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## Transgender Persons Have A Fundamental Right To Use Public Bathrooms Matching Their Gender Identity

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# TRANSGENDER PERSONS HAVE A FUNDAMENTAL RIGHT TO USE PUBLIC BATHROOMS MATCHING THEIR GENDER IDENTITY

*A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded.*<sup>1</sup>

## INTRODUCTION

Recent contention surrounding bathroom access<sup>2</sup> for transgender persons<sup>3</sup> suggests the extension of constitutional rights appears to be moving into its next chapter.<sup>4</sup> At the start of 2016, two events amplified conversations surrounding sex-segregated facilities.<sup>5</sup> First, North Carolina passed the Public Facilities Privacy & Security Act (“HB2”).<sup>6</sup>

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1. United States v. Virginia, 518 U.S. 515, 557 (1996); see also RICHARD B. MORRIS, THE FORGING OF THE UNION, 1781-1789, 193 (1987) (discussing the history of the Constitution).

2. This Comment uses the shortened term “bathroom access” to refer to transgender people’s access to a public bathroom facility corresponding to their gender identity.

3. The term “transgender,” commonly abbreviated as “trans,” refers to a person who does not identify with the gender they were assigned at birth, which includes, but is not limited to persons who identify as transsexual, gender non-conforming, cross-dressers, genderqueer, bi-gendered, two-spirit, female-to-male (FTM), and male-to-female (MTF). *Transgender Terminology*, NAT’L CENTER FOR TRANSGENDER EQUALITY (Jan. 15, 2014), <http://www.transequality.org/issues/resources/transgender-terminology>; see also *LGBT Terminology & Cultural Information*, OUT & EQUAL, <http://outandequal.org/app/uploads/2016/09/LGBT-Terminology-2011.pdf> (defining “transgender”); *Glossary of Transgender Terms*, Stanford Univ. Vaden Health Center, <https://vaden.stanford.edu/health-resources/lgbtqia-health/transgender-health/glossary-transgender-terms> (last visited Feb. 25, 2018) (defining “FTM” and “MTF”). The term’s appropriate use is as an adjective, not a noun. Consequently, it is appropriate to say “transgender people,” but “transgenders” may be considered disrespectful. *Transgender Terminology*, NAT’L CENTER FOR TRANSGENDER EQUALITY (Jan. 15, 2014), <http://www.transequality.org/issues/resources/transgender-terminology>. Terminology within the transgender community varies and has changed over time, making the need for sensitivity regarding term usage especially important. *Id.*

4. Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 508 (2016).

5. “Sex” relates to an individual’s biological status that is typically categorized as female, male, or intersex; categorization can be based on various indicators including “sex chromosomes, gonads, internal reproductive organs, and external genitalia.” *Definitions Related to Sexual Orientation and Gender Diversity in APA Documents*, AMERICAN PSYCHOLOGICAL ASSOCIATION, <https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> (last visited Mar. 4, 2017).

6. Public Facilities Privacy & Security Act (“House Bill 2”), Sess. L. No. 2016-3, 2016 N.C. Sess. Laws 2d Extra Sess. 12 (repealed 2017). On March 23, 2016, the Public Facilities Privacy & Security Act, commonly referred to as “House Bill 2” or “HB2”, was passed by both houses on the same day it was introduced. Tal Kopan & Eugene Scott, *North Carolina governor signs*

HB2 requires transgender individuals to use public bathrooms and changing facilities corresponding to the sex listed on their birth certificate.<sup>7</sup> The U.S. Supreme Court agreed to determine whether public schools are required to let transgender students use the bathroom matching their gender identity<sup>8</sup> in 2017.<sup>9</sup> However, the Court decided not to hear the case due to the Trump administration's move to revoke federal guidance under the Obama administration that instructed public schools to let transgender students use the bathroom of their choice.<sup>10</sup> This would have been the first time the court would hear a case specifically on the issue of transgender rights.<sup>11</sup>

Supporters believe HB2 and similarly proposed legislation<sup>12</sup> are necessary to protect religious freedom and the privacy and safety of

*controversial transgender bill*, CNN (Mar. 24, 2016), <http://www.cnn.com/2016/03/23/politics/north-carolina-gender-bathrooms-bill/>.

7. HB2 mandates, *inter alia*, that all “[p]ublic agencies . . . require multiple occupancy bathrooms or changing facilities be designated for and only used by individuals based on their biological sex”; “Biological sex” is defined as the “physical condition of being male or female, which is stated on a person’s birth certificate.” *Id.* “Public agencies” includes, among other entities, state executive, judicial, and legislative branches, and schools. *Id.*

8. “Gender identity” refers to someone’s internal knowledge related to gender of being male, female, or something else. One’s gender identity is not always readily apparent because it relates to a person’s internal state. *Frequently Asked Questions about Transgender People*, NAT’L CENTER FOR TRANSGENDER EQUALITY (Jan. 15, 2014), <http://www.transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>.

9. Adam Liptak, *Supreme Court to Rule in Transgender Access Case*, N.Y. TIMES (Oct. 28, 2016), <http://www.nytimes.com/2016/10/29/us/politics/supreme-court-to-rule-in-transgender-access-case.html>.

10. Adam Liptak, *Supreme Court Won’t Hear Major Case on Transgender Rights*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/us/politics/supreme-court-transgender-rights-case.html>. See also, Daniel Trotta, *Trump revokes Obama guidelines on transgender bathrooms*, REUTERS (Feb. 22, 2017), <https://www.reuters.com/article/us-usa-trump-lgbt/trump-revokes-obama-guidelines-on-transgender-bathrooms-idUSKBN161243>.

11. The Supreme Court was set to hear oral arguments on March 28, 2017, however, legal observers were correct to predict that future decisions by the Trump administration on the issue of transgender rights would cause the case to be directed to a lower court. Moriah Balingit, *Supreme Court scheduled to hear transgender bathroom case in March*, WASH. POST (Feb. 3, 2017), [https://www.washingtonpost.com/local/education/supreme-court-scheduled-to-hear-transgender-bathroom-case-in-march/2017/02/03/cac96b08-ea52-11e6-b82f-687d6e6a3e7c\\_story.html?utm\\_term=.c9359316b40b](https://www.washingtonpost.com/local/education/supreme-court-scheduled-to-hear-transgender-bathroom-case-in-march/2017/02/03/cac96b08-ea52-11e6-b82f-687d6e6a3e7c_story.html?utm_term=.c9359316b40b). The Supreme Court announced it would not hear the case in March of 2017, and sent it back to the 4th U.S. Circuit Court of Appeals. Bill Chappell, *Supreme Court Won’t Decide Transgender Teen’s Challenge to Bathroom Policy*, NPR (Mar. 6, 2017), <https://www.npr.org/sections/thetwo-way/2017/03/06/518795387/supreme-court-wont-hear-transgender-teens-challenge-to-bathroom-policy>.

12. As of February 23, 2017, fourteen (14) states had introduced legislation seeking to restrict the use of the sex-segregated facilities on the basis of a person’s sex or gender as assigned at birth (“biological sex”): Alabama, Illinois, Kansas, Kentucky, Minnesota, Missouri, New York, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, and Wyoming. Joellen Kralik, *“Bathroom Bill” Legislative Tracking*, NAT’L CONFERENCE OF STATE LEGISLATURES (July 28, 2017), <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>.

others, especially women and children.<sup>13</sup> Conversely, opponents argue these laws codify discrimination without justification.<sup>14</sup> From a legal standpoint, questions remain: can transgender persons be forced to use the restroom facility of the gender they were assigned at birth?<sup>15</sup> Are constitutional rights violated when cisgender persons,<sup>16</sup> but not transgender persons, are granted access to public facilities matching their gender identity? While the Constitution does not expressly grant transgender people the right to access public bathrooms matching their gender identity, the legal and social context surrounding the transgender bathroom debate reveals certain fundamental rights may be extended to encompass this particular right.

To begin, the public bathroom is a well-known site for civil rights struggles in America,<sup>17</sup> and throughout American history has been considered a symbol of inequality.<sup>18</sup> One of the most notable struggles concerned racially-segregated public bathrooms during the Jim Crow era.<sup>19</sup> Eventually, the landmark decision of *Brown v. Board of*

13. *Id.*; see also Kopan & Scott, *supra* note 6.

14. Joshua Berlinger, *North Carolina's Bathroom Law: Six points from both sides of the issue*, CNN POLITICS (May 10, 2016), <http://www.cnn.com/2016/05/10/politics/hb-2-point-counterpoint/>.

15. Many transgender people feel they were assigned the wrong gender at birth and have identified with their gender identity their entire lives. *Transgender Terminology*, *supra* note 3. Recognizing the need to be sensitive among transgender communities, this Comment uses the phrase “gender as assigned at birth” rather than “birth gender” or “a person who was born male” to be considerate to those who feel it less offensive. *Id.*

16. Cisgender (commonly abbreviated as “cis”) refers to a person whose gender identity is the same as the one they were assigned at birth. For example, a cisgender woman is a person who was assigned female at birth and currently identifies as female. *Id.*

17. See C.J. Griffin, *Workplace Restroom Policies in Light of New Jersey's Gender Identity Protection*, 61 RUTGERS L. REV. 409 (2009); Jennifer Bendery, *Panic About Transgender People In Bathrooms Echoes Logic on Racial Segregation*, HUFFINGTON POST (May 13, 2016), [http://www.huffingtonpost.com/entry/transgender-bathrooms-racial-segregation\\_us\\_5735e7ece4b08f96c182eedf](http://www.huffingtonpost.com/entry/transgender-bathrooms-racial-segregation_us_5735e7ece4b08f96c182eedf); Taylor Mayol, *Why the Public Bathroom is Ground Zero for Civil Rights*, OZY.COM, <http://www.ozy.com/flashback/why-the-public-bathroom-is-ground-zero-for-civil-rights/67955> (last visited Nov. 3, 2016).

18. “For generations, Americans have imparted bathrooms with their deepest anxieties about changing social norms and practices. From the Industrial Revolution to Jim Crow to women’s lib to today, restrooms have been a proxy for political fights on almost every major issue in American life – race, class, gender, crime, sexuality. . .” Neil J. Young, *How the Bathroom Wars Shaped America*, POLITICO (May 18, 2016), <http://www.politico.com/magazine/story/2016/05/2016-bathroom-bills-politics-north-carolina-lgbt-transgender-history-restrooms-era-civil-rights-213902>.

19. *Jim Crow Laws*, FREEDOM RIDERS: A PRODUCTION OF AMERICAN EXPERIENCE, <http://www.pbs.org/wgbh/americalexperience/freedomriders/issues/jim-crow-laws> (last visited Mar. 4, 2017). In 1896, the Supreme Court in *Plessy v. Ferguson* upheld the “separate but equal” doctrine which allowed racially-segregated facilities and resulted in the unequal treatment of black people for nearly a century. 163 U.S. 537, 551 (1896).

*Education*<sup>20</sup> and the Civil Rights Act of 1964 (“Civil Rights Act”)<sup>21</sup> “ushered in the modern era of equal protection jurisprudence.”<sup>22</sup>

The transgender bathroom debate is also taking place in the aftermath of the marriage equality decision in *Obergefell v. Hodges*.<sup>23</sup> *Obergefell* removed a key constitutional barrier for lesbian, gay, and bisexual people (LGB) in their struggle for equality.<sup>24</sup> Until 2015, same-sex marriage could be invalidated by state laws; thus, same-sex couples could be denied crucial legal benefits and rights depending on which state they were residing.<sup>25</sup> The Supreme Court’s emphasis on individual autonomy lends support to transgender people who seek legal recognition of their gender identity.<sup>26</sup>

This Comment analyzes how fundamental rights of equality, privacy, and personal autonomy set forth in *Brown* and *Obergefell* encompass the right of transgender persons’ access to bathrooms matching their gender identity. Part II discusses the meaning of “transgender” and provides statistics to show that transgender people are a marginalized group in society. Part III argues *Brown* and *Obergefell* provide the basis for the rights asserted by transgender people in the bathroom debate and concludes HB2 is unconstitutional. Part IV reviews potential legal and policy implications associated with granting transgender persons’ access to public restrooms consistent with their gender identity. Part V concludes that a trans-

20. 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”).

21. Pub. L. No. 88-352, 78 Stat. 241(1964). The Civil Rights Act of 1964 was passed on July 2, 1964, and was a “crucial step in achieving the civil rights movement’s initial goal: full legal equality.” *Civil Rights Movement*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM, <https://www.jfklibrary.org/JFK/JFK-in-History/Civil-Rights-Movement.aspx> (last visited Mar. 4, 2017).

22. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 722 (2011).

23. 135 S. Ct. 2584, 2608 (2015); see also Erwin Chemerinsky, *A Triumph for Liberty and Equality*, ORANGE COUNTY LAWYER (Aug. 2015), <http://www.law.uci.edu/news/in-the-news/2015/oclawyer-dean-cover-2015aug.pdf>.

24. Barry et al., *supra* note 4, at 508 (“[m]arriage equality marks the summit of an incremental march toward equality under the Constitution—one that gained steam decades earlier with successful challenges to facially discriminatory laws that stripped LGB people of civil rights protections”); see, e.g., Baehr v. Lewin, 852 P.2d 44, 57 (Haw. 1993) (Hawaii Supreme Court held that excluding same-sex couples from marriage was a form of discrimination subject to strict scrutiny under the state’s Constitution.); see also *infra* notes 146–51.

25. DOUGLAS E. ABRAMS, ET AL., *CONTEMPORARY FAMILY LAW – DOCTRINE, POLICY, AND PRACTICE IN THE 21ST CENTURY* 82–109 (4th ed. 2016).

26. “The fundamental liberties protected by the Fourteenth Amendment’s Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015) (citing *Einsteid v. Baird*, 405 U.S. 438, 453 (1972) and *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965)). Later, the Court found that personal autonomy was one of four principles that demonstrates the reason that marriage is “fundamental under the Constitution and appl[ies] with equal force to same-sex couples.” *Id.*

gender person's right to use the bathroom matching their gender identity is protected by the constitutional rights of equality, privacy, and personal autonomy.

## II. BACKGROUND

To understand how the Constitution can be extended to encompass a right to bathroom access for transgender people, it is important to understand the challenges facing the transgender population. Part A apprises the reader of the meaning of "transgender," highlights the various struggles transgender people face, and provides an overview of the transgender bathroom debate. Part B provides a historic overview of the LGBT battle for marital equality prior to *Obergefell*, and reviews the history of the transgender rights movement. Part C briefly discusses the challenges experienced by African-American transgender people introducing the intersection of race and transgender rights, and concludes with a historic overview of racially-segregated bathrooms.

### 1. *Transgender Persons: A Marginalized Group in American Society*

"Transgender" is an umbrella term for someone whose gender identity is different from the gender assigned to them at birth.<sup>27</sup> For example, a transgender woman is someone who lives as a woman today, but was assigned the gender of male at birth. According to most sexuality experts, "gender identity" is the private experience or internal sense of being male, female, or something else,<sup>28</sup> and has little to do with a

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27. *Transgender Terminology*, *supra* note 3. Determining who is male or female at birth involves more than checking the baby's external anatomy. *Id.*

Every year, an estimated one in 2,000 babies are born with a set of characteristics that can't easily be classified as 'male' or 'female.' People whose bodies fall in the vast continuum between 'male' and 'female' are often known as intersex people. There are many different types of intersex conditions. For example, some people are born with XY chromosomes but have female genitals and secondary sex characteristics . . . [w]hile it's possible to be both transgender and intersex, most transgender people aren't intersex, and most intersex people aren't transgender. For example, many intersex people with XY (typically male) chromosomes but typically female anatomy are declared female at birth, are raised as girls, and identify as girls . . . [h]owever, some intersex people come to realize that the gender that they were raised as doesn't fit their internal sense of who they are, and may make changes to their appearance or social role similar to what many transgender people undergo to start living as the gender that better matches who they are.

*Id.*

28. "Gender role" is the public experience of gender identity. Gender role refers to what a "person says and does to indicate to others, or to the self, the degree that one is either male, female, or ambivalent." Diana Elkind, *The Constitutional Implications of Bathroom Access*

person's sex organs or genitalia.<sup>29</sup> Although being transgender can overlap with sexual orientation, the two classifications are unrelated.<sup>30</sup> Sexual orientation deals with sexual attraction, not gender identification.<sup>31</sup>

Approximately 1.4 million adults in the U.S. classify as transgender.<sup>32</sup> The U.S. was introduced to transgender issues in 1952, when Christine Jorgensen became the first widely known transgender woman.<sup>33</sup> Jorgensen was a World War II veteran who travelled to Denmark to undergo a series of gender reassignment surgeries.<sup>34</sup> Jorgensen became an instant celebrity after her male-to-female transformation made the front page of the *New York Daily News*.<sup>35</sup> More recently, male-to-female celebrities like Laverne Cox and Caitlyn Jenner have contributed to the growing awareness of transgender persons in the American public.<sup>36</sup> In light of media coverage some transgender advocates believe the transgender community is experiencing

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*Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 897 (2007) (citing Hazel Glenn Beh & Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?*, 7 MICH. J. GENDER & L. 1, 17 n.710).

29. John Gearhart et. al., *Sex Determination, Differentiation, and Identity*, 350 NEW ENG. J. OF MED. 2204 (2004). New research uncovering genes for transsexualism also suggests "gender identity" is not a choice. See *Male-to-female transsexual gene found*, NEW SCIENCE (Oct. 27, 2008), <https://www.newscientist.com/article/dn15045-male-to-female-transsexualism-gene-found/> ("A gene linked to male-to-female transsexualism has been uncovered by Australian researchers, following a similar finding for female-to-male transsexuals . . .").

30. *Frequently Asked Questions about Transgender People*, *supra* note 8; see also Lori Kohler, Remarks at the 17th National HIV/AIDS Update Conference: Vulnerable Communities Track: Forging Nw Ground: Transgender Issues and Corrections Medicine (Apr. 12, 2005), available at [http://www.kaisernet.org/health\\_cast/uploaded\\_files/041205\\_amfar\\_vulnerable.pdf](http://www.kaisernet.org/health_cast/uploaded_files/041205_amfar_vulnerable.pdf). ("[S]exual orientation . . . has nothing to do with gender identity . . . they're really parallel lines.").

31. Kohler, *supra* note 30.

32. Specifically, 0.6% of American adults classify as transgender; no comparable study exists for transgender youth in the United States. Jan Hoffman, *Estimates of U.S. Transgender Population Doubles to 1.4 Million Adults*, N.Y. TIMES (June 30, 2016), <http://www.nytimes.com/2016/07/01/health/transgender-population.html>.

33. Michael Walsh, *It's been 60 years since the first he turned she: Bronx-born Christine Jorgensen's historical sexual reassignment in Denmark*, DAILY NEWS (Nov. 30, 2012), <http://www.nydailynews.com/news/world/60-years-christine-jorgensen-born-article-1.1211068>; After the procedure, Christine wrote to her parents back in New York: "Nature made a mistake which I have had corrected, and now I am your daughter." Chloe Hadjimatheou, *Christine Jorgensen: 60 years of sex change ops*, BBC WORLD SERVICE (Nov. 30, 2012), <http://www.bbc.com/news/magazine-20544095>.

34. Hadjimatheou, *supra* note 33.

35. N.Y. DAILY NEWS, <http://www.nydailynews.com/entertainment/notable-transgender-people-gallery-1.2189572?pmSlide=1.2189562>

36. D'Lane Compton and Tristan Bridges, *#Callmecaitlyn and Contemporary Trans \*Visibility*, AMERICAN SOCIOLOGICAL ASSOCIATION, <http://journals.sagepub.com/doi/full/10.1177/1536504216628852>.

a Dickensian-like period of the “best of times, and the worst of times.”<sup>37</sup> Celebrities who have undergone gender reassignment have informed American mainstream culture of varying gender roles;<sup>38</sup> however, statistics reveal transgender people face alarmingly high rates of mistreatment and violence in society.<sup>39</sup>

In 2015, the National Center for Transgender Equality (NCTE) conducted a survey of 27,715 transgender adults, and found that forty-seven percent of respondents had been sexually assaulted.<sup>40</sup> Eight percent reported being physically attacked.<sup>41</sup> Additionally, the majority of transgender students in primary and secondary school experienced some form of violence: fifty-four percent reported verbal harassment, twenty-four percent suffered physical attack, and thirteen percent experienced sexual assault.<sup>42</sup> This data is consistent with stories covered nationwide regarding violence against transgender persons.<sup>43</sup>

The transgender population also experiences economic disadvantages. It is estimated that one-in-three transgender persons have experienced homelessness.<sup>44</sup> Furthermore, as of 2015, the unemployment rate for transgender persons was fifteen percent—three times higher than the national rate.<sup>45</sup> Additionally, many experienced mis-

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37. Masen Davis, who formerly ran the Transgender Law Center, stated, “We’re seeing a marked increase in the public awareness about transgender people and really incredible progress for trans rights, especially from a legal perspective. At the same time, we still represent and are part of a community that experiences incredibly high rates of unemployment, poverty and violence.” Katy Steinmetz, *Why Transgender People are being Murdered at a Historic Rate*, TIME (Aug. 17, 2015), <http://time.com/3999348/transgender-murders-2015/>.

38. FIRSTHAND, *Transforming Gender*, <http://www.cbc.ca/firsthand/episodes/transforming-gender> (last visited Mar. 5, 2017).

39. *Id.*

40. S.E. James et al., *The Report of the 2015 U.S. Transgender Survey*, NAT’L CENTER FOR TRANSGENDER EQUALITY (2016), <http://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.pdf>. This is the largest survey ever conducted for the transgender population, and includes the experiences of transgender people from all fifty states including the District of Columbia, American Samoa, Guam, Puerto Rico, and U.S. military bases overseas. *Id.*

41. Eight percent (8%) of the transgender respondents reported being kicked out of their home. *Id.*

42. *Id.*

43. In Texas, a third grade transgender girl’s parents pulled her from school due to constant bullying and alienation from her peers. *Parents pull transgender third grader from school due to bullying*, FOX4NEWS (Sept. 29, 2016), <http://www.fox4news.com/news/208772446-story>. One tragic story involved a sixteen-year-old transgender girl who committed suicide in response to relentless bullying at her high school. Avianne Tan, *#HerNameWasTaylor Honors California Transgender Teen’s Life By Spreading Awareness*, ABC NEWS (Apr. 14, 2015), <http://abcnews.go.com/US/hernamewastaylor-honors-california-transgender-teens-life-spreading-awareness/story?id=30315484>.

44. S.E. James et al., *supra* note 40.

45. *Id.*

treatment at work, which included being told to present as their assigned gender to keep their jobs.<sup>46</sup>

Additionally, transgender people deal with a variety of legal issues predicated upon their status as male or female. This includes, but is not limited to, identification documents, housing, military service and veteran's benefits, health care, personal safety, employment, immigration, criminal justice and corrections, and use of public facilities.<sup>47</sup>

### 3. *Transgender Issues Related to Bathroom Access*

Many claims of transgender mistreatment involve the right to access public bathrooms.<sup>48</sup> According to the NCTE survey, twenty-four percent of respondents stated someone told them they were using the wrong bathroom or questioned their presence.<sup>49</sup> Fifty-nine percent avoided bathrooms because they feared confrontation and one-third reported they stopped drinking or eating to avoid using the bathroom.<sup>50</sup> Twelve percent were harassed, attacked, or sexually assaulted in a bathroom.<sup>51</sup> Additionally, some transgender persons have been completely barred from using the bathroom of their choice. One student reported, "[t]he staff told me I could not use the men's bathroom because I'd make other students uncomfortable even though I was out to everyone and none of the students were bothered by my gender."<sup>52</sup>

This survey illustrates how the transgender community is often unable to enjoy their fundamental rights to equality, privacy, and personal autonomy. Access to the bathroom of their choice is central to these issues and HB2 exacerbates the struggle by abridging the constitutional rights that many individuals take for granted.

### 4. *The Transgender Bathroom Debate*

The bathroom debate has been circuitous and contentious, and understanding the ebbs and flows of this debate is necessary to resolve

46. *Id.*

47. ALLY WINDSOR HOWELL, *TRANSGENDER PERSONS AND THE LAW* 11 (2013).

48. *Id.*

49. S.E. James et al., *supra* note 40.

50. *Id.* "Eight percent reported having a urinary tract infection, kidney infection, or another kidney related problem in the past year as a result of avoiding restrooms."

51. *Id.*

52. *Id.*; Using data from the NCTE's 2011 USTS survey, a recently published study from the *Journal of Homosexuality* found transgender students who were denied access to school bathrooms (for being transgender) are more likely to commit suicide. Kristie L. Seelman, *Transgender Adults' Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 J. HOMOSEXUALITY, 1378 (2016) (stating the results suggested there may be a distinct relationship between the stress of not being able to use bathrooms, or gender-appropriate campus housing on the mental health of transgender students).

the issue. In 2015, conservative oppositionists in Houston, Texas successfully rejected the Houston Equal Rights Ordinance (HERO).<sup>53</sup> HERO aimed to prevent discrimination based on sexual orientation and gender identity.<sup>54</sup> The oppositionists' campaign was simple: "No men in women's bathrooms."<sup>55</sup>

In 2016, Charlotte adopted a local ordinance, which added protections against discrimination for gender expression and identity.<sup>56</sup> On March 23, 2016, North Carolina called a special meeting in response to the ordinance and introduced HB2.<sup>57</sup> On the same day, HB2 was passed by both houses and signed into law by the governor.<sup>58</sup> The website of the Senate President of North Carolina reads, "[t]he North Carolina Senate voted unanimously. . . to stop a radical and illegal Charlotte City Council ordinance allowing men into public bathrooms and locker rooms with young girls and women."<sup>59</sup> Lieutenant Governor Dan Forest stated, "[the Charlotte Ordinance] would have given pedophiles, sex offenders, and perverts free rein to watch women, boys, and girls undress and use the bathroom."<sup>60</sup> Some states have either attempted or are attempting to follow North Carolina.<sup>61</sup>

The U.S. Department of Justice filed a complaint against HB2 arguing it requires public entities to follow a facially discriminatory policy of treating transgender individuals differently from similarly situated individuals.<sup>62</sup> In response, North Carolina countersued alleging, "[t]he Act created common sense bodily privacy protections for, among others, state employees, by requiring public agencies to require multiple occupancy bathroom . . . facilities to be designated for and

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53. Houston, Tex., Ordinance 2014-530 (2014), [https://www.houstontx.gov/equal\\_rights\\_ordinance.pdf](https://www.houstontx.gov/equal_rights_ordinance.pdf). See Russell Berman, *How Bathroom Fears Conquered Transgender Rights in Houston*, THE ATLANTIC (Nov. 3, 2015), <http://www.theatlantic.com/politics/archive/2015/11/how-bathroom-fears-conquered-transgender-rights-in-houston/414016/>

54. Ordinance 2014-530, *supra* note 53.

55. Berman, *supra* note 53.

56. Charlotte, N.C., Ordinance 7056 (2016), <http://charlottenc.gov/NonDiscrimination/Documents/NDO%20Ordinance%207056.pdf>.

57. HB2, *supra* note 6.

58. *Id.*

59. *Senate Unanimously Votes to Stop Radical Ordinance Allowing Men into Public Bathrooms With Women and Young Girls*, PHIL BERGER: NORTH CAROLINA SENATE (Mar. 23, 2016), [http://www.philberger.org/senate\\_unanimously\\_votes\\_to\\_stop\\_radical\\_ordinance\\_allowing\\_men\\_into\\_public\\_bathrooms\\_with\\_women\\_and\\_young\\_girls](http://www.philberger.org/senate_unanimously_votes_to_stop_radical_ordinance_allowing_men_into_public_bathrooms_with_women_and_young_girls); see also Pl.'s Compl. at ¶18, *United State v. North Carolina et al.*, No. 1:16-cv-425 (M.D.N.C. May 10, 2016).

60. Pl.'s Compl., *supra* note 59, at ¶19.

61. Kralik, *supra* note 12.

62. Pl.'s Compl., *supra* note 59, at ¶ 43. Private litigation also ensued when the North Carolina American Civil Liberties Union (ACLU), Lambda Legal, and Equality North Carolina filed a complaint challenging the HB2. Pl.'s Compl. at ¶ 1, *Joaquin Carcano et al. v. Patrick McGregory et al.*, No. 1:16-cv-236 (M.D.N.C. Mar. 28, 2016).

only used by persons based on their biological sex.”<sup>63</sup> In August 2016, a district court judge granted a preliminary injunction preventing the University of North Carolina from enforcing HB2’s restroom provision.<sup>64</sup>

Title IX of the U.S. Education Amendments of 1972<sup>65</sup> is a federal civil rights law that prohibits discrimination on the basis of *sex* in federally funded education programs and activities.<sup>66</sup> While Title IX fails to include the terms “transgender,” “gender identity,” or “gender expression,” the U.S. Department of Education (DOE)<sup>67</sup> has clarified that sex discrimination includes claims “based on gender identity or failure to conform to stereotypical notions of masculinity or femininity.”<sup>68</sup> Litigation arose after the DOE, under the Obama Administration, issued a directive to schools stating transgender students must be allowed to access restrooms consistent with their gender identity and may not be required to use facilities inconsistent with their gender identity.<sup>69</sup> In response, at least twenty-one states filed suit against the

63. Pl.’s Compl. for Declaratory Judgment at ¶ 10, Patrick L. McCrory and Frank Perry vs. United States of America, No. 5:16-cv-00238 (E.D.N.C. May 9, 2016). *Read North Carolina’s lawsuit against the federal government over the ‘bathroom bill,’* WASH. POST, <http://apps.washingtonpost.com/g/documents/politics/read-north-carolinas-lawsuit-against-the-federal-government-over-the-bathroom-bill/1980/> (last visited Mar. 5, 2017).

64. Mark Berman, *Federal judge says UNC can’t enforce North Carolina’s transgender bathroom restrictions*, WASH. POST (Aug. 26, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/08/26/federal-judge-says-unc-cant-enforce-restroom-restrictions-in-north-carolinas-bathroom-bill/?utm\\_term=.79718f414476](https://www.washingtonpost.com/news/post-nation/wp/2016/08/26/federal-judge-says-unc-cant-enforce-restroom-restrictions-in-north-carolinas-bathroom-bill/?utm_term=.79718f414476).

65. 20 U.S.C. §§ 1681–1688 (2012).

66. *Id.* § 1681.

67. It is worth noting the DOE has been actively involved in investigations surrounding discrimination against transgender students. *See, e.g.*, RESOLUTION AGREEMENT BETWEEN ARCADIA UNIFIED SCH. DIST., U.S. DEP’T OF EDUC., OFFICE OF CIVIL RIGHTS, AND U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV. (July 24, 2013), <https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadialetter.pdf> (resolution letter); Resolution Letter from Arthur Zeidman, Office for Civil Rights, to Dr. John A. Garcia, Superintendent for Downey Unified Sch. Dist. (Oct. 14, 2014), <https://www2.ed.gov/documents/press-releases/downey-school-district-letter.pdf> (resolution letter regarding harassment); Letter from James A. Ferg-Cadima, Acting Deputy Assistant Sec’y for Policy, Office of Civil Rights, U.S. Dep’t of Educ., to Emily Prince (Jan. 7, 2015), [http://www.bricker.com/documents/misc/transgender\\_student\\_restroom\\_access\\_1-2015.pdf](http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf)

68. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (April 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (see B-2 “How should a school handle sexual violence complainant and alleged partner are the same sex?”); RUSSELLYNN ALI, ASSISTANT SEC’Y FOR CIV. RIGHTS, U.S. DEP’T OF EDUC., *Dear Colleague Letter: Harassment and Bullying*, OFFICE FOR CIV. RIGHTS (Oct. 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> (“[a]lthough Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including . . . transgender . . . students, from sex discrimination”).

69. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., *Dear Colleague Letter on Transgender Students* (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (citing 34 C.F.R. §§ 106.31, 106.33); *see also* Julie Hirschfeld Davis & Matt Apuzzo, *U.S. Directs Public Schools to Allow Transgender Access to Restrooms*, N.Y. TIMES

DOE.<sup>70</sup> A suit filed by Texas, and joined by ten other states, challenged the interpretation of Title IX found in the letter.<sup>71</sup> Twelve states and the District of Columbia filed amicus briefs in support of the United States.<sup>72</sup> Nebraska and eight other states filed a similar lawsuit shortly thereafter.<sup>73</sup>

Prior to this litigation, there seemed to be growing support for the transgender community on the issue.<sup>74</sup> In 2013, the Colorado Civil Rights Division (CCRD), the agency charged with enforcing that state's anti-discrimination laws,<sup>75</sup> became the first state government agency to comment on transgender access to bathrooms. An agency adjudication held that a six-year-old transgender girl must be allowed to use the school bathroom matching her gender identity.<sup>76</sup> The CCRD held the school violated Colorado's unlawful discrimination statute by restricting the transgender girl's bathroom use.<sup>77</sup> The school argued the claim failed to establish she was deprived of equal and full enjoyment of services because she was granted access to other

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(May 12, 2016), [http://www.nytimes.com/2016/05/13/us/politics/obama-administration-to-issue-decree-on-transgender-access-to-school-restrooms.html?\\_r=0](http://www.nytimes.com/2016/05/13/us/politics/obama-administration-to-issue-decree-on-transgender-access-to-school-restrooms.html?_r=0); Christi Parsons, *Obama administration tells school to do the 'right thing' on bathrooms for transgender student*, L.A. TIMES (May 13, 2016), <http://www.latimes.com/nation/la-obama-transgender-bathroom-letter-20160513-snap-story.html>.

70. Moriah Ballingit, *Another 10 States Sue Obama Administration Over Bathroom Guidance for Transgender Students*, WASH. POST (July 8, 2016), [https://www.washingtonpost.com/local/education/another-10-states-sue-obama-administration-over-bathroom-guidance-for-transgender-students/2016/07/08/a930238e-4533-11e6-88d0-6adee48be8bc\\_story.html](https://www.washingtonpost.com/local/education/another-10-states-sue-obama-administration-over-bathroom-guidance-for-transgender-students/2016/07/08/a930238e-4533-11e6-88d0-6adee48be8bc_story.html).

71. Catherine Jean Archibald, *Transgender Bathroom Rights*, 24 DUKE J. GENDER L. & POL'Y 1, 6 (citing Texas v. United States, No. 7:16-cv-00054-O (N.D. Tex. May 25, 2016)).

72. *Id.* ("The other states that have joined Texas in suing the United States are: Alabama, Georgia, Kentucky, Louisiana, Mississippi, Oklahoma, Tennessee, Utah, West Virginia, and Wisconsin. . . . The Arizona Department of Education and the Governor of Maine are also listed as plaintiffs.").

73. *Id.*

74. Catherine Jean Archibald, *Transgender Student in Maine May Use Bathroom That Matches Gender Identity-Are Co-Ed Bathrooms Next?*, 83 UMKC L. REV. 57 (2014).

75. *About the Civil Rights Division*, COLO. DEP'T OF REGULATORY AGENCIES DIV. OF CIVIL RIGHTS, <https://www.colorado.gov/pacific/dora/civil-rights> (last visited Nov. 3, 2016).

76. Archibald, *supra* note 71 (citing COLORADO CIVIL RIGHTS DIVISION, [http://www.transgenderlegal.org/media/uploads/doc\\_529.pdf](http://www.transgenderlegal.org/media/uploads/doc_529.pdf) (last visited Nov. 4, 2016)).

77. COLO. REV. STAT. §24-34-601(2); *see also* Rebuttal Statement in Resp. to Fountain Fort Carlson School District's Position Statement, *Mathis v. Fountain-Fort Carson School District #8*, [http://www.transgenderlegal.org/media/uploads/doc\\_531.pdf](http://www.transgenderlegal.org/media/uploads/doc_531.pdf) (arguing "[i]t is unlawful for an educational institution 'directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of . . . [transgender status] . . . , the full and equal enjoyment of goods, services, facilities, privileges, advantages or accommodations' of an educational institution. By restricting her bathroom access, the District is prohibiting [her] from full and equal enjoyment of the School on the same terms that other girls who are not transgender enjoy.") (quoting COLO. REV. STAT. §24-34-601(2)).

restrooms.<sup>78</sup> The CCRD disagreed and analogized the school's rationale to the Jim Crow Era stating, "This perception is reminiscent of the 'separate but equal' philosophy, which revealed, at least in terms of protected classes, that separate is very rarely, if ever, equal."<sup>79</sup>

On January 1, 2014, California's School Success and Opportunity Act became law.<sup>80</sup> This Act permits primary and secondary school transgender students to "participate in sex-segregated school programs, including . . . [the] use [of] facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records."<sup>81</sup> The Act also protects against discrimination by prohibiting "public schools from discriminating on the basis of specified characteristics, including gender, gender identity, and gender expression."<sup>82</sup> Echoing the Act's sentiment, the California Department of Education (CDE) acknowledged "both state and federal law have prohibited gender-based discrimination for some time."<sup>83</sup>

In 2014, the Supreme Judicial Court of Maine became the nation's first state court to hold that it is sexual orientation discrimination to deny a transgender student access to the bathroom consistent with her gender identity.<sup>84</sup> The dissenting opinion delved deeper into the transgender access to bathroom issue:

Considering the issue presented here, transgendered persons who live their lives as a member of the sex with which they identify face unique challenges with regard to public multiple-user bathrooms. It is simply unreasonable to expect a transgendered person to enter a bathroom designated for use by the sex with which they do not identify. Doing so is likely to provoke confrontation, or even violence. If transgendered people are prohibited from using bathrooms designated for the sex with which they identify, they are left with no practical recourse in most public settings.<sup>85</sup>

In June 2016, the Fourth Circuit, which includes North Carolina, reversed the lower court's decision to dismiss a preliminary injunction

78. The transgender girl claimed discriminatory denial of services on the basis of sex/sexual orientation. *Mathis v. Fountain-Fort Carson Sch. Dist. 8*, Charge No. P20130034X, Colo. Dep't of Regulatory Affairs, Div. of Civil Rights, June 17, 2013 (Colorado State Division of Civil Rights Determination), [http://www.transgenderlegal.org/media/uploads/doc\\_529.pdf](http://www.transgenderlegal.org/media/uploads/doc_529.pdf).

79. *Id.*

80. See School Success and Opportunity Act, 2013 Cal. Legis. Serv. 85 (A.B. 1266) (West), [http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab\\_1251-1300/ab\\_1266\\_bill\\_20130812\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1251-1300/ab_1266_bill_20130812_chaptered.pdf).

81. *Id.*

82. *Id.*

83. *School Success and Opportunity Act (Assembly Bill 1266) Frequently Asked Questions*, CALIFORNIA DEP'T OF EDUC., <http://www.cde.ca.gov/re/di/eo/faqs.asp>

84. *Doe v. Regional Sch. Unit 26*, 86 A.3d 600, 606 (2014).

85. *Id.* at 608. (Mead, J., dissenting).

proceeding brought by a transgender boy seeking to use the boy's restroom at his high school.<sup>86</sup> Shortly after a transgender boy, G.G., began using the boy's restroom, his local high school board passed a policy banning him from using the restroom matching his gender identity.<sup>87</sup> As a rationale for the policy, one board commenter argued, "non-transgender boys would come to school wearing dresses in order to gain access to the girls' restrooms."<sup>88</sup> The court held G.G. had a plausible claim under Title IX and that the lower court applied the wrong evidentiary standard to G.G.'s motion for preliminary injunction.<sup>89</sup> Regarding the former, Title IX permitted separate restroom facilities on the basis of sex.<sup>90</sup> However, the court found the regulation was ambiguous regarding how schools should apply sex-segregated facilities within the context of transgender students. While the regulation's use of the word "sex" unambiguously referred to the distinction between males and females, how a school chose to arrive at this distinction was open to interpretation.<sup>91</sup> On the one hand, maleness or femaleness could be determined through genitalia; on the other hand, it could be determined through gender identity.<sup>92</sup> In light of this ambiguity the court reasoned the district court should have accorded deference to the Department of Education's opinion letter, which offered direction on how the regulation should be applied to transgender persons.<sup>93</sup> The letter wrote: "When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity."<sup>94</sup> The Supreme Court recently decided it would not hear the case, which was petitioned upon a writ of certiorari by the school board.<sup>95</sup> Currently, there is no Supreme Court jurisprudence inter-

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86. *G.G. v. Gloucester County Sch. Bd.*, 822 F.3d 709, 726 (4th Dist. 2016).

87. *Id.* In reference to the policy, the school board wrote, "[W]hereas the [high school] seeks to . . . protect the privacy of all students . . . [i]t shall be the practice of the [high school] to provide male and female restroom . . . facilities . . . and students with gender identity issues shall be provided an alternative appropriate private facility." *Id.* at 732.

88. *Id.* at 716.

89. *Id.* at 723, 726.

90. *Id.* at 718 (citing 34 C.F.R. § 106.33) ("separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex").

91. *G.G.*, 822 F.3d at 720.

92. *Id.* at 721.

93. *Id.* at 718.

94. *Id.* (citing U.S. DEP'T OF EDUC. OFFICE OF CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SINGLE-SEX ELEMENTARY AND SECONDARY CLASSES AND EXTRACURRICULAR ACTIVITIES 25 (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-2014-12.pdf>).

95. *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017); *see also* Lawrence Hurley, *U.S. Top Court Throws Out Ruling Favoring Transgender Student*, REUTERS (Mar. 6, 2017), <https://>

preting Title IX's protections for transgender students.<sup>96</sup> Moreover, the Supreme Court has not yet ruled on whether the Constitution provides express rights for transgender persons. The Supreme Court's decision not to hear the case means the transgender community will have to wait for a determination of basic transgender rights from the nation's highest court.<sup>97</sup>

## *B. The Growing Expansion of Rights within the LGBT Community*

Until recently, transgender rights were largely subsumed within the LGBT movement. Therefore, tracing the events that led to *Obergefell* may foreshadow the fact that rights specific to the transgender community are on the horizon.

### *1. LGBT Rights*

The LGBT community's primary focus has not always been marital equality.<sup>98</sup> Prior to *Obergefell*, the LGBT community generally focused on combating state laws that criminalized homosexual conduct.<sup>99</sup>

In 1996, the Supreme Court in *Romer v. Evans* held a state initiative encouraging discrimination based on sexual orientation violated the Equal Protection Clause.<sup>100</sup> In *Romer*, Colorado voters adopted a statewide referendum that repealed all laws that protected gays, lesbians, and bisexuals from discrimination, and further prohibited all future government action to protect this class of individuals.<sup>101</sup> The Court found that "laws of the kind now before us raise the inevitable

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[www.reuters.com/article/us-usa-court-transgender/u-s-top-court-throws-out-ruling-favoring-transgender-student-idUSKBN16D1OD](http://www.reuters.com/article/us-usa-court-transgender/u-s-top-court-throws-out-ruling-favoring-transgender-student-idUSKBN16D1OD).

96. Corinne Cundiff, A Problem Of Competing Interests: A Detailed Look At Transgender Children In Schools, *DEPAUL J. OF WOMEN GENDER & L.* 94, 97 (2017).

97. Allison Turner, *Breaking News: U.S. Supreme Court Remands and Vacates Gavin Grimm Case*, HUMAN RIGHTS CAMPAIGN BLOG (Mar. 6, 2017), <https://www.hrc.org/blog/breaking-united-states-supreme-court-remands-and-vacates-gavin-grimm-case>.

98. Suzanne B. Goldberg, *Obergefell at the Intersection of Civil Rights and Social Movements*, 6 *CAL. L. REV.* 157, 159 (2015). The Society for Human Rights (SHR), the first known gay rights organization in America, was founded in 1924. *Id.* Thereafter, most gay rights organizations were formed after World War II. Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 *V.A. L. REV.* 1551, 1558 (1993).

99. *Id.*; see *People v. Gillespi*, 202 N.E.2d 565 (N.Y. 1964) (upholding the conviction of a man dressed as a woman under the New York vagrancy statute, which defined a vagrant as "a person, who having his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified, appears in a road or public highway."); *People v. Archibald*, 260 N.E.2d 871 (N.Y. 1970) (upholding conviction under same statute of man who dressed as a woman and stood on subway platform).

100. 517 U.S. 620 (1996).

101. *Id.* at 623–24.

inference that the disadvantage imposed is born of animosity toward the class of persons affected.”<sup>102</sup> *Romer* marks the Court’s first invalidation of a state law where the constitutional protection was rooted in the sexual orientation of the individuals.<sup>103</sup>

In *Lawrence v. Texas*, the Court held states may not prohibit private consensual sexual activity between homosexual adults.<sup>104</sup> *Lawrence* invoked the constitutional protection of privacy to safeguard consensual homosexual activity.<sup>105</sup> In the following year, the Supreme Judicial Court of Massachusetts held that a ban on same sex marriage violated the Massachusetts Constitution.<sup>106</sup> In *United States v. Windsor*, the court held federal definitions of “marriage” and “spouse” restricted to opposite-sex couples violated the Fifth Amendment’s Due Process Clause.<sup>107</sup>

Riding this momentum same-sex marriage was legalized in 2015.<sup>108</sup> In *Obergefell*, the Supreme Court consider whether Michigan, Kentucky, Ohio, and Tennessee violated the Fourteenth Amendment by defining marriage as a union between man and woman.<sup>109</sup> The Court held the marriage laws were unconstitutional.<sup>110</sup> The opinion began by noting the historical importance of the institution of marriage and acknowledged the traditional definition of marriage.<sup>111</sup> The Court

102. *Id.* at 634.

103. CHEMERINSKY, *supra* note 22.

104. 539 U.S. 558, 578 (2003) (stating the statute “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual”). *Lawrence* involved a Texas statute making it a crime for persons of the same-sex to engage in sexual activity. *Id.* at 581. In response to a reported disturbance, police found two men engaging in consensual sexual activity. *Id.* at 558. The same-sex adults were arrested and convicted of “deviat[ing] sexual intercourse” under the statute’s proscription. *Id.*

105. *Id.* at 578. The Court powerfully affirmed privacy as applied to same-sex persons was protected under the Constitution:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

*Id.* at 578–79.

106. *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 968 (2003) (“Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution”).

107. 133 S. Ct. 2675, 2695–96 (2013).

108. 135 S. Ct. 2584 (2015).

109. *Id.* at 2593.

110. *Id.* at 2607.

111. *Id.* at 2593–94.

then discussed how the institution of marriage has evolved over time.<sup>112</sup> The Court extrapolated four basic principles that demonstrate the reasons marriage is fundamental under the Constitution: personal choice, self-definition, childrearing, and societal order.<sup>113</sup> The Court reviewed each principle separately and reasoned these four principles applied with “equal force to same-sex couples.”<sup>114</sup> The Court applied rationale from prior case law concerning the right to marry and extended the institution of marriage to same-sex couples.

## 2. *Transgender Rights*

“*Obergefell* . . . marks the passing of the torch from ‘LGB’ to ‘T’; the next civil rights frontier belongs to transgender people, for whom key barriers still remain.”<sup>115</sup> Courts have shown a lack of understanding and a disregard for the rights of transgender people, especially in the familial context.<sup>116</sup>

Transgender awareness began in nineteenth century Europe.<sup>117</sup> However, formations of transgender social networks and contention surrounding gender-reassignment surgeries caused transgender rights to gain momentum in the mid-twentieth century.<sup>118</sup> Louise Lawrence, a cross-dressing transgender woman, played an integral role in forming a transgender social network by contacting people who were arrested for cross-dressing.<sup>119</sup> Eventually, Lawrence became a mentor for Virginia Prince, who published the first overtly political transgender publication, *Tranvestia: The Journal of American Society for Equality in Dress*.<sup>120</sup> The periodical pled for social tolerance of transvestism, which it defined as a practice of heterosexual men.<sup>121</sup> Argua-

112. *Id.* at 2595.

113. *Id.*

114. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

115. Kevin M. Barry et. al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 508 (2016); see *infra* notes 44–74.

116. Courts have denied transgender people the right to inherit from deceased spouses. See, e.g., *In re Estate of Gardine*, 42 P.3d 120 (Kan. 2002); Courts have revoked parental rights. See, e.g., *Kantaras v. Kantaras*, 884 So.2d 155 (Fla. App. 2004) (reversing lower court’s granting custody to transgender man because he was born female).

117. SUSAN STRYKER, *TRANSGENDER HISTORY* (2008). German sexologist Magnus Hirschfield introduced the concept of gender as a spectrum, rather than a rigid dichotomy, which “helped undergird early transgender political sensibilities.” *Id.* In 1930, Hirschfield carried out the first modern gender reassignment surgeries. *Id.*

118. *Id.*

119. Stryker, *supra* note 153.

120. The Clinic researched homosexuality and variances on sexuality and gender. *Id.*

121. Stryker, *supra* note 157.

bly, this publication marked the beginning of the transgender rights movement.<sup>122</sup>

During this time mayhem statutes presented the “single greatest obstacle faced by every transsexual person in America unable to travel overseas for [gender reassignment] surgery or locate one of the few surgeons willing to flout the law by performing [the] surgery.”<sup>123</sup> Mayhem statutes were imported from English common law, which “forbade the amputation of any body part . . . that might prevent a male-bodied individual from being able to serve as soldier.”<sup>124</sup> In 1949, California’s governor offered “the opinion that transsexual genital modification would constitute ‘mayhem’ . . . and would expose any surgeon who performed such operation to possible criminal prosecution.”<sup>125</sup>

Christine Jorgensen, discussed above, circumvented mayhem statutes by traveling to Denmark.<sup>126</sup> Jorgensen was a patient of Harry Benjamin, who authored *The Transsexual Phenomenon* in 1966.<sup>127</sup> Benjamin worked with more transsexual individuals than any other physician in America and found a distinction between biological sex and psychological sex, or gender identity.<sup>128</sup> Shortly after his publication, Johns Hopkins University opened the first gender identity clinic.<sup>129</sup> The establishment of gender identity clinics brought attention to the health care needs of transsexual people and helped legitimize gender-reassignment surgery.<sup>130</sup>

Currently, the protections for transgender people are jurisdiction-dependent.<sup>131</sup> In 1975, Minneapolis became the first American city to

122. PAISLEY CURRAH ET AL., *TRANSGENDER RIGHTS* 24 (2006).

123. Liza Kahn, *Transgender Health at Crossroads: Legal Norms, Insurance Markets, and the threat of Healthcare Reform*, 11 *YALE J. HEALTH POL’Y L. & ETHICS* 375, 385–86 (2013) (citing DEBORAH RUDACILLE, *THE RIDDLE OF GENDER: SCIENCE, ACTIVISM, AND TRANSGENDER RIGHTS* 116 (2005)).

124. RUDACILLE, *supra* note 123, at 116; *see e.g.* CAL. PEN. CODE § 203, 205 (2013).

125. Stryker, *supra* note 153 at 45.

126. *See supra* note 22.

127. HARRY BENJAMIN, *THE TRANSEXUAL PHENOMENON* (1966).

128. Genny Beemyn, *Transgender History in the United States*, in *TRANS BODIES, TRANS SELVES* (Laura Erickson-Schroth ed., 2014).

129. *Id.* (“Similar programs were soon established at the University of Minnesota, Stanford University, the University of Oregon, and Case Western University.”).

130. *Id.* During this time, transsexualism was considered a psychological disorder, and gender-reassignment was considered a treatment. Kahn, *supra* note 123, at 385–86.

131. Elkind, *supra* note 28, at 912. *Know Your Rights: Transgender People and the Law*, ACLU, <https://www.aclu.org/know-your-rights/transgender-people-and-law> (last visited November 27, 2017). *See also* Kahn, *supra* note 123, at 385–86:

While federal legislation banning discrimination based on gender identity and expression has been stalled in Congress, activists and allies have made significant progress on state and local levels. Prior to 2000, only Minnesota had passed a nondiscrimination law

outlaw discrimination against transgender people.<sup>132</sup> Seventeen states, including the District of Columbia, prohibit transgender discrimination in areas including employment, housing, and public accommodations.<sup>133</sup> Neither federal legislation nor the Supreme Court have addressed what rights the Constitution affords to transgender people. However, a few federal courts have held the Equal Protection Clause of the Fourteenth Amendment bars the government from discriminating against people on the basis of gender identity and gender transition.<sup>134</sup> The American Civil Liberties Union (ACLU) argues the First Amendment and the Fourteenth Amendment Due Process Clause concerning rights to liberty, privacy, and autonomy protect gender identity and expression.<sup>135</sup>

### 3. *The Intersection of Race and Transgender*

In 2008, the National Black Justice Coalition (NBJC) in partnership with the NCTE and the National Gay and Lesbian Task Force, reported the combination of anti-transgender bias with racism causes transgender people of color to experience particularly devastating levels of discrimination.<sup>136</sup> The study found:

Black transgender and gender non-conforming people often live in extreme poverty, with 34% reporting a household income of less than \$10,000/year. This is over twice the rate for transgender people of all races (15%) and four times the general Black population rate (9%).<sup>137</sup>

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that included gender identity/expression; by 2013, seventeen states and the District of Columbia had done so. Similarly, the number of cities and counties with transgender rights ordinances has grown from three in the 1980s to more than 150 in 2012, so that more than forty-five percent of the US population is now covered by a transgender-inclusive nondiscrimination law [citation omitted]. More than 720 college and university campuses have added “gender identity/expression” to their nondiscrimination policies in the last seventeen years, and many have begun to implement other transgender-supportive policies, such as providing gender-inclusive housing, bathrooms, and locker rooms; covering transgender-related counseling, hormone therapy, and gender-affirming surgeries under student health insurance; and enabling transitioning students to change their name and gender on campus records and documents without having legally done so.

*Id.* (citations omitted).

132. Minneapolis, Minn., Ordinance 99-68 (1974); see Beemyn, *supra* note 128.

133. *Know Your Rights*, *supra* note 131.

134. *Id.*

135. *Id.*

136. Jack Harrison-Quintana et al., *Injustice at Every Turn: A look at Black respondents in the National Transgender Discrimination Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL., NAT'L GAY AND LESBIAN TASK FORCE & NAT'L BLACK JUSTICE COALITION, [http://www.transequality.org/sites/default/files/docs/resources/ntds\\_black\\_respondents\\_2.pdf](http://www.transequality.org/sites/default/files/docs/resources/ntds_black_respondents_2.pdf)

137. *Id.* (citing U.S. CENSUS BUREAU, *Current Population Survey*, Washington DC: GPO, 2008); This is over eight times the general U.S. population rate (4%). See U.S. CENSUS BUREAU,

These statistics show the Black transgender population is extremely marginalized. The 1960s civil rights movement explored in the next Section shows that despite legal and social changes, transgender Blacks are still living at the intersection of racism and transphobia.

### C. Desegregation of Race-Separated Facilities

Race-segregated bathrooms were an important issue during the civil rights movement. During the Reconstruction era, from 1865 to 1877, the post-Civil War South was under military rule and Congress enacted many laws to protect civil rights.<sup>138</sup> Following the Reconstruction era, every Southern state enacted discriminatory statutes known as Jim Crow laws.<sup>139</sup> The statutes created an apartheid by separating blacks and whites in most aspects of life, including schools and public restroom facilities.<sup>140</sup> In *Plessy v. Ferguson*, the Supreme Court upheld Jim Crow laws mandating blacks and whites use “separate, but equal facilities.”<sup>141</sup> The Court disagreed the Jim Crow laws stamped black people with a badge of inferiority, stating “[i]f this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”<sup>142</sup> Justice Harlan was the sole dissenter, concluding:

[I]n my opinion, the judgement this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case. . . . The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit seeds of race hate to be planted under the sanction of law.<sup>143</sup>

On May 17, 1954, the Supreme Court decided *Brown v. Board of Education*, invalidating the “separate but equal” doctrine in the context of elementary and high schools.<sup>144</sup> The Court relied on the Equal Pro-

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*Current Population Survey, Annual Social and Economic Supplement* (Washington, DC: GPO, 2008).

138. CHEMERINSKY, *supra* note 22, at 718 (2011); *See, e.g.*, Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1982); Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985) (known as the Ku Klux Klan Act) (opening any person acting under the color of state law who violates the Constitution or laws of the United States to criminal penalty an civil liability).

139. CHEMERINSKY, *supra* note 22, at 719 (2011).

140. *Id.*

141. *Id.*; 163 U.S. 537, 550–51 (1896) (“[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned.”).

142. *Plessy*, 163 U.S. at 550.

143. *Id.* at 559–60 (Harlan, J., dissenting).

144. 347 U.S. at 494.

tection Clause and unanimously held the doctrine was impermissible in the context of public education.<sup>145</sup> Chief Justice Warren effectively declared separate is never equal and explained, “To separate [Black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>146</sup> The Court concluded, “[s]eparate educational facilities are inherently unequal.”<sup>147</sup> One scholar accurately stated:

Every colored American knew that *Brown* did not mean that he would be invited to lunch with the Rotary the following week. It meant something more basic and more important. It meant that black rights had suddenly been redefined; black bodies had suddenly been reborn under a new law. Blacks’ value as human beings had been changed overnight by the declaration of the highest court. At a stroke, the Justices had severed the remaining cords of *de facto* slavery. The Negro could no longer be fastened with the status of official pariah. No longer could the white man look right through him as if he were, in the title words of Ralph Ellison’s stunning 1952 novel, *Invisible Man*.<sup>148</sup>

*Brown* used the Equal Protection Clause to combat invidious discrimination and to extend fundamental rights to a historically marginalized group. In a meeting with his former Senate colleague, then Vice President Lyndon B. Johnson recounted his cook and her husband’s experience when they drove through Mississippi: “[w]hen they had to go to the bathroom, they would . . . pull off on a side road, and . . . the cook of the Vice President of the United States, would squat in the road to pee. That’s wrong. And there ought to be something to change that.”<sup>149</sup> In line with *Brown*’s ruling that separate was inherently unequal, Congress outlawed discrimination on basis of race in places of public accommodation and the workplace with the Civil Rights Act of 1964.<sup>150</sup> The combination of federal case law and federal statutory law ultimately led to the desegregation of several public accommodations, including bathrooms.<sup>151</sup>

145. *Id.* at 495.

146. *Id.* at 494.

147. *Id.* at 495.

148. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 749 (1977).

149. ROBERT DALLEK, *LYNDON B. JOHNSON: PORTRAIT OF A PRESIDENT* 163 (2004).

150. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended 42 U.S.C. §§ 2000(e) et. seq. (2012)); Erwin Chemerinsky, *Celebrating the Civil Rights Act of 1964*, ORANGE COUNTY REGISTER (Aug. 18, 2014), <http://www.ocregister.com/articles/rights-631986-civil-act.html>.

151. Rebecca E. Zeitlow, *To Secure These Rights: Congress, Courts, and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 946 (2004-2005) (“Both *Brown* and the 1964 Act are landmark legal measures outlawing segregation.”).

As discussed below, race-segregated bathroom facilities from the Jim Crow Era are analogous to sex-segregated bathroom facilities today.<sup>152</sup> Therefore, legal landmarks such as *Brown v. Board of Education* and the Civil Rights Act of 1964 help frame discussions concerning the constitutionality of state-sponsored bathroom bills that seek to prevent transgender people from accessing bathrooms that conform with their gender identity.

### III. ARGUMENT

Section A analogizes the fears motivating race-segregated bathrooms with the fears motivating sex-segregated bathrooms and shows that racial desegregation can inform the way we think about the transgender bathroom debate. Section B discusses how *Obergefell* and its recognition of individual autonomy can be expanded to the context of transgender rights. Section C argues the right to privacy and the right to self-definition under the Fourteenth Amendment both lend support for granting transgender persons access to the bathroom of their choice.

#### A. Similar Fears

It was not so very long ago that states, including North Carolina, had other signs above restrooms, water fountains, and on public accommodations, excluding people based on distinctions without a difference. We've moved beyond those dark days.<sup>153</sup>

Those arguing for protection under HB2 are making the same arguments made by defenders of race-segregated facilities during the Jim Crow Era.<sup>154</sup> The underlying purpose of the Jim Crow statutes was to protect white women and children from a group of persons perceived to corrupt “public morals, health, and order.”<sup>155</sup> “While segregationists frequently claimed racial integration would grant black men sexual access to white women, white women also emphasized that contact

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152. See *infra* 153–60.

153. Joe Sterling, *North Carolina, U.S., Square Off Over Transgender Rights*, CNN (May 10, 2016), <http://www.cnn.com/2016/05/09/politics/north-carolina-hb2-justice-department-deadline/index.html>.

154. Amara S. Chaudhry, *Lessons from Jim Crow: What Those Seeking Self-Determination for Transgender Individuals Can Learn from America's History with Racial Classification Categories*, 18 TEMP. POL. & CIV. RTS. L. REV. 505, 506 (2009).

155. *Id.* Conservative ideas that civil rights protections would endanger women and children began in the 1940's. Gillian Frank, *The Anti-Trans Bathroom Scare Has Its Roots in Segregation*, SLATE-BLOGS (Nov. 10, 2015, 4:55 PM), [http://www.slate.com/blogs/outward/2015/11/10/anti\\_trans\\_bathroom\\_propaganda\\_has\\_roots\\_in\\_racial\\_segregation.html](http://www.slate.com/blogs/outward/2015/11/10/anti_trans_bathroom_propaganda_has_roots_in_racial_segregation.html).

with black women in bathrooms would infect them with venereal diseases.”<sup>156</sup>

Similar, if not identical fears, have been echoed by proponents of HB2 and similar laws. State Senator Phil Berger stated that granting transgender persons access to bathrooms “[a]llows grown men to share bathrooms and locker facilities with girls and women.”<sup>157</sup> Some proponents of HB2 and similar laws have characterized transgender demands for civil rights protections as an attempt by sex offenders to gain sexual access to children.<sup>158</sup> Despite there being no reported incidents of transgender violence against women or children in public restrooms, these arguments persist.<sup>159</sup>

Similar to the Jim Crow laws, the bathroom bills are supported by members of dominant social groups portraying themselves as physically vulnerable in public spaces and asserting that marginalized groups are powerful and threatening.<sup>160</sup> The lack of reported incidents reflects transphobic sentiments and demonstrates that excluding transgender people from bathrooms has more to do with power relationships and social dynamics in society.

### *B. Recognizing the Right of Transgender Bathroom Access under the Fourteenth Amendment*

Transgender bathroom access is an important part of the transgender community’s fight for equality. Legislation restricting bathroom access may be challenged under the Equal Protection Clause of the Fourteenth Amendment, which provides, in relevant part: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>161</sup> The Supreme Court has established various tests to determine whether a law’s discrimination of distinct

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156. *Id.*

157. Stephen Ganey, *Religious Liberties Bills Across US Spark Protests, Denounced by Businesses*, FOX4KC (Mar. 27, 2016, 6:38 PM), <http://fox4kc.com/2016/03/27/religious-liberties-bills-across-us-spark-protests-denounced-by-businesses/>; see also Tal Kopan & Eugene Scott, *North Carolina Governor Signs Controversial Transgender Bill*, CNN (March 24, 2016, 11:12 AM), <http://www.cnn.com/2016/03/23/politics/north-carolina-gender-bathrooms-bill/>.

158. Frank, *supra* note 155.

159. Marcie Bianco, *Statistics Show Exactly How Many Times Trans People Have Attacked You in Bathrooms*, MIC NETWORK (Apr. 2, 2015), <https://mic.com/articles/114066/statistics-show-exactly-how-many-times-trans-people-have-attacked-you-in-bathrooms#.2cqXYF6W>; see also 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. 65, 75–76 (2013); Katy Steinmetz, *Why LGBT Advocates say Bathroom “Predators” Argument is a Red Herring*, TIME (May 2, 2016), <http://time.com/4314896/transgender-bathroom-bill-male-predators-argument/>.

160. Frank, *supra* note 155. See also HOWELL, *supra* note 47.

161. U.S. CONST. amend. XIV.

groups is unconstitutional.<sup>162</sup> Accordingly, laws discriminating on the basis of race or alienage are subject to strict scrutiny,<sup>163</sup> and laws discriminating on the basis of gender are subject to “intermediate scrutiny.”<sup>164</sup> The Supreme Court has identified many reasons for applying strict scrutiny to racial classifications including: (1) race is an immutable trait, (2) the relative political powerlessness of racial minority groups, and (3) the primary purpose of the Fourteenth Amendment was to protect Blacks.<sup>165</sup>

Here, the first two elements may lend support to transgender persons seeking access to bathrooms conforming to their gender identity. First, in light of historical and ongoing discrimination, transgender persons can argue they are a suspect class. In *Brown*, the petitioners argued racial discrimination was immutable because it related to ancestry.<sup>166</sup> The petitioners cited *Hirabayashi v. United States*, which stated, “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection . . . .”<sup>167</sup> Here, with new research on the horizon,<sup>168</sup> a transgender person may be able to assert that gender identity represents an immutable trait.<sup>169</sup> While there is much debate on this topic, more definitive research would provide considerable perspective.

*Brown* also lends support to the argument that transgender bathroom access should be allowed in secondary and primary schools. The Court found that segregated school facilities deprived minority chil-

162. Elkind, *supra* note 28, at 900.

163. CHEMERINSKY, *supra* note 22, at 868 (2011).

164. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (applying intermediate scrutiny to the Virginia Military Institute’s exclusion of women).

165. CHEMERINSKY, *supra* note 22, at 712–13.; *see, e.g.*, *United States v. Carolene Products, Co.*, 304 U.S. 144, 144 n.4 (1938) (“prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities,” and thus “may call for a correspondingly more searching judicial inquiry”).

166. *Pet’r’s Br., Brown v. Board of Educ.* 347 U.S. 483 (1954).

167. *Bolling v. Sharpe*, Brief for Petitioners, 1952 WL 47257 (U.S.) 11.

168. N.E. Whitehead, *Is Transsexuality Biologically Determined?*, MYGENES (2000), <http://www.mygenes.co.nz/transsexuality.html>.

169. *See* Daniel Trotta, *Born this Way? Researchers Explore the Science of Gender Identity*, REUTERS (Aug. 3, 2017), <https://www.reuters.com/article/us-usa-lgbt-biology-idUSKBN1AJ0F0>. Trotta reports that “[a] consortium of five research institutions in Europe and the United States, including Vanderbilt University Medical Center, George Washington University and Boston Children’s Hospital, is looking to the genome, a person’s complete set of DNA, for clues about whether transgender people are born that way.” *Id.*

dren of equal education opportunities in contravention of the Equal Protection Clause.<sup>170</sup> The Court reasoned that the “separate but equal” doctrine generated feelings of inferiority in children of minority groups.<sup>171</sup> Similar arguments can be made for transgender students. Transgender students may feel their gender identity is invalid as compared to cisgender students. Denying equal access to public school restrooms effectively singles transgender students out “with a stigmatizing message that a transgender boy is not a normal or real boy, or a transgender girl is not a normal or real girl.”<sup>172</sup> Such treatment “is precisely the kind of ‘badge of inferiority’ that antidiscrimination laws . . . forbid.”<sup>173</sup>

Additionally, transgender persons constitute a class of persons with relative political powerlessness. History shows transgender rights have been largely intertwined with gay rights. But transgender persons still face hardship with regard to sex-segregated facilities, despite gay rights victories.<sup>174</sup> Transgender persons are powerless as a group because their presence challenges society’s “gender binary” system, which refers to the rigid classification of individuals’ sex and gender as being male or female.<sup>175</sup> This system is generally overlooked “until the norms of gender presentation, interaction, or organization are inadvertently violated or deliberately challenged.”<sup>176</sup> This “[t]raditional conception of gender as either male or female fosters and perpetuates discrimination against the gender minority who do not fit the stereotypical mold.”<sup>177</sup>

Considering all of the above, transgender persons may be able to assert that they are a suspect class and entitled to the Equal Protection rights. Similar to racial classifications, transgender persons might be able to argue that gender identity is an immutable trait. The results of ongoing research could provide considerable support for this argument. In addition, transgender persons could argue they are a class of

170. *Brown v. Board of Education*, 347 U.S. 483, 493–95 (1954).

171. *Id.* at 494.

172. Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-segregated Facilities for Transgender Students*, 28 WIS. J. L. GENDER & SOC’Y 301, 309 (2013).

173. *Id.* “For transgender youth . . . placement in a gender-specific facility can mean being forced to share sleeping quarters and bathrooms with members of their biological gender, which can have consequences ranging from humiliation to sexual assault.” Elkind, *supra* note 28, at 900.

174. *Supra* notes 98–114.

175. Darren Rosenblum, “Trapped” In *Sing Song: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 505 (1999).

176. Patricia Gagné and Richard Tewksbury, *Conformity Pressures and Gender Resistance Among Transgendered Individuals*, 45 SOC. PROBS. 81–101 (1998).

177. Elkind, *supra* note 28, at 928.

individuals will political powerlessness as they challenge the binary system of male versus female. This is especially true given the lack of uniform legal jurisprudence concerning the basic rights of transgender persons. For these reasons, the Equal Protection Clause may lend support for transgender persons arguing to remove state-sponsored bans on transgender persons using the bathroom that conforms to their gender identity.

### B. Transgender Rights after *Obergefell*

*Obergefell*'s reasoning can be used to bolster the argument for transgender bathroom access. The Court began the opinion by stating, "The Constitution promises liberty to all within its reach, a liberty that includes specific rights that allow persons, within a lawful realm, to define and express their identity."<sup>178</sup> For transgender people, the fight for equal bathroom access is heavily rooted in a desire to express their *gender* identity, which is integral to achieving individual autonomy.<sup>179</sup> Therefore, the Court's reasoning, albeit in the context of marital equality, allows one to argue that the fundamental rights related to privacy and personal autonomy encompass bathroom access. Since the historic protection of the right to marry alone, could not resolve the issue, in *Obergefell* the Court outlined four principles that helped rationalize same-sex marriage: personal choice, self-definition, childrearing, and societal order.<sup>180</sup> The first two principals lend considerable support to the transgender bathroom debate. Under the first principal, the Court found "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."<sup>181</sup> This is in line with the shifting public opinion toward a desire for the government to withdraw from intimate decisions in people's personal lives.<sup>182</sup> Therefore, the first principal supports the notion that individ-

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178. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015); Bradley C.S. Watson, *Reclaiming the Rule of Law after Obergefell*, NAT'L REV. (July 9, 2015), <http://www.nationalreview.com/article/420934/same-sex-marriage-and-rule-law>.

179. Transgender people also face difficulties when it comes to changing documents necessary to live according their gender identity: such as birth certificates, social security cards, driver's licenses, and medical records. "Unfortunately, these changes are often expensive, burdensome, and complicated, putting them out of reach for many people. For example, some states still require proof of surgery or a court order to change a gender marker." *Frequently Asked Questions about Transgender People*, *supra* note 8. See also Lark Mulligan, *Dismantling Collateral Consequences: The Case for Abolishing Illinois' Criminal Name-Change Restrictions*, 66 DEPAUL L. REV. 647 (2017) (providing an overview of criminal name-change restrictions that present barriers for transgender persons and arguing for the abolishment of such restrictions).

180. 576 U.S. (2015).

181. *Id.*

182. Abrams, *supra* note 25.

uals cannot be forced to use a restroom that conflicts with their gender identity. “Choices about whether to live an authentic life consistent with one’s gender identity can powerfully shape one’s destiny, and may implicate ultimate control over one’s body.”<sup>183</sup> Therefore, transgender people may argue that laws like HB2 seek to make them “social prisoners by the sex assigned to them,” contrary to ideas of personal autonomy and the right to define one’s identity discussed in *Obergefell*.<sup>184</sup>

The Court also held that the nature of a person’s commitment to another commands equal dignity from the State.<sup>185</sup> This principal was illustrated in *Lawrence v. Texas*, which held that state laws may not demean the nature of people’s intimate relationships by criminalizing their association.<sup>186</sup> The concept of dignity has deep roots in the Constitution and promotes the sentiment that “all individuals are deserving in equal measure of personal autonomy and freedom to ‘define [their] own concept of existence.’”<sup>187</sup> Because choosing a bathroom is such a personal and intimate choice, transgender people can argue it is their right as a matter of dignity, to be able to so choose.

*Obergefell* is strong precedent for the argument that gender identity should fall within the ambit of constitutional rights deserving protection.<sup>188</sup> Though the fundamental right to privacy and to self-definition may seem to conflict, they are consistent with one another. As one author noted, one’s gender is “among the most personal and private matters, and state interference in gender self-determination perpetuates the most egregious discrimination.”<sup>189</sup> Attorney General Loretta Lynch’s response to the North Carolina bathroom bill seemed to reflect a similar sentiment when she called the bill “state-sponsored discrimination against transgender individuals who simply seek to engage in the most private functions in a place of safety and security.”<sup>190</sup> However, some proponents of bathroom bills argue that forcing an

183. David B. Cruz, *Transgender Rights After Obergefell*, 84 UMKC L. REV. 693, 700 (2016).

184. Scott Skinner-Thompson, *How Obergefell Could Help Transgender Rights*, SLATE-BLOGS (June 26, 2015), [http://www.slate.com/blogs/outward/2015/06/26/obergefell\\_and\\_trans\\_rights\\_the\\_supreme\\_court\\_s\\_endorsement\\_of\\_identity.html](http://www.slate.com/blogs/outward/2015/06/26/obergefell_and_trans_rights_the_supreme_court_s_endorsement_of_identity.html).

185. *Obergefell v. Hodges*, 135 S. Ct. 2589 (2015).

186. 539 U.S. 558 (2003).

187. Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 32 (2015-2016).

188. Cruz, *supra* note 183, at 693; *see also* Skinner-Thompson, *supra* note 184.

189. Jillian T. Weiss, *Gender Autonomy, Transgender Identity and Substantive Due Process: Finding a Rational Basis for Lawrence v. Texas*, RACE & GENDER EQUALITY, 2, 22 (2010).

190. Gregory Krieg, *North Carolina Gov. Pat McCrory Blames Democrats for ‘Bathroom Bill,’* CNN (May 11, 2016) <http://www.cnn.com/2016/05/11/politics/north-carolina-pat-mccrory-bathroom-bill-the-lead/index.html>.

individual to share a bathroom with a transgender person violates *their* fundamental right of privacy.<sup>191</sup> For instance, Governor McCrory argued there was an expectation of privacy and security for girls and boys using sex-segregated public facilities.<sup>192</sup> Thus, as scholars have correctly pointed out, the issue is “whose privacy should govern when it comes to the use of multi-occupied bathroom[s]”?<sup>193</sup>

One scholar persuasively reasoned that the cisgender person’s privacy argument is misplaced, stating:

On the surface, this argument would make it appear that there are private actions on both sides—the transgender person’s side and the non-transgender person’s side—and that allowing transgender people into a bathroom/changing room privileges their private actions over those who do not wish to expose themselves to anyone not possessing the same biological build. But this ignores that the basis of the transgender person’s claim is grounded in a *private act* of expressing one’s personal identity, which is constitutive of her choice of facility, while the claim of the uncomfortable biological user is based strictly on a social convention of what should aid intimacy in other contexts or simply be information she did not want revealed.<sup>194</sup>

This is an important distinction. This is really about the transgender person’s private act related to a very personal, individualized choice weighed against cisgender persons’ private information.<sup>195</sup> Notably, Justice Kennedy’s opening opinion in *Obergefell* asserted that the Constitution protects certain fundamental liberties, which encompasses “personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”<sup>196</sup> Thus, it appears the right to privacy protects the right of private acts as they relate to choices that define a person’s identity, but not necessarily private information. The desire for cisgender persons to avoid exposing their bodies to someone who is transgender appears to be more of a social construct than a basic fundamental liberty.<sup>197</sup> Under this line of reasoning, the right to use the bathroom that

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191. Scott Skinner-Thompson, *Bathroom Bills and the Battle Over Privacy*, SLATE-BLOGS (May 10, 2016, 7:30 AM), [http://www.slate.com/blogs/outward/2016/05/10/in\\_the\\_battle\\_over\\_bathroom\\_privacy\\_transgender\\_people\\_s\\_needs\\_matter\\_more.html](http://www.slate.com/blogs/outward/2016/05/10/in_the_battle_over_bathroom_privacy_transgender_people_s_needs_matter_more.html).

192. Krieg, *supra* note 190. See also Vincent J. Samar, *The Right of Privacy and the Right to Use the Bathroom Consistent with One’s Gender Identity*, 24 DUKE J. GENDER L. & POL’Y 33, 51 (2016).

193. *Id.* at 52.

194. Samar, *supra* note 192, at 54.

195. *Id.* at 52.

196. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

197. Samar, *supra* note 192, at 55.

matches a person's gender identity is a basic liberty that finds support in the Constitution.

#### IV. IMPACT

It is important to recognize the distinction between “sex,” which refers to physical and biological traits, and “gender,” which refers to social or cultural traits.<sup>198</sup> Society's rigid gender binary system operates upon the presumption that “gender will correlate with the sex assigned at birth.”<sup>199</sup> Accordingly, even if granted access to bathrooms matching their gender identity, transgender individuals may still face other obstacles.

Changing facilities warrant a closer examination of the reasons laws segregate facilities on the basis of sex in the first place. One court has noted, “The desire to shield one's unclothed figured [sic] from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.”<sup>200</sup> Therefore, it has been proposed that equal access consistent with gender identity is appropriate for restrooms, but schools should be given more leeway to restrict access to facilities such as locker or changing rooms.<sup>201</sup> But, one article argues, “Just as students with other physical differences, such as different stages of sexual development, visible disabilities or medical devices, or unusual scars or skin conditions, must be treated equally, so must transgender students.”<sup>202</sup>

In *Students and Parents for Privacy v. United States Department of Education*, the court took an interesting counter approach holding that high school students do not have a constitutionally protected right *against* sharing locker rooms with transgender students.<sup>203</sup> The school district allowed transgender students to use the bathroom that conformed to their gender identity.<sup>204</sup> The plaintiffs sought a preliminary injunction requiring the school to have biologically sex-segregated locker rooms.<sup>205</sup> The court found allowing transgender students to use changing facilities consistent with their gender identity “does not create a severe, pervasive, or objectively offensive hostile environ-

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198. *Definitions Related to Sexual Orientation and Gender Diversity in APA Documents*, AM. PSYCHOL. ASS'N, <https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> (last visited March 4, 2017).

199. Gagné & Tewksbury, *supra* note 176.

200. *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963).

201. Tobin & Levi, *supra* note 172, at 324.

202. *Id.* at 325.

203. No. 16 C 4945, 2016 WL 3269001, \*2 (N.D. Ill. June 15, 2016).

204. *Id.*

205. *Id.*

ment under Title IX given the privacy protections [the school district] has put in place.”<sup>206</sup> These privacy protections included providing students who did not want to share a locker room with a transgender student with access to alternative facilities.<sup>207</sup>

This decision provides hope that transgender persons will also be allowed to use the locker rooms matching their gender identity in the future. But this hope is tempered by anticipated legislation under the Trump administration.<sup>208</sup> Prior to his inauguration, Donald Trump stated transgender persons should be allowed to use the bathroom of their choice.<sup>209</sup> President Trump’s stance was in line with the Obama administration’s letter, which stated transgender students fell within the class of persons protected by sex discrimination under Title IX.<sup>210</sup> However, in February 2017 the Trump administration rescinded the letter, allowing states flexibility in interpreting Title IX.<sup>211</sup> The presidential election has created uncertainty in how states will address the transgender bathroom issue. In March 2017, the Supreme Court announced it would not hear the transgender bathroom case.<sup>212</sup> This means the issue will continue to be litigated in the lower courts and will perhaps be swayed by shifting public opinion.<sup>213</sup> Accordingly, it is appropriate to recall the public shift that occurred leading up to *Obergefell*. In just twenty years public opinion of same-sex marriage shifted dramatically.<sup>214</sup> The American public is divided over which public bathrooms transgender people should be able to use.<sup>215</sup> Perhaps the public opinion concerning transgender bathroom access will undergo this same shift prior to a future decision by the Supreme Court.

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206. *Id.*

207. *Id.*

208. Anya Kamenetz & Cory Turner, *Trump And Transgender Rights: What Just Happened?*, NPR (Feb. 23, 2017), <http://www.npr.org/sections/ed/2017/02/23/516837258/5-questions-about-the-trump-administrations-new-transgender-student-guidance>.

209. Ashley Parker, *Donald Trump Says Transgender People Should Use The Bathroom They Want*, N.Y. TIMES (Apr. 21, 2016), <https://www.nytimes.com/politics/first-draft/2016/04/21/donald-trump-says-transgender-people-should-use-the-bathroom-they-want/>.

210. *Dear Colleague Letter on Transgender Students*, *supra* note 69.

211. Kamenetz & Turner, *supra* note 208.

212. Liptak, *supra* note 10.

213. *Id.*

214. Chris Cillizza, *How Unbelievably Quick Public Opinion Changed on Gay Marriage*, in *5 Charts*, WASH. POST (June 26, 2015), [https://www.washingtonpost.com/news/the-fix/wp/2015/06/26/how-unbelievably-quickly-public-opinion-changed-on-gay-marriage-in-6-charts/?utm\\_term=.7e338bcb1a42](https://www.washingtonpost.com/news/the-fix/wp/2015/06/26/how-unbelievably-quickly-public-opinion-changed-on-gay-marriage-in-6-charts/?utm_term=.7e338bcb1a42).

215. Michael Lipka, *Americans are Divided Over Which Public Bathrooms Transgender People Should Use*, PEW RESEARCH (Oct. 3, 2016), <http://www.pewresearch.org/fact-tank/2016/10/03/americans-are-divided-over-which-public-bathrooms-transgender-people-should-use/>.

## V. CONCLUSION

The transgender bathroom debate challenges society to rethink and reshape the traditional gender binary system. This Comment aimed to assess how certain fundamental rights may be expanded to encompass transgender persons' right to access bathrooms consistent with their gender identity. *Brown* and *Obergefell* demonstrate this vision is possible. But a review of American history reveals change can be unpredictable. "June 26, 2015 [the date on which *Obergefell* was decided] thus will be remembered, like dates such as May 17, 1954 when the Court decided *Brown v. Board of Education*, as the Court's taking an historic step forward in advancing liberty and equality."<sup>216</sup> Perhaps the transgender bathroom debate will lead to another date of equal importance.

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216. Chemerinsky, *supra* note 23.

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