Breaking the Binary: Desegregation of Bathrooms

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INTRODUCTION

Sex discrimination is prohibited in the United States by several laws and constitutional guarantees. In recent years, the public bathroom has become a battleground for equal rights under these laws, both in the courts and the local legislature. Some states have attempted to legislate access to sex-segregated bathrooms purportedly based on biology, defining sex in a myriad of ways, which exclude gender-diverse individuals. Meanwhile, the Equal Employment Opportunity Commission (EEOC) has held that denying access to a bathroom corresponding with gender identity constitutes sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964. While the EEOC’s approach to bathroom access is a
not worthy of equal treatment and respect”).

5. See Shelby Hanssen, Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law, 96 OR. L. REV. 283, 284–88 (2017) (detailing the relationship between “sex” and “gender” identity and describing the complexities of categorization by chromosomes, genitalia, or gender identity as it pertains to the non-binary, genderqueer, transgender, and intersex communities).

6. Id. at 286–87. “[S]ex is a ‘vast’ continuum that defies the constraints of the traditional male/female binary. [T]he existence of such a varied spectrum of sex designations challenges the assumptions underlying gender binarism. In this light, limiting people to the categories of male or female is overly reductive.” Id.


8. Angie Martell, Legal Issues Facing Transgender and Gender-Expansive Youth, 96 MICH. B.J. 30, 30 (2017) (explaining “gender expansive” is a more positive term than “gender nonconforming” and that “a whole spectrum of gender identification” exists “between the binary biological sex categories of male and female.”); see, e.g., Definition of Terms, UC BERKELEY, https://campusclimate.berkeley.edu/students/ejce/geneq/resources/lgbtq-resources/definition-terms [https://perma.cc/K5HN-RMBG] (last visited Sept. 18, 2018). Agender, bigender, gender fluid, gender non-conforming, genderqueer, gender variant, intersex, pangender, transgender, and two-spirit individuals may identify outside the binary male and female options. Id. Gender identity is so wide-ranging that since 2014, social media giant Facebook has expanded the available gender options users can select from two to fifty-nine, including the opportunity to “fill in the blank.” Facebook Users Now Have New Gender Option: Fill in the Blank, NBC NEWS (Feb. 26, 2015, 6:08 PM), https://www.nbcnews.com/tech/social-media/facebook-users-now-have-new-gender-option-fill-blank-n313716 [https://perma.cc/N2GW-559C].


10. Hanssen, supra note 5, at 289 (“Few courts have adopted an analytical approach reflecting the
This note discusses how the binary view of gender in relation to public bathroom segregation is insufficient to meet the diverse needs of the public and proposes the desegregation of bathrooms as the solution to promote gender equality and reduce gender-based social imbalances. This note will focus on the bathroom rights of individuals who identify outside of the binary options of male and female, viewed through the lens of how transgender people identifying within the binary have been treated by the courts. For the purposes of this note, the term non-binary will be used to refer to these individuals. Part I provides a brief overview of recent bathroom legislation in the United States, the statutory and constitutional framework that has been applied to sex discrimination claims, and the courts’ treatment of gender-based discrimination claims under each law. Part II analyzes gender-based discrimination claims in relation to public bathroom access under this framework in light of how courts have treated gender litigation and addresses widespread myths about privacy and safety concerns. Part III proposes the complete desegregation of bathrooms based on gender, considers which legal claim is the best avenue of implementing desegregation, delineates the benefits of such implementation, and addresses potential concerns raised by this proposal.

variety of sex designations consistent with contemporary gender theory or statistical realities.”); Martell, supra note 8, at 31 (“Historically, non-binary transgender people have largely been excluded from the discussion of transgender people, which has caused them to be further marginalized in legal circles.”); see also Patrick C. Brayer, Gender Nonconforming Expression and Binary Thinking: Understanding How Implicit Bias Becomes Explicit in the Legal System, Considering the Shooting Death of Philando Castile, 55 AM. CRIM. L. REV. ONLINE 44, 46–48 (2018) (describing “a number of setbacks in eliminating laws, policies, and regulations negatively impacting people who are transgender, gender fluid, and non-binary”).

Nonbinary gender identity is a novel legal concept. Gender binarism and resulting “dichotomous sexual tradition” dominate the current legal landscape. Scholars such as Saru Matambanadzo and Alice Domurat Dreger have commented on the evolution of legal and medical understandings of sex, as well as the interplay between the two. For much of history, one’s “medical” sex determined property and voting rights. Until recently, one’s sex determined whom one could marry. Currently, legal determinations of sex can still affect one’s life. The current legal landscape, by and large, does not provide identity options for non-normative gender identities.

Hanssen, supra note 5, at 288.

11. Definition of Terms, supra note 8.
I. Background

Bathrooms were not always envisioned as particular to sex, but today the sex-segregated public restroom is so prevalent that Judge Niemeyer of the Fourth Circuit improperly characterized it as “commonplace and universally accepted” that public facilities be segregated by sex “[a]cross societies and throughout history.” This perception has contributed to the emergence of the “bathroom narrative,” which typecasts any proposed LGBTQIA+ nondiscrimination bill as opening the bathroom door for sexual predators to victimize young girls and women under the guise of claiming to be transgender. Many states have reacted by considering “biology-based” bathroom legislation, closing the door to many whose gender identities do not align with how they are perceived by others. Such proposed statutes have been struck

12. Laura Portuondo, The Overdue Case Against Sex-Segregated Bathrooms, 29 YALE J.L. & FEMINISM 465, 471–74 (2018). Public restrooms were not a common feature until after the 1870s and were for male use under the theory that men and women inhabited “separate spheres,” wherein women did not need access to public lavatories because they were meant to remain in the home. Id. The advent of sex-segregated public restrooms began as women entered the workforce in factories and had its roots in the perception of women as weak and vulnerable, requiring special protection in line with Victorian ideals of modesty and social morality. Terry S. Kogan, Sex-Separation in Public Restrooms: Law, Architecture, and Gender, 14 MICH. J. GENDER & L. 1, 54 (2007).


15. Robin Fretwell Wilson, The Nonsense About Bathrooms: How Purported Concerns Over Safety Block LGBT Nondiscrimination Laws and Obscure Real Religious Liberty Concerns, 20 LEWIS & CLARK L. REV. 1373, 1383–87 (2017). The “bathroom narrative” has “hobbled” efforts to enact nondiscrimination bills at state and municipal levels throughout the United States. Id. at 1387. Despite the use of the “bathroom narrative” to prevent the passing of nondiscrimination bills, supporters maintain that including gender identity protection with sexuality protections in public accommodations is non-negotiable, and Americans overwhelmingly agree that LGBTQIA+ protections are needed and favorable. Id. at 1383, 1389.

16. Fleming & McFadden-Wade, supra note 2, at 163. For example, Kansas House Bill 2737 and Senate Bill 513 proposed a school-centered restriction on public restrooms, which defined sex as “being male or female . . . determined by a person’s chromosomes, and . . . identified at birth by a person’s anatomy.” Id. at 166. Some states, such as Indiana, have proposed criminalizing bathroom use inconsistent with these biological proscriptions. Id. at 167. However, this sort of definition of sex fails to account for individuals whose chromosomes or anatomy do not comport to a strictly binary system. See Hansen, supra note 5, at 286–87 ("[O]ne in every one hundred people has atypical sex anatomy that
down—often in committee—before becoming law, with the exception of North Carolina’s House Bill 2 (HB2). HB2 required that government agencies within the state segregate all multiple-occupancy public restrooms by “biological sex,” which the statute defined as male or female as listed on a person’s birth certificate. In response to overwhelming negative backlash from the federal government and private companies, newly-elected Governor Roy Cooper, signed a bill that partially repealed HB2 in March 2017. The net result is that bathroom usage in the United States lies largely in the hands of the courts, which considers the rights of individuals related to federal sex discrimination claims on the basis of Title VII of the Civil Rights Act of 1964, Title IX of the Educational Amendments Act of 1972, and the Equal Protection Clause of the Fourteenth Amendment.

.. There are at least eighteen documented sex designations limiting people to the categories of male or female is overly reductive.”; Intersex.


18. Fleming & McFadden-Wade, supra note 2, at 169. Government agencies included those under the control of the state council, local boards of education, the judicial and legislative branches of government, and other political subdivisions. Id.


20. See Fleming & McFadden-Wade, supra note 2, at 172–73 (“Plaintiffs commonly assert that the law violates either Title IX and/or Title VII.”); Nathan Heffernan, Potty Politics: G.G. ex rel. Grimm v. Gloucester County School Board, Title IX, and the Challenges Faced by Transgender Students Under the Trump Administration and Beyond, 32 Wis. J.L. GENDER & SOC’Y 215, 221 (2017) (“The Equal
A. Title VII

Title VII of the Civil Rights Act of 1964 protects individuals from workplace discrimination on the basis of race, color, religion, sex, or national origin. The EEOC is the government agency responsible for interpreting and enforcing Title VII. Plaintiffs must establish that they (1) are a member of a protected class, (2) suffered adverse employment action, (3) were qualified for the position, and (4) were treated differently from those outside of the protected class to maintain a claim under Title VII. In a landmark case for Title VII, Price Waterhouse v. Hopkins, the Supreme Court ruled that discrimination based on nonconformity to gender stereotypes constitutes sex discrimination. The Supreme Court has never considered the question of what constitutes sex, a factor that has contributed to differing opinions from the lower courts as to whether transgender individuals constitute a protected class per se. Price Waterhouse opened up a new window for protection of transgender people under Title VII by recognizing that treating people differently because of sex stereotypes violates the statute, and courts have

Protection Clause . . . has been repeatedly used to contest gender-based government action.”)

22. Id.
24. Price Waterhouse v. Hopkins, 490 U.S. 228, 251–52 (1989) (“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”).
25. See e.g., Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007); Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008). Following precedent in Ulane v. Eastern Airlines, the Tenth Circuit denied Title VII protection to transgender individuals as a separate class per se, stating that “[i]n light of the traditional binary conception of sex,” transgender status alone was not sufficient to state a claim, but a claim may still be brought if the discrimination is based on binary sex stereotypes. Etsitty, 502 F.3d at 1221–22. In contrast, the D.C. District Court ruled that discrimination because of transgender status was per se sex discrimination since it was “because of . . . sex.” Schroer, 577 F. Supp. 2d at 306. The Schroer court analogized exclusion of “transgender” from gender protections under Title VII to exclusion of “converts” from religious protections. Id.

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only “converts.” That would be a clear case of discrimination “because of religion.” No court would take seriously the notion that “converts” are not covered by the statute. Discrimination “because of religion” easily encompasses discrimination because of a change of religion.

Id.
repeatedly applied this analysis to protect transgender people in subsequent cases. On October 8, 2019, the Supreme Court heard oral arguments for three cases that hold the potential to drastically change how Title VII is applied to cases involving sexual orientation and gender identity.

In addition to the differences in interpreting how Title VII applies to members of the LGBTQIA+ community, a rift has divided the executive branch between the EEOC in support of protection and the Department of Justice (DOJ) in opposition. The DOJ under the Trump Administration argues the plain language meaning of “sex” does not include gender identity and policies relegating people to restroom use based on “biological” sex are applied to all employees equally and thus are non-discriminatory. The DOJ has concluded that on balance these policies protect the majority of employees from the discomfort some claim to feel sharing common spaces with transgender people.

26. Smith, 378 F.3d at 572 (upholding a transgender woman’s claim of sex discrimination because, by embracing feminine mannerisms and appearance, she did not conform to masculine stereotypes); Glenn v. Brumby, 724 F. Supp. 2d 1284, 1302 (N.D. Ga. 2010). Such cases focus on the discriminatory perspective that in the employer’s view, the transgender person’s existence violates stereotypes about how proper men and women should behave. Id.

27. Amy Howe, Court Releases October Calendar, SCOTUSBLOG (July 1, 2019, 2:58 PM), https://www.scotusblog.com/2019/07/court-releases-october-calendar-2/ [https://perma.cc/8P98-KBKR]. The Court will rule on whether employment discrimination because of sex applies to sexual-orientation discrimination in the consolidated cases of Bostock v. Clayton County and Altitude Express v. Zarda. Id. The Court will determine whether employment discrimination laws prohibit discrimination against transgender people per se based on their transgender status or by sex stereotyping under Price Waterhouse precedent in R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission. Id.


29. Id. at 742–44. The DOJ under the Trump Administration reversed position on several transgender policies put in place by the DOJ under the Obama Administration, such as interpreting Title VII to prohibit discrimination against transgender people in the workplace, interpreting Title IX to require equal access to restrooms for all students based on gender identity, and allowing transgender soldiers to openly serve in the military. Joseph Tanfani, Reversing Obama Policy, Sessions Says Job Protections Don’t Cover Transgender People, L.A. TIMES (Oct. 5, 2017, 1:30 PM), http://www.latimes.com/politics/la-na-pol-trump-transgender-20171005-story.html [https://perma.cc/E4YV-9QCQ].

30. Bader, supra note 28, at 743. Proponents of this position often cite safety concerns related to abuse by sexual predators, but statistics show that non-discrimination ordinances do not result in an increase in sexual assault. Brynn Tannehill, Debunking Bathroom Myths, HUFFINGTON POST (Nov. 28, 2015, 8:29 AM), https://www.huffingtonpost.com/brynn-tannehill/debunking-bathroom-myths_b_8670438.html [https://perma.cc/L4DV-323V]. In thirty-five years of non-discrimination
The EEOC, on the other hand, has taken the position that differential treatment based on gender identity is sex discrimination under *Price Waterhouse*’s broader interpretation and that a plain-language reading applies even beyond anatomy. The EEOC further observed that transgender employees are burdened by being unable to enjoy facilities consistent with their identities, as all cisgender employees are able to, and that the transgender community is exposed to higher levels of violence when using public bathrooms. By the same token, non-binary people are unable to enjoy facilities consistent with their identities while restrooms remain binarily sex-segregated.

**B. Title IX**

Title IX of the Educational Amendments Act of 1972 is modeled after Title VII and protects students against sex discrimination in educational settings. Plaintiffs must establish that (1) they were excluded from participating in an educational program due to sex, (2) the educational program was receiving federal funding, and (3) the discrimination caused them harm to maintain a claim under Title IX. Consistent with its approach to Title VII, the DOJ under the Trump Administration concluded that Title IX does not protect transgender students in regards to restroom access, and much like its approach to Title VII, this interpretation is out of line with the majority of federal district and circuit court opinions.

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32. Id. Studies show almost seventy percent of transgender people had negative interactions in bathrooms, fifty-four percent had experienced medical complications resulting from bathroom avoidance, and that using bathrooms that do not match gender identity causes psychological harm. Id. at 747–48.

33. Id. at 745–47.


In 2016, the Fourth Circuit addressed gender identity under Title IX in the landmark case, *Grimm v. Gloucester County School Board*, in which a transgender boy was denied access to male restrooms at his high school and brought a claim against the school board seeking a preliminary injunction. The district court declined to recognize Grimm as male and dismissed his claim, but the Fourth Circuit Court of Appeals reversed and remanded—primarily because of a now-rescinded guidance letter from the DOJ under the Obama Administration. The Supreme Court granted certiorari, but when the guidance letter was revoked, the Court remanded the case back to the district court for reconsideration in light of this turn of events. On August 9, 2019, the district court ruled in favor of Grimm, awarding him one dollar in damages, court costs, and an injunction requiring the school to update his records to indicate he is male.

C. Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment to the Constitution states that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” In *United States v. Virginia*, the Supreme Court established that to defend
gender-based discriminatory conduct a party must demonstrate an “exceedingly persuasive” justification showing that an important government objective is served and the discriminatory practice employed is “substantially related” to achieving that goal.\footnote{United States v. Virginia, 518 U.S. 515, 539–40, 553–56, 571–72 (1996) (challenging the Virginia Military Institute’s policy of admitting only men as violating the Equal Protection Clause by denying female applicants to the program). Although the Court in United States v. Virginia rejected Virginia’s proposed plan of a separate program for women on the basis the proposed plan was not equal in nature and benefit to the original program, it did not reject the concept of a separate program outright as a correction to the violation. Id. at 550–53. It is unclear if this ambiguity constitutes an exclusion of the reasoning that “separate but equal” has no place in education from Brown v. Board of Education being applied to gender-based claims or not. See Marisa Pogofsky, Transgender Persons Have a Fundamental Right to Use Public Bathrooms Matching Their Gender Identity, 67 DePaul L. Rev. 733, 755–56 (2018).} Prior precedent laid out in Reed v. Reed in 1971 stated that, under the Equal Protection Clause of the Fourteenth Amendment, laws could not treat individuals differently based only on criteria unrelated to the objective of the particular statute.\footnote{Virginia, 518 U.S. at 560–61.}

When addressing gender-based discrimination claims under the Equal Protection Clause, the Supreme Court uses the intermediate scrutiny test to determine constitutionality, as opposed to the strict scrutiny standard applied to race-based discrimination claims.\footnote{Diana Elkind, The Constitutional Implications of Bathroom Access 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, 900–01 (2007). The Court has supported this distinction of scrutiny standards on the basis that race is immutable, the political powerlessness of racial minority groups, and the primary purpose of the Fourteenth Amendment in light of the Civil Rights era. Pogofsky, supra note 42, at 754–55.} Although the Supreme Court has not yet addressed gender identity rights under the Equal Protection Clause, the trend among federal courts is to hold that the Equal Protection Clause does bar discrimination.\footnote{Pogofsky, supra note 42, at 750. The Equal Protection Clause extends to gender expression and medical care. Know Your Rights LGBTQ Rights, ACLU https://www.aclu.org/know-your-rights/transgender-people-and-law [https://perma.cc/QC6M-8VDM] (last visited Sept. 23, 2018).}

II. Analysis

The applicability of both Title VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments Act of 1972 to sex discrimination claims in relation to public bathroom access hinges on
whether denying access to a sex-segregated restroom is a discriminatory practice under each statute.\textsuperscript{46} As courts have found, defining sex is not as cut-and-dry as it may once have seemed.\textsuperscript{47} Unlike Title VII and Title IX, the constitutionality of gender discrimination is not determined by statutory interpretation.\textsuperscript{48} Instead, the constitutionality of gender discrimination rests on the scrupulous scrutiny of policies that potentially discriminate, which must be narrowly tailored to a compelling government interest when it comes to suspect classifications or substantially related to an important government interest for quasi-suspect classifications.\textsuperscript{49}

A. \textit{Evaluating Statutory Claims Under Title VII and Title IX}

Reliance on the argument that Congress understood sex to be physiologically mandated at the time such statutes were enacted fails to account for the long history of awareness that gender does not always neatly fall into binary categories—the history of which legislators would have been aware when considering the bills.\textsuperscript{50} The D.C. district court criticized this congressional intent approach as “an elevation of judge-supposed legislative intent over clear statutory

\textsuperscript{46} See Schroer v. Billington, 577 F. Supp. 2d 293, 306 (D.C. Cir. 2008); Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221–22 (10th Cir. 2007); Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004).

\textsuperscript{47} See, e.g., Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 522 (3d Cir. 2018) (describing sex as the “anatomical and physiological processes that lead to or denote male or female,” which typically lead to a determination at birth based on external genitalia and gender as a “broader societal construct” encompassing how sex is defined in a cultural context); Adams v. Sch. Bd., 318 F. Supp. 3d 1293, 1298 (M.D. Fla. 2018) (listing external genitalia, internal sex organs, chromosomes, gonads, fetal and pubertal hormones, neurology, hypothalamic sex, and gender identity and role as components of gender).

\textsuperscript{48} See Reed v. Reed, 404 U.S. 71, 75–76 (1971).

\textsuperscript{49} \textit{id.} (“[A] classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”).

text.”\footnote{Schroer, 577 F. Supp. 2d at 307 (“This is no longer a tenable approach to statutory construction . . . Supreme Court decisions subsequent . . . have applied Title VII in ways Congress could not have contemplated.”).} Moreover, courts that have attempted to apply this standard have necessarily wrestled with how to categorize gender when multiple physiological factors point to different conclusions and binary gender lines are blurred; this has led to drastically differing results.\footnote{See, e.g., Zayym v. Kerry, 220 F. Supp. 3d 1106, 1114 (D. Colo. 2016) (holding a binary-only gender policy violated intersex individual’s rights when passport was denied); Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999) (finding a transgender woman who had undergone gender-affirming surgery and changed her birth certificate to reflect her male gender invalidated her marriage); Richards v. United States Tennis Ass’n, 400 N.Y.S.2d 267, 272–73 (N.Y. Special Term 1977) (holding a transgender woman who had undergone gender-affirming surgery and was female by “all other known indicators of sex” besides chromosomally should not be barred from participating in women’s tennis tournaments).}

As a practical matter, a ruling that would require public accommodations to make a determination of which binary sex an individual is a member of based on physiological elements would be nearly impossible to implement. It would require invasive inspections of physical gender markers, and scientific consensus now establishes that such markers are not the primary determinant of one’s true sex—which instead is gender identity.\footnote{See Brief for interACT: Advocates for Intersex Youth et al. as Amici Curiae Supporting Respondent, supra note 50, at 37–40.} Binary-based judgments of gender expression have already made clear that this sort of system will never work, as it results in biased and discriminatory judgments that determine access rights based on conformity to the established expectations of the gender binary.\footnote{See, e.g., Nina Golgowski, Woman Says She was Accosted in Walmart Bathroom After Being Mistaken As Trans, HUFFINGTON POST (May 18, 2016, 1:40 PM) https://www.huffingtonpost.com/entry/woman-allegedly-mistaken-as-transgender_us_573b3095e4b0ef86171c1762 [https://perma.cc/6QNH-ELV2] (reporting a Connecticut woman was verbally abused in a Walmart bathroom when another patron assumed she was transgender).} Gender expression is the external appearance of gender as expressed by one’s behavior, clothing, and grooming choices; and it may or may not conform to society’s traditional social norms.\footnote{Sexual Orientation and Gender Identity Definitions, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions [https://perma.cc/EX4E-JKZ5] (last visited Aug. 1, 2019).}
In enacting statutory protections for gender, Congress provided a wide ban on sex discrimination in all its forms rather than a specified list of prohibited acts that constituted discrimination.\textsuperscript{56} Congress was more concerned with casting a broad net to catch and eradicate sex discrimination when it enacted Title IX to supplement Title VII protections in the educational sphere.\textsuperscript{57} Even if Congress did not intend for these statutes to cover individuals outside of the gender binary, the Supreme Court has held that lack of specific intent is not necessarily determinative of statutory reach.\textsuperscript{58} As Justice Scalia wrote in \textit{Oncale v. Sundowner Offshore Services, Inc.}, “[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils”\textsuperscript{59}

The Code of Federal Regulations provides that schools “may provide 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.”\textsuperscript{60} Unlike their classmates who identify with their assigned sex, non-binary youth are unable to enjoy the use of public facilities that affirm their gender identity.\textsuperscript{61} Students who are denied access to bathrooms consistent with their gender identity are not being provided with comparable facilities and are harmed by this inequality; many suffer from health complications related to holding


\textsuperscript{57} Id. at 13–18. Principal sponsor Senator Birch Bayh described Title IX as “far-reaching” and with a reach specifically left open-ended in order to “root out, as thoroughly as possible . . . the social evil of sex discrimination in education.” 118 CONG. REC. 5808 (1972) (statement of Sen. Bayh); see also Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (“Congress intended to strike at the entire spectrum of disparate treatment . . . resulting from sex stereotypes.”).

\textsuperscript{58} Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 147 (2000); see also Tenn. Valley Auth. v. Hill, 437 U.S. 153, 185 (1978) (“It is not for [the Court] to speculate . . . on whether Congress would have altered its stance had . . . specific events . . . been anticipated.”).

\textsuperscript{59} Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (holding that although the “principal evil” Congress was targeting when it enacted Title VII was not male-on-male sexual harassment, there is no justification for a categorical rule excluding same-sex harassment from coverage under the statute).

\textsuperscript{60} 34 C.F.R. § 106.33 (2018).

their urine for extended periods, such as bladder and kidney infections, which affect their ability to participate in school programs. They are not only denied full participation in school programs when they lose the “basic condition” of bathroom access, but are also deprived of “equal status, respect, and dignity.”

Moreover, the relegation of transgender and non-binary persons to separate unisex restrooms—as in Grimm’s case—inherently forces those individuals into the category of “other,” ostracizing them from their peers and reinforcing the assertion that they do not fit in by denying them identity recognition. Marisa Pogovsky explains that there are common lessons to learn from an era when African-Americans were systematically excluded from common spaces by Jim Crow statutes that were often supported by reasoning similar to the bathroom narrative—the need to protect women from sexual assault or moral corruption from those who would abuse the grant of equal rights. The Supreme Court has continuously repudiated rules that impermissibly discriminate by imposing physical separation of a group of people from places where they would otherwise be present to protect some individuals from perceived danger or discomfort.

62. Amici Curiae Brief of Scholars Who Study the Transgender Population Supporting Respondent at 14–15, Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2016) (No. 16-273), 2017 WL 1057277 (reporting greater absenteeism, poorer performance in school, withdrawal from public spaces, physical health impacts such as bladder infections and kidney problems, and mental health impacts including increased risk of suicide). “Since gender conforming individuals . . . can simply use the facilities designated for those of their biological gender with whom they identify, the transgender individual will only achieve true equality once [they are] permitted the same liberty and personal dignity.” Elkind, supra note 44, at 921–22.

63. Lusardi v. McHugh, EEOC Appeal No. 0120133395, 2015 WL 1607756, at *10 (Apr. 1, 2015) (denying access to a bathroom corresponding with gender identity constitutes sex discrimination within the meaning of Title VII and deprives the employee of dignity and respect).

64. Elkind, supra note 44, at 927 (“Unisex itself is an instrument of discrimination . . . if society is composed only of those who enter the women’s room and those who enter the men’s room, requiring someone to use a third bathroom tells them they are outside society.”).

65. See also Pogofsky, supra note 42, at 753–54 (comparing sex segregation and gender discrimination against transgender persons with Jim Crow laws enforcing racial segregation in the Civil Rights Era).

The position of the EEOC provides reprieve in employment under Title VII, but if the conciliation process fails to resolve the discrimination claim, the victims of gender discrimination in the workplace must rely on the federal courts within their jurisdiction. Fortunately, many federal circuits now recognize that discrimination against transgender people is sex discrimination as a matter of law. The EEOC supporters argue that *Price Waterhouse* and *Oncale* create an expansive framework for the protection of gender identity in the workplace. Even the recent Supreme Court decision legalizing same-sex marriage, *Obergefell v. Hodges*, seemed to imply that equal rights in gender identity and expression should be recognized under federal law when the majority opened with, “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”

In *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, a transgender woman brought suit after she was fired from her position at a funeral home after she announced her intention to begin transitioning from male to female presentation at work. The district court ruled that transgender status itself was not a protected class, but upheld the suit against a motion to dismiss on the basis of her failure to adhere to gender stereotypes.

67. See Lusardi, 2015 WL 1607756, at *8–10; What You Can Expect After a Charge is Filed, U.S. EQUAL OPPORTUNITY COMMISSION, https://www.eeoc.gov/employers/process.cfm [https://perma.cc/S63K-232T] (last visited Sept. 25, 2019). If the EEOC determines there is reasonable cause to believe discrimination occurred, the parties are first invited to resolve the matter in an informal process called conciliation. Id. Failing that, the EEOC may choose to pursue enforcement against the statutory violation by filing suit directly or may give the plaintiff a notice of right to sue, which allows them to file suit personally with their own finances and legal counsel. Id.

68. Legal Developments on Gender Identity Discrimination as Sex Discrimination, NAT’L CTR. FOR TRANSGENDER EQUALITY 1, 1 n.2 (May 2018), https://mobile.reginfo.gov/public/do/eoDownloadDocument?pubId=&eodoc=true&documentId=3508 [https://perma.cc/CC7S-5T9C] (listing cases from the First, Sixth, Seventh, Ninth, and Eleventh Circuits holding discrimination against transgender people to be sex discrimination under federal law in addition to a host of district court cases across the country).

69. Bader, supra note 28, at 745.


71. Equal Emp’t Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 568–69 (6th Cir. 2018). The employee had worked at the funeral home from 2007 to 2013 without issue while presenting as a male. Id. at 567.

72. Id. at 569–70.
However, the district court ultimately granted summary judgment to the funeral home based on religious protections. The Sixth Circuit reversed the district court’s decision, holding that the transgender employee could state a claim not only under a theory of sex stereotypes, but also on the basis of transgender status per se, and that continuing to employ her did not substantially burden her employer’s ability to practice his religion. The Supreme Court will rule on the case to determine if transgender status—or more broadly, gender identity—is protected under federal sex discrimination laws.

B. Evaluating Constitutional Claims Under the Equal Protection Clause

Suspect classifications target groups that (1) share a distinguishing characteristic as a group that is considered immutable, (2) have historically faced discrimination because of that characteristic, (3) are politically powerless, and (4) are treated disparately based on something other than actual ability. Transgender and non-binary people share a distinguishing characteristic of incongruence between their gender identity and the sex they were assigned at birth. In 2013, psychologists confirmed a shift in their perspective on the treatment of those who do not identify with the sex they were deemed at birth, recognizing that gender identity is an immutable trait rather than a pathological disorder.

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73. Id. at 570. The district court determined that enforcing Title VII against the employer would substantially burden his religious exercise, protected under the Religious Freedom Restoration Act, and that the EEOC had not proven that enforcement was the least restrictive way of achieving the interest of eliminating sex discrimination in the workplace. Id.
74. Id. at 574–75, 586–90, 600.
75. Howe, supra note 27.
76. Frontiero v. Richardson, 411 U.S. 677, 686–87 (1973) (finding that classifications based on sex—in this case within the binary system—are suspect and subject to higher scrutiny).
77. See Adkins v. City of New York, 143 F. Supp. 3d 134, 139–40 (S.D.N.Y. 2015) (“[T]ransgender status is a sufficiently discernible characteristic to define a discrete minority class . . . transgender people often face backlash in everyday life when their status is discovered.”).
78. Gender Dysphoria, Am. Psychiatric Ass’n 1, 1–2 (2013), https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf [https://perma.cc/3MRF-RZUC] (showing psychologists no longer view gender identity that differs from assigned sex as a pathological disorder and recognize distress is not inherent to cross-gender identification). The Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders changed “gender identity disorder” to “gender dysphoria” to avoid the pathologizing...
The National Transgender Discrimination Survey and the United States Transgender Survey show that people whose gender identity does not match the sexes they were deemed at birth historically face high levels of discrimination in public accommodations, from healthcare to employment to education.\(^79\) Courts have found that minorities who represent a small percentage of the population tend to be politically powerless for the purposes of consideration as a suspect class.\(^80\) Finally, gender identity bears no relation to productivity as an individual; yet those that identify outside of the sex they were assigned at birth continue to receive negative treatment.\(^81\)

In discrimination claims under the Equal Protection Clause, government classification on the basis of sex is subject to intermediate scrutiny; therefore, the government must show the existence of an important government interest, the discriminatory practice substantially relates to the objective, and the objective actually motivated the classification to pass muster.\(^82\) Courts require classifications be “rationally related” to the state interest and prohibit “arbitrary or irrational” classifications, which reflect “a

\(^79\) Jaime M. Grant et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey, NAT’L CTR. FOR TRANSGENDER EQUALITY & NAT’L GAY AND LESBIAN TASK FORCE (2011), https://transequality.org/sites/default/files/docs/resources/NTDS_Exec_Summary.pdf [https://perma.cc/2JNT-CDKF]; Sandy E. James et al., The Report of the 2015 U.S. Transgender Survey: Executive Summary, NAT’L CTR. FOR TRANSGENDER EQUALITY (2015), https://transequality.org/sites/default/files/docs/ustrs/USTS-Executive-Summary-Dec17.pdf [https://perma.cc/86JR-8KFS]. The majority of school-age respondents experienced verbal or physical abuse related to gender identity, thirty percent reported workplace mistreatment, nearly one-third were living in poverty, and their unemployment rate was three times higher than that of the U.S. population. James et al., supra. Many respondents reported mistreatment by health care professionals, not seeking healthcare out of fear of mistreatment, or being unable to afford healthcare when they needed it. Id. at 8. Additionally, nearly one-third of respondents reported experiencing homelessness, and nearly one-quarter experienced some form of housing discrimination. Id. One in ten reported being denied access to public restrooms in the past year, and more than half avoided using public restrooms out of fear. Id.

\(^80\) Bd. of Educ. v. U.S. Dep’t of Educ., 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (“[A]s a tiny minority of the population, whose members are stigmatized for their gender non-conformity in a variety of settings, transgender people are a politically powerless minority group.”); see also Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 989 (S.D. Ohio 2013) (“[Lack of political power is caused by a number of factors, including small population size and dispersion.”).

\(^81\) Adkins, 143 F. Supp. 3d at 139 (“Some transgender people experience debilitating dysphoria while living as the gender they were assigned at birth, but this is the product of a long history of persecution forcing transgender people to live as those who they are not.”).

bare . . . desire to harm a politically unpopular group.”

Intermediate scrutiny places the burden on the government to prove that not only a particularly persuasive government interest exist that is served by the rule at issue, but that the means of achieving that goal have been tailored in a way that reduces potentially discriminatory effects as much as possible, and the means were actually motivated by that interest. The existence of viable alternatives that would eliminate or greatly reduce the prejudicial effects of a particular statute bolsters the determination that it violates the Constitution. While the government must find a sufficient argument to justify its discriminatory interpretation of sex, much is still left to judicial discretion.

The often-cited concern over safety in restrooms provides an unfounded argument for state interest in maintaining sex segregation in public restrooms, since it assumes that either transgender and non-binary people present a danger to their cisgender counterparts or cisgender people will pretend to be transgender to gain access to and commit crimes in common spaces. In actuality, it is possible that the danger in relegating people to bathrooms that do not match their gender identity will result in violence against them. Furthermore, such safety concerns are discriminatory because they are based on the antiquated notion that women are frail and should be afforded more protection.

84. ROYDEN A. SMOLLA, 1 LAW OF LAWYER ADVERTISING § 2:4 (Thomson Reuters 2018) (“The requirements that the government demonstrate ‘important’ or ‘substantial’ justifications for its actions and that the government establish a ‘substantial nexus’ or a ‘narrow tailoring’ of ends to means are the touchstones of intermediate review.”). Intermediate scrutiny is a middle ground between the rational basis and strict scrutiny standards. Id. Courts tend to show deference and do not often strike down legislation under plain rational basis. Id. § 2:3. Strict scrutiny, on the other hand, is “so demanding that it once was understood as virtually impossible for the government to satisfy.” Id. § 2:5.
85. Id. § 2:4.
87. See Tannehill, supra note 30.
88. See James et al., supra note 79, at 14. Twelve percent of respondents reported being verbally harassed, one percent physically attacked, and one percent sexually assaulted when accessing a restroom in the past year. Id.
89. Frontiero v. Richardson, 411 U.S. 677, 684–85 (1973) (noting that “[t]raditionally, such discrimination was rationalized by an attitude of ‘romantic paternalism,’” and holding such “gross,
Another common concern of opponents is privacy, but multi-stall restroom facilities inherently afford the same privacy protections for anyone who decides to take advantage of them. Moreover, courts have previously held that privacy concerns are not sufficient to overcome the interest in individual rights to prevent gender discrimination—as in the case of female journalists given access to male locker rooms in professional athletics, a situation far less integral to personal identity than gender identity and expression. Regardless, psychologists have seen no reported psychological harm from those who share a public restroom with transgender people in schools where inclusive policies are in place, whereas exclusive policies likely contribute to a forty percent suicide attempt rate in the transgender population, which is nine times that of the general U.S. population. As the Third Circuit found in Doe v. Boyertown Area School District, there is no recognized privacy right to not have to share common spaces with a group of people, even where subjective harm is claimed, because there is no objectively reasonable feeling of such harm—particularly where restrooms do afford a variety of different privacy protections for people.

stereotyped distinctions between the sexes” cannot be supported by public policy); see also United Auto. Workers v. Johnson Controls, 499 U.S. 187, 197–200 (1991) (holding employer policy of excluding all fertile female employees from particular jobs to protect the safety of potential pregnancies constituted discrimination because safety concerns did not justify disparate treatment).

90. Elkind, supra note 44, at 925.
93. Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 531 (3d Cir. 2018) (declining to recognize a constitutional right of privacy that extends to excluding the presence of students who do not share the same birth sex from bathrooms and locker rooms, especially where all students, whether transgender or not, who were uncomfortable with the privacy afforded by the multi-stall restrooms had the option of single-user facilities).
III. Proposal

The solution for equal treatment of non-binary persons in public accommodations is to demolish the binary concept of gender in the law. Adherence to this two-option perception is unnecessary and fails to recognize established scientific facts.94 The desegregation of public accommodations is a necessary step towards equal gender identity recognition under the law and the elimination of binary-based discrimination against non-binary and binary individuals alike.95 Challenges to biology-based bathroom policies for transgender people within the binary have been successful in federal district and circuit courts, but the current political climate makes it unlikely that the argument for total desegregation of public bathrooms is forthcoming despite its legal merits.96

A. Agency Interpretation or Judicial Discretion?

The rollback of the Obama Administration’s pro-equality guidance in schools, prisons, homeless shelters, and the military is a strong indicator that, at least under the Trump Administration, agency interpretation will disfavor a diverse reading of sex in agency regulatory actions.97 Moreover, a memo leaked from the Department of Health and Human Services in October 2018 urged the “Big Four” agencies that enforce different portions of Title IX to adopt a uniform definition of sex as “male or female based on immutable biological traits identifiable by or before birth . . . listed on a person’s birth certificate, as originally issued.”98 These Big Four agencies include

95. See Terry S. Kogan, Public Restrooms and the Distorting of Transgender Identity, 95 N.C. L. REV. 1205, 1234 (2017); Portuondo, supra note 12, at 517, 519.
96. See infra Section III.A.
98. Id. The definition was expected to be formally presented to the DOJ before the end of 2018 and was considered “integral” to two proposed rules under review at the White House at the time, both of which were expected to be released in the fall of 2018 for public comment before final issuance. Id. The
the Departments of Education, Justice, Health and Human Services, and Labor.99

Should the Supreme Court issue a ruling holding that bathroom segregation constitutes discrimination under the Equal Protection Clause, the definition of sex under Title IX and Title VII would consequently be interpreted to avoid conflict with that ruling.100 Discrimination against non-binary individuals should constitute a suspect classification for the purposes of Fourteenth Amendment claims because: (1) they share a distinguishing characteristic of gender identity that diverges from sex assigned at birth, which research has shown to be an immutable trait with roots in genetics; (2) they face high levels of violence, unemployment, and homelessness due to discrimination; (3) they have little ability to protect themselves through use of the political process because they make up a small percentage of the population; and (4) their disparate treatment has no relationship to their actual ability.101 Even without suspect classification triggering strict scrutiny, the government interests that proponents cite in defense of biology-based bathroom policies fail to meet the standard required by Fourteenth Amendment gender jurisprudence under intermediate scrutiny, particularly when balanced against the constitutional interest of equal protection for minority groups that would otherwise be powerless.102

Despite its plain language, the intermediate scrutiny test’s wide latitude for judicial discretion makes any ruling highly contingent on

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99. Id.
100. Crowell v. Benson, 285 U.S. 22, 62 (1932) (describing the canon of constitutional avoidance). “When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”Id.
102. See infra Section III.B.
the makeup of the Court. Research shows that judges tend to vote in line with their personal ideology, and that effect is more pronounced when the case is a close vote. The case for the elimination of sex-segregated public bathrooms would likely be such a vote. With the recent confirmations of firmly conservative Justices Gorsuch and Kavanaugh, and the retirement of Justice Kennedy—famously the median judge providing the swing vote in close cases—the Supreme Court is now made up of predominantly conservative judges who will likely vote conservatively. That being said, according to the Martin-Quinn ideology score, which uses voting patterns to determine ideology, Chief Justice Roberts—now the median justice—has been slowly shifting closer to the center over the course of his tenure. Like same-sex marriage, gender identity rights may be forced to wait until public opinion shifts more firmly in favor of a gender-expansive view.

103. See Jake J. Smith, Supreme Court Justices Become Less Impartial and More Ideological When Casting the Swing Vote, KELLOGGINSIGHT (Sept. 13, 2018), https://insight.kellogg.northwestern.edu/article/supreme-court-justices-become-less-impartial-and-more-ideological-when-casting-the-swing-vote (describing judges’ tendency to vote according to their personal ideologies based on the research of Tom Clark, B. Pablo Montagnes, & Jörg L. Spenkuch). “A judge whom editorial writers depict as a mild conservative, or a hardline liberal, will often vote like one.” Id.
104. Id. When casting a pivotal vote, liberal justices are more likely to vote liberally while conservatives are more likely to vote conservatively, compared to when those same judges cast a non-pivotal vote.


107. Id.

108. Molly Ball, How Gay Marriage Became a Constitutional Right, ATLANTIC (July 1, 2015), https://www.theatlantic.com/politics/archive/2015/07/gay-marriage-supreme-court-politics-activism/397052/ (�Much as Americans like to imagine judges, particularly Supreme Court justices, as ahistorical applicators of a timeless code, the court is inevitably influenced by the world around it. As social mores have evolved, the justices’ consensus has too.” Id.)
B. Balancing the Benefits of a Non-Binary System Against State Concerns

As discussed in Section II of this note, the most common concerns raised in opposition of equal bathroom rights are privacy and safety.\textsuperscript{109} To survive intermediate scrutiny, these arguments must show that both (1) the discriminatory policy is substantially related to an important government interest and (2) there is a lack of viable alternative ways that protect that interest without discriminating against a group.\textsuperscript{110} Both privacy and safety fail to meet that standard.\textsuperscript{111}

Courts that recognize an interest in privacy in bathroom cases have historically been focused on a supposed heightened right to privacy from the opposite sex in the binary-gender system, with many courts specifically noting concern over exposure of unclothed body parts.\textsuperscript{112} Public restrooms do not afford the same heightened level of privacy from members of the same binary sex as they do members of the opposite sex, nor have they been expected or required to; members of the public routinely use the facilities without regard to any perceived loss of privacy they endure from others in the restroom.\textsuperscript{113} Contrary to the courts’ concerns, few users of public facilities disrobe outside of the relative privacy of bathroom stalls.\textsuperscript{114} Moreover, stall cubicles can be modified to provide additional privacy using floor-to-ceiling partitions and shiplap-cut edges to remove sightlines in the gaps, providing a viable non-discriminatory alternative.\textsuperscript{115}

Fourth Circuit Judge Niemeyer described in a dissenting opinion the concern of privacy as linked to “sexual responses prompted by students’ exposure to the private body parts of students of the other

\textsuperscript{109} See supra Section II.B.

\textsuperscript{110} Smolla, supra note 84, § 2:3–5.

\textsuperscript{111} See supra Section III.B.

\textsuperscript{112} G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 734–35 (4th Cir. 2016) (describing several cases that address privacy concerns from the Third, Fourth, Sixth, and Ninth Circuits).

\textsuperscript{113} Portuondo, supra note 12, at 502.

\textsuperscript{114} Id. at 508.

biological sex.”¹¹⁶ Following this logic to its natural end, it presupposes that no users of public restrooms are sexually attracted to members of the same binary sex.¹¹⁷ The sexual response argument thus relies on heteronormative gender stereotypes that men are attracted to women and women are attracted to men.¹¹⁸ It also discounts the privacy rights with regard to sexual responses of those that do not identify as heterosexual; implying that the LGBTQIA+ community’s right to privacy in public restrooms is not as fundamental as Judge Niemeyer suggested the heterosexual community’s privacy right is.¹¹⁹

In Virginia, the Supreme Court dicta allowed separate facilities by resting on the “physical differences between men and women”—allowing biological differences to justify different facilities.¹²⁰ Functionally, the various anatomical structures at use in the public restroom do not require different equipment like we see in the private home bathroom and the single-user gender-neutral public toilet.¹²¹ However, not all people fall into the binary categories of physical differences; for example, intersex and medically-transitioning transgender individuals may have physical traits associated with both or neither category.¹²² Upholding enforcement of sex segregation under this framework would necessitate disclosure or physical inspection of each bathroom user prior to entry, a practice much more invasive to privacy.¹²³ Moreover, such a practice would continue to leave those with differing anatomical characteristics uncertain of the appropriate bathroom for their use and require surgical medical

¹¹⁶ Grimm, 822 F.3d at 735.
¹¹⁷ See Portuondo, supra note 12, at 503.
¹¹⁸ Id.
¹¹⁹ See id.
¹²² See Intersex, supra note 16.
¹²³ See Brief for interACT: Advocates for Intersex Youth et al. as Amici Curiae Supporting Respondent, supra note 50, at 37–40.
transition for binary-identifying transgender individuals seeking to use the facilities consistent with their gender identity.\textsuperscript{124}

Safety concerns used to promote sex segregation of public restrooms suffer from the same logical fallacy that privacy concerns do. Those that raise concerns about violence in bathroom cases are specifically worried about the threat of sexual assault.\textsuperscript{125} In relying on the reasoning that separation from members of the opposite binary sex promotes safety from sexual assault, proponents inherently discount the potential for same-sex violence and depend on incorrect gender stereotypes.\textsuperscript{126}

Moreover, separated bathrooms have not prevented sexual assaults in public bathrooms—sexual predators are not deterred by a sign on the door.\textsuperscript{127} For transgender and non-binary individuals, being relegated to a biology-based restroom often increases the threat to safety, which is high even when using the bathrooms that correspond with their gender identities.\textsuperscript{128} Segregated bathrooms may even increase the risk of assault across the board because they isolate victims and lessen the effect of safety in numbers, like parents have found when separated from their children who are too old to accompany them into the binary bathroom.\textsuperscript{129}

**CONCLUSION**

The limitations of a binary system will never meet the needs of the diverse gender spectrum.\textsuperscript{130} Ending sex segregation of public restrooms in favor of multi-user, all-gender restrooms will eliminate

\begin{itemize}
  \item \textsuperscript{125} Portuondo, supra note 12, at 512 n.268.
  \item \textsuperscript{126} See id.
  \item \textsuperscript{127} See id. at 512.
  \item \textsuperscript{128} See Grant et al., supra note 79, at 14.
  \item \textsuperscript{129} See Emily Peck, We Don’t Need Separate Bathrooms for Men and Women, HUFFINGTON POST (Mar. 31, 2016, 5:26 PM), https://www.huffingtonpost.com/entry/gender-neutral-bathrooms_us_56fd8ccbe4b083f5c60f262e [https://perma.cc/T3HY-P4ND].
  \item \textsuperscript{130} See Hanssen, supra note 5, at 287.
\end{itemize}
the problems associated with enforcing any sort of biology-based policy while promoting equal protection for non-binary persons and ultimately breaking down gender stereotypes and social stigmas.\textsuperscript{131} With the Supreme Court leaning more and more conservatively and the Trump Administration rolling back previous protections for those falling outside of the traditional gender binary system, desegregation of public bathrooms is unlikely to be seen in the foreseeable future.\textsuperscript{132} While there may be jurisdiction-dependent changes at the state and lower circuit federal levels, nation-wide change will have to come from the people, much like the slow march of progress for same-sex marriage and sexuality recognition.\textsuperscript{133}

As public opinion shifts in favor of equal protection, courts will more likely find in favor of plaintiffs seeking redress of the failings of the binary system.\textsuperscript{134} Ideally, this redress will come in the form of a definitive Supreme Court decision laying to rest sex segregation of public facilities because a system of separate facilities that ignores the diverse range of gender and the inherent complexity of sex characteristic combinations is inherently inadequate—it is failing the non-binary community.

\footnotesize{\textsuperscript{131} See supra Part III.}
\footnotesize{\textsuperscript{132} See Chang, supra note 106; Green, Benner & Pear, supra note 97.}
\footnotesize{\textsuperscript{133} See Fleming & McFadden-Wade, supra note 2, at 160–61; Ball, supra note 108.}
\footnotesize{\textsuperscript{134} Ball, supra note 108.}