



# OPINION: IN TRANSGENDER CASE, CAN SCOTUS CUT TO THE MORAL HEART OF THE ISSUE? - JOSH HAMMER

Posted on December 10, 2024 by Josh Hammer



On Wednesday, the Supreme Court heard oral argument in this term's marquee case, *United States v. Skrmetti*.

The case, out of Tennessee, nominally involves a state law banning minors' use of puberty blockers and cross-sex hormones for purposes of so-called gender-affirming care -- which, stripped of all euphemism, means genital mutilation and chemical castration. And the justices will indeed have to resolve the narrow legal question before them in this case: namely, whether or not Tennessee's commonsense protection of vulnerable youth from the predations of the billion-dollar transgender industry offends the 14th Amendment's injunction that no state "deny to any person within its jurisdiction the equal protection of the laws."

The straightforward legal answer is that it plainly does not. Fatuous arguments this week from the U.S. solicitor general and American Civil Liberties Union advocate aside, one simply cannot divorce the issue of medical treatment from the issue of medical purpose. Consider the case of fentanyl. There are legitimate purposes for small amounts of fentanyl, which can be used as a painkiller in a contained hospital setting. There are also myriad illegitimate purposes for fentanyl, as anyone remotely familiar with America's depressing drug overdose crisis can sadly attest. So too can a reasonable person distinguish between testosterone therapy for an adolescent boy with delayed puberty, on the one hand, and testosterone therapy for an adolescent girl with gender dysphoria, on the other hand.

Tennessee's law **does** treat every "person within its jurisdiction" equally. It simply requires that the remedy for gender dysphoria for **all** children and adolescents "within its jurisdiction," regardless of biological sex, is psychological treatment -- not irreversible physical damage to the human body. As recent as a decade ago, this would have been considered so obvious as to not even require legislation. Because we live in morally confused and ideologically fervent times, sadly, such laws are now necessary.

But the *Skrmetti* case also entails a considerably more important, and more sweeping, dispute than the technical constitutional issue that is now pending before the justices. More fundamentally, what was presented to the Supreme Court on Wednesday were two diametrically opposed conceptions of anthropology and the human person -- of man's very being and his relation with his fellow man, the state and God Himself.

The transgender lobby and the Biden-Harris administration argue that the human person is, in essence, a "Choose Your Own Adventure"

book. Under this dispensation, it is not sufficient that free will exists when it comes to making the decisions and choosing the courses of action that define our lives. Rather, "free will" also extends, in a bastardized sense, to the biologically irreducible question of who we quite literally are as Homo sapiens, members of the human race. The result of this pseudo-intellectual sophistry is the bizarre spectacle of Ketanji Brown Jackson, then an intellectually challenged judge and now an intellectually challenged justice, refusing to answer the question of what a "woman" is when pressed during her Supreme Court confirmation hearing. Gender activists hectored us for years that sexual orientation is established at birth, but apparently one now gets to choose whether he is man or woman.

On the other side of the civilizational clash, there are those of us who still "get bitter" and "cling," to use our 44th president's infamous words, to the norm established by God Himself in the Book of Genesis: "And God created man in His image; in the image of God He created him; male and female He created them." Even holding the Good Book aside, it doesn't require a Ph.D. in biology or embryology to grasp that human beings (and any number of species of animals) have precisely two possible chromosomal structures: XX for "female," and XY for "male." We know from the birds and the bees that human beings are specifically designed with sexual complementarity so that they can, upon the marital union, become one flesh and, to again cite Genesis, "be fruitful and multiply."

These two visions of the human person are in irreconcilable tension with one another. There is no middle ground here. Only one vision can survive.

The imperative of the statesman, be he political or judicial in nature, is to choose. It is not statesmanlike -- indeed, it is cowardly -- for constitutional officers of all stripes, judges included, to simply toss their hands in the air and proclaim their contentedness with letting the chips fall where they may. America's great antebellum dispute, that over chattel slavery, similarly concerned the nature of the human person. That dispute ended in tragedy, destruction and mass bloodshed.

In order to forestall a similar fate, we need more Lincoln-esque figures in our time: those who, like the Great Emancipator, have the courage to advance forthright moral arguments. Perhaps the Supreme Court can begin by using Skrmetti to declare transgenderism the lie against the human person that it is.