Obergefell Liberates Bathrooms

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I. INTRODUCTION: THE BATHROOM BILL PROBLEM

The recent history of transgender access to bathrooms is fraught with controversy. In February 2017, President Donald Trump rescinded President Barack Obama’s policy allowing transgender students to use bathrooms matching their gender identity rather than their birth gender. The Obama administration had argued that nondiscrimination laws require schools to allow transgender students to use the bathrooms of their choice. President Trump rejected that approach because it disregarded “the primary role of the states and local school districts in establishing educational policy.”

Just two months earlier, in December 2016, the political climate had briefly seemed friendlier to transgender bathroom users. The North Carolina state legislature announced that it would repeal the state’s House Bill 2 (HB2), known as the Public Facilities Privacy & Security Act. HB2 required transgender people to use bathrooms matching their birth gender—rather than their gender identity—in many public buildings. The repeal effort ultimately failed in 2016, even though

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1. “Transgender” is defined as “a person whose gender identity differs from the sex the person had or was identified as having at birth.” Transgender, Merriam-Webster, www.merriam-webster.com/dictionary/transgender (last visited Apr. 9, 2018).


5. Id.


8. See Fausset, supra note 6.

critics assert that the law was discriminatory and costly—HB2 caused North Carolina to lose thousands of jobs. To protest the law, high-profile sporting events pulled out of North Carolina: the National Basketball Association moved its All-Star Game elsewhere, and the National Collegiate Athletic Association and the Atlantic Coast Conference moved their championship games to other locations. The unpopularity of HB2 helped voters to oust Governor Pat McCrory (R-NC) who had supported the law. But proposals for similar anti-transgender bathroom laws sprang up in at least fifteen states after North Carolina passed HB2, each attempting to block transgender people from using bathrooms matching their gender identity.

In 2016, the Supreme Court added to the bathroom bill controversy when it announced that it would hear *G.G. ex rel. Grimm v. Gloucester County School Board* during the 2017 term to address the legality of restricting transgender bathroom use in schools. In 2015, a seventeen-year-old transgender boy, Gavin Grimm, challenged a policy of the Gloucester County School Board (the “Board”) that...
mandated students to use school bathrooms matching their birth gender.\textsuperscript{10} Grimm, who was born female but identifies as male, wished to use the boys’ bathrooms in his school.\textsuperscript{17} He sought an injunction in the Eastern District of Virginia blocking the Board’s policy, arguing that it violated his rights under the Equal Protection Clause of the Fourteenth Amendment\textsuperscript{18} and Title IX of the Education Amendments of 1972.\textsuperscript{19} The district court dismissed Grimm’s claim and he appealed.\textsuperscript{20} Grimm argued that while the school provided an alternative appropriate private facility for students with gender identity issues, “he [could] not use these new unisex restrooms because they ma[d]e him feel even more stigmatized.”\textsuperscript{21} The Fourth Circuit Court of Appeals held in favor of Grimm regarding one issue: the U.S. Department of Education and U.S. Department of Justice’s joint guidance letter interpreting the Title IX regulations and supporting Grimm’s position was entitled to deference.\textsuperscript{22} The letter, issued during the Obama Administration, protected Grimm’s right to use the boys’ bathrooms in his school.\textsuperscript{23}

Opposing the Obama Administration and rejecting Grimm’s position, Judge Paul Niemeyer of the Fourth Circuit wrote a vigorous dissent in part.\textsuperscript{24} He opposed gender-identity-based bathroom use in schools because courts had consistently recognized “bodily privacy” as “inherent in the nature and dignity of humankind.”\textsuperscript{25} “Across societies and throughout history,” he reasoned, bathrooms have always been separated “on the basis of biological sex in order to address privacy and safety

\textsuperscript{16} See Grimm, 822 F.3d at 715–17. The policy mandated the school to provide male and female bathrooms and limited their use “to the corresponding biological genders.” Id. at 716.

\textsuperscript{17} See id. at 715.

\textsuperscript{18} The Equal Protection Clause of the Fourteenth Amendment states that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

\textsuperscript{19} See Grimm, at 715–17. Grimm alleged that the Board unlawfully discriminated against him in violation of Title IX and the Equal Protection Clause of the U.S. Constitution, which both guarantee the right to equal education and equal protection, because he was denied use of the boys’ bathrooms in his school. Id. at 714–15. The Fourth Circuit ruled in favor of Grimm regarding his Title IX claim and declined to preemptively dismiss his equal protection claim. Id. at 717, 723. The district court had not yet ruled on his equal protection claim. See id. at 717.

\textsuperscript{20} See id.

\textsuperscript{21} See id. at 716 (internal quotation marks omitted).

\textsuperscript{22} Id. at 722–23. In the letter, the departments explained that a school generally must “treat students consistent with their gender identity.” U.S. Dep’t of Justice & U.S. Dep’t of Educ., Dear Colleague Letter on Transgender Students 3 (2016). According to Grimm, this means that when providing gender-separate bathrooms, a school must allow a biologically female student who identifies as male to use boys’ bathrooms. See Grimm, at 714–18, 730; see also Supreme Court Will Hear Transgender Bathroom Case, supra note 15.

\textsuperscript{23} See Grimm, 822 F.3d at 714–15; see also Supreme Court Will Hear Transgender Bathroom Case, supra note 15; Peters et al., supra note 3.

\textsuperscript{24} See Grimm, 822 F.3d at 730 (Niemeyer, J., concurring in part and dissenting in part).

\textsuperscript{25} Id. at 734 (citing Doe v. Luzerne Cnty., 660 F.3d 169, 176–77 (3rd Cir. 2011)).
concerns arising from the biological differences between males and females.”

This is a legitimate and important interest, he argued, to ensure that our “nude or partially nude body, genitalia, and other private parts, are not exposed to persons of the opposite biological sex.” The passion with which both sides argued their positions was reminiscent of the contentious dispute over same-sex marriage, which was legitimized by the Supreme Court in *Obergefell v. Hodges*.

The law should prevent discrimination, abuse, and harassment of transgender people. Their struggle to find safe bathrooms to use is a major impingement on personal freedom and privacy. According to a study by the National Gay and Lesbian Task Force and the National Center for Transgender Equality, sixty-four percent of transgender people will experience sexual assault in their lifetime. In 2013, seventy percent of transgender people who responded to a Washington D.C. survey had been “denied access, verbally harassed, or physically assaulted” in a public bathroom. In another study, over sixty percent of transgender college students who had been denied access to school bathrooms attempted suicide. Worst of all, transgender people face an insidious and unfounded stigma that they are sexual predators in bathrooms. “Ever since psychoanalytic theory linked toilet training

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26. *Id.*

27. *Id.*


29. Websites such as Safe2Pee list “trans-friendly” bathrooms where users from all over the world submit gender-neutral, single-use, and other safe bathroom locations. See Safe2Pee, safe2pee.org (last visited Apr. 5, 2017).


34. The myth that transgender people attack women and children in bathrooms has been debunked by facts; nineteen states, the District of Columbia, and over two hundred municipalities have “anti-discrimination
with sexuality, bathroom and sex have been intrinsically connected in both public imagination and scholarly analysis." According to researchers, because transgender people defy societal expectation of gender, their presence in gender-segregated spaces can raise anxieties about sexuality. The notion of the transgender predator is baseless because experts agree that criminals who sexually assault victims will likely enter any bathroom to attack "regardless if it corresponds to their gender.”

In a rare case in 2015, police arrested a man, who was not transgender, dressed as a woman in a Virginia shopping mall after he was caught peeping into a stall in the women's bathroom. But should an isolated incident like this justify law and policy? Judge Paul Niemeyer of the Fourth Circuit Court would likely answer yes, reasoning that gender-identity-based bathroom use “tramples on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes.” To Judge Niemeyer, gender-identity-based bathroom use “overrules custom, culture, and the very demands inherent in human nature for privacy and safety, which the separation of such facilities is designed to protect.”

This Note argues that fear and isolated incidents should not justify law and policy and that we can overcome our fears by knowing that transgender people are the same as everyone else. By closing our eyes and seeing the world through a “veil of ignorance,” we can “evaluate principles solely on the basis of general considerations” rather than resorting to exploiting “social and natural circumstances to [our] own advantage” as advocated by philosopher John Rawls. Part II of this Note examines how the evolution of society compelled the legalization of same-sex marriage under

laws and ordinances allowing transgender people to use public facilities that correspond to their gender identity” and no evidence indicated that transgender people were or had ever been predators in bathrooms. Emanuella Grinberg & Dani Stewart, 3 Myths That Shape the Transgender Bathroom Debate, CNN (Mar. 7, 2017, 9:19 PM), www.cnn.com/2017/03/07/health/transgender-bathroom-law-facts-myths/index.html. Prosecutors, law enforcement agencies, and state human rights commissions, have “consistently denied that there is any correlation” between transgender bathroom use and any increase in assaults. Id.


36. Id.

37. Borrello, supra note 31.

38. See Man Dressed as Woman Arrested for Spying into Mall Bathroom Stall, Police Say, NBC4 Wash., www.nbcwashington.com/news/local/Man-Dressed-as-Woman-Arrested-for-Spying-Into-Mall-Bathroom-Stall-Police-Say-351232041.html (last updated Nov. 18, 2015, 10:21 AM). Cases such as this are extremely rare; CNN found only one case, in Seattle, Washington, where a man allegedly undressed in a women's locker room “citing [the state's] anti-discrimination law as motivation" in 2016. See Grinberg & Stewart, supra note 34. Though CNN “reached out to 20 law enforcement agencies in states with anti-discrimination policies covering gender identity,” the agencies that responded did not report "any bathroom assaults after the policies took effect." Id.


40. Id. at 731.

Obergefell. Part III argues that history compels us to legalize bathroom use based on gender identity. Part IV discusses how public policy of safety and dignity for everyone compels us to legalize bathroom use based on gender identity. Part V concludes this Note, asserting that just as Obergefell liberated marriage and legalized same-sex marriage, it should liberate bathrooms and legalize transgender bathroom use.

II. HISTORY HELPED OBERGEFELL LEGALIZE SAME-SEX MARRIAGE

The right to bathroom use is akin to the right to marry because both are two of the “most private human conduct[s].” In Obergefell, the Supreme Court held that the U.S. Constitution protects same-sex marriage in all fifty states because same-sex couples seek the same rights as heterosexual couples. Both intimacy and marriage are fundamental in American life; we may not easily tolerate governmental restrictions on people’s choices regarding these institutions. Both are legally protected under the Fourteenth Amendment. The Court explained that the historical evolution of intimacy and marriage justified this conclusion and answered two legal questions. First, does the Constitution require states to permit same-sex marriage? The Court answered yes. Thus, state bans on same-sex marriage are invalid. Second, does the Constitution require states to recognize same-sex marriage validly performed in another state? Again, the Court answered yes. Thus, no state may invalidate a same-sex couple’s marriage in another state.

As a general principle, Justice Kennedy argued that the historical evolution of American perceptions about important social issues should act as a vehicle for

43. Id.
44. Obergefell, 135 S. Ct. at 2604–05. The law protects our rights regarding our “most private human conduct” because those rights are fundamental. Id. Our right to marry is deemed most private and fundamental and is therefore legally protected. Id. Our right to bathroom use of our choice is private and fundamental and should also be legally protected.
45. See id. at 2604–06 (“Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.”).
46. See id. at 2599–2606.
47. See id.
48. See id. at 2602–06.
49. See id. at 2599–2606.
50. See id.
51. Id. at 2607.
52. Id. at 2607–08.
53. Id.
54. See id. at 2595, 2599–2607.
implementing positive changes in the country’s law.55 Throughout American history, the institution of marriage has changed; marriage was originally a male dominated institution, in which men were the property owners and the family decision makers.56 Over time, women became equal partners with men as property owners and decision makers regarding family finance, children, and custody of children in divorce.57 Justice Kennedy discussed at length how law and societal perception worked hand-in-hand to allow women to gain more rights as the institution of marriage shifted from a male dominated enterprise to a partnership between women and men.58 For Justice Kennedy, this shift applied not only to the institution of marriage but also to the notion of male and female roles in society.59 The combined changes in what it means to be married and what it means to be male or female helped Justice Kennedy conclude that America was ready to treat same-sex marriage as a fundamental right guaranteed by the Constitution.60 America’s evolving perception of marriage justified the outcome of Obergefell because Justice Kennedy believed that law should develop as society develops; law should not be static.61

Moreover, the issue was not only the legality of same-sex marriage but also the government’s role in resolving the issue.62 Chief Justice John Roberts dissented in Obergefell and argued that the real issue must be “what constitutes ‘marriage,’ or more precisely, who decides what constitutes ‘marriage.’”63 He preferred to leave decisions about marriage to the states.64 But Justice Kennedy concluded that equal rights must be applied uniformly across the nation to be fully effective; if a same-sex couple formalizes their relationship and intimacy by legally marrying in one state, their union must be recognized by every state.65

55. See id. at 2588.
56. Id. at 2595.
57. Id.
58. See id. at 2595–2605.
59. See id.
60. See id.
61. See id. Justice Kennedy justified the majority opinion to legalize same-sex marriage because he believed that as our societal perception of marriage evolved, our law should do the same, and thus same-sex marriage must now be federal law. Id. Justice Kennedy deftly handled his opposition by admitting that “[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.” Id. at 2602. Turning again to the historical evolution of marriage, Justice Kennedy argued that “when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon deems or stigmatizes those whose own liberty is then denied.” Id.
62. See id. at 2612.
63. Id. at 2612.
64. Id.
65. See id. at 2604–05.
To bolster his argument, Justice Kennedy referred to a series of prior decisions by the Court that granted increased access to the institution of marriage under the Fourteenth Amendment. He looked to *Zablocki v. Redhail*, which applied the Equal Protection Clause of the Fourteenth Amendment to protect a debtor’s right to marry without interference from a Wisconsin statute. Justice Kennedy also found support in *Griswold v. Connecticut*, which reinforced that the right to marry was a part of the fundamental right to privacy implicit in the Fourteenth Amendment’s Due Process Clause. He applied the Due Process Clause to expand the right to marry to same-sex couples in *Obergefell*. Further, Justice Kennedy looked to the historical evolution of mixed-race couples’ right to marry under *Loving v. Virginia*. The *Loving* Court reasoned that “[t]o deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.”

Who defines gender as it relates to bathrooms? Who is male? Who may legally use men’s bathrooms in North Carolina? Who may not use those bathrooms? *Obergefell* and the historical evolution of bathrooms in America teach us that it should not be the states that decide.

III. HISTORY COMPELS LEGALIZING TRANSGENDER BATHROOM USE

The history of bathrooms is as rich as that of marriage because both bathrooms and marriage are private matters of fundamental importance to individuals. The Court’s argument to legalize biracial marriage in *Loving* can be applied to legalize bathroom use based on gender identity. To deny a fundamental freedom such as the right to use the bathroom of one’s choice on the basis of biological gender classification—a classification “so directly subversive of the principle of equality at the heart of the Fourteenth Amendment”—would be a deprivation of citizens’ liberty without due process of law.

66. *See id.* at 2598–2604.
67. *See id.* (citing *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding that the statute at issue, which restricted the debtor’s ability to marry because he owed child-support money to the state, impinged on the debtor’s fundamental right to marriage)).
69. *See Obergefell*, 135 S. Ct. at 2588–90, 2602–05.
70. *See id.* at 2598–99, 2603–05 (citing *Loving v. Virginia*, 388 U.S. 1, 10–12 (1967)).
73. *Loving*, 388 U.S. at 12.
The ways in which society has handled the relationship between gender and bodily functions have changed over the years. Bathrooms are not straightforward pieces of technology; they are “culturally determined and historically specific.” Scholars argue that bathroom rules “directly reflect the dominant political ideology and its shifts: at the first sign of perestroika, for instance, Russians almost immediately began making ‘Euro-repairs’ to their homes, replacing communal toilets and baths with private ones.” Before that, they had been using state-mandated communal toilets, which were customary but were not, it turned out, their preference. Much of the change in bathroom customs has been driven by changes in the meaning of gender. Bathroom evolution is similar to the evolution of the institution of marriage; just as a husband and a wife no longer have the same cultural and societal roles as they did fifty years ago, male and female gender roles have changed. This shift has affected how society reacts to gender; today, gender can be a fluid notion. It may be a manifestation of complex relationships between physical characteristics, genetics, and psychological understandings rather than an automatic assignment at birth, just as marriage is no longer strictly between a man and a woman. As Obergefell recognized the marital validity of various sexual orientations, the law must recognize gender identity preferences as a legitimate continuation of the Court’s decision to extend greater rights to those who could not wed.

Historical evolution of bathrooms began in Rome with gender-based inequality. The Roman emperor Vespasian appears to have been the first ruler to provide his people with public bathrooms. However, they were not for everyone; he built urinals

74. See generally Barbara Penner, Bathroom (2014) (delineating the evolution of the bathroom and discussing its representation of modern civilization’s values).

75. Id. at 18.

76. Perestroika, which may be translated as “reconstruction,” was a period, starting in 1985, of political and economic reform within the Communist Party in the Soviet Union. Archie Brown, Perestroika: Reform that Changed the World, BBC (Mar. 10, 2015), www.bbc.com/news/world-europe-31733045. Under Mikhail Gorbachev’s leadership, perestroika changed the Soviet Union and the world. Id. However, the period did not last; by 1991, Gorbachev’s efforts to recreate the Union as a voluntary federation ended in failure, and the country dissolved into fifteen successor states. Id.

77. Penner, supra note 74, at 18.


79. See Penner, supra note 74, at 18–20.

80. See id.


84. See id.
“of fair polished marble” for male users only, who were not permitted to urinate elsewhere.\textsuperscript{85} This mandate allowed Vespasian to exercise control over men by restricting where they could urinate and to profit financially by collecting the sewage and selling it.\textsuperscript{86} Over one thousand years later in 1596, Sir John Harrington invented the flushing toilet in England, which Queen Elizabeth I installed in her palace.\textsuperscript{87} While these toilets improved sanitation, they were only available to the privileged; safety and privacy continued to be lacking in most bathrooms in Europe.\textsuperscript{88} It took another 250 years for commoners to be able to use public bathrooms with some privacy.\textsuperscript{89} European and American toilets were a combination of “communal outhouses, chamber pots and holes in the ground;” toilets did not become commonly integrated parts of architecture until 1851.\textsuperscript{90}

The first gender-specific bathrooms seemed to have appeared in Paris around 1739 as a temporary setup at a societal ball.\textsuperscript{91} Party organizers placed a chamber pot\textsuperscript{92} for men in one room and a chamber pot for women in another.\textsuperscript{93} Attendees thought it was “a novelty” and so “eccentric and fun.”\textsuperscript{94} For common people in the Western world, however, public bathrooms were mostly for men until the Victorian era.\textsuperscript{95} Women who were “out and about” had to urinate over a gutter or carry small urine holding devices to use discretely, hidden under long skirts.\textsuperscript{96} At the time, social norms preferred women and girls to stay close to home and not be out for long periods of time.\textsuperscript{97} Researchers call this a urinary leash, which continues to restrain women today; some female workers and schoolgirls in India refrain from eating or

\begin{itemize}
  \item \textsuperscript{85} \textit{Id.}
  \item \textsuperscript{86} \textit{Id.}
  \item \textsuperscript{87} See Claire Suddath, \textit{A Brief History of Toilets, Time} (Nov. 19, 2009), http://content.time.com/time/health/article/0,8599,1940525,00.html. Queen Elizabeth was Sir John Harrington’s godmother. \textit{Id.}
  \item \textsuperscript{88} See \textit{id.}
  \item \textsuperscript{89} See \textit{id.}
  \item \textsuperscript{90} Jimmy Stamp, \textit{From Turrets to Toilets: A Partial History of the Throne Room}, Smithsonian.com (June 20, 2014), www.smithsonianmag.com/history/turrets-toilets-partial-history-throne-room-180951788/.
  \item \textsuperscript{92} A chamber pot is a pot inside a box with a seat on top. Pappas, \textit{supra} note 91. Chamber pots were commonly used as toilets prior to the advent of indoor plumbing. \textit{Life Before Indoor Plumbing, PETE FER & SON PLUMBING & SUPPLY Co.} (Dec. 15, 2017), www.pfplumbing.net/blog/san-pedro-plumber/life-indoor-plumbing.
  \item \textsuperscript{93} See Pappas, \textit{supra} note 91; \textit{see also} Cavanagh, \textit{supra} note 91.
  \item \textsuperscript{94} Pappas, \textit{supra} note 91; \textit{see} Cavanagh, \textit{supra} note 91.
  \item \textsuperscript{95} Pappas, \textit{supra} note 91.
  \item \textsuperscript{96} \textit{Id.}
  \item \textsuperscript{97} \textit{Id.}
\end{itemize}
drinking all day to avoid having to use bathrooms outside of their homes. They want to avoid “the danger, embarrassment, or dirt of the communal facility.” Such urinary segregation has held women back for much of Western history. It is rooted in “moral ideology concerning the appropriate role and place for women in society.” When government officials investigated American factories for sanitation in the early 1900s, they inspected bathrooms to ensure that they were segregated by gender as a matter of public health. At the time, scientists believed that women could not physically take the same “strains, fatigues, and privations” as men. The women’s bathroom, they thought, would allow a tired woman to “rest when her weak body gave out on the job.” In reality, girls and women suffered the consequences of less opportunity in schools and in workplaces. Something that is customary is not necessarily right if one inequality is used to justify other inequalities. Carefully constructed legal norms about bathroom use can help society overcome unfounded fears and myths about gender just as legal norms about race have helped overcome racism in America.

Until the Civil Rights Act of 1964 banned racially segregated bathrooms, the legal system failed to protect non-white bathroom users, who lacked safe, clean, and dignified public bathrooms. White segregationists justified the separation with fear of diseases “among Negroes” and the alleged threat of sexual violence. They similarly opposed integrating swimming pools because “black men would act upon their supposedly untamed sexual desire for white women by touching them in the water and assaulting them with romantic advances.” The nation has since risen above these unfounded racial fears.


99. Molotch, supra note 98, at 3–4; see also Potty Parity, supra note 98.


101. Id.

102. Id. at 44.

103. Id. at 42.

104. Id. at 44.

105. See id. at 55–56.


108. Id.
Gender issues have caused a great deal of anxiety about bathroom use.\textsuperscript{109} During the 1970s, an invented controversy over unisex bathrooms helped kill the Equal Rights Amendment to the Constitution.\textsuperscript{110} Phyllis Schlafly, a well-known conservative political activist,\textsuperscript{111} claimed that the Equal Rights Amendment, intended to bring equality for women, would destroy traditional family values and would bring men and even rapists into ladies’ bathrooms.\textsuperscript{112} Her provocative language caught the American public’s attention, and she received President Ronald Reagan’s support by arguing that the Equal Rights Amendment would “degrade and defeminize women by forcing them to mingle with men in close, intimate quarters.”\textsuperscript{113}

Learning from our past mistakes and looking at the evolution of our understanding of gender, the law should protect transgender Americans rather than further stigmatize them. While there are arguments on both sides, the definition of gender has become expansive, requiring legal protection of gender-identity-based bathroom use. Because transgender people challenge the traditional notion that a person’s gender identity and birth gender are naturally the same, they may make people uncomfortable.\textsuperscript{114} However, the fact that our “bathroom arrangements and divisions change according to the prevailing social structure underscores the reality that there is nothing ‘natural’ about them.”\textsuperscript{115} Bathroom arrangements and laws governing them are neither inherent nor natural; they evolve as society evolves.

In Japan, for example, “genderless” men challenge traditional notions of gender; they wear makeup, nail polish, and both women’s and men’s clothing.\textsuperscript{116} In the United States, the Boy Scouts of America announced that they would start accepting transgender members based on their chosen gender listed on their application.\textsuperscript{117} For over a century, the organization had deferred to an applicant’s birth gender to determine eligibility for its single-gender programs.\textsuperscript{118} “However, that approach is no longer sufficient as communities and state laws are interpreting gender identity

\begin{itemize}
\item[\textsuperscript{109}] Americans are experiencing a “period of profound gender anxiety” as our understanding of gender and what it means to be men and women is changing. See Emma Green, \textit{America’s Profound Gender Anxiety}, \textit{Atlantic} (May 31, 2016), www.theatlantic.com/politics/archive/2016/05/americas-profound-gender-anxiety/484856/.
\item[\textsuperscript{110}] Young, \textit{supra} note 14.
\item[\textsuperscript{112}] Young, \textit{supra} note 14.
\item[\textsuperscript{113}] \textit{Id}.
\item[\textsuperscript{114}] See Pappas, \textit{supra} note 91.
\item[\textsuperscript{115}] Penner, \textit{supra} note 74, at 19.
\item[\textsuperscript{116}] See generally Ben C. Soloman, \textit{Video: Genderless in Japan}, N.Y. Times (Jan. 5, 2017), http://nyti.ms/2j80mCx (“I think gender can exist. But I don’t think it has to exist.”).
\item[\textsuperscript{117}] Niraj Chokshi, \textit{Boy Scouts, Reversing Century-Old Stance, Will Allow Transgender Boys}, N.Y. Times (Jan. 30, 2017), https://nyti.ms/2jPqGZX.
\item[\textsuperscript{118}] \textit{Id}.
\end{itemize}
Taking inspiration from the evolution of gender identity in America, the Supreme Court should treat gender-identity-based bathroom use as it did same-sex marriage in Obergefell, same-sex intimacy in Lawrence, and interracial marriage in Loving. Those decisions protect privacy and autonomy essential to fundamental acts of human existence under the Constitution.

IV. POLICY OF SAFETY AND DIGNITY FOR EVERYONE IN BATHROOMS

Dignity is what everyone seeks in bathrooms. Bathrooms are a zone of personal privacy and can also be a space “with a latent sexual charge.” While some parents and lawmakers believe that enacting bathroom bills protect children, their concerns do not justify unfounded fears of sexual advances by transgender people. Such fear is widely recognized as invalid for two reasons. First, being transgender does not make a person a predator. Spokespeople from the American Civil Liberties Union have stated that no statistical evidence of violence, such as attacks by transgender people targeting non-transgender people in bathrooms, exists. There are no documented cases of a transgender person attacking someone in a public bathroom. Second, transgender people appear more likely to be victims of violence than other groups. There is a history of transgender people not being treated with respect by law enforcement, and violence against transgender people is increasing. Some researchers believe that this is due to the increased visibility of transgender people in America.

119. Id.
121. Young, supra note 14.
123. See Pappas, supra note 91.
124. Transgender people may be more likely to be victims of violence because “violence is inseparable from the social climate: . . . anti-transgender violence and anti-transgender laws—like so-called bathroom bills, which aim to police who may use gender-specific public facilities—are outgrowths of the same prejudice.” Maggie Astor, Violence Against Transgender People Is on the Rise, Advocates Say, N.Y. Times (Nov. 9, 2017), www.nytimes.com/2017/11/09/us/transgender-women-killed.html.
126. More transgender people were killed in America in the first six months of 2015 than in all of 2014. See Park & Mykhalysyn, supra note 125; see also Human Rights Campaign & Trans People of Color Coal., supra note 122. In 2017, twenty-five transgender people were killed in the United States. Astor, supra note 124. In 2016, twenty-three transgender people were killed in the United States, and in 2015, twenty-one were killed. Id. In New York City, the Anti-Violence Project reported that after the 2016 presidential election, it was seeing an increase in incidents of hate violence against transgender people.
communities. In particular, “transgender women of color are facing an epidemic of violence that occurs at the intersections of racism, sexism and transphobia.” How can law protect this truly vulnerable population?

When a transgender person enters a bathroom, other users there often react with “curiosity, inquisition, surprise, [and] confusion” as well as “fear, anger, hostility, and hatred.” One transgender woman described her constant fear of being harassed because most women mistake her for a man or are deeply troubled by her presence. Another transgender woman explained that women have approached her in bathrooms to say that she did not “belong there,” which she felt was a sign of hatred rather than of fear. Still, she takes the risk of such harassment and shaming because using the women’s bathroom is safer.

For some women in bathrooms, entry of a transgender woman threatens their core notions of traditional families. The fear is rooted in a societal confusion about transgender identity, which is at odds with a reproductive mandate. Scholars argue that some people react this way because they feel that transgender people’s bodies lack “purity or dignity” in spaces such as bathrooms. People also feel shame when their

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127. See Park & Mykhalyshyn, supra note 125; see also Human Rights Campaign & Trans People of Color Coal., supra note 122.


129. Sheila L. Cavanagh, Queering Bathrooms 55 (2010). Transgender people generally may feel more anxiety about using public bathrooms than non-transgender people, who “misunderstand . . . transgender health issues,” as one transgender man stated. Dana Levinson, 8 Health Issues You Had No Idea Transgender and Gender-Diverse People are Dealing with, Women’s Health (July 6, 2017), www.womenshealthmag.com/health/transgender-health-issues. He recounted that early on in his transition from female to male, he avoided drinking liquid as a way to cope: “I wanted to dehydrate myself so I wouldn’t have to pee. Because if I had to pee, I had to use a public bathroom.” Id. As a result, anxiety, as well as urinary tract infections, kidney stones, and kidney infections can arise as health problems. Id. Some transgender women take a testosterone-blocking medication that acts as a diuretic, which magnifies the problem for trans women. Id.

130. Cavanagh, supra note 129, at 55. She receives strange looks and comments, and people interrogate her about whether she should be there. Id. She is “stared at a lot, spoken about” as if she were not there. Id.

131. Id. at 77.

132. See id. She said the worst thing that can happen in the women’s bathroom is, “I freak someone out and . . . this awkward moment [follows].” Id. (alteration in original). But if she uses the men’s bathroom, she risks being “beat up or raped.” Id.

133. Id. at 190–91.

134. Id. “[People] look at us as child molesters and perverts . . . and hookers,” a transgender woman explains, so when they come into a bathroom and see a transgender person, they “grab their child and run out.” Id.

own vulnerable bodies are exposed to others, especially members of the opposite sex.\footnote{Id.; see also Nick Haslam, How the Psychology of Public Bathrooms Explains the ‘Bathroom Bills’, WASH. POST (May 13, 2016), www.washingtonpost.com/posteverything/wp/2016/05/13/how-the-psychology-of-public-bathrooms-explains-the-bathroom-bills/?utm_term=.3d05949d3222.}

What makes shame more insidious than guilt is that shame causes great psychological harm.\footnote{See Psychology in the Bathroom, supra note 135; Haslam, supra note 136.} Guilt is what “people feel when they harm others or violate their rights,” which “motivates us to make amends.”\footnote{Id. at 2593.} However, shame “besmirches the whole self and motivates us to hide away or sink into the ground.”\footnote{Id. (quoting Tocqueville, supra note 140, at 309 (internal quotation marks omitted)).} Therefore, denial of safe and dignified bathroom use can harm everyone; it is a public health issue.

For public policy reasons, anti-transgender bathroom laws such as HB2 violate the American tradition of legal justice and liberty for all. Quoting Alexis de Tocqueville,\footnote{Obergefell, 135 S. Ct. 2584, 2601 (2015) (quoting Alexis de Tocqueville, Democracy in America 309 (Henry Reeve trans., rev. ed. 1990) (1835) (internal quotation marks omitted)).} the Court stated that the right to marry may not be denied on the basis of gender because marriage is a societal foundation, and there is “no country in the world where the tie of marriage is so much respected as in America.”\footnote{Id. (quoting Tocqueville, supra note 140, at 309 (internal quotation marks omitted)).} When an American “retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace,” and he feels safe and dignified.\footnote{Id. at 2593.} That person carries an image of safety and dignity “with him into public affairs.”\footnote{See id. at 2601.} Every person is entitled to feel safe and dignified in the bathroom. If someone feels ashamed, harassed, or stigmatized, she carries that image of fear and uncertainty into public affairs. The Obergefell opinion began by declaring that the U.S. Constitution “promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”\footnote{Id. at 2601.} The right to same-sex marriage was made lawful for this reason, and the right to gender-identity-based bathroom use should be its continuation. By giving dignity and recognition to America’s same-sex couples and their families, Obergefell helped to reduce the stigma of same-sex marriage and to promote education. The same can happen for transgender Americans and their families.
In the U.S. military, transgender troops may not enjoy the same rights as non-transgender troops. In 2017, President Trump directed the military to cease moving forward with an Obama-era plan which would have allowed transgender individuals to be recruited into the armed forces. While transgender individuals continue to be recruited for now, litigation surrounding President Trump’s order forces transgender troops to live with uncertainty and fear.

In 2015, a transgender airman, Logan Ireland, completed his deployment, during which he served as male—his gender identity. He told his command leaders and certain peers that his birth gender was female, and they supported him despite an existing military policy preventing transgender people from serving openly. However, Ireland’s fiancée, Laila Villanueva, whose birth gender was male, was not as fortunate. Villanueva also served in the military but without the support of her command regarding her gender identity as female. Both Ireland and Villanueva risked discharge because a military regulation considers transgender people psychologically impaired. Like many who serve in the military, Ireland and Villanueva dreamed of serving until retirement and having a home with their own family. Today, they live in fear because the law does not protect them. To rectify this injustice and to educate the public, anti-transgender laws such as HB2, must be repealed.

There is cause for optimism because increased acceptance of same-sex marriage in America shows our capacity to change with respect to bathroom laws. People seem to understand that transgender bathroom users seek the same safety and dignity as everyone else; in the workplace, most employees accept their employer’s right to set company policies regarding transgender employees so long as they are fair and clear. Today, successful employers are adopting “transgender-inclusive initiative[s]

147. Id.
148. See Fiona Dawson, Op-Docs Video: Transgender, at War and in Love, N.Y. Times (June 4, 2015), http://nyti.ms/1H2Y4gM.
149. Id.
150. Id.
151. Id.
152. Id.
153. Id.
154. Id.
155. Id.
156. According to Pew Research Center polling in 2001, only thirty-five percent of Americans supported same-sex marriage, while fifty-seven percent opposed it, but in 2017, sixty-two percent of Americans supported same-sex marriage, while thirty-two percent opposed it. Changing Attitudes on Gay Marriage, Pew Res. Ctr. (June 26, 2017), www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/.
across businesses” such as gender-identity-based bathroom use in offices. Of the Fortune 500 companies, eighty-two percent have “gender identity protections” enumerated in their non-discrimination policies, and many offer “explicit gender identity non-discrimination protections.” As more companies help employees engage in transgender integration to better understand transgender colleagues, underlying assumptions and fears about sharing bathrooms with transgender people will likely decrease because familiarity provides comfort. Companies like Wal-Mart Stores, Exxon Mobil, Chevron, and Apple have implemented successful integration policies for their transgender employees while maintaining an inclusive and comfortable workplace environment for all employees.

Furthermore, “unexpected congruities of interest” can occur. By adding more single-user bathrooms, disabled people can also benefit. To researchers, “one answer for designers is that wherever possible, different sorts of spaces might be made available, allowing people some degree of choice.” Architects propose a “universal design,” which accommodates all ages and body types that “eschews uniform notions of a single, able-bodied, ergonomically-normative subject.” Space traditionally used to separate men’s and women’s bathrooms can be “recalculated as a series of walled in enclosures,” each designed for wheelchair access and a helper, equipped with a sink and a toilet. In such a space, transgender people would not be forced to choose between bathrooms, and those around them would not “remark or reject.”

V. CONCLUSION: OBERGEFELL LIBERATES BATHROOMS

As a practical matter, the issue of gender and bathroom use may be more complex than the issue of marriage because finding an appropriate remedy can be even more challenging. Marriage is a ritual that can be performed anywhere while bathroom use involves physical facilities. If gender is truly fluid, should federal law ban gender-segregated bathrooms altogether? Should it only allow unisex bathrooms and single-user stalls? Scholars explain that people seek two types of privacy in bathrooms: privacy for their own acts and privacy from other people’s acts. Further, gender segregation of bathrooms is tied to perceptions of sexuality; people feel compelled to

158. Id. at 4, 18.
159. Id. at 6.
160. See id. at 7.
162. Id. at 34.
164. Id.
165. Id.

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conceal their bodies from potential mating partners and use single-sex spaces to prepare for mating by grooming themselves and observing competitors.\textsuperscript{167} Therefore, replacing all bathrooms with unisex and single-user units may not be culturally acceptable.\textsuperscript{168} Moreover, governments may prefer bathrooms to be gender-segregated in a traditional manner to “uphold and actively enforce” each society’s “cherished classifications.”\textsuperscript{169} Governments can use bathroom restrictions to prevent “promiscuous social mixing” and other unwanted activities and to “define proper relations between people.”\textsuperscript{170}

The real question is why politicians are asking such questions today. The roots go back to at least 1887, when Massachusetts, later followed by forty-three other states, enacted a law requiring gender-segregated public bathrooms.\textsuperscript{171} Similar practices are even appearing in American middle-class homes today, where more parents are assigning their sons and daughters different bathrooms “to avoid any improper moments between their children.”\textsuperscript{172}

\textit{Obergefell} encourages both law and policy to evolve to reflect societal evolution rather than cling to outdated norms and fear-based traditions.\textsuperscript{173} Reflecting the historical evolution of gender, both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment protect a transgender person’s right to use bathrooms matching his or her gender identity. Both clauses protect this right for the same reasons they protect the right of a same-sex couple to marry under \textit{Obergefell}.\textsuperscript{174} First, such right may not be denied on the basis of gender because it is a fundamental freedom.\textsuperscript{175} Second, such right may not be denied because from a historical perspective, it is sacred and at the heart of the American life.\textsuperscript{176} The right to marry is “older than the Bill of Rights,” and thus the institution of marriage is sacred under \textit{Obergefell}.\textsuperscript{177} While people may not legally marry until they reach a certain age in America, everyone may legally use the bathroom at any age. Therefore, the right to safe and dignified bathroom use may be even more sacred than the right to marry.

\begin{itemize}
\item \textsuperscript{167} Id.
\item \textsuperscript{168} See id.
\item \textsuperscript{169} Penner, \textit{supra} note 74, at 18–19.
\item \textsuperscript{170} Id. In this vicious cycle, fear justifies segregation, which fuels fear. Exploiting this fear during the 2016 U.S. presidential campaign, one candidate, Senator Ted Cruz (R-TX), asked the following in an advertisement: “Should a grown man pretending to be a woman be allowed to use . . . the same restroom used by your daughter? Your wife?” Young, \textit{supra} note 14.
\item \textsuperscript{171} See id.
\item \textsuperscript{172} Id.
\item \textsuperscript{173} See \textit{Obergefell}, 135 S. Ct. at 2584, 2604–05 (2016).
\item \textsuperscript{174} See id.
\item \textsuperscript{175} See \textit{id}. at 2598–2608.
\item \textsuperscript{176} See \textit{id}.
\item \textsuperscript{177} \textit{Id}. at 2599.
\end{itemize}
OBERGEFELL LIBERATES BATHROOMS

Just as Lawrence liberated same-sex intimacy and Loving liberated interracial marriage, Obergefell liberated same-sex marriage and can liberate American bathrooms. The transgender bathroom right is the natural successor to the Obergefell analysis, advocating that the law reflect both the historical evolution and the shift in perception of societal, cultural, and legal notions of gender. As intended, Obergefell accelerated this ongoing shift in how America defines gender and what it means to be male, female, or something other. While the political debate continues, the vulnerable must be protected. Federal law must protect the right to gender-identity-based bathroom use because Obergefell calls for more rights for more people. “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”

For the fearful and the fearmongers who oppose gender-identity-based bathroom use, Rawls inspires an idea. He based his philosophy of the veil of ignorance on the fundamental equality that blindness brings. Imagine a world in which we are not yet born. We do not know whether we will identify as female, male, or someone. Now, create an equitable rule regarding bathroom use. What would make it safe and dignified for everyone? In 2015, Lieutenant Governor Dan Patrick (R-TX) proposed a rule blocking transgender people from using bathrooms matching their gender identity because “[i]t was about protecting our grandmoms and our mothers and our wives and our sisters and our daughters” from transgender bathroom users. However, those transgender bathroom users are also grandmoms, mothers, wives, sisters, and daughters. They desire and deserve the right to feel safe and dignified just as same-sex couples desire and deserve to marry under Obergefell. Let Obergefell liberate bathrooms.

179. Obergefell, 135 S. Ct. at 2602.
181. Young, supra note 14.