Opinion
NCR Voices

The U.S. Supreme Court building is seen in Washington, D.C., June 1, 2024. (OSV News/Reuters/Will Dunham)

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The U.S. Supreme Court's decision to uphold a Tennessee law that bans certain treatments for transgender minors was the correct legal conclusion, no matter what you think of the law itself. The failure to distinguish between what is constitutional and what is a political outcome one does not like stalks many activists today, pouring gasoline on the flames of the culture wars.

The heart of the legal issue was twofold: whether the Tennessee law, known as SB1, violated the Equal Protection clause of the 14th Amendment by discriminating against persons who are transgender, and whether the law required "strict scrutiny" from the court or the lesser burden of "rational basis." The two issues are linked.

Writing for the majority, Chief Justice John Roberts neatly dismissed the 14th amendment argument. "SB1 classifies on the basis of age. Healthcare providers may administer certain medical treatments to individuals ages 18 and older but not to minors," Roberts wrote. "Second, SB1 classifies on the basis of medical use. Healthcare providers may administer puberty blockers or hormones to minors to treat certain conditions but not to treat gender dysphoria, gender identity disorder, or gender incongruence. Classifications that turn on age or medical use are subject to only rational basis review."

There are a lot of laws that bar young people from doing certain things that older people are permitted. For example, you can't buy liquor or cigarettes until you are 21, but you can vote at 18.

The different classifications based on medical use are routine: You can administer strong painkillers with the intent of alleviating pain, but not with the intent of helping a patient to get high.

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Applying "rational basis" review, the court "employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." The court will uphold a law if it finds "any reasonably conceivable state of facts that could provide a rational basis for the classification."

As Roberts writes: "SB1 clearly meets this standard. Tennessee determined that administering puberty blockers or hormones to a minor to treat gender dysphoria, gender identity disorder, or gender incongruence 'can lead to the minor becoming irreversibly sterile, having increased risk of disease and illness, or suffering from adverse and sometimes fatal psychological consequences.' "

Separating the legal argument from the cultural debate about transgenderism is more difficult than determining which legal standard to apply to a given law. Roberts writes, "Here, however, SB1 does not mask sex-based classifications. For reasons we have explained, the law does not prohibit conduct for one sex that it permits for the other."

Throughout his decision, the male-female binary is presumed and, of course, in most civil rights legislation, that binary was presumed.

Rep. Sarah McBride, D-Delaware (Wikimedia Commons/House Creative Services/Ike Hayman)

That presumption, which strikes most of us as commonsensical, has been under sustained attack among cultural elites for about a decade. Ezra Klein, at The New York Times, recently interviewed Rep. Sarah McBride, the first transgender member of Congress. McBride's way of speaking about transgender rights was far less doctrinaire than one hears from, say, the Human Rights Campaign fund. But, throughout the interview, McBride assumed that the problem was a failure to persuade, not that she might be wrong.

"And I think some of the cultural mores and norms that started to develop around inclusion of trans people were probably premature for a lot of people," McBride said.

"Premature?" As if a lack of sophistication or education was the problem? Some of us worry that, while every rule has anomalies, certain basic rules like the male-female binary have served our civilization well, and should not be dismissed. We also can and should make allowances for and show compassion to those people who experience gender dysphoria.

Many of us are rightly suspicious of the supposed "science" advocates routinely cite in arguing against laws like Tennessee's.

Justice Sonia Sotomayor's dissent points to a study that identified an increased risk of suicide among transgender youth. The report did not determine, or even test, whether hormonal or other therapies were helpful in decreasing suicidal ideation.

Nor did the study deal with the problem of diagnostic overcrowding, which was identified by the Cass Report in the United Kingdom as a principal difficulty with most studies of transgender youth. That is to say, children who self-identify as transgender also usually have a lot of other issues going on in their lives as well, and isolating one issue like gender identity from the others makes causality more difficult to assign to any one issue.

N.B. The Cass Report, the most systematic examination of studies to date, identified a host of problems with most studies. If you do not have time to read the whole report, the 25-page summary at the beginning gives a sufficient flavor of the whole.

There are three core problems with the orthodoxy of the left on the issue.

First, it demands a complete adherence to the proposition that 14-year-olds and 15-year-olds should be able to make irrevocable decisions. Many Americans rightly worry that the leaders of our culture are too enamored of personal autonomy as a transcendent value, to the exclusion of all other values, and this proposition is Exhibit A.

Second, the orthodoxy, as exhibited in Sotomayor's dissent, never entertains an ounce of concern for anyone who might make such an irrevocable decision as a teenager, later regret it, and would never, ever show up in a nonrandomized survey paid for by an advocacy organization. Why are those young people, who might just be going through a phase, beyond our moral concern?

Third, there is something Orwellian about the way some cultural leaders try to put their finger on the scale of the debate. I have noted before that AP style guidelines state: "If surgery is involved, *gender-affirming* or *gender-affirmation surgery*. Do not use the outdated term *sex change*, and avoid describing someone as *pre-op* or *post-op*." The object of the "gender-affirming care" is to change a person's sex. If objectivity is the point, why the creepy insistence on a vague and amorphous phrase like "gender-affirming care?"

The same goes for the frightening phrase "sex assigned at birth," as if there were some conspiracy afoot to assign a particular gender when, in most cases, a doctor or midwife looks down and says, "It's a girl!" or "It's a boy!" Such things should set off liberal alarm bells.

For all three reasons, I am suspicious of gender ideology, of the ideologues who promote it, and of the laws they seek to enact. Still, I am not sure the Tennessee law is a good one.

I am sympathetic to the position articulated by former New Jersey Gov. Chris Christie, who opposed laws like Tennessee's. "I don't think that the government should ever be stepping into the place of the parents in helping to move their children through a process where those children are confused or concerned about their gender," said Christie in a 2023 interview. "The parents are the people who are best positioned to make these judgments."

Going through puberty is difficult enough for everyone. It is almost impossible to imagine going through it with substantial questions about one's gender identity. Until we know more about the long-term consequences of interventions to change a minor's sex, and reflect on the cultural consequences of divorcing gender identity from biological sex, laws like Tennessee's seem reasonable as well as constitutional.