442 U.S. 584, 604 (1979)).

363. *Id.* at 727–28.

364. *Id.* at 728 (cleaned up) (quoting Christopher Tollefsen, *John Paul II and Children's Education*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 159 (2007)).

strict, not intermediate, scrutiny.[365] It goes without saying that applying this standard to the "one-size-fits-all" and limitless treatment bans would lead to their invalidation.

The last point is further supported by another publication that similarly confirms, from a conservative perspective, that the adequate standard of review is strict scrutiny. In a detailed 2024 legal memorandum analyzing the conservative litigation against school policies on gender identity, The Heritage Foundation explained that since the Supreme Court has long recognized parental rights as "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,'"[366] "strict scrutiny" applies to "government actions that burden [them]."[367] The Foundation's memorandum also summarized the state of the law as follows:

> A majority of the federal appellate circuit courts also hold to a strict scrutiny analysis when assessing the constitutionality of state action against a parent's substantive due process claim—properly assessing the parental right to be a fundamental one, as the Supreme Court recognized in Troxel v. Granville, 530 U.S. 57 (2000). *See e.g.*, Kanuszewski v. Mich. Dep't of Health and Hum. Servs., 927 F.3d 396 (6th Cir. 2019).[368]

Of particular note here is The Heritage Foundation's choice to rely on the Sixth Circuit decision in *Kanuszewski*. As previously discussed, the majority in *Skrmetti* took pains to deny the relevance of *Kanuszewski* to the discussion of parents' rights to pursue treatments for gender dysphoria. However, The Heritage Foundation's analysis supports the opposite view: *Kanuszewski* demonstrates the need to examine substantive due process claims using the highest, not the lowest, standard of review.

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Overall, the canvassing of conservative legislation, litigation, and publications related to the rights of conservative parents in the context of gender identity offers vital support to three central arguments made in

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365. *Id.* at 720 & n.35.

366. SARAH PARSHALL PERRY & THOMAS JIPPING, HERITAGE FOUND., LEGAL MEMO. NO. 355, PUBLIC SCHOOL GENDER POLICIES THAT EXCLUDE PARENTS ARE UNCONSTITUTIONAL 13 (2024) [hereinafter HERITAGE GENDER POLICIES MEMO], https://www.heritage.org/sites/default/files/2024-06/LM355.pdf [https://perma.cc/44V3-VVG9] (first quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); and then quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

367. *Id.* at 9.

368. *Id.* at 34 n.89.

this Part. First, there is no genuine partisan dispute that parental rights to seek adequate medical care for their children have long been protected under the Due Process Clause as fundamental rights deeply rooted in history and tradition. Second, no one doubts that such constitutional rights are implicated when the state takes over and dictates how to respond to minors' health needs. Third, given this agreed impact on fundamental rights, lawyers and thinkers on both sides of the political map agree that intervening state acts must be subject to more than a rational basis of review, *i.e.*, heightened or strict scrutiny.

The Sixth Circuit's *Skrmetti* decision, which so far was narrowly reviewed by the Supreme Court only as to its refusal to find discrimination, directly conflicts with each of these undisputed principles. Therefore, even in a Court dominated by conservatives, there might be (and should be) a majority for reversing this decision based on its flawed analysis of parental rights. Significantly, even if one believes the Court's partisanship makes such a reversal an unlikely result, the parents at least deserve to raise their Due Process challenge, be heard, and probably earn a supportive dissent that might become the law in the future. By contrast, if a conservative majority on the Court ends up allowing the treatment bans to remain in effect without even considering their undeniable intrusion into the family sphere, it will patently be engaging in exercising political power rather than legal analysis.

The coming Part introduces *additional* reasons—beyond care for parental rights—for which some conservative Justices should be skeptical about the treatment bans and the rationale that they reflect and disseminate. Accounting for those reasons can further contribute to the effort made in this Article to conceive of a path to a narrow ad hoc coalition between liberals and some conservatives on the Court to save minors' access to gender-affirming care.

III. From Due Process to Due Care

As shown in Part I, there is a high risk that Equal Protection challenges, despite their strength, would not suffice to invalidate the treatment bans in the current Supreme Court, creating an urgent need to expand the review. And, as Part II has argued, the Due Process challenge has superior potential to expose the flaws of the Sixth Circuit's decision in *Skrmetti*. To all that, this Part adds an original analysis of supplementary rationales related to government interventions for which *some* conservative Justices should be reluctant to validate the treatment bans. In light of this analysis, this Part also examines the potential and limits of centering some of the debate regarding the constitutionality of the bans on parental rights and state power.

A. Additional Conservative Reasons for Invalidating the Bans

So far, the discussion of the conservative positions vis-à-vis questions of gender identity has assumed a single conservative ideology related to gender identity. However, a more nuanced outlook is required to better understand the surfacing of internal disagreements and to uncover additional reasons for which some conservatives might object to the treatment bans. As leading scholars studying the conservative movement in the United States have illuminated, this movement is not homogeneous; it has two dominant prongs that have constituted a successful coalition or alliance in the last few decades.[369]

The distinctive orientations of those two coordinated prongs can be described in broad strokes as follows. One prong includes thinkers, leaders, activists, and organizations focusing on the ideals of a free market and small government as key to a thriving society.[370] This group devotes efforts and resources to promoting individual responsibility, privatization, corporate activity, and entrepreneurship.[371] Accordingly, it resists government regulation and welfare or social state policies.[372] Economists like Nobel Laureate James Buchanan, organizations like the Cato Institute, Supreme Court Justices like the late Antonin Scalia, and influential billionaires like Charles Koch, to name a few, belong to this group.[373] For conciseness and consistency, this prong will be referred to as *neoliberal conservatism* due to the alignment between its principles and neoliberalism.[374]

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369. *See, e.g.*, BROWN, *supra* note 100, at 89–90; BENNETT, *supra* note 100; JESSICA WHYTE, THE MORALS OF THE MARKET: HUMAN RIGHTS AND THE RISE OF NEOLIBERALISM (2019); MELINDA COOPER, FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM (2017); DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 84 (2005).

370. *See, e.g.*, David Boaz, *Key Concepts of Libertarianism*, CATO INST. (Apr. 12, 2019), https://www.cato.org/commentary/key-concepts-libertarianism [https://perma.cc/RX5Q-FQGM].

371. *See* Harvey, *supra* note 369, at 2–3.

372. *Id.*

373. *See generally* NANCY MACLEAN, DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA (2017).

374. *See, e.g.*, Hila Keren, *Separating Church and Market: The Duty To Secure Market Citizenship for All*, 12 UC IRVINE L. REV. 911, 936 (2022) ("[T]he term [neoliberalism] refers to a political project that historically emerged in Europe, started to take over the Anglo-American world in the 1980s, and by now has become a global way of seeing the optimal organization of human society. Throughout the last decades, neoliberalism has deliberately reconfigured not only the market—that must be free *and* served by the state—but also the way we think about noneconomic fields such as 'politics, society, culture, and the environment.' In this way, neoliberalism aims at establishing its market-centered rationality as a general common sense." (quoting Damien Cahill, Melinda Cooper, Martijn Konings & David Primrose, *Introduction: Approaches to Neoliberalism*, *in* THE SAGE HANDBOOK OF NEOLIBERALISM xxx (Damien Cahill, Melinda Cooper, Martijn Konings & David Primrose eds., 2018))).

The other prong includes thinkers, leaders, activists, and organizations concentrating on religion, tradition, and morality as the building blocks of a healthy society. This group dedicates efforts and resources to advancing traditional morality, religious beliefs, and family values.[375] Accordingly, it opposes abortions, contraceptives, same-sex marriage, and the concept of gender identity.[376] Thinkers like David Barton, organizations like the ADF, Justices like Samuel Alito, and influential leaders like Jerry Falwell Sr., co-founder of the Moral Majority, to name a few, belong to this group.[377] For conciseness and consistency, this prong will be referred to as *religious conservatism* due to the centrality of (certain strands of) religion in its goals.[378]

In the last half a century, the two prongs of conservatism—neoliberal and religious—have increasingly worked in tandem to promote shared goals and accumulate influence. As a result, they have often been jointly discussed as one group occupying the right side of the political map, sometimes called neoconservatives or referred to as the Republicans.[379] As political scientist Melinda Cooper explains the coalition: "Not all religious conservatives were committed to free-market capitalism (certainly not the majority of Catholics) and not all neoliberals were religious (or indeed social) conservatives, but their alliance would come to dominate social policy reform over the following decades."[380]

What precisely brought the neoliberal and religious prongs together and has held them synchronized for long decades is a fascinating question that this Article does not attempt to answer. While political scientist Wendy Brown reformed her answer and conceptualized both prongs as pillars of a deeper understanding of neoliberalism, she has also mapped out other theories that recognize the prongs' differences, on the one hand, and their alliance, on the other.[381] Variety aside, what matters most for this Article's focus on the treatment bans is that all explanations recognize that neoliberal and religious conservatism differ in motivation but typically share a political trajectory that has led to significant political

375. *See* BROWN, *supra* note 100, at 89–90.

376. KATHERINE STEWART, THE POWER WORSHIPPERS: INSIDE THE DANGEROUS RISE OF RELIGIOUS NATIONALISM 211 (2020).

377. *See id.* at 213–16; MACLEAN, *supra* note 373, at xxvii.

378. Other names include the religious right, neoconservatism, social conservatism, and Christian evangelism. *See* BROWN, *supra* note 100, at 89–96 (discussing other scholars' analysis of the religious prong and citing them as using different names).

379. *See, e.g.*, HARVEY, *supra* note 369, at 84.

380. COOPER, *supra* note 369, at 281.

381. BROWN, *supra* note 100, at 89–96 (reviewing the theories of relationships between the prongs, including supplemental, hybrid, resonance, convergence, and mutual exploitation, and introducing the theory that market and morals are two pillars of the neoliberal project as envisioned by Friedrich Hayek).

and legal victories, including the recent creation of a conservative supermajority at the Supreme Court.[382]

A recent and leading example is the Court's decision in *303 Creative LLC v. Elenis*.[383] Initiated by the Alliance Defending Freedom as part of a religious conservative battle against serving same-sex couples in the market, the case arrived at the highest court by conservative invitation and ended with a 6–3 decision divided along partisan lines.[384] Six conservative Justices agreed that the State of Colorado cannot impose equality via its nondiscrimination law on a private business owner.[385] Notably, in this case, the plea of religious conservatives in the name of Christian beliefs and the right to express them *aligned* with the neoliberal conservatives' general suspicion of the state, their wish to limit governmental power, and their ongoing commitment to a deregulation project.[386]

Indeed, the world views of neoliberal and religious conservatives are perfectly aligned in cases like *303 Creative*, in which *conservative* plaintiffs challenge a *liberal* government regulation.[387] However, as this Part shows, the same beliefs are in acute tension when these positions flip, and the litigation reflects—like in the case of the treatment bans—a liberal challenge to a conservative state act. Therefore, the enactment and content of the treatment bans, as well as the way the majority in *Skrmetti* defended them, present a fundamental challenge to the longstanding collaboration between neoliberal and religious conservatives. Concretely, the bans and their justifications by the majority and conservative amici in *Skrmetti* conflict with multiple core principles held and advanced by neoliberal conservatives, including some Justices on the Court. As elaborated below, they collide with neoliberal commitments to deregulation, restrained federal agencies, private care provided by

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382. *Id.* at 94–95 (discussing the 2016 election of President Trump as an accomplishment of the conservative alliance).

383. 143 S. Ct. 2298 (2023).

384. *See* Hila Keren, *Beyond Discrimination: Market Humiliation and Private Law*, 95 U. COLO. L. REV. 87, 110–39 (2024) [hereinafter Keren, *Beyond Discrimination*] (explaining the ADF's strategy that led the case to the Court, the ideological zeal behind the grant of certiorari, and the partisan debate between the conservative majority and the liberal dissent).

385. *303 Creative*, 143 S. Ct. at 2303, 2307–08 (finding for the business owner because Colorado "[sought] to use its law to compel an individual to create speech she does not believe," which "violates the Free Speech Clause of the First Amendment").

386. Keren, *Beyond Discrimination*, *supra* note 384, at 134–39 (explaining how the majority's opinion in *303 Creative* is fueled by hostility toward the state and mistrust of its use of regulatory powers).

387. The litigations in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) and *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) are other known examples.

families, a minimized state, the free market, and individualized responsibility for maximizing human capital.

1. Hyper-Regulation

Deregulation is probably the goal most associated with neoliberal conservativism and a necessary companion of neoliberal privatization. It would not be an exaggeration to say that battles against state regulation fuel and define the neoliberal project. For example, in his famous book *A Brief History of Neoliberalism*, anthropologist David Harvey describes the rise of neoliberalism as follows: "There has everywhere been an emphatic turn towards neoliberalism in political-economic practices and thinking since the 1970s. Deregulation, privatization, and withdrawal of the state from many areas of social provision have been all too common."[388] Since law plays a central part in disseminating neoliberal ideas and putting them into practice,[389] deregulation has been strongly advanced by conservative Justices on the Supreme Court in the last decades.[390]

Alas, the treatment bans are a quintessential act of state hyper-regulation that utterly clashes with neoliberal antiregulatory ideology. Indeed, promoters and defenders of the bans heavily rely on (and amplify) the regulative power of the state, portraying the bans as regulating safety in the medical arena. Significantly, they do not only define the treatment bans as regulations. They also seek to justify them by more generally normalizing and legitimizing the regulative state—the ultimate foe of neoliberalism.

In *Skrmetti*, the Sixth Circuit committed to such pro-regulation framing from the very opening of its decision. It stated: "In addition to sharing a border, Kentucky and Tennessee share an interest in *regulating* the medical treatments offered to children suffering from gender dysphoria."[391] The court then continued to amplify and prioritize the state's power to regulate medical treatments, making it the core logic of its decision. For example, it asserted that:

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388. HARVEY, *supra* note 369, at 2–4.

389. *See generally* David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 1, 9 ("Whether defensive or offensive, whether through a 'rolling back' of regulation or a 'rolling out' of market-style governance, neoliberalism is always mediated through law." (footnote omitted)).

390. *See, e.g.*, Mark A. Graber, *Does It Really Matter? Conservative Courts in a Conservative Era*, 75 FORDHAM L. REV. 675, 676–77 (2006) (demonstrating areas of deregulation led by conservative majorities in the 1990s). *See also id.* at 705 ("For the most part, conservatives promote deregulation.").

391. *L.W. v. Skrmetti*, 83 F.4th 460, 468 (6th Cir. 2023) (emphasis added).

> There is a long tradition of permitting state governments to regulate medical treatments for adults and children. So long as a federal statute does not stand in the way and so long as an enumerated constitutional guarantee does not apply, the States may regulate or ban medical technologies they deem unsafe.[392]

In direct opposition to the neoliberal legal project of deregulation, the court also adopted "a strong presumption of validity" to support the "critical role" of governments "in regulating health and welfare."[393] This presumption, and especially the embracement of the regulation of "welfare," cannot be more in conflict with the neoliberal hostility towards regulative welfare programs.[394]

A pro-regulation approach is also repeatedly weaponized by red states when they defend their treatment bans in courts. For example, in a brief recently submitted by Tennessee's Attorney General to the Supreme Court in an attempt to prevent a review of the Sixth Circuit's decision in *Skrmetti*, he highlighted that "legislatures have considerable discretion to regulate [medical treatments]."[395] Moreover, the brief repeats several times a statement of the majority in *Skrmetti* that collides with all the neoliberal efforts to roll back regulations. In one of those times, it states: "[T]his Nation lacks a 'deeply rooted' tradition of preventing governments from regulating the medical profession."[396] Tennessee took the same position in the brief it submitted before the oral arguments at the Supreme Court. It stated, for example, that "[t]hrough SB1, Tennessee lawfully exercised its power to regulate medicine."[397]

This sample of statements from both the judiciary and the states shows how defending the treatment bans as desirable regulation counters several decades of anti-regulatory neoliberal jurisprudence. To fully appreciate the exceptionalism of this position, consider another successful collaboration of neoliberal and religious conservatives, this time in the healthcare setting that is highly relevant to the treatment bans. In *Burwell v. Hobby Lobby Stores*,[398] employers sought to deny their employees health insurance coverage for contraceptives, to which the

392. *Id.* at 474.

393. *Id.* at 473 (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)).

394. *See, e.g.*, Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 789 (2003).

395. Respondents' Brief in Opposition at 20, *L.W. v. Skrmetti* and *United States v. Skrmetti*, Nos. 23-466, 23-477 (U.S. Feb. 2, 2024) [hereinafter *Skrmetti* Respondents' Brief Opposing Cert.].

396. *Id.* at 29.

397. Brief for Respondents at 15, *United States v. Skrmetti*, No. 23-477 (U.S. Oct. 8, 2024) [hereinafter *Skrmetti* Brief for Respondents].

398. 573 U.S. 682 (2014).

employers objected on religious grounds.[399] To be able to do so, the employers challenged the government's power to regulate their compliance with the Affordable Care Act.[400]

Significantly, as it affirmed the employers' position, the Court's conservative majority did not need to choose between neoliberal and religious conservatism—both approaches directed it to the *same* conclusion.[401] By contrast, to affirm the treatment bans promoting traditionalist morality, a goal of religious conservativism, the Court would have to *undermine* the deregulatory project, a compass of neoliberal conservativism. Indeed, any effort to justify the bans acutely contradicts the "neoliberal anti-regulatory impulse."[402]

Relatedly, as both *303 Creative* and *Hobby Lobby* demonstrate, neoliberal and religious conservatives have typically joined their forces to *limit* state power in the name of various individual freedoms. However, defending the treatment bans requires making the opposite move: *expanding* state power while *disregarding* individual liberty and freedom of choice. On this point, much is revealed by turning to the Sixth Circuit's decision in *Skrmetti* again. The court maintained: "State governments have an abiding interest 'in protecting the integrity and ethics of the medical profession,'" and "[t]hese interests give States broad power, even broad power to '*limit parental freedom*.'"[403] Justices whose views are closer to neoliberal conservatism than to religious conservatism could and should be hesitant to enhance state power and limit individual freedom in this way.

2. Deference to Federal Agencies

Neoliberal conservative jurisprudence increasingly entails strict restrictions on federal agencies, which are highly related to the projects of deregulation and limiting state powers. Theoretically, this heightened antagonism to agencies can be traced back to the "Hayekian skepticism of the possibility of expert knowledge residing in the state."[404]

399. *Id.* at 683.

400. *Id.* at 688–90, 696–700 (defining the issue).

401. Jennifer M. Denbow, *The Problem with* Hobby Lobby*: Neoliberal Jurisprudence and Neoconservative Values*, 25 FEMINIST LEGAL STUD. 165, 166 (2017) (explaining that in *Hobby Lobby* "the Court both economizes religious expression and spiritualizes economic activity" (emphasis omitted)).

402. *Id.* at 172.

403. *L.W. v. Skrmetti*, 83 F.4th 460, 473 (6th Cir. 2023) (cleaned up) (emphasis added) (first quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997); and then quoting *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944)).

404. Yochai Benkler, Structure and Legitimation in Capitalism: Law, Power, and Justice in Market Society 61 (Oct. 26, 2023) (unpublished manuscript), https://ssrn.com/abstract=4614192 [https://perma.cc/BX2J-9649].

Pragmatically and with enhanced force in the last few years, neoliberal conservatives have engaged in criticizing, doubting, and restricting a long list of federal agencies. The process reached a jurisprudential peak when, in June 2024, the conservative supermajority of the Supreme Court officially overturned *Chevron*—the precedent that for decades ordered judicial deference to agencies' expertise whenever a regulation related to their work was ambiguous.[405] "[A]gencies," the six conservative Justices agreed, "have no special competence in resolving statutory ambiguities,"[406] despite the dissent's reminder that interpretive resolution depends on "subject-matter expertise."[407] In two other June 2024 cases, a majority of conservative Justices accepted challenges directed at the Environmental Protection Agency[408] and the Securities and Exchange Commission,[409] adding to the conservative weakening of federal agencies and the administrative state.[410]

It is therefore entirely paradoxical, especially after June 2024, for religious conservatives to try and justify the treatment bans by heavily relying on the expertise of one such federal agency—the Food and Drug Administration (FDA). Yet, this is precisely one of the strategies defenders of the bans have utilized.

In a striking deviation from the neoliberal mistrust of agencies, the majority in *Skrmetti* dedicated long passages to the FDA, loudly singing its praises. For example, it describes the agency as one "whose existence is premised on . . . medical expertise of its own."[411] It also compliments its "highly reticulated process" and "credibility," emphasizing that "the Constitution rarely has a say over the FDA's work."[412]

In addition to this general celebration of the FDA and its expertise, the majority also unnecessarily discusses the agency's authority and operations in a manner that could mislead. For example, it states the obvious that no one has a right to use drugs that the FDA deemed "unsafe or ineffective," adding that the agency sometimes "permit[s] drugs to be used for some purposes but not others."[413] It further maintains that "the FDA has not approved" using "puberty blockers and hormones" for gender dysphoria.[414] Such a discussion creates the wrong impression as

405. *Loper Bright Enters. v Raimondo*, 144 S. Ct. 2244, 2254, 2273 (2024).

406. *Id.* at 2266.

407. *Id.* at 2300–01 (Kagan, J., dissenting).

408. *Ohio v. EPA*, 144 S. Ct. 2040 (2024).

409. *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024).

410. *See generally* Karen M. Tani, *The Supreme Court, 2023 Term—Foreword: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 1, 53 (2024).

411. *L.W. v. Skrmetti*, 83 F.4th 460, 478 (6th Cir. 2023).

412. *Id.*

413. *Id.* at 473.

414. *Id.* at 488.

if the agency made an adverse determination or otherwise expressed concerns regarding the blockers and hormones used for gender-affirming care. However, that is untrue. As the dissent explains, off-label usage of *approved* drugs is "commonplace in the medical community."[415] If anything, the FDA's general authority to set limitations on specific uses of drugs—which the majority cites[416]—clarifies that it has *not* seen a need to use its authority in the case of treatments of trans adolescents.

When neoliberal conservatives relentlessly suspect agencies' overreach, the extensive, flattering, but unjustified discussion of the FDA in *Skrmetti* seems not only outcome-driven but also something neoliberal conservatives on the highest court might want to avoid. Indeed, the conservative judge who issued the preliminary injunction in *Skrmetti* did precisely that. Judge Richardson refused to rely on the agency's approval process and instead stated he was "*not persuaded* that the fact of FDA's silence on the approval of the medical procedures banned under SB1 for treatment of gender dysphoria somehow indicates that these treatments are unsafe when used for that purpose."[417]

Moreover, when the agency at stake is the FDA, unnecessary reliance on its vast authority and expertise can later create a problem for conservatives—neoliberal and religious alike. In June 2024, the Court delayed deciding the matter of the FDA's approval of the abortion drug mifepristone.[418] However, if the issue returns to the Court, inconsistency regarding this agency's trustworthiness and authority might be hard to escape. In any case, the reservations regarding the assertions related to the FDA in *Skrmetti* do not intend to doubt the agency's expertise, only to argue that in the context of treating gender dysphoria, its silence can only support the conclusion that safety issues are unlikely the reason behind the treatment bans. For this reason, Justices closer to the neoliberal strand of conservatism should be reluctant to adopt the FDA thesis in *Skrmetti*.

3. Retraction of Family Care

For decades, neoliberals have made the family "the primary locus of care."[419] Eager to undo the New Deal, abolish the welfare state, and relinquish government responsibility for inevitable human illness, they have worked to delegate care duties to families. In her book *Family*

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415. *Id.* at 509 n.8 (White, J., dissenting) (quoting *Ironworkers Loc. Union 68 v. AstraZeneca Pharms., LP*, 634 F.3d 1352, 1356 (6th Cir. 2011)).

416. *Id.* at 473–74.

417. *L.W. v. Skrmetti*, 679 F. Supp. 3d 688, 711 (M.D. Tenn. 2023) (emphasis added).

418. *FDA v. All. for Hippocratic Med.*, 144 S. Ct. 1540, 1565 (2024).

419. COOPER, *supra* note 369, at 197.

Values: Between Neoliberalism and the New Social Conservatism, political scientist Melinda Cooper carefully depicts and contextualizes this scheme, calling it "the reinstitutionalization of the private family."[420] As she explains, the delegation of care duties to families did not limit itself to public campaigns dedicated to the "valorization of home-based care."[421] Nor was it restricted to budgetary cuts that eliminated previously available social services. It also included legal reforms such as the Reagan-era curtailing of hospital stays, which returned care work to the families waiting at home.[422]

Placing the responsibility on families to care for their members *instead of* the state is thus a pillar of neoliberal governance. Removing the neoliberal state from the caregiving arena is so fundamental to the neoliberal logic that it became one of its most famous mantras, coined by British Prime Minister Margaret Thatcher, who declared: "There's no such thing as society. There are individual men and women and there are families."[423] As legal scholar Yochai Benkler recently illuminated, making families responsible for providing healthcare (both directly and by purchasing medical services at the healthcare market) has always served business interests dear to neoliberals.[424] Family care burdens have severely weakened the bargaining power of most people, who, unlike the super-rich, must work for a living. In this way, employers and the economic elite have enjoyed lower production costs and increased profits, supporting the neoliberal commitment to market efficiency.[425]

With this background in mind, the position taken now by the proponents of the treatment bans can be seen in two ways that similarly contradict neoliberal rationality. First and most straightforwardly, the bans prevent families from providing care to their young members who were professionally diagnosed as needing treatment. This result sharply contradicts the neoliberal restructuring of society, which demands that families, not the state, assume responsibility for providing healthcare to their members.

Alternatively, one might say that the treatment bans force families to internalize the struggles of their young because they are no longer allowed to buy healthcare services in the market. In this reading, the bans may seem at first glance in harmony with the neoliberal push for at-home care. However, in a second look, it is quite clear that without professional

420. *Id.* at 198.

421. *Id.* at 197.

422. *Id.* at 197–98.

423. *Margaret Thatcher: A Life in Quotes*, GUARDIAN (Apr. 8, 2013, 8:38 AM), http://www.theguardian.com/politics/2013/apr/08/margaret-thatcher-quotes [https://perma.cc/SD2V-XAJZ].

424. *See, e.g.*, Benkler, *supra* note 404, at 72–23.

425. *Id.*

skills to handle gender dysphoria, the burdens on the impacted families will inevitably exceed their resources—economic, physical, and emotional. For example, without treatment, adolescents may drop out of school, inflict harm on themselves, or even attempt suicide.[426] As a result, families may lose their ability to handle the crisis. And, when this happens, the cost of the crisis will have to be carried by the state—exactly in opposition to the preferred neoliberal order.

Either way, under both versions, while the treatment bans certainly advance the views of religious conservatives, they collide with the heavy responsibilities that neoliberals have long assigned to families.

4. Enhanced State Responsibility

In addition to disabling families' ability to provide care, the treatment bans are defended by articulating an expansion of the state's duties. Such expansion contradicts neoliberal efforts to decrease rather than enhance the state's responsibilities for individuals' wellbeing. By a process of individualization, neoliberal rationality "suppresses individuals' ability to link their fate to the social order or to implore assistance from social institutions or the state."[427] By contrast, a leading justification raised by proponents of the treatment bans in courts—and now awaiting the Supreme Court's consideration—is that the state needs to protect trans minors. This claim includes a state admission of responsibility and assumption of duty that neoliberals would abhor.

Consider, for example, the way the Sixth Circuit describes in *Skrmetti* the relationship between the state and trans minors in need of treatment. According to the majority's framing, the adolescents are the children of the state, and the state functions as their protective parent: "Tennessee and Kentucky's interests . . . in being permitted to protect *their* children from health risks weigh heavily in favor of the States at this juncture."[428] Likewise, in an interview recently given after Idaho passed its own treatment ban, its Attorney General assumed state responsibility for all its children. He said: "The State has *a duty to protect and support* all children and that's why I'm proud to defend Idaho's law that ensures no child is subjected to these life-altering drugs and procedures."[429]

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426. *L.W. v. Skrmetti*, 83 F.4th 460, 492 (6th Cir. 2023) (White, J., dissenting).

427. Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575, 619 (2020).

428. *Skrmetti*, 83 F.4th at 491 (White, J., dissenting) (emphasis added).

429. Christian Fernsby, *Idaho Joins 22 States and European Health Authorities To Protect Children from Drugs and Removing Healthy Body Parts*, POST ONLINE MEDIA MAG. (Jan. 18, 2024) (emphasis added), https://www.poandpo.com/in-sickness-and-health/idaho-joins-22-states-and-european-health-authorities-to-protect-children-from-drugs-and-removing-healthy-body-parts/ [https://perma.cc/MA9K-49U5].

State responsibility was also a theme in Tennessee's arguments, both in its written brief and during the oral arguments. In its brief, the state argued, for example, that "Tennessee has 'authority, in truth a responsibility, to look after the health and safety' of minors in the State. . . . And 'protecting minors from dangerous and risky treatments' is part and parcel of that duty."[430] Similarly, during the oral arguments, Tennessee Solicitor General Matt Rice said that although "parents are trying to do the best they can and get the best treatment for . . . their kids," Tennessee "had multiple instances" in which "the state had to intervene as a regulator to protect the children."[431]

Surely, from a liberal perspective, state responsibility for children and their destinies is highly preferred.[432] However, the point here is that expanding state responsibility is wholly foreign to neoliberal conservatism. Neoliberals have dedicated their intellect, careers, wealth, and power to *shifting* the responsibility away from the state to private citizens, making the "responsibilization" of individuals their signature move.[433] Therefore, religiously motivated claims that transgender adolescents are the children of the state and owed duties by the state could and should sound troubling to neoliberal conservatives.

5. Attack on the Free Market

The belief in the power of a free and competitive market is at the core of the neoliberal worldview and guides its other principles. Neoliberalism attributes to the market the ability to not only supply the material needs of individuals but also to maximize people's self-value, productivity, and contribution to society.[434] So strong is the neoliberal admiration of the market that in a process called "economization," market logic and metrics are applied outside of the marketplace to transform most other areas of life.[435]

Conversely, treatment bans' proponents have raised some remarkable anti-market arguments. These arguments include doubting

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430. *Skrmetti* Brief for Respondents, *supra* note 397, at 48–49.

431. *Skrmetti* Transcript, supra note 8, at 142.

432. *See, e.g.*, Linda A. White, *The United States in Comparative Perspective: Maternity and Parental Leave and Child Care Benefits Trends in Liberal Welfare States*, 21 YALE J.L. & FEMINISM 185 (2009) (describing liberal child care policies in five countries).

433. *See, e.g.*, WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION 133 (2015) (explaining how people are being "responsibilized" because neoliberalism, for its own political goals, "solicits the individual as the only relevant and wholly accountable actor" (emphasis omitted)).

434. *See id.* at 28.

435. *Id.* at 30 (explaining the process of neoliberal economization and the application of market rationality to noneconomic areas of life).

the market's operation in the context of medical treatments for gender dysphoria. They also entail blaming the market's competitiveness—highly important to neoliberals—for leading to negative consequences, namely allegedly excessive and unnecessary treatments. Moreover, the sudden hostility to the free market has brought about the most potent form of state intervention in the market, even more robust than mere regulation. The bans, after all, do not only monitor or limit doctors' ability to prescribe drugs to minors or merely restrict medicines' availability. Instead, in the narrow segment of trans care, the bans impose a total *block* on what the free market previously had offered: services provided by doctors, medications sold by pharmaceutical corporations, and coverage guaranteed by health insurance companies.

Time and again, proponents of the bans have alleged in courts and in public that medical treatments for gender dysphoria are offered out of greed, in an utter departure from the neoliberal narrative that "[g]reed is good" for competitive markets.[436] Contrary to neoliberalism, proponents have also denied the market's wisdom and ability to respond to the changing needs of its actors. Instead, they have argued that, in this unique case, the market is uncharacteristically failing and thus must be restrained.

For example, a recent amicus brief submitted by Alabama to the Supreme Court to support Tennessee's position in *Skrmetti* lamented that "transitioning services are 'huge money makers.'"[437] Similarly, a group of conservative organizations submitted an amicus brief in similar litigation at the Eighth Circuit, *Brandt v. Rutledge*,[438] cautioning that "the sex-change industry has exploded into a market worth billions."[439]

Furthermore, these organizations used an anticapitalist tone to decry a reality in which money matters, claiming that "when it comes to transgenderism, cash is king."[440] They also assigned fault to entrepreneurial doctors and corporations—usually celebrated under any

436. THOM HARTMANN, THE HIDDEN HISTORY OF NEOLIBERALISM: HOW REGANISM GUTTED AMERICA AND HOW TO RESTORE ITS GREATNESS 56 (2022).

437. Brief of Alabama as Amicus Curiae Supporting Respondents at 21, *L.W. v. Skrmetti*, *United States v. Skrmetti*, and *Doe 1 v. Kentucky ex rel. Coleman*, Nos. 23-466, 23-477, 23-492 (U.S. Feb. 2, 2024) (quoting Kimberlee Kruesi, *Vanderbilt To Review Gender-Affirming Surgeries for Minors*, AP NEWS (Oct. 7, 2022, 7:48 PM), https://apnews.com/article/health-business-tennessee-nashville-vanderbilt-university-6deb93f7dea92f1b2082c39f72b59766).

438. 47 F.4th 661 (8th Cir. 2022).

439. Brief Amicus Curiae of Public Advocates of the United States et al. in Support of Defendants-Appellants & Reversal at 21, *Brandt v. Griffin*, 47 F.4th 661 (8th Cir. 2022) (No. 23-2681) (cleaned up).

440. *Id.* at 24 (quoting Mary Frances Delvin, *Blood Money: The Rise of the Gender Reassignment Industry*, AM. SPECTATOR (Oct. 7, 2023, 11:05 PM), https://spectator.org/blood-money-obamacare-big-pharma-and-gender-reassignment/ [https://perma.cc/8BFX-23QX]).

other neoliberal measurement. According to their brief, "the transgender-medical complex is a combination of 'Big Pharma, a vulnerable patient population, and physicians misled by medical organizations or tempted by wealth and prestige.'"[441]

Such delegitimization of the market dramatically deviates from the neoliberal celebration of a market-based society and must present a challenge to jurists who have adhered to it for many years, producing numerous pro-market decisions. Accordingly, when deciding the constitutional validity of the bans, the conservative Justices on the Supreme Court will face a hard choice. They can either continue to express their trust in the market *or* curtail the market in the service of religious interests. It is much harder, however, to affirm the bans and keep promoting the market as trustworthy and free.

6. Paternalist Regulation of Emotions

Neoliberalism imposes on individuals the duty to maximize their human capital, and the heavy task includes an emotional component.[442] The neoliberal subject is expected to engage in continuous and intense emotional labor to cultivate positive emotions that enhance productivity and fight negative emotions that impede this goal.[443] This emotional project is highly individualized and economized, with a flourishing market built around it to help people ceaselessly regulate their own emotions.[444]

By contrast, Tennessee's treatment ban justifies itself by trying to protect minors from feeling regret. It declares: "The legislature finds that . . . many individuals have expressed regret for medical procedures . . . performed on . . . them for . . . purposes [of treating gender dysphoria] when they were minors."[445] Similar regret allegations also appear in briefs submitted in courts[446] and have found their way to

441. *Id.* (quoting *Questioning America's Approach to Transgender Health Care*, ECONOMIST (July 28, 2022), https://www.economist.com/united-states/2022/07/28/questioning-americas-approach-to-transgender-health-care).

442. SAM BINKLEY, HAPPINESS AS ENTERPRISE: AN ESSAY ON NEOLIBERAL LIFE 58–59 (2014).

443. Hila Keren, *Valuing Emotions*, 53 WAKE FOREST L. REV. 829, 867–68 (2018).

444. *Id.* at 868–69.

445. TENN. CODE ANN. § 68-33-101(h) (2024).

446. *See, e.g.*, Brief of Amici Curiae Detransitioners in Support of Defendants-Appellants Seeking Reversal at 23–24, *L.W. v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023) (No. 23-5600), and Brief of Alliance Defending Freedom as Amicus Curiae in Support of Appellants & for Reversal at 13, *L.W. v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023) (No. 23-5600) (both briefs alleging regret felt by minors and adults who went through gender dysphoria treatments); *see also Skrmetti* Respondents' Brief Opposing Cert., *supra* note 395, at 9, 34.

some legal decisions.[447] Likewise, at oral arguments, Tennessee's Solicitor General spoke about "the tragic regret of detransitioners,"[448] while Justice Kavanaugh raised the issue of the "physical and psychological effects on those who later change their mind."[449]

While there is much to say about how mistaken or misleadingly presented those claims are,[450] the focal point here is their clash with neoliberal conservatism. Even if the risk of regret was somewhat higher than in other contexts, soliciting the state to protect people from their (alleged) negative emotions is a position that has no room in neoliberal thinking.[451] One might ask whether conservative Justices would be willing to open the door to other state acts aimed at protecting emotions. What if, to draw on a caution made in Texas by Republican Justice Lehrmann,[452] a legislature argued that homeschooling causes feelings of loneliness in minors?

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Illuminating the above six points of deep conflict between the treatment bans and neoliberal conservatism suggests that Justices whose views are closer to neoliberal conservatism than to religious conservatism might recognize that the treatment bans not only violate parental rights under the Due Process Clause but also counter much of their broader jurisprudence and ideological commitments. The following section carefully considers the implications of this critical insight.

B. The Potential and Limits of Reliance on Parental Rights

As Part I has shown, there is much risk in relying on the Equal Protection Clause alone. Additionally, as Part II has argued and the previous section has further supported, shifting the focus from equal rights to government intrusion into the private sphere could and should provoke more conservative skepticism of the treatment bans. This section turns to explaining why such a shift is indispensable to avoiding severe injustice. Yet, it also considers how a decision in *Skrmetti* based on

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447. *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1216 (11th Cir. 2023).

448. *Skrmetti* Transcript, *supra* note 8, at 139.

449. *Id.* at 44.

450. *See, e.g.*, MCNAMARA ET AL., *supra* note 59, at 22–23 (specifically refuting regret allegations included in "The Cass Review").

451. This conflict with neoliberalism also exists in the bans on books and on discussions related to race, sexuality, and gender. Those bans seek to protect students from feeling guilt or discomfort in conflict with the neoliberal approach that assigns individuals the duty to cope with difficult feelings.

452. *See supra* text accompanying note 275.

parental rights and restraint of state power should be carefully structured to ensure it will not harm minors instead of assisting them.

1. Avoiding Injustice

As mentioned, minors, parents, and doctors from both Tennessee and Kentucky have petitioned the Supreme Court for writs of certiorari after their loss at the Sixth Circuit.[453] Both petitions raised two, not one, constitutional challenges—one under the Equal Protection Clause and the other under the Due Process Clause. The two petitions are still pending, and the Court has yet to take action on either. Still, at the end of the 2023–24 Term, the Court granted a review of *Skrmetti* by accepting a similar petition submitted by the Government as plaintiff intervenor. The Biden Administration's petition was limited in scope to a review under the Equal Protection Clause due to the rules applied to interventions by the Federal Government. This odd process led the Court to hear oral arguments in an inadequately partial manner.[454]

While it is true that the Court sometimes limits its review to specific questions, the decision to do so at the first time it agreed to consider the constitutionality of the treatment bans is perplexing at best. What might have been seen as a possible mistake at first glance could hardly continue to be considered unintentional after commentators raised the issue.[455] Thus, it seems probable that the conservative Justices have been so far reluctant to support the liberal Justices in granting the petitions of the private plaintiffs to allow for a full review of the Sixth Circuit decision. One can only speculate, especially in light of the oral arguments, that whereas the six conservatives on the Court felt relatively united against claims of discrimination, they were less certain about the case's result if parental rights were to be discussed. Be that as it may, continuing to leave parental rights out of the analysis is a highly troubling decision for several reasons.

First, in its petition for a narrow review, the Government added a footnote in which it opined that the due process question does not warrant consideration because the Sixth Circuit's analysis of this question "does not conflict with any decision of another court of appeals."[456] However, the Sixth Circuit's due process reasoning has always conflicted with multiple lower courts' decisions.[457] More importantly, after the

453. *See L.W. v. Skrmetti*, No. 23-466 (U.S. Nov. 1, 2023) (cert. pending) and *Doe 1 v. Kentucky ex rel. Coleman*, No. 23-492 (U.S. Nov. 3, 2023) (cert. pending).

454. *See supra* notes 34–39 and accompanying text.

455. *See, e.g.*, Keren, *Moment of Truth*, *supra* note 12.

456. *United States* Cert. Petition, *supra* note 36, at 17 n.6.

457. *See Poe v. Labrador*, 709 F. Supp. 3d 1169, 1197 n.7 (D. Idaho 2023) (collecting cases that accepted and rejected the Due Process challenge).

Government submitted its petition in 2023, a conflict between courts of appeals arose. First, a district court issued a preliminary injunction against an Idaho treatment ban, relying in part on a Due Process challenge.[458] Then, in 2024, the Ninth Circuit refused to stay or consider en banc this preliminary injunction,[459] effectively affirming the district court's preliminary analysis of the likelihood of success.[460] And, although the Supreme Court later issued a partial stay due to a general criticism of universal injunctions, it left untouched the injunction that guaranteed the continuation of treatment for the minor plaintiffs that sued Idaho.[461] That created disagreement between the Ninth and the Sixth Circuits regarding parental rights, highlighting the need for a Supreme Court decision on this issue.

Second, including the Due Process challenge in the Court's review is essential to a fair hearing. Admittedly, if, after considering the Equal Protection challenge alone, the Court *invalidates* the treatment bans as discriminatory, then the holding of a narrow hearing might end up having little pragmatic impact. However, and critically, justice cannot possibly be done given the possibility that the Court would *affirm* the bans' validity after reviewing only the equal protection analysis in *Skrmetti*. As Part I has detailed, the likelihood of such an outcome seems higher after the oral arguments, during which comments and questions offered by most of the conservative members of the Court suggested their unwillingness to find that Tennessee has engaged in sex-based classifications that should be subject to heightened scrutiny.

Third, it would be a grave injustice to minors, parents, and doctors not to be heard at all about the extreme intrusion into their joint decision-making, especially after the Sixth Circuit made the issue a *primary* justification for its decision. The court's opinion started with the Due Process Clause and turned to the Equal Protection Clause only after a lengthy discussion.[462] It also included much legal history and medical information uniquely relevant to the due process analysis.[463] Therefore, a decision affirming the treatment bans without delving into the core reasoning of their approval by the court below is indefensible. It would also be no consolation if the written decision were to echo Justice Barrett's insistence during oral arguments that the parents reserve their right to bring their due process claims in the future.[464] While such a

458. *Id.* at 1195–98.

459. *Poe v. Labrador*, No. 24-142 (9th Cir. Jan. 30, 2024), *reh'g en banc denied*, No. 24-142 (Feb. 9, 2024).

460. "Effectively" because the Ninth Circuit did not explain its decisions.

461. *Labrador v. Poe*, 144 S. Ct. 921 (2024).

462. *L.W. v. Skrmetti*, 83 F.4th 460, 472–79 (6th Cir. 2023).

463. *Id.* at 466–68 (medical information) and 473–75 (legal history).

464. *Skrmetti* Transcript, *supra* note 8, 64–65.

statement might allow other cases to develop and possibly reach the Court, it would leave the current plaintiffs and numerous families around the country with irreparable injury due to a prolonged loss of access to necessary treatments. For adolescents going through puberty and their supportive parents, time is of the essence, making any delay in considering the infringement of parental rights ruinous.

Fourth, in addition to the fact that equal protection arguments have less chance of succeeding in a conservative Court than due process claims, there is another significant difference between the challenges' potential to lead to an invalidation of the bans. Including due process claims in the consideration could elevate the standard of review from intermediate to strict scrutiny. While there is no definite consensus on this point,[465] there are strong arguments,[466] including some made by Justice Thomas,[467] that the appropriate standard in the context of parental rights is the highest: strict scrutiny. Significantly, Judge Richardson, a President Trump appointee who authored the district court's decision in *Skrmetti*, expressed no hesitation in following Sixth Circuit precedents and subjecting Tennessee's treatment ban to strict scrutiny.[468] He further explained that, according to his analysis, Tennessee's ban will likely fail the intermediate scrutiny required under the Equal Protection Clause. Hence, Judge Richardson added, it "necessarily follows" that the ban will also fail the more stringent strict scrutiny standard.[469] Other lower courts applied the same reasoning, arriving at the same conclusion.[470]

A shift from intermediate to strict scrutiny could become critical. During the oral arguments, several conservative Justices sounded less inclined than Judge Richardson to criticize conservative legislatures.

465. *See, e.g.*, Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 137 (2018) ("Due to the U.S. Supreme Court's lack of an articulated level of scrutiny, the lower courts have also been inconsistent when considering parental right cases.").

466. *See, e.g.*, F. Lee Francis, *Who Decides: What the Constitution Says About Parental Authority and the Rights of Minor Children To Seek Gender Transition Treatment*, 46 S. ILL. U. L.J. 535, 562 (2022) (arguing that "the proper level of scrutiny when overruling a parent's authority is strict scrutiny").

467. *E.g.*, *Troxel v. Granville*, 530 U.S. 57, 80 (Thomas, J., concurring) (emphasizing, in the context of parental rights, that the appropriate standard of review for alleged infringement of fundamental constitutional rights should be strict scrutiny).

468. *L.W. v. Skrmetti*, 679 F. Supp. 3d 668, 683 (M.D. Tenn. 2023) ("Defendants' actions constitute a denial of the parents' fundamental right to direct the medical care of their children, and their actions must survive strict scrutiny." (cleaned up) (quoting *Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396, 420 (6th Cir. 2019))). Judge Richardson then concluded: "Given that SB1 infringes on a parent's fundamental right to direct the medical care of that parent's child by banning medical treatments given for particular purposes, SB1 must survive strict scrutiny." *Id.* at 685.

469. *Id.* at 685.

470. *See, e.g.*, *Poe v. Labrador*, 709 F. Supp. 3d 1169, 1198 (D. Idaho 2023).

Recall, for example, Justice Alito's zealous efforts to justify Tennessee's approach by going beyond the case's record,[471] and Justice Kavanaugh's willingness to let states decide such matters.[472] Add to this Chief Justice Roberts' expressed inclination to defer to the state when it comes to what he called at the hearing an "area of medical nuances."[473] Combined, these responses indicate the Court might find that the state has a compelling interest to regulate and accordingly decide that the bans can satisfy intermediate scrutiny. However, if strict scrutiny is applied, the bans may still be too broad, failing the demand for narrow tailoring that comes with this exacting standard. In other words, consideration of the Due Process challenge before finalizing the decision might change the case's outcome—a possibility that is significant enough to discredit a continued refusal to do so as outcome-driven.

To avoid such an indefensible result, at least one conservative Justice must join the liberal Justices and grant the pending petitions of the private plaintiffs. The fact that the Court has already heard oral arguments makes such late development less likely than it was before. However, whereas Justice Gorsuch's silence regarding discrimination claims was a negative indication, it is still possible to imagine him voting to circumvent the undermining of his decision in *Bostock* by returning the case to the Sixth Circuit for proper scrutiny of the risk to parental rights. It is also somewhat conceivable that Justice Barrett's insistence that parental rights claims are not before the Court might be transformed into support for putting them before the Court. In the same vein, Justice Kavanaugh, who in *Eau Claire* clarified that he would have granted conservative parents' petition, is also a conservative who may show consistency and agree to hear parents' claims in the context of the treatment bans.

Regardless of how likely it is that the Court will correct the posture of its review of *Skrmetti* to avoid grave injustice, the issue of parental rights, and, more broadly, regulative intrusions into the family sphere, eventually will have to be considered by the Supreme Court. For example, the ACLU, representing the private plaintiffs in *Skrmetti*, has recently announced its petition for an en banc hearing at the Seventh Circuit for claims against an Indiana treatment ban, including based on a Due Process challenge.[474]

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471. *See supra* notes 180–81 and accompanying text.

472. *See supra* note 182 and accompanying text.

473. *Skrmetti* Transcript, *supra* note 8, at 12.

474. *ACLU of Indiana and American Civil Liberties Union Request En Banc Review in Challenge to Indiana's Ban on Care for Transgender Youth*, ACLU IND. (Dec. 27, 2024), https://www.aclu-in.org/en/press-releases/aclu-indiana-and-american-civil-liberties-union-request-en-banc-review-challenge [https://perma.cc/5GXQ-Z9YR].

Be the way and timing in which the parental rights arrive at the Court as it may, this Article has offered multiple reasons why some conservatives on the Court could and should—according to *their* jurisprudence—be more willing to rise above partisanship and join their liberal colleagues in invalidating the bans as long as doing so does not directly recognize transgender rights. While the emergence of such a coalition is not highly probable, it is not unprecedented either.

For example, despite a clear partisan division on the Court regarding abortion rights, the 2023–24 Term ended with an ad hoc coalition between all the liberal Justices and three of the conservative Justices on the Court. The decision in *Moyle v. United States*[475] effectively blocked,[476] at least for a while,[477] an Idaho broad ban on emergency abortions, preventing enforcement of the ban "when the termination of a pregnancy is needed to prevent serious harms to a woman's health."[478] On the conservative side, Justices Barrett and Kavanaugh, together with Chief Justice Roberts, supported the result in light of the conflict between Idaho's abortion ban and the Emergency Medical Treatment and Labor Act.[479] The creation of this ad hoc coalition provoked a fierce response from the remaining three conservatives: Justice Alito, who wrote the lead dissent, and Justices Thomas and Gorsuch, who joined him.[480] They attributed their unusual minority position to the "emotional and highly politicized question that the case presents,"[481] and in a part of their dissent to which Justice Gorsuch did not join, blamed their three colleagues who supported the liberals for relying on a justification that is "patently unsound."[482]

Of course, even if the Court timely corrects its decision to hear only one of the relevant challenges in *Skrmetti* or later agrees to consider how the treatment bans impede parental rights, the odds that a liberal-conservative ad hoc coalition will emerge are limited. It is quite thinkable that despite a century of recognizing parental rights and significant neoliberal commitments, all the conservative Justices would end up following partisan lines, just as they did in *Dobbs*.[483] Indeed, they all may decide to engage in "privileging the parental rights of those asserting

475. 144 S. Ct. 2015 (2024) (per curiam).

476. *Id.* at 2016. The blocking effect resulted from the Court's dismissal of Idaho's petition for writ of certiorari combined with a lift of a stay the Court previously ordered regarding a lower court's preliminary injunction.

477. Because, as Justice Jackson added, the issue is most likely going to return to the Court. *Id.* at 2024 (Jackson, J., concurring in part and dissenting in part).

478. *Id.* at 2017 (Kagan, J., concurring).

479. *Id.* at 2019–22 (Barrett, J., concurring).

480. *Id.* at 2027–28, 2035 (Alito, J., dissenting).

481. *Id.* at 2028 (Alito, J., dissenting).

482. *Id.* at 2035 (Alito, J., dissenting).

483. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2240 (2024).

religious rights while also rejecting parental rights arguments from [other] parents . . . asserting their right to seek gender-affirming care for their transgender children."[484] However, this pessimistic possibility has not materialized yet. Nor should it discourage efforts, like the one made in this Article, to insist that parental rights are salient on both sides on the aisle. This understanding is valuable both theoretically and pragmatically as it suggests a path to ensuring that trans adolescents receive the treatments they need even when their rights and health depend on a conservative Court.

2. The Limits of Parental Rights

While reliance on parental rights to invalidate the treatment bans might be the only way to renew trans minors' access to necessary healthcare when the Supreme Court is controlled by a conservative supermajority, such reliance is far from being a risk-free move. As Part II discussed and others have observed, parental rights have become the center of a politicized debate,[485] and "movement conservatives are invoking parental rights to advance a socially conservative political agenda."[486] In the domain of gender care, the main risk is that invalidation of the treatment bans in the name of parental rights might injure many other minors who are struggling with the gap between their sex assigned at birth and their gender identity, whether diagnosed with gender dysphoria or not.[487] Given this risk, the question becomes what are the contours of parental rights when minors cope with questions of gender identity.

The most immediate answer is that rights, including parental rights, are never absolute, and therefore context is key. The circumstances that strongly support broad parental rights and limited state power in the case of treatment bans do not always exist. Most meaningfully, in seeking treatments for their trans children, parents follow doctors' advice and embrace and advance their children's wishes. In such situations, presumptions regarding parents' fitness and ability to make the best choices on behalf of their children should be the strongest. Accordingly, regulative interventions are neither needed nor justified. At other times, however, this might not be the case.

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484. Elizabeth Tobin-Tyler, *The Past and Future of Parental Rights: Politics, Power, Pluralism, and Public Health*, 30 VA. J. SOC. POL'Y & L. 312, 341 (2023).

485. *See id.* at 322–41 (discussing multiple contemporary controversies surrounding parental rights).

486. Clare Huntington, *Parental Rights: Rhetoric Versus Doctrine,* 91 U. CHI. L. REV. 503, 507 & n.22 (2024) (collecting resources).

487. While this Article focuses on gender care, related questions arise also in the educational context.

Some conflicts between parents and their children may justify a state intervention to assist children despite their parents' preferences. In the specific context of minors handling incongruity between their sex assigned at birth and their gender identity, parents might object to everything from their children's wishes to change their name and appearance to their children's pursuit of medical treatment. If this happens, and if the parents' objection enhances the suffering of the impacted minors, the entire analysis of the relationship between the state and the parents should be different.

For example, in a recent case that the Supreme Court refused to review,[488] the Indiana Court of Appeals upheld a lower court's order placing a sixteen-year-old transgender minor diagnosed with gender dysphoria[489] with the Department of Child Services and "outside the home."[490] The Court of Appeals found no error in the lower court's view that this was "an extreme case where [the minor] has reacted to a disagreement with the [p]arents by developing an eating disorder and self-isolating, which seriously endangers [the minor's] physical, emotional, and mental well-being."[491] In response to the parents' constitutional challenge based on the Due Process Clause, the court recognized that "[a] parent has a fundamental right to raise his or her child without undue influence by the state" but emphasized that this right "is limited by the State's compelling interest in protecting the welfare of children."[492]

This Indiana case differs from *Skrmetti* and other cases that challenge the treatment bans in *two* critical ways. First, it presents a severe crisis in the minor-parent relationship.[493] Second, the state's intervention aligns rather than conflicts with a specific medical recommendation made after examining the minor. In cases like that, as the Indiana Court of Appeals explained, the state has a "compelling interest" that justifies limiting constitutional parental rights.[494]

More generally, while this Article does not cover all the needed limits on parents' constitutional rights, other scholars studying the issue have convincingly argued that promoting children's wellbeing is and

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488. *In re A.C.*, 198 N.E.3d 1 (Ind. Ct. App. 2022), *cert. denied*, 144 S. Ct. 1084 (2024) (mem.).

489. *Id.* at 13.

490. *Id.* at 8, 17.

491. *Id.* at 11.

492. *Id.* at 14 (quoting *In re Ju.L.*, 952 N.E.2d 771, 776 (Ind. Ct. App. 2011)).

493. *See* Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 135 (2021) (proposing a new model that conceives parental rights in relational terms and therefore offers enhanced support for children's independent interests and agency including when transgender "children seek to obtain or refuse medical care over the objection of their parents").

494. *In re A.C.*, 198 N.E.3d. at 17.

should be the sole justification for protecting parental rights and the sole reason to limit them.[495] This child-wellbeing rationale directly explains why parental rights might be limited when the interests of parents and children are severely misaligned. Moreover, the rationale precludes parents' usage of parental rights for purposes that deviate from promoting their children's wellbeing, such as disseminating certain ideologies.

Importantly, the deviation problem is relevant to handling the concern that invalidating the bans in *Skrmetti* via parental rights would allow conservative parents to invalidate acts and policies that are necessary for the *protection* of transgender youth. Under the child-wellbeing theory, invoking parental rights merely to advance an anti-trans ideology without an actual link to the child's concrete needs should not enjoy constitutional protection.[496] Accordingly, because the parents in *Skrmetti* are genuinely focused on their children's wellbeing, as opposed to their ideology,[497] they deserve constitutional protection. And vice versa: Conservative parents of cisgender children who have *not* experienced distress related to their gender identity are misusing the argument of parental rights when they raise it to block education policies that conflict with their religious views.[498] This reasoning offers justification to judicial decisions such as *Eau Claire*, which dismissed those parental arguments based on lack of standing.[499]

In sum, if enough Supreme Court Justices agree to invalidate the treatment bans because they infringe on parents' rights, they should carefully limit their decision to circumstances in which the state uses its legislative power to forbid healthcare that parents and children seek *together* according to specific medical advice.

CONCLUSION: DUE CARE AND DEMOCRACY

Writing the majority opinion in *Skrmetti*, Chief Judge Sutton invoked the democratic narrative upon which the watershed decision in *Dobbs* rests. In a nutshell, *Dobbs*'s theory of the relationship between democracy and courts demands self-restraint from judges reviewing the

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495. *See, e.g.*, Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371 (2020); Clare Huntington & Elizabeth S. Scott, *The Enduring Importance of Parental Rights*, 90 FORDHAM L. REV. 2529, 2529 n.1 (2022) (also collecting works that have advanced a "child-wellbeing rationale for parental rights").

496. *See* Huntington, *supra* note 486, at 507–09.

497. See the quote of a Republican father opening this Article.

498. For a similar argument in the context of racial ideology, see LaToya Baldwin Clark, *The Critical Racialization of Parents' Rights,* 132 YALE L.J. 2139 (2023) (criticizing the weaponizing of parental rights to advance white supremacy).

499. *Parents Protecting Our Child., UA v. Eau Claire Area Sch. Dist.*, 95 F.4th 501 (7th Cir. 2024).

products of the democratic legislative process.[500] In *Dobbs*'s telling, this is particularly true when the dispute before the court concerns an issue of "profound moral and social importance" at the heart of a "national controversy."[501]

Chief Judge Sutton portrayed his approach to the treatment bans as an exercise of a *Dobbs*-style self-restraint in a case of such "national controversy." In his words: "Life-tenured federal judges should be wary of removing a vexing and novel topic of medical debate from the ebbs and flows of democracy by construing a largely unamendable Constitution to occupy the field."[502]

Skrmetti's extension of *Dobbs*'s democratic narrative from the debate about abortion rights to the "culture wars" around gender-affirming care was almost foretold by legal scholars. In their *Harvard Law Review* article titled "*Dobbs* and Democracy" Professors Melissa Murray and Katherine Shaw trace the rise of this conservative argument. Their study includes the fact that the dissenting conservative Justices in *Obergefell v. Hodges*[503] already raised democracy as a reason to object to judicial recognition of same-sex marriage.[504] The authors specifically document the impulse of conservative Justices to object to any judicial effort to protect LGBTQ+ rights, which those Justices have reconfigured as an act of taking sides "in the culture war."[505]

With this reasoning in mind, Murray and Shaw cite and support the *Obergefell* majority's response: "[D]emocracy is the appropriate process for change, so long as that process does not abridge fundamental rights."[506] In other words, the Constitution's protection of fundamental rights—such as parental rights—is a vital building block of democracy, not a disruption to its working. Or, as the dissent in *Skrmetti* insisted: "'The very purpose of' our constitutional system 'was to withdraw certain subjects from the vicissitudes of political controversy, to place

500. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2277 (2022). *See generally* Melissa Murray & Katherine A. Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728 (2024).

501. *Dobbs*, 142 S. Ct. at 2265.

502. 576 U.S. 644 (2015).

503. *L.W. v. Skrmetti*, 83 F.4th 460, 471 (6th Cir. 2023).

504. Murray & Shaw, *supra* note 500, at 743. Notably, Chief Judge Sutton clerked for Justice Antonin Scalia who raised the democratic argument in *Obergefell* and elsewhere, *see Sutton, Jeffrey S.*, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/sutton-jeffrey-s [https://perma.cc/37NP-MSUN]; Murray & Shaw, *supra* note 500, at 742–43 (discussing Justice Scalia's use of democratic argument), and his approval of the bans on same-sex marriage created the controversy that led the Supreme Court to hear and decide the historical *Obergefell*. *See DeBoer v. Snyder*, 772 F.3d 388, 420–21 (6th Cir. 2014).

505. Murray & Shaw, *supra* note 500, at 791.

506. *Id.* at 793 (quoting *Obergefell*, 576 U.S. at 676). The entire Article offers compelling support for this position.

them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'"[507]

Demonstrating resistance to the idea that "gender identity is real,"[508] the majority in *Skrmetti* did the opposite of exercising the judicial restraint it preached. It ignored the Constitution and conventional constitutional analysis, which not only allows but rather demands the judiciary to scrutinize legislation threatening equality and fundamental rights. Instead, the majority turned the constitutional democracy of our country on its head. It allowed its sense of controversy—fueled by initiatives like Project 2025 and organizations such as the ADF and The Heritage Foundation—to harm minors in need of treatment. Taking the name of democracy in vain, it also permitted the violation of the fundamental rights of parents to take care of their children. Indeed, the *Skrmetti* majority went as far as blaming the parents seeking protection of their constitutional rights in sabotaging democracy. "[B]ecoming a parent," the majority stated, "does not create a right to reject democratically enacted laws."[509]

During the oral arguments, Justice Kavanaugh reintroduced the idea of using democracy as an excuse to squash rights rather than protect them. He asked Solicitor General Prelogar: "[I]f there's strong, forceful scientific policy arguments on both sides in a situation like this, why isn't it best to leave it to the democratic process?"[510] To which Justice Sotomayor offered a sharp response: It is that very democratic process that necessitates a Constitution that protects those who cannot vote to protect themselves. In her words: "When you're 1 percent of the population or less, very hard to see how the democratic process is going to protect you."[511]

Remarkably, only a few days after the oral arguments in *Skrmetti*, in *Eau Claire*, Justices Alito and Thomas forcefully repeated Justice Sotomayor's reply to the democratic argument. Having *conservative* parents in mind, they no longer preached judicial self-restraint. Instead, they insisted that when a case about gender identity "presents a question of great and growing national importance" and "some particularly contentious constitutional questions," courts must "carry out their 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'"[512]

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507. *Skrmetti*, 83 F.4th at 513 (White, J., dissenting) (cleaned up) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

508. *See supra* note 207 and accompanying text.

509. *Skrmetti*, 83 F.4th at 475.

510. *Skrmetti* Transcript, *supra* note 8, at 41.

511. *Id.* at 129.

512. *Parents Protecting Our Child., UA v. Eau Claire Area Sch. Dist.*, No. 23-1280, slip op. at 1–2 (U.S. Dec. 9, 2024) (Alito, J., dissenting) (alteration in original)

This rare consensus between Justices from left and right reveals much of the fallacy in suggesting that the review of the treatment bans' constitutionality should be blocked by deference to the so-called "democratic process." Our democracy does not call for such a result, and our Constitution does not permit it. Indeed, the Constitution's protection of the many ways in which parents holding diverse worldviews raise their children should be seen as enhancing, rather than clashing, with democracy. Notably, preventing the government from imposing its views on heterogeneous citizenry serves core democratic commitments to self-governance and pluralism that can be understood as an antidote to totalitarianism.[513] Like the Court said a century ago, the government's wish "to foster a homogeneous people" cannot justify coercive steps taken to eliminate differing views that can be "helpful and desirable."[514] Indeed, such steps are not the product of democracy, properly understood, but a threat to it.

This Article has offered a plethora of reasons for the Justices of the Supreme Court to find common ground and reverse *Skrmetti*, even while outside of the courtroom, conservatives have increasingly exploited various legal tools to abolish trans rights and deny the existence of both gender identity and transgender people.[515] At this critical moment, the Sixth Circuit's flawed analysis can be viewed as an opportunity. It could allow the Court to reject a partisan and divisive approach, apply our constitutional law correctly, and—most importantly—ensure that minors, regardless of their gender identity, receive the treatment they need. To do all this should not be a "vexing" matter. As this Article has shown, it is a matter of due care that is within reach even in a conservative Court.

(quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

513. *See* Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236 (2010) (discussing the antitotalitarian potential of a broad spectrum of families and parental choices).

514. *Meyer v. Nebraska*, 262 U.S. 390, 400, 402 (1923).

515. For example, and in addition to numerous anti-trans laws mentioned at *supra* note 3, at the time of finalizing this Article, President Trump's offensive Executive Order targeting gender-affirming care, which uses toxic rhetoric against transgender individuals, is challenged in courts and has already been found unconstitutional. *See, e.g.*, *Washington v. Trump*, 25-cv-00244 (W.D. Wash. Feb. 16, 2025), ECF No. 161.