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Obergefell Liberates Bathrooms

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62 N.Y.L. SCH. L. REV. [•] (2017–2018)

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OBERGEFELL LIBERATES BATHROOMS

I. INTRODUCTION: THE BATHROOM BILL PROBLEM

The recent history of transgender¹ access to bathrooms is fraught with controversy.² In February 2017, President Donald Trump rescinded President Barack Obama’s policy allowing transgender students to use bathrooms matching their gender identity rather than their birth gender.³ The Obama administration had argued that nondiscrimination laws require schools to allow transgender students to use the bathrooms of their choice.⁴ President Trump rejected that approach because it disregarded “the primary role of the states and local school districts in establishing educational policy.”⁵

Just two months earlier, in December 2016, the political climate had briefly seemed friendlier to transgender bathroom users.⁶ 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.⁷ HB2 required transgender people to use bathrooms matching their birth gender—rather than their gender identity—in many public buildings.⁸ The repeal effort ultimately failed in 2016,⁹ 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).
 2. Transgender advocates’ victories include a 2018 case in which a Wisconsin school district agreed to pay \$800,000 to a transgender student who was denied use of the boys’ bathrooms in his high school. Jacey Fortin, *Transgender Student’s Discrimination Suit Is Settled for \$800,000*, N.Y. TIMES (Jan. 10, 2018), <https://nyti.ms/2FqjeJg>. On the other hand, there have been pushbacks, including the exploding popularity of Jordan Peterson, a Canadian psychology professor, powerful and brilliant public speaker, and Amazon.com best-selling author. See Park MacDougald, *Why They Listen to Jordan Peterson*, N.Y. MAG: DAILY INTELLIGENCER (Feb. 11, 2018), <http://nymag.com/daily/intelligencer/2018/02/why-they-listen-to-jordan-peterson.html>. Peterson denounced a federal amendment to add gender identity and expression to the Canadian Human Rights Act and vehemently opposed forced use of gender-neutral pronouns. See Jason McBride, *The Pronoun Warrior*, TORONTO LIFE (Jan. 25, 2017), <https://torontolife.com/city/u-t-professor-sparked-vicious-battle-gender-neutral-pronouns>. He also criticized his university’s plans for a mandatory anti-bias training. See Dorian Lynskey, *How Dangerous Is Jordan B Peterson, the Rightwing Professor Who ‘Hit a Hornets’ Nest’?*, GUARDIAN (Feb. 7, 2018, 10:20 AM), www.theguardian.com/science/2018/feb/07/how-dangerous-is-jordan-b-peterson-the-rightwing-professor-who-hit-a-hornets-nest?CMP=share_btn_link.
 3. See Jeremy W. Peters et al., *Trump Rescinds Obama Directive on Bathroom Use*, N.Y. TIMES, Feb. 23, 2017, at A1.
 4. Sandhya Somashekhar et al., *Trump Administration Rolls Back Protections for Transgender Students*, WASH. POST (Feb. 22, 2017), www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643_story.html?utm_term=.9bcc5371403d.
 5. *Id.*
 6. See Richard Fausset, *North Carolina Limits on Transgender Rights Appear Headed for Repeal*, N.Y. TIMES (Dec. 19, 2016), <https://nyti.ms/2laaixT>.
 7. See *id.*; H.B. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016).
 8. See Fausset, *supra* note 6.
 9. See Ralph Ellis et al., *North Carolina Legislature Fails to Repeal ‘Bathroom Bill’*, CNN: POLITICS (Dec. 22, 2016, 10:11 AM), www.cnn.com/2016/12/21/politics/north-carolina-bathroom-bill-hb2/index.html.

critics assert that the law was discriminatory and costly¹⁰—HB2 caused North Carolina to lose thousands of jobs.¹¹ 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.¹² The unpopularity of HB2 helped voters to oust Governor Pat McCrory (R-NC) who had supported the law.¹³ 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.¹⁴

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.¹⁵ In 2015, a seventeen-year-old transgender boy, Gavin Grimm, challenged a policy of the Gloucester County School Board (the “Board”) that

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10. *See id.* North Carolina’s bathroom bill is estimated to cost \$3.76 billion in lost business over the next decade. *See* Emery P. Dalesio, *AP Exclusive: Price Tag of North Carolina’s LGBT Law: \$3.76B*, ASSOCIATED PRESS (Mar. 27, 2017), www.apnews.com/fa4528580f3e4a01bb68bcb272f1f0f8. Among the lost profits was \$2.66 billion that a PayPal facility in Charlotte would have generated, as well as \$33,000 from a Ringo Starr concert. *Id.* PayPal canceled its project, and Ringo Starr canceled his concert. *Id.*
 11. Ellis et al., *supra* note 9. North Carolina is estimated to have lost four hundred jobs when PayPal canceled its project and seven hundred jobs when CoStar backed out of its plan to set up business in the state, both in protest of the transgender bathroom bill. Dalesio, *supra* note 10. When Deutsche Bank canceled its plan to bring its business to the state in protest, North Carolina lost 250 jobs. *Id.* Adidas also canceled its plan to bring its business to the state and Voxpro chose to hire hundreds of customer support workers in Georgia rather than in North Carolina because, according to Voxpro’s CEO, it “couldn’t set up operations in a state that was discriminating against LGBT people.” *Id.* North Carolina had missed out on at least 2,900 jobs as of 2017 because those jobs went elsewhere. *See id.*
 12. *See* Marc Tracy & Alan Blinder, *N.C.A.A. Pulls Events from a State Over a Law*, N.Y. TIMES, Sept. 13, 2016, at B9.
 13. *See* Fausset, *supra* note 6.
 14. *See* Neil J. Young, *How the Bathroom Wars Shaped America*, POLITICO MAG. (May 18, 2016), www.politico.com/magazine/story/2016/05/2016-bathroom-bills-politics-north-carolina-lgbt-transgender-history-restrooms-era-civil-rights-213902. In 2017, lawmakers in Alabama, Arkansas, Illinois, Kansas, Kentucky, Minnesota, Missouri, Montana, New York, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, and Wyoming officially considered state laws that would restrict transgender people’s access to bathrooms based on their biological sex. *See* “Bathroom Bill” Legislative Tracking, NAT’L CONF. ST. LEGISLATURES (July 28, 2017), www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx.
 15. *See* 822 F.3d 709 (4th Cir. 2016), *cert. granted*, 137 S. Ct. 369 (2016); *Supreme Court Will Hear Transgender Bathroom Case*, NPR (Nov. 2, 2016, 5:03 AM), www.npr.org/2016/11/02/500331123/supreme-court-will-hear-transgender-bathroom-case. In a blow to transgender rights advocates, the Supreme Court eventually sent the case back down to the Fourth Circuit. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239. This means that transgender students, like Grimm, must follow policies on bathroom use set by individual school districts. *See* Emma Green, *The Trump Administration May Have Doomed Gavin Grimm’s Case*, ATLANTIC (Mar. 6, 2017), www.theatlantic.com/politics/archive/2017/03/the-trump-administration-may-have-doomed-gavin-grimm/518676/. This was due partly to the Trump administration rescinding a U.S. Department of Education guidance letter that supported transgender students’ right to use bathrooms of their choice during the Obama administration. *See id.*

OBERGEFELL LIBERATES BATHROOMS

mandated students to use school bathrooms matching their birth gender.¹⁶ Grimm, who was born female but identifies as male, wished to use the boys' bathrooms in his school.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 Amendment¹⁸ and Title IX of the Education Amendments of 1972.¹⁹ The district court dismissed Grimm's claim and he appealed.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."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.²² The letter, issued during the Obama Administration, protected Grimm's right to use the boys' bathrooms in his school.²³

Opposing the Obama Administration and rejecting Grimm's position, Judge Paul Niemeyer of the Fourth Circuit wrote a vigorous dissent in part.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."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

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.

17. *See id.* at 715.

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.

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.

20. *See id.*

21. *See id.* at 716 (internal quotation marks omitted).

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.

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.

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

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.”²⁶ 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.”²⁷ 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*.²⁸

The law should prevent discrimination, abuse, and harassment of transgender people. Their struggle to find safe bathrooms to use²⁹ is a major impingement on personal freedom and privacy.³⁰ 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.³¹ 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.³² In another study, over sixty percent of transgender college students who had been denied access to school bathrooms attempted suicide.³³ Worst of all, transgender people face an insidious and unfounded stigma that they are sexual predators in bathrooms.³⁴ “Ever since psychoanalytic theory linked toilet training

26. *Id.*

27. *Id.*

28. See 135 S. Ct. 2584 (2015); see also E.J. Graff, *The Long, Contentious Battle for the Simple Right for Gays to Marry*, WASH. POST (July 14, 2017), www.washingtonpost.com/opinions/the-long-contentious-battle-for-the-simple-right-for-gays-to-marry/2017/07/14/e4587fae-5c45-11e7-9fc6-c7ef4bc58d13_story.html?utm_term=.009a8fb597ae. *Obergefell* banned state laws restricting same-sex marriage by relying partially on the historical evolution of the institution of marriage and concluding that the robust changes in the contour of that institution justified broadening access to same-sex couples. See Bill Chappell, *Supreme Court Declares Same-Sex Marriage Legal in All 50 States*, NPR: THE TWO-WAY (June 26, 2015, 10:05 AM), www.npr.org/sections/thetwo-way/2015/06/26/417717613/supreme-court-rules-all-states-must-allow-same-sex-marriages.

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).

30. See Parker Marie Molloy, *Trans Woman Releases Bathroom-Finder App Refuge Restrooms*, ADVOCATE (Feb. 7, 2014, 6:00 AM), www.advocate.com/politics/transgender/2014/02/07/trans-woman-releases-bathroom-finder-app-refuge-restrooms.

31. Stevie Borrello, *Sexual Assault and Domestic Violence Organizations Debunk ‘Bathroom Predator Myth’*, ABC NEWS (Apr. 22, 2016, 7:15 PM), <http://abcnews.go.com/US/sexual-assault-domestic-violence-organizations-debunk-bathroom-predator/story?id=38604019>.

32. Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People’s Lives*, 19 J. PUB. MGMT. & Soc. POL’Y 65, 77 (2013).

33. Kristie L. Seelman, *Transgender Adults’ Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 J. HOMOSEXUALITY 1378, 1388 (2016); *Transgender College Students at Higher Suicide Risk When Denied Access to Bathrooms, Research Shows*, GA. ST. UNIV.: NEWS HUB (Apr. 19, 2016), <http://news.gsu.edu/2016/04/19/transgender-college-students-at-higher-suicide-risk-after-denial-of-access-to-bathrooms-research-shows/>.

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

OBERGEFELL LIBERATES BATHROOMS

with sexuality, bathroom and sex have been intrinsically connected in both public imagination and scholarly analysis.”³⁵ According to researchers, because transgender people defy societal expectation of gender, their presence in gender-segregated spaces can raise anxieties about sexuality.³⁶ 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.”³⁷

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.³⁸ 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.”³⁹ 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.”⁴⁰

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.⁴¹ 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.*

35. Olga Gershenson, *The Restroom Revolution: Unisex Toilets and Campus Politics*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING* 191, 192 (Harvey Molotch & Laura Norén eds., 2010).

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.*

39. *G.G. ex rel. Grimm v. Gloucester School Board*, 822 F.3d 709, 730–34 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part).

40. *Id.* at 731.

41. JOHN RAWLS, *A THEORY OF JUSTICE* 118 (rev. ed. 1999), <https://giuseppicapograssi.files.wordpress.com/2014/08/rawls99.pdf>.

Obergefell.⁴² 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.⁴³

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].”⁴⁴ 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.⁴⁵ Both intimacy and marriage are fundamental in American life; we may not easily tolerate governmental restrictions on people’s choices regarding these institutions.⁴⁶ Both are legally protected under the Fourteenth Amendment.⁴⁷ The Court explained that the historical evolution of intimacy and marriage justified this conclusion and answered two legal questions.⁴⁸ First, does the Constitution require states to permit same-sex marriage? The Court answered yes.⁴⁹ Thus, state bans on same-sex marriage are invalid.⁵⁰ Second, does the Constitution require states to recognize same-sex marriage validly performed in another state?⁵¹ Again, the Court answered yes.⁵² Thus, no state may invalidate a same-sex couple’s marriage in another state.⁵³ Justice Anthony Kennedy turned to history to elaborate in his majority opinion.⁵⁴

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

42. See 135 S. Ct. 2584, 2604–05 (2015).

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.

OBERGEFELL LIBERATES BATHROOMS

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 demeans 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.⁶⁶ 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.⁶⁷ 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.⁶⁸ He applied the Due Process Clause to expand the right to marry to same-sex couples in *Obergefell*.⁶⁹ Further, Justice Kennedy looked to the historical evolution of mixed-race couples' right to marry under *Loving v. Virginia*.⁷⁰ 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."⁷¹ Justice Kennedy quoted another Supreme Court decision upholding homosexual intimacy rights, *Lawrence v. Texas*: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."⁷² 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.⁷³

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)).

68. *See Obergefell*, 135 S. Ct. at 2599–2600, 2604–05 (citing *Griswold v. Connecticut*, 381 U.S. 479, 495–99 (1965)).

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)).

71. *Loving*, 388 U.S. at 12.

72. *Obergefell*, 135 S. Ct. at 2600 (alteration in original) (citing *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

73. *Loving*, 388 U.S. at 12.

OBERGEFELL LIBERATES BATHROOMS

The ways in which society has handled the relationship between gender and bodily functions have changed over the years.⁷⁴ Bathrooms are not straightforward pieces of technology; they are “culturally determined and historically specific.”⁷⁵ Scholars argue that bathroom rules “directly reflect the dominant political ideology and its shifts: at the first sign of perestroika,⁷⁶ for instance, Russians almost immediately began making ‘Euro-repairs’ to their homes, replacing communal toilets and baths with private ones.”⁷⁷ Before that, they had been using state-mandated communal toilets, which were customary but were not, it turned out, their preference.⁷⁸ Much of the change in bathroom customs has been driven by changes in the meaning of gender.⁷⁹ 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.⁸⁰ This shift has affected how society reacts to gender; today, gender can be a fluid notion.⁸¹ 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.⁸² 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.⁸³ The Roman emperor Vespasian appears to have been the first ruler to provide his people with public bathrooms.⁸⁴ 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.

78. See Georgy Manaev, *In It Together: How Communal Apartments Shaped the Outlook of Generations*, Russ. BEYOND (Jan. 5, 2015), www.rbth.com/society/2015/01/05/in_it_together_how_communal_apartments_shaped_the_outlook_of_generati_41877.html.

79. See PENNER, *supra* note 74, at 18–20.

80. *See id.*

81. Lauren Booker, *What It Means to Be Gender-Fluid*, CNN, www.cnn.com/2016/04/13/living/gender-fluid-feat/index.html (last updated Apr. 13, 2016, 1:22 PM).

82. *Understanding Gender*, GENDER SPECTRUM, www.genderspectrum.org/quick-links/understanding-gender/ (last visited Apr. 3, 2018).

83. See FRANK MUIR, AN IRREVERENT AND ALMOST COMPLETE SOCIAL HISTORY OF THE BATHROOM 133 (Stein & Day 1983) (1982).

84. *See id.*

“of fair polished marble” for male users only, who were not permitted to urinate elsewhere.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.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.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.⁸⁸ It took another 250 years for commoners to be able to use public bathrooms with some privacy.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 1851.⁹⁰

The first gender-specific bathrooms seemed to have appeared in Paris around 1739 as a temporary setup at a societal ball.⁹¹ Party organizers placed a chamber pot⁹² for men in one room and a chamber pot for women in another.⁹³ Attendees thought it was “a novelty” and so “eccentric and fun.”⁹⁴ For common people in the Western world, however, public bathrooms were mostly for men until the Victorian era.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.⁹⁶ At the time, social norms preferred women and girls to stay close to home and not be out for long periods of time.⁹⁷ Researchers call this a urinary leash, which continues to restrain women today; some female workers and schoolgirls in India refrain from eating or

85. *Id.*

86. *Id.*

87. See Claire Suddath, *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. *Id.*

88. *See id.*

89. *See id.*

90. Jimmy Stamp, *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/.

91. Stephanie Pappas, *The Weird History of Gender-Segregated Bathrooms*, LIVE SCI. (May 9, 2016, 5:44 PM), www.livescience.com/54692-why-bathrooms-are-gender-segregated.html; see also Sheila Cavanagh, *You Are Where You Urinate*, GAY & LESBIAN REV. (July 1, 2011), www.glreview.org/article/you-are-where-you-urinate/.

92. A chamber pot is a pot inside a box with a seat on top. Pappas, *supra* note 91. Chamber pots were commonly used as toilets prior to the advent of indoor plumbing. *Life Before Indoor Plumbing*, PETE FER & SON PLUMBING & SUPPLY Co. (Dec. 15, 2017), www.pfplumbing.net/blog/san-pedro-plumber/life-indoor-plumbing.

93. See Pappas, *supra* note 91; see also Cavanagh, *supra* note 91.

94. Pappas, *supra* note 91; see Cavanagh, *supra* note 91.

95. Pappas, *supra* note 91.

96. *Id.*

97. *Id.*

OBERGEFELL LIBERATES BATHROOMS

drinking all day to avoid having to use bathrooms outside of their homes.⁹⁸ They want to avoid “the danger, embarrassment, or dirt of the communal facility.”⁹⁹ Such urinary segregation has held women back for much of Western history.¹⁰⁰ It is rooted in “moral ideology concerning the appropriate role and place for women in society.”¹⁰¹ 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.¹⁰² At the time, scientists believed that women could not physically take the same “strains, fatigues, and privations” as men.¹⁰³ The women’s bathroom, they thought, would allow a tired woman to “rest when her weak body gave out on the job.”¹⁰⁴ In reality, girls and women suffered the consequences of less opportunity in schools and in workplaces.¹⁰⁵ 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.¹⁰⁶ White segregationists justified the separation with fear of diseases “among Negroes” and the alleged threat of sexual violence.¹⁰⁷ 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.”¹⁰⁸ The nation has since risen above these unfounded racial fears.

98. Harvey Molotch, *Introduction: Learning from the Loo*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING*, *supra* note 35, at 1, 3–4; *see also Potty Parity: Summit to Discuss Lack of Women’s Restrooms*, LIVE SCI. (Nov. 4, 2008, 8:21 AM), www.livescience.com/5187-potty-parity-summit-discuss-lack-women-restrooms.html [hereinafter *Potty Parity*].

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

100. *See* Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 3, 55–56 (2007).

101. *Id.*

102. *Id.* at 44.

103. *Id.* at 42.

104. *Id.* at 44.

105. *See id.* at 55–56.

106. *See Jim Crow Laws and Racial Segregation*, VA. COMMONWEALTH U.: SOC. WELFARE HIST. PROJECT, <https://socialwelfare.library.vcu.edu/eras/civil-war-reconstruction/jim-crow-laws-and-racial-segregation/> (last visited Apr. 3, 2018).

107. Mark Joseph Stern, *The NAACP Legal Defense Fund’s Transgender Rights Brief is a Trenchant History Lesson*, SLATE (Mar. 3, 2017), www.slate.com/blogs/outward/2017/03/03/naacp_ldf_s_trans_rights_brief_is_a_trenchant_history_lesson.html.

108. *Id.*

Gender issues have caused a great deal of anxiety about bathroom use.¹⁰⁹ During the 1970s, an invented controversy over unisex bathrooms helped kill the Equal Rights Amendment to the Constitution.¹¹⁰ Phyllis Schlafly, a well-known conservative political activist,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.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."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.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."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.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.¹¹⁷ For over a century, the organization had deferred to an applicant's birth gender to determine eligibility for its single-gender programs.¹¹⁸ "However, that approach is no longer sufficient as communities and state laws are interpreting gender identity

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, *America's Profound Gender Anxiety*, ATLANTIC (May 31, 2016), www.theatlantic.com/politics/archive/2016/05/americas-profound-gender-anxiety/484856/.

110. Young, *supra* note 14.

111. See Larisa Epatko, *Conservative Activist Phyllis Schlafly Dies at 92*, PBS NEWSHOUR (Sept. 6, 2016, 2:55 PM), www.pbs.org/newshour/nation/conservative-activist-phyllis-schlafly-dies-92.

112. Young, *supra* note 14.

113. *Id.*

114. See Pappas, *supra* note 91.

115. PENNER, *supra* note 74, at 19.

116. See generally Ben C. Soloman, *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.")

117. Niraj Chokshi, *Boy Scouts, Reversing Century-Old Stance, Will Allow Transgender Boys*, N.Y. TIMES (Jan. 30, 2017), <https://nyti.ms/2jPgZXX>.

118. *Id.*

OBERGEFELL LIBERATES BATHROOMS

differently, and these laws vary widely from state to state.”¹¹⁹ 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.¹²⁰

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.”¹²¹ 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.¹²² There are no documented cases of a transgender person attacking someone in a public bathroom.¹²³ Second, transgender people appear more likely to be victims of violence than other groups.¹²⁴ There is a history of transgender people not being treated with respect by law enforcement,¹²⁵ and violence against transgender people is increasing.¹²⁶ Some researchers believe that this is due to the increased visibility of transgender people in

119. *Id.*

120. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Loving v. Virginia*, 388 U.S. 1 (1967).

121. Young, *supra* note 14.

122. Marcie Bianco, *Statistics Show Exactly How Many Times Trans People Have Attacked You in Bathrooms*, MIC (Apr. 2, 2015), <https://mic.com/articles/114066/statistics-show-exactly-how-many-times-trans-people-have-attacked-you-in-bathrooms#.FMGuTDGm0>; HUMAN RIGHTS CAMPAIGN & TRANS PEOPLE OF COLOR COAL., ADDRESSING ANTI-TRANSGENDER VIOLENCE 1–6 (2015), <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/HRC-AntiTransgenderViolence-0519.pdf>.

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.

125. See Haeyoun Park & Iaryna Mykhalysyn, *L.G.B.T. People Are More Likely to Be Targets of Hate Crimes Than Any Other Minority Group*, N.Y. TIMES (June 16, 2016), www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html?_r=0;

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.¹²⁷ In particular, “transgender women of color are facing an epidemic of violence that occurs at the intersections of racism, sexism and transphobia.”¹²⁸ 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.”¹²⁹ 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.¹³⁰ 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.¹³¹ Still, she takes the risk of such harassment and shaming because using the women’s bathroom is safer.¹³²

For some women in bathrooms, entry of a transgender woman threatens their core notions of traditional families.¹³³ The fear is rooted in a societal confusion about transgender identity, which is at odds with a reproductive mandate.¹³⁴ 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.¹³⁵ People also feel shame when their

Id. “[T]he annual murder rate for Americans ages fifteen to thirty-four is about one in 12,000 But . . . for black transgender women in the same age group, the rate was one in 2,600.” *Id.*

127. *See* Park & Mykhyalyshyn, *supra* note 125; *see also* HUMAN RIGHTS CAMPAIGN & TRANS PEOPLE OF COLOR COAL., *supra* note 122.

128. 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.*

135. *See* NICK HASLAM, *PSYCHOLOGY IN THE BATHROOM* 9 (2012) [hereinafter *PSYCHOLOGY IN THE BATHROOM*].

OBERGEFELL LIBERATES BATHROOMS

own vulnerable bodies are exposed to others, especially members of the opposite sex.¹³⁶ What makes shame more insidious than guilt is that shame causes great psychological harm.¹³⁷ Guilt is what “people feel when they harm others or violate their rights,” which “motivates us to make amends.”¹³⁸ However, shame “besmirches the whole self and motivates us to hide away or sink into the ground.”¹³⁹ 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,¹⁴⁰ 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.”¹⁴¹ 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.¹⁴² That person carries an image of safety and dignity “with him into public affairs.”¹⁴³ 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.”¹⁴⁴ 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.¹⁴⁵ The same can happen for transgender Americans and their families.

136. *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.

137. See PSYCHOLOGY IN THE BATHROOM, *supra* note 135; Haslam, *supra* note 136.

138. PSYCHOLOGY IN THE BATHROOM, *supra* note 135.

139. *Id.*

140. Alexis de Tocqueville (1805–1859) was a French politician and a philosopher whose “anxieties about liberty and democracy” appear to be as relevant today as they were in his time; he called for civic virtue, active citizens, and strong community associations. *It Took a Frenchman*, ECONOMIST (Nov. 23, 2006), www.economist.com/node/8314096; Seymour Drescher, *Alexis de Tocqueville, French Historian and Political Writer*, ENCYCLOPEDIA BRITANNICA, www.britannica.com/biography/Alexis-de-Tocqueville (last visited Apr. 9, 2018). When he visited America from 1831 to 1832, he wrote of his findings about the country with great enthusiasm in his book, DEMOCRACY IN AMERICA. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Francis Bowen ed., Henry Reeve trans., Dover Publ’ns, Inc. 2017) (1835).

141. *Obergefell*, 135 S. Ct. 2584, 2601 (2015) (quoting ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 309 (Henry Reeve trans., rev. ed. 1990) (1835) (internal quotation marks omitted)).

142. *Id.* (quoting TOCQUEVILLE, *supra* note 140, at 309 (internal quotation marks omitted)).

143. *Id.* (quoting TOCQUEVILLE, *supra* note 140, at 309 (internal quotation marks omitted)).

144. *Id.* at 2593.

145. See *id.* at 2601.

In the U.S. military, transgender troops may not enjoy the same rights as non-transgender troops.¹⁴⁶ 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.¹⁴⁷ While transgender individuals continue to be recruited for now, litigation surrounding President Trump's order forces transgender troops to live with uncertainty and fear.¹⁴⁸

In 2015, a transgender airman, Logan Ireland, completed his deployment, during which he served as male—his gender identity.¹⁴⁹ 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.¹⁵⁰ However, Ireland's fiancée, Laila Villanueva, whose birth gender was male, was not as fortunate.¹⁵¹ Villanueva also served in the military but without the support of her command regarding her gender identity as female.¹⁵² Both Ireland and Villanueva risked discharge because a military regulation considers transgender people psychologically impaired.¹⁵³ Like many who serve in the military, Ireland and Villanueva dreamed of serving until retirement and having a home with their own family.¹⁵⁴ Today, they live in fear because the law does not protect them.¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷ Today, successful employers are adopting "transgender-inclusive initiative[s]"

146. See *Transgender Military Service*, HUMAN RIGHTS CAMPAIGN, www.hrc.org/resources/transgender-military-service (last updated Mar. 15, 2018).

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/.

157. HUMAN RIGHTS CAMPAIGN FOUND., CORPORATE EQUALITY INDEX 2017: RATING WORKPLACES ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER EQUALITY 4 (2017), http://assets.hrc.org/files/assets/resources/CEI-2017-FinalReport.pdf?_ga=1.167708350.1020248664.1488938464.

OBERGEFELL LIBERATES BATHROOMS

across businesses” such as gender-identity-based bathroom use in offices.¹⁵⁸ 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.”¹⁵⁹ 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.¹⁶⁰

Furthermore, “unexpected congruities of interest” can occur.¹⁶¹ 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.”¹⁶² Architects propose a “universal design,” which accommodates all ages and body types that “eschews uniform notions of a single, able-bodied, ergonomically-normative subject.”¹⁶³ 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.¹⁶⁴ In such a space, transgender people would not be forced to choose between bathrooms, and those around them would not “remark or reject.”¹⁶⁵

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.¹⁶⁶ 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.

161. Ruth Barcan, *Dirty Spaces: Separation, Concealment, and Shame in the Public Toilet*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING*, *supra* note 35, at 25, 33–34.

162. *Id.* at 34.

163. *Id.* at 181–82. David Serlin, *Pissing Without Pity: Disability, Gender, and the Public Toilet*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING*, *supra* note 35, at 167, 181–82.

164. *Id.*

165. *Id.*

166. *See* Julie Beck, *The Private Lives of Public Bathrooms*, *ATLANTIC* (Apr. 16, 2014), www.theatlantic.com/health/archive/2014/04/the-private-lives-of-public-bathrooms/360497/.

conceal their bodies from potential mating partners and use single-sex spaces to prepare for mating by grooming themselves and observing competitors.¹⁶⁷ Therefore, replacing all bathrooms with unisex and single-user units may not be culturally acceptable.¹⁶⁸ Moreover, governments may prefer bathrooms to be gender-segregated in a traditional manner to “uphold and actively enforce” each society’s “cherished classifications.”¹⁶⁹ Governments can use bathroom restrictions to prevent “promiscuous social mixing” and other unwanted activities and to “define proper relations between people.”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.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.”¹⁷²

Obergefell encourages both law and policy to evolve to reflect societal evolution rather than cling to outdated norms and fear-based traditions.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 *Obergefell*.¹⁷⁴ First, such right may not be denied on the basis of gender because it is a fundamental freedom.¹⁷⁵ Second, such right may not be denied because from a historical perspective, it is sacred and at the heart of the American life.¹⁷⁶ The right to marry is “older than the Bill of Rights,” and thus the institution of marriage is sacred under *Obergefell*.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.

167. *Id.*

168. *See id.*

169. PENNER, *supra* note 74, at 18–19.

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, *supra* note 14.

171. *See id.*

172. *Id.*

173. *See Obergefell*, 135 S. Ct. at 2584, 2604–05 (2016).

174. *See id.*

175. *See id.* at 2598–2608.

176. *See id.*

177. *Id.* at 2599.

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.¹⁷⁸ 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.”¹⁷⁹

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.¹⁸⁰ 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.¹⁸¹ 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.

178. See *Obergefell*, 135 S. Ct. at 2604–05; *Lawrence v. Texas*, 539 U.S. 558 (2003); *Loving v. Virginia*, 388 U.S. 1 (1967).

179. *Obergefell*, 135 S. Ct. at 2602.

180. RAWLS, *supra* note 41, at 118–23.

181. Young, *supra* note 14.