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"Déjà vu All Over Again": The Recourse to Biology by Opponents of Transgender Equality

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“DÉJÀ VU ALL OVER AGAIN”: THE RECOURSE TO BIOLOGY BY OPPONENTS OF TRANSGENDER EQUALITY*

SHANNON PRICE MINTER**

This Article explores striking parallels between the current battle to secure equality for transgender people and the prior battle to win marriage equality for same-sex couples. In both instances, the success of the marriage and transgender equality movements came only after years of judicial losses and depended heavily on two profound changes: increasing judicial and legislative acceptance of gender equality; as well as increasing social acceptance of lesbian, gay, bisexual, and, more recently, transgender people. As a result of those changes, defenders of state marriage bans were unable to rely on gender stereotypes or arguments about the pathology or immorality of gay people, since those arguments lacked credibility in most courts. Instead, they turned to biology, seeking to justify the restriction of marriage to different-sex couples as merely a neutral, nondiscriminatory reflection of the biological differences involved in procreation. While those arguments enjoyed some initial success, most courts—including the U.S. Supreme Court—ultimately rejected them as circular, concluding that the marriage bans were discriminatory and not simply the reflection of “natural” facts.

Today, opponents of transgender equality are reviving that failed strategy. Rather than seeking to justify differential treatment of transgender people, they are once again invoking biology to argue that laws excluding transgender persons from shared restrooms merely reflect neutral biological differences between men and women, not a deliberate intention to discriminate. This Article predicts that just as biology-based arguments failed to shield marriage bans from meaningful judicial review in the past, the courts will again recognize that these renewed appeals to biology are circular and do not supply a principled basis for excluding transgender persons from full and equal participation in the public sphere—including access to the same restrooms used by others.

* © 2017 Shannon Price Minter. The quotation in the title has been attributed to Yogi Berra. See *Yogisms*, YOGI BERRA MUSEUM & LEARNING CTR., <https://yogiberramuseum.org/just-for-fun/yogisms/> [<https://perma.cc/T3GL-SANB>].

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INTRODUCTION

Historically, biological arguments have been used to justify many different types of discrimination, from slavery¹ to coverture² to the forced sterilization of people with disabilities.³ In recent years, those

1. See Christian B. Sundquist, *Genetics, Race and Substantive Due Process*, 20 WASH. & LEE J. C.R. & SOC. JUST. 341, 355 (2014) (“Science was relied upon to provide ‘objective’ and ‘empirical’ validation of the biological inferiority of non-white persons in order to classify slaves as less than human, and thus not entitled to social equality.”).

2. Mary L. Heen, *From Coverture to Contract: Engendering Insurance on Lives*, 23 YALE J.L. & FEMINISM 335, 371–74 (2011) (describing the influence of biology-based arguments about women’s role in childbearing on the persistence of sex discrimination against both married women and women of childbearing age in insurance law).

3. See Alfred Brophy & Elizabeth Troutman, *The Eugenics Movement in North Carolina*, 94 N.C. L. REV. 1871, 1878–86 (2016) (describing genetic arguments, including a belief in “the supposed inheritance of mental deficiency,” used to justify sterilization in North

seeking to exclude same-sex couples from marriage also invoked biological arguments. In cases challenging state marriage bans, state officials and others argued that the bans did not discriminate against same-sex couples, but rather simply reflected their inability to procreate biologically.⁴ Ultimately, such arguments failed. In 2015, the U.S. Supreme Court held that same-sex couples must be permitted to marry on the same terms and conditions as others, recognizing “that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”⁵ In reaching that historic conclusion, the Court rejected the notion that biology was a sufficient justification for the harms imposed on same-sex couples and their children by discriminatory marriage laws.

Today, those who oppose transgender equality are once again appealing to biology to support exclusionary laws and policies—in this case, laws and policies that isolate transgender people and treat them differently than others. Biology-based arguments have come to dominate opposition to the equal inclusion of transgender people in workplaces, schools, and other public arenas—and particularly in public restrooms.⁶ On this view, restricting access to restrooms based on a person’s “biological sex” is warranted by the physiological differences between men and women.⁷ Because many transgender individuals retain physical characteristics (including genitalia) typically associated with their sex at birth, proponents of this view believe that permitting a transgender person to use the same restrooms as others would disrupt that biological framework, calling the continued existence of gender-segregated restrooms into question.⁸

Carolina and across the country); Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 BERKELEY WOMEN’S L.J. 122, 160–63 (1993) (discussing rationalizations for forced sterilizations of individuals with disabilities).

4. See *infra* notes 120–28 and accompanying text.

5. Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015).

6. See generally Terry S. Kogan, *Public Restrooms and the Distorting of Transgender Identity*, 95 N.C. L. REV. 1205 (2017) (providing an overview of the history surrounding sex-separated bathrooms and discussing the use of such biology-based arguments within the context of litigation challenging a North Carolina law requiring transgender persons to use restrooms corresponding to the gender listed on their birth certificates).

7. See *id.* (manuscript at 111–17); DALE O’LEARY & PETER SPRIGG, FAMILY RES. COUNCIL, ISSUE ANALYSIS: UNDERSTANDING AND RESPONDING TO THE TRANSGENDER MOVEMENT 5–6 (2015), <http://downloads.frc.org/EF/EF15F45.pdf> [<https://perma.cc/P5W2-T3CV>].

8. See O’LEARY & SPRIGG, *supra* note 7, at 7 (“A person’s sex (male or female) is an immutable biological reality. In the vast majority of people (including those who later identify as ‘transgender’), it is unambiguously identifiable at birth.”).

This Article discusses similarities in the arguments used to oppose marriage by same-sex couples and the current arguments of those who oppose equality for transgender people. Like the biology-based claims previously used by marriage equality opponents, these arguments seek to insulate discrimination against transgender people from meaningful scrutiny by claiming that any such discrimination merely reflects neutral biological differences between men and women. Although initially successful, biology-based rationales for excluding same-sex couples from marriage were eventually rejected by most courts, including the Supreme Court in *Obergefell v. Hodges*.⁹ For similar reasons, it is likely that most courts will also ultimately reject such justifications for policies that exclude transgender people from full participation in public life—as they should. By examining the remarkable parallels between the recourse to biology in these two debates, this Article highlights the principal failings of the current justifications for unequal treatment of transgender people.

Especially in the last decade, the struggle for marriage equality achieved unprecedented public visibility, often dominating the national news.¹⁰ The struggle to win marriage equality for same-sex couples took many years and the efforts of millions of lesbian, gay, bisexual, and transgender (“LGBT”) advocates, allies, and ordinary individuals who made the courageous choice to come out and share their lives with family members, coworkers, and friends. Although LGBT people faced other issues of discrimination and violence, for a variety of reasons, marriage became the primary focus of legal and political debate.¹¹ The

9. 135 S. Ct. 2584, 2604–05 (2015).

10. See, e.g., Leigh M. Moscovitz, *Gay Marriage in Television News: Voice and Visual Representation in the Same-Sex Marriage Debate*, 54 J. BROADCASTING & ELECTRONIC MEDIA 24, 24–25 (2010) (discussing how as early as 2003 “[t]he topic of gay marriage quickly became front-page news”); Stacey L. Sobel, *Culture Shifting at Warp Speed: How the Law, Public Engagement, and Will & Grace Led to Social Change for LGBT People*, 89 ST. JOHN’S L. REV. 143, 181 (2015) (attributing increased support for marriage equality to “media attention generated by marriage litigation”); *Same-Sex Marriage Dominates Conversation in the Blogosphere*, PEW RES. CTR. (Apr. 16, 2009), <http://www.journalism.org/2009/04/16/samesex-marriage-dominates-conversation-blogosphere/> [<https://perma.cc/8JJS-F4XV>] (noting that in a five-day span twenty-six percent of posts on blogs and social media sites focused on marriage equality); see also *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, N.Y. TIMES, <https://www.nytimes.com/topic/subject/samesex-marriage-civil-unions-and-domestic-partnerships?action=click&contentCollection=Opinion&module=RelatedCoverage®ion=EndOfArticle&pgtype=article> [<https://perma.cc/74AH-8Z5R> (staff-uploaded archive)] (archiving *New York Times* articles about same-sex marriage).

11. See, e.g., Hailey Branson-Potts, *LGBT Activists Say the Fight Doesn’t End at Marriage*, L.A. TIMES (July 12, 2015, 3:00 AM), <http://www.latimes.com/local/california/la-me-lgbt-activism-20150712-story.html> [<https://perma.cc/7HJA-YHWY>] (describing efforts to achieve marriage equality as “a broad unifying force,” and how after success at the Supreme Court, activists can shift their focus to other issues); Evan Wolfson, *Why It Matters*, FREEDOM

stakes of that struggle were high, as marriage increasingly came to be seen by both sides as a litmus test of whether same-sex couples and their families would be accepted as equal members of our society.¹²

Today, efforts to win equality for transgender people have come to play a similarly central role in our nation's political imagination. Just as legislative and judicial debates over same-sex couples and marriage once dominated the headlines, thousands of news stories about transgender issues now flood media outlets, with new stories and opinion pieces appearing every day.¹³ On conservative radio and internet outlets, commentators seek to mobilize conservative donors and voters by depicting legal protections for transgender people as a dangerous "assault on the sexes."¹⁴ In the past two years alone, state legislators introduced scores of anti-transgender bills.¹⁵ In North Carolina,

TO MARRY (Jan. 2016), <http://www.freedomtomarry.org/pages/why-it-matters> [<https://perma.cc/RU94-5875>].

12. See *Obergefell*, 135 S. Ct. at 2606 (recognizing that a decision denying same-sex couples the freedom to marry "would teach the Nation that these laws are in accord with our society's most basic compact" and thus would inflict serious "[d]ignitary" harms); Brief of Amici Curiae Cato Institute, William N. Eskridge Jr., and Steven Calabresi in Support of Petitioners at 32–33, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574) (arguing that a refusal to recognize same-sex couples' freedom to marry would mark them as inferior and impede their integration as equal citizens).

13. These stories range from coverage of proposed legislation and legal cases to human interest stories. See, e.g., Associated Press, *Montana Won't Get Statewide Vote on Transgender Bathrooms*, U.S. NEWS & WORLD REP. (Mar. 27, 2017, 2:24 PM), <https://www.usnews.com/news/best-states/montana/articles/2017-03-27/montana-lawmakers-vote-against-transgender-bathroom-bill> [<https://perma.cc/P67M-69WR>]; Korin Miller, *Meet the First Transgender Bride Featured on 'Say Yes to the Dress'*, WOMEN'S HEALTH (Mar. 27, 2017), <http://www.womenshealthmag.com/life/say-yes-to-the-dress-transgender> [<https://perma.cc/T32H-GQAT>]; Daniel Weissner, *6th Circuit Says Transgender Woman Can Intervene in EEOC Case*, REUTERS (Mar. 27, 2017, 5:32 PM), <http://www.reuters.com/article/employment-transgender-idUSL2N1H41M1> [<https://perma.cc/9MD4-KC4W>].

14. O'LEARY & SPRIGG, *supra* note 8, at 1. For example, in April 2016, Target announced that it was adopting a non-discrimination policy permitting transgender customers to use Target's restrooms based on their gender identity. *Continuing to Stand for Inclusivity*, TARGET (Apr. 19, 2016), <https://corporate.target.com/article/2016/04/target-stands-inclusivity> [<https://perma.cc/ZUF8-J3RS>]. In response, conservative groups mounted a nationwide boycott of Target's stores. Khorri Atkinson, *Conservative Group Calls for Target Boycott over Transgender Bathroom Policy*, MSNBC (Apr. 22, 2016, 5:55 PM), <http://www.msnbc.com/msnbc/conservative-group-calls-target-boycott-over-transgender-bathroom-policy> [<https://perma.cc/YX34-9KGE>].

15. E.g., H.B. 364, 2016 Gen. Assemb., Reg. Sess. (Ky. 2016); S.F. 3002, 89th Leg., Reg. Sess. (Minn. 2016); H.B. 2215, 55th Leg., 1st Reg. Sess. (Okla. 2015); A.B. 469, 2015 Leg., Reg. Sess. (Wis. 2015); Stephen Peters, *New HRC Report Reveals Unprecedented Onslaught of State Legislation Targeting Transgender Americans*, HUM. RTS. CAMPAIGN (Feb. 22, 2016), <http://www.hrc.org/blog/new-hrc-report-reveals-unprecedented-onslaught-of-state-legislation-targeting-transgender-americans> [<https://perma.cc/B9NV-55SZ>] ("In 2015, at least 125 anti-LGBT bills were introduced in state houses all across the country. Twenty-one specifically targeted transgender people, though none became law.").

legislators enacted the Public Facilities Privacy & Security Act (“H.B. 2”), a law that purported to override federal protections for transgender employees and students.¹⁶ These federal protections require that employers and schools treat transgender persons equally, including by permitting them to use the same restrooms as others.¹⁷ Instead, H.B. 2 mandated that transgender persons use restroom and locker room facilities based on their “biological sex[.]” which the law defined as the sex designated “on a person’s birth certificate.”¹⁸ In Mississippi, the

16. Public Facilities Privacy & Security Act (H.B. 2), secs. 1.2–3, §§ 115C-521.2, 142-760, 2016-2 N.C. Adv. Legis. Serv. 1 (LexisNexis), *repealed by* An Act to Reset S.L. 2016-3 (H.B. 142), 2017 N.C. Sess. Laws __ (requiring transgender persons to use restrooms according to their biological sex as identified in their birth certificate).

17. These federal laws primarily include Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-8 (2012), and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. Many federal appellate courts have held that Title VII protects transgender employees. *See Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App’x 883, 884 (11th Cir. 2016) (“Sex discrimination includes discrimination against a transgender person for gender nonconformity.”); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (“Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004) (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination”); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (holding that transgender persons are protected under federal sex discrimination laws); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–03 (9th Cir. 2000) (same); *see also Lusardi*, No. 0120133395, 2015 WL 1607756, at *8 (EEOC Apr. 1, 2015) (holding that Title VII requires employers to treat transgender workers equally in all respects, including permitting them to use the same restrooms used by others). Similarly, a number of federal courts, including the Fourth Circuit, have held that Title IX protects transgender students. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016), *vacated and remanded*, __ S. Ct. __ (2017) (mem.), 2017 WL 855755; *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-CV-943-PP, 2016 U.S. Dist. LEXIS 136940, at *7 (E.D. Wis. Oct. 3, 2016); *Bd. of Educ. v. U.S. Dep’t of Educ.*, No. 2:16-CV-524, 2016 U.S. Dist. LEXIS 131474, at *34–51 (S.D. Ohio Sept. 26, 2016). In *Grimm*, after granting certiorari, the Supreme Court vacated the decision and remanded the case back to the Fourth Circuit for reconsideration after the Department of Education and Department of Justice withdrew its guidance providing that Title IX requires schools to permit transgender students to use the same public restrooms as other students, consistent with their gender identity. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, __ S. Ct. __ (2017) (mem.), 2017 WL 855755, at *1.

18. Public Facilities Privacy & Security Act (H.B. 2), sec. 1.2–3, §§ 115C-521.2, 143-760, 2016-2 N.C. Adv. Legis. Serv. at 1–2. In response to H.B. 2, a number of businesses and organizations, including the NCAA, announced that they would cease doing business or holding sporting events in North Carolina, resulting in the loss of an estimated \$3.76 billion of revenue to the state. Associated Press, *Bathroom Bill to Cost North Carolina \$3.76 Billion*, CNBC (Mar. 27, 2017, 7:00 AM), <http://www.cnbc.com/2017/03/27/bathroom-bill-to-cost-north-carolina-376-billion.html> [<https://perma.cc/3689-5HJN>]. On March 30, 2017, North Carolina Governor Roy Cooper signed into law H.B. 142, a law that repealed H.B. 2, but effectively left its restrictions on restroom usage by transgender persons in place. An Act to Reset S.L. 2016-3, 2017 N.C. Sess. Laws __; *see* Craig Jarvis, *With HB2 Repeal, NC Still an Outlier*, NEWS & OBSERVER (Apr. 2, 2017, 1:12 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article142260859.html> [<https://perma.cc/334F-2QYT>];

legislature enacted the Protecting Freedom of Conscience from Government Discrimination Act (“H.B. 1523”), a law that created an extremely broad religious exemption, applicable to virtually any state law, for persons who believe that the terms “man” or “woman” “refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.”¹⁹

As these examples illustrate, much of the current focus on transgender issues centers on restrooms. Indeed, just as the freedom to marry became the public focus of equality for lesbian, gay, and bisexual people, the freedom to use restrooms based on one’s gender identity has now become the public focus of equality for transgender persons. Unlike the focus on marriage, however, which was driven in significant part by the choice of LGBT advocates to prioritize the issue, the current centrality of restrooms in the battle for transgender equality has been the result of a concerted effort by conservative public officials and groups, who have forced this issue to the forefront through aggressive legislation and litigation.²⁰

In the past year, litigation about transgender people and restrooms has exploded, resulting in a flurry of cases challenging laws and policies that permit transgender people to use the same restrooms as others. In May 2016, Texas and eleven other states filed a federal lawsuit seeking to enjoin the enforcement of federal agency guidance stating that federal sex discrimination laws require equal treatment of transgender students and workers with respect to restrooms and other sex-separated

Matthew Burns & Laura Leslie, *HB2 Repealed, But Many Unhappy with “Reset”*, WRAL (Mar. 30, 2016, 10:05 PM), <http://www.wral.com/hb2-repealed-but-many-unhappy-with-reset-/16615133/> [<https://perma.cc/7RWP-Z9K2>]. The ACLU has indicated that it will continue its lawsuit challenging H.B. 2, noting that its “legal team will seek to amend the lawsuit to challenge H.B. 142 as well.” Press Release, Am. Civil Liberties Union, ACLU and LAMBDA Condemn ‘Fake’ Repeal of HB2 (March 30, 2017), <https://www.aclu.org/news/aclu-and-lambda-legal-condemn-fake-repeal-hb-2> [<https://perma.cc/PA65-CC7L>].

19. Protecting Freedom of Conscience from Government Discrimination Act, ch. 3334, § 2, 2016 Miss. Laws 427, 428. On June 30, 2016, a federal district court judge held that H.B. 1523 was unconstitutional and issued a preliminary injunction enjoining its enforcement. *Barber v. Bryant*, 193 F. Supp. 3d 677, 723–24 (S.D. Miss. June 30, 2016), *appeal docketed*, No. 16-60478 (5th Cir. July 8, 2016). The district court subsequently denied the state’s motion to stay the ruling pending appeal, which was later affirmed by the Fifth Circuit. *Barber v. Bryant*, Nos. 3:16-CV-417-CWR-LRA, 3:16-CV-442-CWR-LRA, 2016 WL 4096726, at *3 (S.D. Miss. Aug. 1, 2016), *aff’d*, 833 F.3d 510 (5th Cir. 2016). As of this writing, this case is on appeal before the Fifth Circuit. *Barber v. Bryant*, No. 16-60478 (5th Cir. July 8, 2016).

20. Associated Press, *Bathroom Laws Spurring Transgender Americans to Organize*, CBS NEWS (Apr. 3, 2016, 3:16 PM), <http://www.cbsnews.com/news/bathroom-laws-spurring-transgender-americans-to-organize/> [<https://perma.cc/PTZ3-2PCH>] (noting that “transgender rights has supplanted same-sex marriage as the most volatile, high-profile issue for the broader movement of lesbian, gay, bisexual and transgender activists”).

facilities.²¹ In August 2016, the district court issued a preliminary injunction blocking the enforcement of the guidance nationwide.²² Two weeks after Texas filed suit, a second group of states filed a similar lawsuit in Nebraska.²³ Across the country, the same conservative organizations that once sought to intervene in lawsuits to defend state marriage bans are filing cases challenging the adoption of nondiscrimination policies for transgender students by public schools, claiming that such policies endanger the privacy and safety of other students.²⁴

21. *Texas v. United States*, __ F. Supp. 3d __, __, 2016 WL 4426495, at *1–2 (N.D. Tex. Aug. 21, 2016); see U.S. Dep’t of Educ. & U.S. Dep’t of Justice, Opinion Letter on Transgender Students 3 (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/A4E3-QVDS>].

22. *Texas v. United States*, __ F. Supp. 3d at __, 2016 WL 4426495, at *17; see *Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 7852331, at *4 (N.D. Tex. Oct. 18, 2016) (clarifying scope of nationwide injunction). Notably, however, because the Fourth Circuit had already issued a decision deferring to the Department of Education guidance, the federal district court presiding over the challenge to H.B. 2 in North Carolina declined to follow this ruling, relying instead on the Fourth Circuit’s holding in *G.G. ex rel. Grimm v. Gloucester County School Board*. Carcaño v. McCrory, 203 F. Supp. 3d 615, 635 (M.D.N.C. 2016). The Fourth Circuit’s decision has since been vacated by the Supreme Court. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, __ S. Ct. __ (2017) (mem.), 2017 WL 855755, at *1.

23. Complaint for Declaratory and Injunctive Relief at 1–3, *Nebraska v. United States*, No. 4:16-cv-03117 (D. Neb. July 8, 2016). The complaint was filed by Nebraska, Arkansas, Kansas, Michigan, Montana, North Dakota, Ohio, South Carolina, South Dakota, and Wyoming. *Id.*; see also Daniel Wiessner, *More States Sue Obama Administration over Transgender Directive*, REUTERS (July 8, 2016, 6:27 PM), <http://www.reuters.com/article/us-usa-lgbt-lawsuit-idUSKCN0ZO2B> [<https://perma.cc/W3EM-QY76>].

24. See, e.g., *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, No. 2:16-cv-00524, 2016 WL 5372349, at *1 (S.D. Ohio Sept. 26, 2016); Verified Complaint for Injunctive and Declaratory Relief ¶ 213, at 32, *Students & Parents for Privacy v. U.S. Dep’t of Educ.*, No. 1:16-cv-04945 (N.D. Ill. May 4, 2016), 2016 WL 2591322. An Ohio school district, represented by the Alliance Defending Freedom (“ADF”), filed suit challenging non-discrimination policies. See *Bd. of Educ. of Highland Local Sch. Dist.*, 2016 WL 5372349, at *1; Associated Press, *Ohio Judge Orders Girls’ Bathroom Access for Transgender Student*, FOX NEWS (Sept. 27, 2016), <http://www.foxnews.com/us/2016/09/27/ohio-judge-orders-girls-bathroom-access-for-transgender-student.html> [<https://perma.cc/M9LN-HTUG>]. Similarly, in Illinois, a group of parents and students represented by ADF brought suit challenging the same policies. See Verified Complaint for Injunctive and Declaratory Relief, *supra*, ¶¶ 1–3, at *2–3; Dawn Rhodes & Duaa Eldeib, *No Decision from Judge on Barring Transgender Student from Locker Room*, CHI. TRIB. (Aug. 15, 2016, 5:49 PM), <http://www.chicagotribune.com/news/local/breaking/ct-transgender-lawsuit-palatine-met-20160815-story.html> [<https://perma.cc/9A93-R8FT>]. A magistrate judge recently recommended that the district court deny the plaintiffs’ motion for preliminary injunction. *Students v. United States Dep’t of Educ.*, No. 16-cv-4945, 2016 WL 6134121, at *40 (N.D. Ill. Oct. 18, 2016). ADF is also representing a group of students bringing similar claims in Minnesota. See Verified Complaint for Declaratory and Injunctive Relief, *Privacy Matters v. U.S. Dep’t of Educ.* at 63–66, No. 0:16-cv-03015-WMW-LIB (D. Minn. Sept. 7, 2016), 2016 WL 4691526; Associated Press, *Minnesota School District Sued over Transgender Bathroom Policy*, TWIN CITIES PIONEER PRESS (Sept. 9, 2016, 3:00 PM), <http://www.twincities.com/2016/09/09/minnesota-school-district-sued-over-transgender-bathroom-policy/> [<https://perma.cc/UG4U-3HWH>].

Whether and when the Supreme Court may step in to resolve this issue remains unclear. In October 2016, the Supreme Court agreed to review the Fourth Circuit's decision in *G.G. ex rel. Grimm v. Gloucester County School Board*.²⁵ As the first federal appellate court to address the issue, the Fourth Circuit held that the guidance issued by the Department of Education and Department of Justice requiring that transgender students must be permitted to use the same restrooms as other students was entitled to deference.²⁶ On remand, the district court struck down a Virginia school district's policy barring Gavin Grimm, a transgender boy, from using the same restrooms as other boys.²⁷ The school district petitioned for certiorari to the U.S. Supreme Court, and the Court agreed to hear the case to decide two questions: whether federal courts must defer to the agencies' guidance on this issue and whether, regardless of the deference owed to the guidance, the department's position that Title IX protects transgender students is "reasonable."²⁸ Shortly after the election of Donald Trump, however, the Department of Education and the Department of Justice withdrew the guidance.²⁹ In response, the Court reversed course, vacating the Fourth Circuit's decision and remanding the case back to the Fourth Circuit for "further consideration in light of the guidance document issued by the Department of Education and Department of Justice[.]"³⁰

In the face of this accelerating onslaught of hostile legislation and litigation, transgender advocates have been forced to confront arguments claiming that laws and policies that exclude transgender persons from using communal restrooms consistent with their gender identity are justified by the biological differences between men and women. With the possibility that a case involving this issue might reach the Supreme Court in the near future, the pressure to respond to these arguments has become even greater, given the possibility that an adverse ruling by the Court could set back the pace of progress for transgender people for decades. Moreover, because federal courts construe the term

25. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016), *vacated and remanded*, __ S. Ct. __ (2017) (mem.), 2017 WL 855755.

26. *Id.* at 721; see U.S. Dep't of Educ. & U.S. Dep't of Justice, *supra* note 21.

27. *G.G. ex rel. Grimm*, 822 F.3d at 721–23; *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15-cv-00054, 2016 WL 3581852, at *1 (E.D. Va. June 23, 2016).

28. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 137 S. Ct. 369 (2016) (mem.) (granting certiorari on questions two and three); Petition for Writ of Certiorari at i, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 16-273, (U.S. Aug. 29, 2016).

29. U.S. Dep't of Educ. & U.S. Dep't of Justice, Opinion Letter on Withdrawal of Title IX Guidance Documents 1–2 (Feb. 22, 2017), <https://www.justice.gov/opa/press-release/file/941551/download> [<https://perma.cc/4XHQ-VGVU>].

30. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, __ S. Ct. __ (2017) (mem.), 2017 WL 855755, at *1.

“sex” consistently across federal sex discrimination laws,³¹ a Supreme Court case resolving this issue under any federal sex discrimination law would reverberate in other areas, ranging from employment to education, housing, credit, gender-based violence, and other arenas.

As explored below, the fate of similar biology-based arguments in cases challenging state marriage bans is instructive and suggests that while such arguments may have some initial success, courts are ultimately unlikely to accept biology as a sufficient justification for differential treatment of transgender people. Part I highlights the prominent role of biology-based arguments in litigation challenging state marriage bans and explains why courts, including the U.S. Supreme Court, ultimately rejected those arguments as circular and unpersuasive. Part II examines the resurgence of biology-based arguments in litigation about transgender equality and argues that courts are likely to—and should—reject them for similar reasons in this new context as well.

I. WHY BIOLOGY-BASED ARGUMENTS PLAYED A CENTRAL ROLE IN THE MARRIAGE EQUALITY DEBATE

The Supreme Court’s 2015 *Obergefell* decision, which struck down state laws barring same-sex couples from marriage, was the culmination of an extraordinary shift in the legal and social position of gay people in the United States.³² This Part examines how that decision—issued a mere twelve years after the Court held that states may not criminalize same-sex intimacy³³—was made possible by two other profound changes: the Court’s embrace of gender equality and elimination of gender-based discrimination in marriage; and the growing social acceptance of lesbian, gay, and bisexual people. Those changes limited the arguments that state officials and others could use to defend state marriage bans, effectively eliminating justifications based on overt gender stereotypes or on condemnation of same-sex relationships. As a result, those defending the bans sought to portray them as a mere reflection of the biological, sex-based differences involved in procreation, rather than as measures intentionally designed to exclude same-sex couples.³⁴ Initially, some courts accepted those arguments.³⁵ In the long run, however, most courts—including the Supreme Court—rejected biology-based

31. See Shane T. Muñoz & David M. Kalteux, *LGBT, the EEOC, and the Meaning of Sex*, 90 FL. BAR J. 43, 44–46 (2016).

32. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

33. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

34. See *infra* notes 120–35 and accompanying text.

35. See *infra* text accompanying note 129.

rationales as circular and required states to justify their discriminatory treatment of same-sex couples, which they were unable to do.³⁶

A. “*The Stunning Velocity of the Marriage Equality Movement*”³⁷

In hindsight, the speed with which courts recognized same-sex couples’ freedom to marry was breathtaking.³⁸ For most of the twentieth century, being lesbian or gay was treated as a mental illness.³⁹ In 2003, when the Supreme Court finally struck down state laws criminalizing same-sex intimacy,⁴⁰ not a single state permitted same-sex couples to marry; only a handful provided any form of statewide relationship recognition for such couples; and a significant minority still treated intimacy between same-sex partners as a crime.⁴¹ Nonetheless, a mere twelve years later, in 2015, the Supreme Court ruled that every state must permit same-sex couples to marry “on the same terms and conditions as marriage between persons of the opposite sex.”⁴² As one reporter noted in 2014, “[t]he direction and pace of the marriage decisions—their sheer velocity—is unlike any other debate in modern politics or the law.”⁴³

36. See *infra* text accompanying notes 129–33.

37. Chris Geidner, *The Stunning Velocity of the Marriage Equality Movement*, BUZZFEED NEWS (Sept. 17, 2014, 12:55 AM), https://www.buzzfeed.com/chrisgeidner/the-stunning-velocity-of-the-marriage-equality-movement?utm_term=.xd6Zxq0nY#.mtdx4EKV2 [<https://perma.cc/MY87-742X>].

38. See, e.g., Nate Silver, *Change Doesn’t Usually Come This Fast*, FIVETHIRTYEIGHT (June 26, 2015, 6:14 PM), <http://fivethirtyeight.com/datalab/change-doesnt-usually-come-this-fast/> [<https://perma.cc/2WKY-LJWQ>] (“In the United States, gay marriage has gone from unthinkable to the law of the land in just a couple of decades.”).

39. Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 50 (2010) (“Psychoanalysts in the 1930s viewed homosexuality as a psychiatric problem. The first [DSM-I] catalogued homosexuality as a form of psychopathic personality disorder. In 1973 the American Psychiatric Association removed homosexuality from the list of sociopathic mental disorders but developed a new classification of ‘sexual orientation disturbance,’ later called ‘ego-dystonic homosexuality.’ It was not until 1986—little more than two decades ago—that this category was finally removed from the DSM-III-R.”).

40. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

41. *Id.* at 603 (Scalia, J., dissenting). Just a few short years before *Lawrence*, Vermont became the first state to provide limited relationship recognition for same-sex couples. *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999). Massachusetts was the first state permitting same-sex couples to marry just five months after *Lawrence* was decided. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

42. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

43. Geidner, *supra* note 37. In remarks at the University of Minnesota law school the same month, Justice Ruth Bader Ginsburg similarly referred to the “remarkable” shift in public perception about same-sex couples, which she attributed to the greater openness of gay people: “Having people close to us say who they are—that made the attitude change in this country.” Associated Press, *Ginsburg Talks Gay Marriage*, POLITICO (Sept. 16, 2014, 9:04

The marriage equality movement began with a series of state court challenges to marriage bans. In 1993, the Supreme Court of Hawaii in *Baehr v. Lewin*⁴⁴ became the first court in the country to call the constitutionality of a state marriage ban into question.⁴⁵ Although later reversed by Hawaiian voters,⁴⁶ that ruling marked a significant turning point in the effort to achieve marriage equality. After Hawaii, a growing number of state courts invalidated laws barring same-sex couples from marriage on state constitutional grounds, starting with the Massachusetts Supreme Judicial Court in 2003.⁴⁷ Despite early losses in Maryland,⁴⁸ New York,⁴⁹ and Washington,⁵⁰ state courts across the country eventually followed Massachusetts' lead. New Jersey's ban was partially struck down in 2006,⁵¹ followed by victories for same-sex couples in California and Connecticut in 2008,⁵² and in Iowa in 2009.⁵³ In California, voters soon reversed that initial victory by enacting Proposition 8, which amended the California Constitution to create an exception to the state's equal protection clause in order to once again exclude same-sex couples from marriage.⁵⁴ Nonetheless, the prior ruling

PM), <http://www.politico.com/story/2014/09/supreme-court-gay-marriage-ruth-bader-ginsburg-111032> [<https://perma.cc/P96Z-CY9N>].

44. 852 P.2d 44 (Haw. 1993).

45. *Id.* at 50.

46. HAW. CONST. art. I, § 23. In 1998, Hawaii voters amended their state constitution to permit discrimination against same-sex couples in marriage. See Mike Yuen, 'Yes' Won with Focus, Clear Message, STAR-BULLETIN (Nov. 5, 1988), <http://archives.starbulletin.com/98/11/05/news/story4.html> [<https://perma.cc/4LL6-A2QD>] (discussing the "overwhelming approval of a constitutional amendment that [gave] the Legislature the power to outlaw same-sex marriages in Hawaii").

47. Goodridge v. Dep't of Pub. Health, 798 N. E. 2d 941, 948 (Mass. 2003).

48. Conaway v. Deane, 932 A.2d 571, 586 (Md. 2007), *opinion extended after remand*, No. 24-C-04-005390, 2008 WL 3999843 (Md. Cir. Ct. Jan. 7, 2008) (rejecting challenge to Maryland's law barring same-sex couples from marriage).

49. Hernandez v. Robles, 855 N.E.2d 1, 5 (N.Y. 2006) (holding that the "New York Constitution does not compel recognition of marriages between members of the same sex").

50. Andersen v. King Cty., 138 P.3d 963, 968 (Wash. 2006) (en banc) (holding that provisions of Washington's Defense of Marriage Act prohibiting marriage by same-sex couples did not violate the state constitution).

51. Lewis v. Harris, 908 A.2d 196, 221 (N.J. 2006) (holding that "committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples").

52. *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008) (holding that statutory language "limiting the designation of marriage to a union 'between a man and a woman' is unconstitutional and must be stricken from the statute" (quoting CAL. FAM. CODE § 300(a))), *superseded by constitutional amendment*, CAL. CONST. art. I § 7.5 (2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008).

53. Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009).

54. See CAL. ATT'Y GEN., CALIFORNIA GENERAL ELECTION: OFFICIAL VOTER INFORMATION GUIDE 54 (2008), <http://vig.cdn.sos.ca.gov/2008/general/pdf-guide/vig-nov-2008-principal.pdf> [<https://perma.cc/FF26-7Z62>] (providing a summary and text of Proposition

by the Supreme Court of California tipped the balance for other state courts. After that decision, advocates for marriage equality never lost another case in a state supreme court.⁵⁵ Moreover, Proposition 8 galvanized LGBT advocates and allies across the country, ultimately strengthening the political and legal movement for marriage equality.⁵⁶

In 2012, the U.S. Supreme Court prompted yet another wave of new litigation, this time in federal courts. In *United States v. Windsor*,⁵⁷ the Supreme Court struck down the federal Defense of Marriage Act, which had denied married same-sex couples all of the federal rights and protections given to other married persons.⁵⁸ *Windsor* unleashed an avalanche of federal court challenges to remaining state marriage bans. Across the country, from Alabama to Idaho, federal district courts began concluding that state laws barring same-sex couples from marriage failed to serve any legitimate governmental interest and struck them down.⁵⁹ In many cases, state officials agreed, declining to defend state marriage bans and, in some cases, even urging courts to invalidate them.⁶⁰ The Fourth, Seventh, Ninth, and Tenth Circuits quickly affirmed

8); Tamara Audi, Justin Scheck & Christopher Lawton, *California Votes for Prop 8*, WALL ST. J. (Nov. 5, 2008, 10:59 PM), <http://www.wsj.com/articles/SB122586056759900673> [https://perma.cc/AM7N-HKV4 (staff-uploaded archive)].

55. See Shannon Minter, *California Dreaming: Winning Marriage Equality in the California Courts*, in LOVE UNITES US: WINNING THE FREEDOM TO MARRY IN AMERICA 145, 145 (Kevin M. Cathcart & Leslie J. Gabel-Brett eds., 2016) (discussing California's road to marriage equality and court decisions that followed California's lead).

56. See Kate Kendell, *This Changes Everything*, in LOVE UNITES US, *supra* note 55, at 168, 170. Proposition 8 brought together over eighty organizations that mobilized to defeat the measure. See *id.* Additionally, the mobilization surrounding Proposition 8 enlisted the support of an unlikely ally, conservative attorney Ted Olson. Later, Olson was joined by his former adversary David Boies. See Jo Becker, *A Conservative's Road to Same-Sex Marriage Advocacy*, N.Y. TIMES (Aug. 18, 2009), <http://www.nytimes.com/2009/08/19/us/19olson.html> [https://perma.cc/UKD4-87EE].

57. 133 S. Ct. 2675 (2013).

58. *Id.* at 2682.

59. See, e.g., *Searcy v. Strange*, 81 F. Supp. 3d 1285, 1290–91 (S.D. Ala. 2015); *Latta v. Otter*, 19 F. Supp. 3d 1054, 1086–87 (D. Idaho), *aff'd*, 771 F.3d 456 (9th Cir. 2014); Tom Watts, Note, *From Windsor to Obergefell: The Struggle For Marriage Equality Continued*, 9 HARV. L. & POL'Y S52, S72 (2015) (noting that during this period twenty-two federal district courts and four circuit courts ruled in favor of same-sex couples challenging state marriage bans, while only two district courts and one circuit court upheld such bans).

60. See Nigel Duara & Jonathan J. Cooper, *Oregon Won't Defend Gay-Marriage Ban in Lawsuit*, SEATTLE TIMES (Feb. 20, 2014, 11:59 PM), <http://www.seattletimes.com/seattle-news/oregon-wont-defend-gay-marriage-ban-in-lawsuit/> [https://perma.cc/M7TE-GN5T]; Juliet Eilperin, *Pa. Attorney General Says She Won't Defend State's Gay Marriage Ban*, WASH. POST (July 11, 2013), <https://www.washingtonpost.com/news/post-politics/wp/2013/07/11/sources-pa-attorney-general-wont-defend-states-gay-marriage-ban/> [https://perma.cc/ZU8B-Y6BF]; Ed Vogel, *Nevada Officials Won't Defend Gay Marriage Ban*, LAS VEGAS REV. J. (Feb. 12, 2014, 6:45 AM), <http://www.reviewjournal.com/news/1173evada-officials-wont-defend-gay-marriage-ban> [https://perma.cc/Z7CB-JSMS].

the decisions below on appeal, bringing marriage equality to more than twenty-two states.⁶¹ When the Sixth Circuit became the first federal appellate court to uphold state marriage bans,⁶² the U.S. Supreme Court stepped in to resolve the issue for the entire country. In *Obergefell v. Hodges*, the Court struck down marriage bans in Kentucky, Michigan, Ohio, and Tennessee, holding that same-sex couples have the same fundamental freedom to marry as others.⁶³ Reversing the Sixth Circuit, which had accepted biology as a legitimate justification for limiting marriage to different-sex couples, the Court concluded that “many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted,” and that discriminatory “marriage laws . . . harm and humiliate the children of same-sex couples.”⁶⁴

B. *Doctrinal and Social Predicates of Change*

Two reasons U.S. courts embraced marriage equality claims so quickly stand out. First, by the time the Hawaii Supreme Court set the stage for *Obergefell* in 1993, the legal institution of marriage had already undergone an enormous and far more significant change than that required by permitting same-sex couples to marry—namely, the elimination of all other gender-based distinctions within marriage.⁶⁵ Because of that profound change, advocates for marriage equality could persuasively argue that permitting same-sex couples to marry would require no substantive changes in existing marriage laws, which already treated both spouses equally regardless of sex. In addition, by 1993, the

61. *Kitchen v. Herbert*, 755 F.3d 1193, 1199 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014) (mem.); *Bostic v. Schaefer*, 760 F.3d 352, 367 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014); *Latta v. Otter*, 771 F.3d 456, 464–65 (9th Cir. 2014), *cert. denied sub nom.* *Idaho v. Latta*, 135 S. Ct. 2931 (2015) (mem.); *Wolf v. Walker*, 986 F. Supp. 2d 982, 987 (W.D. Wis. 2014), *aff'd sub nom.* *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014) (mem.).

62. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

63. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

64. *Id.* at 2600–01.

65. See Amber Bailey, *Redefining Marriage: How the Institution of Marriage Has Changed to Make Room for Same-Sex Couples*, 27 WIS. J.L. GENDER & SOC'Y 305, 314–20 (2012) (describing the elimination of gender-based marriage laws in the United States). The elimination of gender-based distinctions in marriage took place over centuries, transforming marriage from a legal institution largely defined by gender and the presumed complementarity of men's and women's legal and social roles to an institution in which gender no longer plays any formal legal role. See generally Heen, *supra* note 2, at 344–50 (describing the influence of the coverture doctrine and its abolition on the treatment of women under insurance law); Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) (describing the long history of legal reform required to fully eliminate the common law rule permitting husbands to “chastise” their wives).

American Psychiatric Association and other leading mental health organizations had renounced their prior condemnation of “homosexuality” as a mental illness or disorder that could be “cured,”⁶⁶ and public attitudes and beliefs regarding lesbian, gay, and bisexual people had already become far more positive.⁶⁷ As a result, legal arguments based on an outmoded view of gay identity as immoral or diseased were unlikely to gain much lasting traction. Instead, opponents of marriage equality were forced to advance less aggressive claims—ceding same-sex couples’ right to equality, but falling back upon biological justifications for restricting marriage to opposite-sex couples—that ultimately lacked sufficient credibility or weight to counteract same-sex couples’ claims to equality, freedom, and respect.⁶⁸

As explained in Part II, a similar dynamic is now at work in the debate over transgender persons and restrooms. Those seeking to defend policies that exclude transgender people from using the same restrooms as others consistent with their gender identities, increasingly rely upon biological justifications for such policies rather than attack the morality or legitimacy of transgender identity directly.⁶⁹ Just as opponents of marriage equality invoked biological arguments about procreation in an attempt to avoid the appearance of bias and to cloak discriminatory policies in an ostensibly neutral garb, those who oppose

66. Levit, *supra* note 39, at 50. In 1973, the American Psychiatric Association replaced “homosexuality” with the term with “sexual orientation disturbance,” and later “ego-dystonic homosexuality” from the Diagnostic and Statistical Manual of Mental Disorders (“DSM”). The category was completely eliminated from the DSM-III-R in 1986. *Id.*

67. See Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1557 (2004) (“By the middle of the 1990s, [the LGB movement] had gained considerable political clout, and public acceptance of homosexuality had grown . . .”).

68. *Obergefell*, 135 S. Ct. at 2605; Brief for the Respondents at 46, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-571), 2015 WL 1384104, at *46 [hereinafter Brief for the Respondents (No. 14-571)] (asserting that “Michigan’s marriage laws are based on biological complementarity, not sexual orientation”); Brief of Amicus Curiae Idaho Governor C.L. “Butch” Otter at 9–10, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556) (arguing that “marriage is principally about children—since the ability to create a child together is what makes man-woman unions unique”). See generally Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1478–81 (2013) (describing both the prominence and the weakness of procreation-based arguments against marriage equality); Edward Stein, *The ‘Accidental Procreation’ Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI. KENT L. REV. 403 (2009) (same). In addition to making biology-based arguments, opponents of marriage equality also argued that state bans on same-sex marriage were consistent with a state’s constitutional authority to recognize marriages under the Full Faith and Credit Clause and the traditional tenants of federalism. Brief for Respondent at 6–8, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 1384100, at *6–8 [hereinafter Brief for Respondent (No. 14-556)].

69. See *infra* Section II.E.

sharing restrooms with transgender people invoke biology to justify policies that isolate transgender people from others.⁷⁰

1. The Real Marriage Revolution: Gender Equality

State officials and others defending state marriage bans might have preferred to argue that gender-based distinctions in marriage are permissible;⁷¹ however, by the time same-sex couples sought the right to marry in the 1990s, the Supreme Court had already firmly rejected such distinctions as unconstitutional.⁷² Indeed, historically, the legal and social changes wrought by permitting same-sex couples to marry pale in significance compared to those brought about by gender equality within marriage. At common law, gender inequality was central to the legal institution and definition of marriage. In effect, marriage was a legal institution that required women to give up their separate legal existence and subordinate themselves to men.⁷³ The law prescribed distinct rights and responsibilities for each spouse based on gender, giving husbands virtually unlimited power over their wives and children.⁷⁴ This gender dynamic was most pronounced in the doctrine of coverture, which had a profound impact on marriage law in this country. As William Blackstone explained, coverture provided that “[b]y marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband”⁷⁵ For most of our nation’s

70. See *infra* Section II.E.

71. See Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL’Y 1, 16–24 (2006). Some advocates defending state marriage bans did in fact argue that marriage is, and should remain, an inherently gendered institution based on enduring differences in the social as well as biological roles of men and women. See, e.g., *Baker v. State*, 744 A.2d 864, 909 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (“[T]he State asserts public purposes—uniting men and women to celebrate the ‘complementarity’ (sic) of the sexes and providing male and female role models for children—based on broad and vague generalizations about the roles of men and women that reflect outdated sex-role stereotyping.” (alteration in original)); Stewart, *supra*, at 16–24 (arguing that limiting marriage to male-female couples is justified by the differences between men and women).

72. See *infra* notes 77–83 and accompanying text.

73. See *Latta v. Otter*, 771 F.3d 456, 487–90 (9th Cir. 2014) (Berzon, J., concurring) (describing the “profoundly unequal status of men and women in marriage” under the common law and for much of our nation’s history); *Baker*, 744 A.2d at 908 (Johnson, J., concurring in part and dissenting in part) (describing the history of the marriage laws in Vermont); NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 11–12 (2000).

74. COTT, *supra* note 73, at 11–12.

75. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *441.

history, as a result of the coverture doctrine, the rights and duties of husbands and wives were distinct.⁷⁶

In the United States, many states mitigated the most restrictive aspects of the coverture doctrine, such as the inability of married women to form valid contracts, through the enactment of Married Women's Property Acts and other measures.⁷⁷ Over time, legislatures and courts abolished other gender-based aspects of marriage, such as the requirements that husbands support their wives and that women take a husband's last name, the rule barring women from pressing charges against husbands for assault or rape, and presumptions giving husbands (and later, wives) automatic preference in child custody disputes, among other steps towards marital gender equality.⁷⁸

Among the states, Louisiana was the last to have its so-called "head and master" law struck down.⁷⁹ In 1979, a federal district court upheld Louisiana's law, which made a husband the "head and master of the [marital] community."⁸⁰ The Fifth Circuit reversed, holding that the law impermissibly discriminated based on sex and violated the Constitution's equal protection clause.⁸¹ In 1982, in *Kirchberg v. Feenstra*,⁸² the U.S. Supreme Court unanimously affirmed that holding, effectively bringing the era of male rule and gender-based distinctions in marriage to an end.⁸³

Thus, by the time of the Hawaii state court decision in 1993, marriage had already become a gender-neutral legal institution.⁸⁴ The

76. See Suzanne B. Goldberg, *A Historical Guide to the Future of Marriage for Same-Sex Couples*, 15 COLUM. J. GENDER & L. 249, 252 (2006) (noting the "demise of coverture" occurred prior to the more recent "invalidation of . . . rules that reinforced different roles for husbands and wives"); Deborah A. Widiss, *Reconfiguring Sex, Gender, and the Law of Marriage*, 50 FAM. CT. REV. 205, 207 (2012) (discussing the recent "demise" of many sex-based classifications within marriage).

77. See Bernie D. Jones, *Revisiting the Married Women's Property Acts: Recapturing Protection in the Face of Equality*, 22 AM. U. J. GENDER, SOC. POL'Y & L. 91, 99 (2013).

78. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603–04 (2015) (summarizing these changes); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (striking down a sex-specific Alabama alimony law).

79. See *Kirchberg v. Feenstra*, 609 F.2d 727, 730 (5th Cir. 1979), *aff'd*, 450 U.S. 455 (1981).

80. *Kirchberg v. Feenstra*, 430 F. Supp. 642, 644 (E.D. La. 1977), *rev'd*, 609 F.2d 727 (5th Cir. 1979), *aff'd*, 450 U.S. 455 (1981).

81. *Kirchberg*, 609 F.2d at 730.

82. 450 U.S. 455 (1981).

83. *Id.* at 465.

84. See Bailey, *supra* note 65, at 331 (showing that, because marriage had already become a gender-neutral institution, states did not have to make substantive changes to state marriage laws in order to permit same-sex couples to marry). As a result, those who sought to defend state marriage bans were effectively foreclosed from making arguments that might otherwise—in an earlier era—have been persuasive to many judges. For example, at the time that Richard Baker and James McConnell challenged Minnesota's marriage ban in 1971, see

oral argument in *Obergefell* highlighted the importance of that evolution for same-sex couples. Justice Ginsburg invoked *Kirchberg* in a colloquy with counsel for the State of Michigan, who was defending Michigan's ban: "Marriage today," she noted, "is not what it was under the common law tradition. Marriage was a relationship of a dominant male to a subordinate female. That ended as a result of this court's decision in 1982 when Louisiana's Head and Master Rule was struck down."⁸⁵ As Justice Ginsburg then pointedly noted: "And no state was allowed to have such a marriage anymore."⁸⁶ The demise of gender-based distinctions within marriage underscored the irrationality of limiting marriage only to male-female couples.

Nearly two decades before *Obergefell*, in the 1999 decision partially striking down Vermont's marriage ban on state equal protection grounds,⁸⁷ Vermont Supreme Court Justice Denise Johnson made a similar point. "[H]istorically," she noted, "the marriage laws imposed sex-based roles for the partners to a marriage—male provider and female dependent—that bore no relation to their inherent abilities to contribute to society."⁸⁸ In contrast, "[t]oday, the partners to a marriage are equal before the law."⁸⁹ Viewed in that historical context, she concluded that "the sex-based classification contained in the marriage law is simply a vestige of the common law unequal marriage relationship."⁹⁰

After the *Obergefell* decision, Justice Ginsburg continued to stress the role of *Kirchberg* and similar cases in laying a foundation for marriage equality for same-sex couples. In an interview with Gloria Steinem, she noted:

Baker v. Nelson, 191 N.W.2d 185, 185 (Minn. 1971), Minnesota law still assigned some different rights and responsibilities to spouses based on their sex, *see* Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1768 (2005) ("This asymmetry of roles, duties, and privileges in law, although on the decline since at least the passage of the first Married Women's Property Acts in the mid-nineteenth century, remained . . . very much a part of the legal landscape when Baker and McConnell first applied for a marriage license, and presented real obstacles to the recognition of their marriage.").

85. Transcript of Oral Argument at 70–71, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/14-556q1_15gm.pdf [<https://perma.cc/9MVZ-8S3Z>].

86. *Id.*

87. *Baker v. State*, 744 A.2d 864, 908–09 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

88. *Id.* at 908.

89. *Id.* at 909.

90. *Id.* at 906; *see also* Latta v. Otter, 771 F.3d 456, 487–90 (9th Cir. 2014) (Berzon, J., concurring) (similarly concluding that state marriage bans impermissibly "seek to preserve an outmoded, sex-role-based vision of the marriage institution").

It's a facet of the gay rights movement that people don't think about enough. Why suddenly marriage equality? Because it wasn't until 1981 that the court struck down Louisiana's "head and master rule," that the husband was head and master of the house. Marriage was a relationship between the dominant, breadwinning husband and the subordinate, child-rearing wife. What lesbian or gay man would want that?⁹¹

In sum, while the Supreme Court in *Obergefell* did not expressly adopt a sex discrimination argument in striking down state marriage bans,⁹² the demise of coverture and gender-based distinctions within marriage provided a critical foundation for same-sex couples seeking the freedom to marry. As explained further below, the existence of *Kirchberg* and similar precedents made it impossible for supporters of state marriage bans to defend such laws based on overt appeals to gender-based differences or stereotypes, forcing them to fall back upon a much narrower and ultimately unsuccessful appeal to the biological differences involved in sexual procreation.

2. The Demise of Justifications Based on Viewing Gay People as Immoral or Diseased

Just as the mandate of gender equality within marriage largely foreclosed arguments based on overt sexism or gender stereotypes to defend state marriage bans, so the growing legal and social acceptance of lesbian, gay, and bisexual people made it increasingly difficult to defend such bans on moral grounds. In 1973, the American Psychiatric Association voted to remove "homosexuality" from its official designation of mental disorders.⁹³ In 1955, the American Law Institute recommended that states repeal laws criminalizing private same-sex intimacy,⁹⁴ and Illinois became the first state to do so in 1961.⁹⁵ Over the

91. Philip Galanes, *Ruth Bader Ginsburg and Gloria Steinem on the Unending Fight for Women's Rights*, N.Y. TIMES (Nov. 14, 2015), http://mobile.nytimes.com/2015/11/15/fashion/ruth-bader-ginsburg-and-gloria-steinem-on-the-unending-fight-for-womens-rights.html?_r=0 [<https://perma.cc/7VDN-BPSS>].

92. Instead, the Court characterized the laws at issue as discriminating against same-sex couples. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600–01 (2015).

93. Neel Burton, *When Homosexuality Stopped Being a Mental Disorder*, PSYCHOL. TODAY (Sept. 18, 2015), <https://www.psychologytoday.com/blog/hidden-and-see/201509/when-homosexuality-stopped-being-mental-disorder> [<https://perma.cc/7HKE-D2UB>].

94. Jennifer Naeger, Note, *And Then There Were None: The Repeal of Sodomy Laws After Lawrence v. Texas and Its Effect on the Custody and Visitation Rights of Gay and Lesbian Parents*, 78 ST. JOHN'S L. REV. 397, 401 (2004) ("In 1955, the American Law Institute (ALI) transformed the practice of non-enforcement into an official acknowledgement when it decided that the Model Penal Code would not include sodomy laws.").

95. *Id.*

years, several state appellate courts struck down state same-sex sodomy laws,⁹⁶ and the U.S. Supreme Court finally declared such laws unconstitutional in 2003 in *Lawrence v. Texas*.⁹⁷

Also beginning in the 1980s, many states began enacting laws prohibiting discrimination based on sexual orientation in employment, housing, and public accommodations.⁹⁸ In 1996, the Seventh Circuit issued the first federal appellate decision recognizing a federal cause of action for homophobic harassment in public schools.⁹⁹ The court held that Jamie Nabozny, a Wisconsin student who had been viciously harassed and bullied by other students because of his sexual orientation, had stated a viable equal protection and Title IX claim.¹⁰⁰ In the wake of *Nabozny*, LGBT students brought many successful Title IX claims, challenging homophobic peer harassment,¹⁰¹ and thousands of school districts across the country adopted anti-discrimination policies to protect LGBT students.¹⁰² The Department of Education recognized the protections afforded to LGBT students in regulations and guidance, expressly noting that Title IX “extends to claims of discrimination based

96. See, e.g., *Campbell v. Sundquist*, 926 S.W.2d 250, 266 (Tenn. Ct. App. 1996); *Commonwealth v. Wasson*, 842 S.W.2d 487, 489 (Ky. 1992). In Tennessee, for example, the state supreme court refused to hear an appeal in a case granting summary judgment to a group of individuals challenging the state’s sodomy act. See *Campbell*, 926 S.W.2d at 250. In 1992, the Supreme Court of Kentucky determined that sodomy laws were unconstitutional under the state constitution. *Wasson*, 842 S.W.2d at 489.

97. 539 U.S. 558, 558 (2003).

98. William N. Eskridge, Jr., *Group Conflict and the Constitution: Race, Sexuality, and Religion: A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2448 n.146 (1997); *Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1625 (1996).

99. *Nabozny v. Podlesny*, 92 F.3d 446, 449 (7th Cir. 1996); see also Joseph G. Kosciw et al., *Gender Equity and Lesbian, Gay, Bisexual, and Transgender Issues in Education*, in HANDBOOK FOR ACHIEVING GENDER EQUITY THROUGH EDUCATION 553, 555 (Susan S. Klein et al. eds., 2d ed. 2007) (discussing how *Nabozny* was “the first successful appellate court decision involving school harassment of an LGBT student”).

100. *Nabozny*, 92 F.3d at 449.

101. Kris Franklin, *Empathy and Reasoning in Context: Thinking About Antigay Bullying*, 23 TUL. J. L. & SEXUALITY 61, 87 (2014).

102. See, e.g., John Wright, *Over 900 Texas School Districts Quietly Ban Anti-LGBT Bullying*, TEX. OBSERVER (Sept. 28, 2015, 3:49 PM), <https://www.texasobserver.org/texas-school-districts-add-comprehensive-lgbt-protections/> [<https://perma.cc/MV7J-4WLZ>] (“And since 2012, more than 900 Texas school districts have quietly—and in some cases perhaps unknowingly—added references to sexual orientation and gender identity in their anti-harassment policies.”); see also *Nabozny v. Podlesny*, LAMBDA LEGAL, <http://www.lambdalegal.org/in-court/cases/nabozny-v-podlesny> [<https://perma.cc/6SQA-99WJ>] (explaining how the 1996 *Nabozny* decision “electrified the nation’s education community and led to an explosion in legal advocacy for LGBTQ youth”).

on . . . actual or perceived sexual orientation[.]” as well as to claims of discrimination based on gender non-conformity.¹⁰³

Similarly, in the family law arena, both state courts and state legislatures increasingly rejected discrimination against parents in same-sex relationships. As recently as the 1970s and early 1980s, many state courts routinely denied custody and restricted visitation to openly lesbian, gay, and bisexual parents.¹⁰⁴ By the early 2000s, almost every state had rejected such per se rules in favor of a nexus test requiring state courts to view a parent’s sexual orientation as irrelevant unless there was specific evidence, based on the facts of a particular case, that the parent’s conduct was harming the child.¹⁰⁵ Around the same time, a growing number of state courts granted “second-parent adoptions” to same-sex couples, providing those couples with a way for both parents to have a legally recognized relationship with their children.¹⁰⁶ In many of these cases, the American Psychological Association and other groups submitted amicus briefs summarizing the growing body of social science literature showing that being lesbian, gay, or bisexual was not relevant to a person’s overall psychological health or ability to be a good parent.¹⁰⁷

Like the rise of gender equality in marriage, the growing medical, legal, and social consensus that sexual orientation is not relevant to a person’s ability to enter into committed relationships, contribute positively to society, or be a good parent shut the door on legal arguments that were previously used to justify discrimination against lesbian, gay, and bisexual (“LGB”) people. If states could legitimately seek to deter persons from being gay or from entering into same-sex relationships, then seeking to establish an equal right of same-sex

103. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 5 (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/AG6C-MRAA>].

104. See Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691, 727 n.155 (2003); see also Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 148 (2000).

105. See KAREN MOULDING, *Raising Children and the New Family Law: The Irrelevance of Sexual Orientation—Nexus and Specificity*, in SEXUAL ORIENTATION AND THE LAW § 1.7, at 21 (Karen Moulding & Roberta Achtenberg eds., 2016) (explaining that “[m]any courts have employed an ‘adverse impact’ or ‘nexus’ test”); *id.* § 1.7, at 22 n.2 (providing a summary of case law applying the nexus test when determining custody); Shannon Minter, Feature, *Lesbian and Gay Parents and Their Children*, 18 GPSOLO, Oct.–Nov. 2001, at 36, 37–38.

106. Katrina Greiner, *Foster Care and Adoption*, 5 GEO. J. GENDER & L. 503, 527–28 (2002) (surveying second-parent adoption cases in several states).

107. See, e.g., Brief for the Am. Psychological Ass’n et al. as Amici Curiae Supporting Petitioners at 21–30, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574); see also Patricia M. Logue, *The Facts of Life for Gay and Lesbian Parents Compelling Equal Treatment Under the Law*, 25 FAM. ADVOC., Fall 2002, at 43, 43–47 (2002).

couples to marry would have been futile. In 1986, when the U.S. Supreme Court decided *Bowers v. Hardwick*,¹⁰⁸ a majority of the Court resoundingly endorsed the notion that expressing moral disapproval of homosexuality was a legitimate state interest.¹⁰⁹ Seventeen years later, however, the tables had turned. By 2003, when the Court decided *Lawrence v. Texas*, an equally strong majority rejected the notion that moral disapproval of same-sex intimacy or relationships could ever constitute a legitimate state interest.¹¹⁰

To be sure, public opinion regarding the morality of same-sex relationships remained profoundly divided throughout most of the two decades from the Hawaii marriage decision in 1993 to the Supreme Court's ruling in *Obergefell* in 2015.¹¹¹ California's Proposition 8, in particular, unleashed a bitter firestorm of controversy and, in the short term, dealt the marriage equality movement a serious blow. In the longer view, however, simply by giving the issue of marriage by same-sex couples so much visibility, Proposition 8 accelerated the process of public understanding and galvanized LGBT people and allies across the country to mount an unprecedented public education campaign.¹¹² Proposition 8 also spurred Ted Olson, one of the icons of the conservative movement, to come out in support of same-sex couples seeking the freedom to marry and to file a case challenging the measure in federal court.¹¹³ Increasingly, support for marriage equality came to be seen as a bipartisan issue, uniting people across the political and ideological spectrum.¹¹⁴

108. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

109. *See id.* at 196 (recognizing “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable” as a legitimate state interest and holding Georgia law criminalizing same-sex intimacy did not violate either the equal protection or due process rights of a gay plaintiff).

110. *Lawrence v. Texas*, 539 U.S. 558, 571, 577–78 (2003) (rejecting moral disapproval of gay people as a legitimate state interest).

111. *See Gay and Lesbian Rights*, GALLUP, <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx> [https://perma.cc/2Z3L-3J8N].

112. Claude Summers, *The Crucial Significance of Proposition 8*, THE NEW C.R. MOVEMENT (July 3, 2016, 1:44 PM), http://www.thenewcivilrightsmovement.com/claude_summers/the_crucial_significance_of_proposition_8 [http://perma.cc/58WM-YWG3].

113. *See* Susan Page, *Ted Olson: ‘Point of No Return’ on Gay Marriage Passed*, USA TODAY (Oct. 27, 2014, 6:42 AM), <http://www.usatoday.com/story/news/politics/2014/10/27/capital-download-theodore-olson-supreme-court-gay-marriage/17952923/> [http://perma.cc/HG4G-TSPE]. *See generally* DAVID BOIES & THEODORE B. OLSON, REDEEMING THE DREAM: PROPOSITION 8 AND THE STRUGGLE FOR MARRIAGE EQUALITY 15–21 (2014) (recounting Olson's decision to join the legal fight against Proposition 8 and his experience with the case).

114. *See, e.g.*, Jocelyn Kiley, *61% of Young Republicans Favor Same-Sex Marriage*, PEW RES. CTR. (Mar. 10, 2014), <http://www.pewresearch.org/fact-tank/2014/03/10/61-of-young-republicans-favor-same-sex-marriage/> [https://perma.cc/GP32-PUBC]; Donna Red Wing, *The*

As a result of that remarkable progress, by 2015, the constitutional trajectory of LGB people from “outlaws” to “outcasts” to fully equal, respected, and participating members of society was complete.¹¹⁵ As the Court held in *Obergefell*, persons in same-sex relationships must be given “equal dignity in the eyes of the law.”¹¹⁶ While some resistance to marriage equality continues,¹¹⁷ same-sex couples can now marry in every state,¹¹⁸ and public opinion has overwhelmingly shifted in favor of treating such couples equally in the eyes of the law.¹¹⁹

C. *The Shift to Biology-Based Arguments and Why It Failed*

Because defenders of state marriage bans could not credibly appeal to overt gender stereotypes or to the immorality or pathology of same-sex relationships, they looked elsewhere to justify the exclusion of same-sex couples from marriage. In Hawaii, after concluding that the state marriage ban triggered heightened scrutiny under the equal protection clause of the Hawaii Constitution, the Supreme Court of Hawaii remanded to give the State an opportunity to make its case.¹²⁰ On remand, the State sought to prove that Hawaii had a compelling state interest in restricting marriage only to opposite-sex couples in order “to promot[e] the optimal development of children.”¹²¹ At trial, however, even the State’s own experts had to concede that lesbians and gay men

Bipartisan/Nonpartisan Push for Marriage Equality, HUFFINGTON POST (Mar. 6, 2013, 1:04 PM), http://www.huffingtonpost.com/donna-red-wing/the-bipartisan-nonpartisan-push-for-marriage-equality_b_2807196.html?utm_hp_ref=politics&ir=Politics [<https://perma.cc/WN2D-DW9X>].

115. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (describing the Court’s ruling in *Lawrence* as having shifted gay people from the status of “outlaw[s]” to that of “outcast[s]”). Despite that constitutional trajectory, the Supreme Court has not yet ruled on whether federal sex discrimination laws prohibit discrimination based on sexual orientation or gender identity, and a majority of states still do not have laws that prohibit sexual orientation or gender identity discrimination in employment, housing, public accommodations, and other arenas. See Erik Eckholm, *Next Fight for Gay Rights: Bias in Jobs and Housing*, N.Y. TIMES (June 28, 2015), https://www.nytimes.com/2015/06/28/us/gay-rights-leaders-push-for-federal-civil-rights-protections.html?_r=0 [<https://perma.cc/P9C7-KZJ4>].

116. *Obergefell*, 135 S. Ct. at 2608.

117. Nico Lang, *The Fight to Repeal Same-Sex Marriage Begins: Texas Hears Case to Restrict Spousal Benefits to LGBT Couples*, SALON (Mar. 7, 2017), <http://www.salon.com/2017/03/07/the-fight-to-repeal-same-sex-marriage-begins-texas-hears-case-to-restrict-spousal-benefits-to-lgbt-couples/> [<https://perma.cc/RHJ5-R4B3>] (discussing recent attempts to “roll back marriage equality”).

118. *Obergefell*, 135 S. Ct. at 2608.

119. See *id.* at 2615 (Roberts, J., dissenting) (acknowledging that “[o]ver the last few years, public opinion on marriage has shifted rapidly”); *supra* text accompanying notes 111–14.

120. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993).

121. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *3 (Haw. Cir. Ct. Dec. 3, 1996), *aff’d*, 950 P.2d 1234 (Haw. 1997) (table decision), and *rev’d*, 994 P.2d 566 (Haw. 1999) (table decision).

were just as capable of being good parents as heterosexual persons.¹²² As the trial court held, “[t]he sexual orientation of parents is not in and of itself an indicator of the overall adjustment and development of children.”¹²³ Moreover, the court noted that “[g]ay and lesbian parents and same-sex couples can be as fit and loving parents, as non-gay men and women and different-sex couples.”¹²⁴

After this case, state officials and others defending state marriage bans continued to focus on justifications related to children, but increasingly turned to arguments based on the supposedly *causal* relationship between biological procreation and marriage. Both in court and in the arena of public opinion, those who continued to support state marriage bans argued that permitting same-sex couples to marry would undermine the purportedly central connection between marriage and biological procreation.¹²⁵ They argued that the purpose of marriage is to channel biological procreation and encourage couples that have children together to enter into a stable family relationship.¹²⁶ In effect, they reverse engineered a vision of marriage that focused on the one characteristic that distinguishes same-sex couples from many opposite-sex couples: their inability to procreate. In the words of the Massachusetts Supreme Judicial Court, “[t]he ‘marriage is procreation’ argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage.”¹²⁷

122. *Id.* at *5.

123. *Id.* at *17.

124. *Id.*

125. See William Saletan, *Biological Baloney: The Glaring Contradiction at the Heart of the Anti-Gay Marriage Argument*, SLATE (Apr. 28, 2015, 4:11 PM), http://www.slate.com/articles/news_and_politics/frame_game/2015/04/the_glaring_contradiction_at_the_heart_of_the_anti_gay_marriage_argument.html [https://perma.cc/P7SC-TFD6].

126. Mark Sherman, *Meet the Five Lawyers Who Will Be Fighting for Same Sex Marriage in the Supreme Court This Week*, BUS. INSIDER (Apr. 27, 2015, 3:28 PM), <http://www.businessinsider.com/meet-the-five-lawyers-who-will-be-fighting-for-same-sex-marriage-in-the-supreme-court-this-week-2015-4> [http://perma.cc/P7EB-XKBM] (noting the Tennessee Attorney General’s office defended that state’s marriage ban by contending that “[t]he legitimate interest of the state is to ensure that when children are born, particularly children who are born and the pregnancy is accidental, that they will be born into stable family units, i.e., marriage”); see also DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* 201–12 (2007). After serving as one of the primary public spokespersons for same-sex marriage bans and providing expert testimony supporting California’s Proposition 8 in the federal case that held Proposition 8 to be unconstitutional, Blankenhorn changed his position, explaining that he no longer believed that excluding same-sex couples from marriage could be legally justified. David Blankenhorn, *Opinion, How My View on Gay Marriage Changed*, N.Y. TIMES (June 22, 2012), <http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html> [https://perma.cc/8XRF-AEQX].

127. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003).

The tactical benefits of this argument were clear. By contending that marriage is defined by its link to heterosexual procreation, defenders of state marriage bans could argue that the restriction of marriage to opposite-sex couples simply reflects a biological reality, not animus or bias toward same-sex couples. Because same-sex couples cannot biologically procreate, they reasoned, those couples simply fall outside the purpose of marriage and may be permissibly excluded from it.¹²⁸

Ultimately, however, this attempt to rely on biology did not succeed. While some courts initially accepted arguments based on procreation as a sufficient justification for state marriage bans,¹²⁹ over time, courts increasingly rejected them as fatally under-inclusive both of the purposes of marriage (which include protecting couples who do not have children) and the range of families (including same-sex parents) who would benefit from the stability and protections of marriage.¹³⁰ In *Obergefell*, the U.S. Supreme Court reached a similar conclusion, holding that appeals to biology could not justify the exclusion of same-sex couples from the freedom to marry.¹³¹ Despite the dissent's objection that "every state" at some point "defined marriage in the traditional, biologically rooted way[.]"¹³² the Court held that excluding same-sex couples from marriage undermined, rather than furthered, the state's interest in responsible procreation.¹³³

Today, less than two years after *Obergefell*, advocates for transgender equality must confront biology-based arguments and tactics remarkably similar to those previously used to oppose marriage equality for same-sex couples. In fact, the situation facing transgender advocates now is strikingly similar to that facing marriage equality advocates in the decade or so before *Obergefell* was decided. Those challenging marriage bans failed for many years before the victory in Hawaii signaled a turning of the tide. Similarly, after decades of failure in the courts,

128. See, e.g., Brief for Respondents (No. 14-571), *supra* note 68, at 46 (describing Michigan's marriage laws as "based on biological complementarity, not sexual orientation"); Tierney Sneed, *Don't Listen to Same-Sex Marriage Foes: It Was Always About Hating on the Gays*, TALKING POINTS MEMO (Jun. 18, 2015, 6:00 AM), <http://talkingpointsmemo.com/dc/same-sex-marriage-scotus-animus-preview> [<http://perma.cc/U69V-RUVX>].

129. See, e.g., *Conaway v. Deane*, 932 A.2d 571, 586 (Md. 2007), *opinion extended after remand*, No. 24-C-04-005390, 2008 WL 3999843 (Md. Cir. Ct. Jan. 7, 2008); *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006); *Andersen v. King Cty.*, 138 P.3d 963, 968 (Wash. 2006) (en banc).

130. See, e.g., *Latta v. Otter*, 771 F.3d 456, 472 (9th Cir. 2015); *Kitchen v. Herbert*, 755 F.3d 1193, 1219 (10th Cir. 2014).

131. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

132. *Id.* at 2614 (Roberts, J., dissenting).

133. *Id.* at 2600–01 (majority opinion).

transgender advocates today are making remarkably rapid progress. The backlash to that progress is intense, just as it was for same-sex couples in the aftermath of *Baehr v. Lewin*, and the stakes, this time for transgender people, are equally high.¹³⁴

II. THE REVIVAL OF BIOLOGY-BASED ARGUMENTS IN THE DEBATE OVER TRANSGENDER EQUALITY

The movement to achieve transgender equality has, in many ways, paralleled the legal battle for marriage equality. After years of judicial losses, the last decade has brought about a sea change in the courts, with more and more decisions protecting the right of transgender persons to equal treatment under the law. At the same time, medical science has recognized that being transgender is a normal variation of human experience and that, with the proper support, transgender people can be healthy, productive members of society.¹³⁵ In response to these changes, those who oppose transgender equality have found themselves in a dilemma similar to that previously confronting those who opposed marriage equality for same-sex couples—namely, wishing to defend laws and policies that treat transgender persons differently than others, but unable to credibly do so based either on overt appeals to gender stereotypes or to arguments based on the immorality or pathology of transgender identity.

This Part examines the resurgence of biology-based arguments in this new context, particularly with respect to laws and policies that seek to exclude transgender people from common restrooms. It predicts that, similar to the fate of such arguments in cases challenging state marriage bans, courts will ultimately reject such arguments as circular and insufficient to justify the significant harms that they impose upon transgender people.

134. Janet Mock, *Janet Mock: Young People Get Trans Rights. It's Adults Who Don't*, N.Y. TIMES (Feb. 23, 2017), https://www.nytimes.com/2017/02/23/opinion/janet-mock-young-people-get-trans-rights-its-adults-who-dont.html?_r=0 [<https://perma.cc/5HUU-CCWH>]; Scott Skinner-Thompson, *The Supreme Court Should Decide the Gavin Grimm Case Now*, SLATE (Feb. 27, 2017, 3:33 PM), http://www.slate.com/blogs/outward/2017/02/27/scotus_should_decide_the_gavin_grimm_transgender_case_now.html [<https://perma.cc/Q7LS-SYSM>].

135. See Brief of Amici Curiae the World Prof'l Ass'n for Transgender Health, Pediatric Endocrine Soc'y, et al. in Support of Appellant at 15–17, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016) (No. 15-2056), *vacated and remanded in part*, ___ S. Ct. ___ (2017) (mem.), 2017 WL 855755.

A. “*The Transgender Tipping Point*”¹³⁶

Just as the push for marriage equality gained unprecedented traction in the 1990s and escalated rapidly in the years before *Obergefell*, the movement to gain equality for transgender people has hit a critical tipping point in the last decade. In the 1970s and 1980s, most transgender litigants seeking protection in the courts met with failure, rejection, and in some instances, even ridicule.¹³⁷ In the past few decades, however, signs of positive change have emerged. In 1993, Minnesota became the first state to enact a law expressly prohibiting discrimination against transgender people in employment, housing, and public accommodations.¹³⁸ Throughout the 1990s, dozens of localities enacted similar local antidiscrimination laws.¹³⁹ In 1998, California added express protections for transgender people to its hate crimes law and shortly thereafter, adopted similar antidiscrimination protections for transgender students.¹⁴⁰ Today, eighteen states expressly prohibit discrimination based on gender identity in their state laws.¹⁴¹

More recently, both the U.S. Equal Employment Opportunity Commission (“EEOC”) and courts across the country have begun reversing older precedents that excluded transgender people from protection and imposing liability for discrimination against transgender people under state and federal sex discrimination laws. In *Macy v. Holder*,¹⁴² the EEOC held that Title VII protects federal transgender workers against discrimination, regardless of whether that discrimination is “motivated by hostility, by a desire to protect people of

136. In June 2014, the cover of *TIME* read “The Transgender Tipping Point” and featured actress Laverne Cox, the first transgender person to appear on *TIME*’s cover. Nicholas Snow, ‘Time’ Magazine’s ‘Transgender Tipping Point’ Cover Girl, HUFFINGTON POST (May 8, 2015, 2:30 PM), http://www.huffingtonpost.com/nicholas-snow/laverne-cox-time-magazine_b_7238884.html [<https://perma.cc/Y8V8-RJ8C>]. The magazine cover identified the transgender movement as “America’s next civil rights frontier[.]” Katy Steinmetz, *The Transgender Tipping Point*, *TIME*, June 9, 2014, at cover, 38–46.

137. See Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 39 (2000).

138. Act of Apr. 2, 1993, ch. 22, 1993 Minn. Laws 121, 121–22 (codified as amended in scattered sections of MINN. STAT. § 363); Currah & Minter, *supra* note 137, at 46.

139. See Currah & Minter, *supra* note 137, at 45; *Non-Discrimination Laws That Include Gender Identity and Expression*, TRANSGENDER L. & POL’Y INST., <http://www.transgenderlaw.org/ndlaws/index.htm#jurisdictions> [<https://perma.cc/YGP4-ZXAE>] (last updated Feb. 1, 2012) (providing a comprehensive list of local and state laws prohibiting discrimination on the basis of gender identity).

140. Currah & Minter, *supra* note 137, at 46.

141. *LGBT Americans Aren’t Fully Protected from Discrimination in 32 States*, FREEDOM FOR ALL AMS., <http://www.freedomforallamericans.org/states/> [<http://perma.cc/3Z8T-EJN3>].

142. No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012)

a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort."¹⁴³ In *Lusardi v. McHugh*,¹⁴⁴ the EEOC clarified that the requirement of nondiscrimination includes equal access to shared restrooms and other gender-segregated facilities.¹⁴⁵ Also in recent years, the First, Sixth, Ninth, and Eleventh Circuit Courts of Appeals have all agreed that federal sex discrimination laws must be construed broadly to protect transgender people against discrimination,¹⁴⁶ and the Eighth Circuit has expressly rejected a claim that being required to share a communal restroom with a transgender person constitutes sexual harassment or an invasion of privacy.¹⁴⁷ In the last eight years, the U.S. Department of Justice and other agencies across the federal government have adopted similar positions, affirming that transgender persons are fully protected by sex discrimination laws and that policies excluding them from using the same restrooms used by others, consistent with their gender identities violate those laws.¹⁴⁸

At the same time, just as medical science rejected older models of gay identity as pathological, medical experts increasingly have recognized that being transgender is not a disorder. In the most recent edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM"), the diagnosis given to facilitate medical treatment for transgender people was changed from "gender identity disorder" to "gender dysphoria," to better reflect that simply being transgender is not in itself a mental disorder.¹⁴⁹ More

143. *Id.* at *10.

144. No. 0120133395, 2015 WL 1607756 (EEOC Apr. 1, 2015).

145. *Id.* at *10.

146. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016), *vacated and remanded in part*, __ S. Ct. __ (2017) (mem.), 2017 WL 855755; *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004); *Rosa v. Parks W. Bank & Tr. Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000); *see also G. G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016) (holding that the U.S. Department of Education's guidance recognizing protections for transgender students was entitled *Auer* deference), *vacated and remanded in part*, __ S. Ct. __ (2017) (mem.), 2017 WL 855755.

147. *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (holding that school's policy of permitting transgender women to use women's restroom did not create a hostile work environment for other female teachers).

148. *See, e.g.*, Press Release, U.S. Dep't of Educ., U.S. Departments of Education and Justice Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students (May 13, 2016), <http://www.ed.gov/news/press-releases/us-departments-education-and-justice-release-joint-guidance-help-schools-ensure-civil-rights-transgender-students> [<http://perma.cc/T5CW-W434>].

149. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013) (explaining that the term gender dysphoria "is more descriptive than the previous DSM-IV term gender identity disorder and focuses on dysphoria

broadly, medical and mental health organizations have issued numerous policy statements condemning discrimination against transgender people and calling for their full inclusion, on equal terms, in all aspects of society.¹⁵⁰ Transgender people have gained tremendous visibility in popular culture as well, including positive depictions of transgender characters in television shows and of transgender public figures in mainstream media publications.¹⁵¹

B. Backlash: Mounting Opposition to Transgender Equality

In response to this unprecedented progress, state officials and conservative groups have launched an equally unprecedented counterattack. Across the country, those who oppose transgender equality are bringing lawsuits challenging nondiscrimination policies,¹⁵² sponsoring legislation to restrict the rights of transgender people,¹⁵³ boycotting businesses that have pledged not to discriminate against transgender people,¹⁵⁴ and mounting public campaigns depicting the

as the clinical problem, not identity per se”); *see also* Wynne Parry, *Gender Dysphoria: DSM-5 Reflects Shift in Perspective on Gender Identity*, HUFFINGTON POST (Aug. 4, 2013, 3:00 PM), http://www.huffingtonpost.com/2013/06/04/gender-dysphoria-dsm-5_n_3385287.html [<http://perma.cc/Z2DY-4TL3>] (explaining that this change in terminology signaled that the mental health profession does not view being transgender as a disorder but rather seeks merely to alleviate the dysphoria experienced by many transgender people). Like the American Psychiatric Association, all the remaining major professional associations of medical and mental health providers recognize that having a gender identity that differ from a person’s birth-assigned sex is not a disorder, but instead a medical condition that requires appropriate treatment that affirms a transgender person’s gender identity. *See* PROFESSIONAL ORGANIZATION STATEMENTS SUPPORTING TRANSGENDER PEOPLE IN HEALTH CARE, LAMBDA LEGAL 1–6 (2016), http://www.lambdalegal.org/sites/default/files/publications/downloads/ll_trans_professional_statements.rtf_.pdf [<https://perma.cc/PH4M-LD6J>].

150. *See, e.g., Transgender, Gender Identity & Gender Expression Non-Discrimination*, AM. PSYCHOL. ASS’N (Aug. 2008), <http://www.apa.org/about/policy/transgender.aspx> [<http://perma.cc/YR5K-K57E>].

151. *See* Shannon Price Minter, *Supporting Transgender Children: New Legal, Social, and Medical Approaches*, 59 J. HOMOSEXUALITY 422, 423–25 (2012).

152. *See, e.g., Franciscan All., Inc. v. Burwell*, No. 7:16-cv-00108-O, 2016 WL 7638311, at *22 (N.D. Tex. Dec. 31, 2016) (granting a preliminary injunction to enjoin the U.S. Department of Health and Human Services from enforcing a regulation prohibiting discrimination against transgender people); Ian Lovett & Louise Radnofsky, *U.S. Sued over New Transgender Health-Care Protections*, WALL ST. J. (Aug. 24, 2016, 1:11 PM), <http://www.wsj.com/articles/u-s-sued-over-new-transgender-health-care-regulation-1471995720> [<http://perma.cc/P2WF-Q5BD>].

153. Alia E. Dastagir, *The Imaginary Predator in America’s Transgender Bathroom War*, USA TODAY (Apr. 29, 2016, 8:32 PM), <http://www.usatoday.com/story/news/nation/2016/04/28/transgender-bathroom-bills-discrimination/32594395/> [<http://perma.cc/K4UL-KKSA>].

154. *Id.* For example, the American Family Association, a conservative activist group, has garnered nearly 1 million signatures from individuals pledging to boycott Target in response to their transgender-inclusive bathroom policy. *Id.*

transgender equality movement as misguided and dangerous.¹⁵⁵ For the most part, however, these efforts seek to avoid attacking transgender people directly.¹⁵⁶ Instead, as happened in the marriage equality battles, those who oppose the rapid progress of transgender equality are once again invoking biology-based arguments—this time, in an attempt to justify the exclusion of transgender people from restrooms.

C. *The Focus on Restrooms*

As a strategic matter, it is no accident that opponents of transgender equality have focused so intently on restrooms—one of the few places where gender segregation is still permitted. By sponsoring legislation and bringing cases that focus on restrooms, opponents have forced transgender advocates onto vulnerable terrain, compelling them to defend antidiscrimination policies for transgender people in a context that triggers many people’s deep-seated anxieties and fears about sexuality and gender.¹⁵⁷ In addition, being forced to devote time and resources to defending equal treatment in restrooms diverts transgender advocates from other goals. Certainly, being able to use restrooms based on one’s gender identity is important and often is a prerequisite to other more important rights, such as being able to attend school or work without fear of discrimination. For example, a transgender student who

155. See Riham Feshir, *Target Transgender Bathroom Policy Sparks Opposition Campaign*, MPR NEWS (May 16, 2016), <https://www.mprnews.org/story/2016/05/16/target-transgender-bathroom-policy-sparks-opposition-campaign> [<http://perma.cc/MAM4-CJZB>] (stating that Target’s inclusive restroom policy takes “the wrong side in a massive cultural assault on women and girls”).

156. See, e.g., Dastagir, *supra* note 153 (describing the fear that “[m]ale perverts and pedophiles disguised as women (faux transgender people) will troll women’s bathrooms and sexually assault our wives and daughters”); Rachel Tuchman, *Not in the Name of My “Protection”*, HUFFINGTON POST (Apr. 4, 2016, 12:12 PM), http://www.huffingtonpost.com/rachel-tuchman/not-in-the-name-of-my-pro_b_9593714.html [<https://perma.cc/RH9H-GKKN>] (discussing the North Carolina campaign aimed at “keep[ing] . . . children safe”). In some instances, however, groups have promulgated ads and other materials that directly stigmatize and attack transgender people as immoral, dangerous, and depraved. See, e.g., Lucas Grindley & Dawn Ennis, *In This New Ted Cruz Ad, Trans People Are Predators*, ADVOC. (Apr. 22, 2016, 10:31 AM), <http://www.advocate.com/election/2016/4/22/everything-you-need-know-about-ted-cruzs-transphobic-attack-ad-video> [<http://perma.cc/MG4F-9Z4T>].

157. See German Lopez, *Texas’s Anti-Transgender Bathroom Bill, Explained*, VOX (Jan. 5, 2017, 4:07 PM), <http://www.vox.com/identities/2017/1/5/14173882/texas-transgender-bathroom-law-lgbtq> [<https://perma.cc/3U27-G3GV>] (“While the issue is now being used primarily against trans people, historically bathroom fears have been regularly deployed against civil rights causes [because] . . . [b]athrooms are places where really private things happen, and that makes people feel vulnerable in all sorts of ways.”); Maria L. La Ganga, *From Jim Crow to Transgender Ban: the Bathroom as Battleground for Civil Rights*, GUARDIAN (Mar. 30, 2016, 7:00 AM), <https://www.theguardian.com/world/2016/mar/30/transgender-ban-bathrooms-north-carolina-civil-rights> [<https://perma.cc/5Z4N-W6S9>].

is constantly “outed” as such by being forced to use a separate bathroom is likely to be targeted for harassment, and, at a minimum, will be negatively affected by the constant stigma of being treated differently than other students.¹⁵⁸

Nonetheless, if transgender advocates were able to choose their own priorities, equal treatment in restrooms, in and of itself, would likely fall lower on the scale than ensuring that transgender people are able to work, attend school, be free from hate violence, have access to homeless shelters and medically necessary care, secure accurate state-issued identification, raise children, obtain asylum, and be protected from violence and abuse in prisons, jails, and detention facilities. Rather than focusing on any of these other equality issues, where seeking to justify discrimination would be more challenging, the opponents of transgender equality have made a strategic choice to make restrooms the centerpiece of their opposition. In so doing, they have identified the one context where, on its face, biological differences between men and women are likely to seem most important, just as focusing on the role of procreation in marriage highlighted the one aspect of marriage where biological differences were likely to be seen as highly relevant.¹⁵⁹

For opponents of transgender equality, this narrow focus on restrooms serves many of the same strategic purposes as the narrow focus on procreation served for the opponents of marriage equality. First, it allows them to tell a story about the origins and purposes of sex-separated restrooms that resonates with popular understandings about “biological sex” and the importance of anatomical differences between men and women.¹⁶⁰ Second, by highlighting those biological differences, it provides a ready way to deny that policies barring transgender people from shared restrooms are based on animus or bias and to depict such policies as a benign reflection of natural reality. Finally, it allows those defending such exclusionary policies to exploit fears about the vulnerability of women and children—themes with a long history among those opposing both gender equality and equality for LGBT people.¹⁶¹

158. See Brief of Amicus Curiae for the World Prof'l Ass'n for Transgender Health, Pediatric Endocrine Soc'y et al. in Support of Appellant, *supra* note 135, at 29–30.

159. See *supra* notes 125–28 and accompanying text.

160. For example, in North Carolina proponents of H.B. 2 have taken particular care to promote the legislation as a “common-sense” measure. See ‘Myths vs Facts’ About House Bill 2 Released by NC Gov. Pat McCrory’s Office, FOX 8 (Mar. 29, 2016, 12:44 PM) <http://myfox8.com/2016/03/29/myths-vs-facts-about-house-bill-2-released-by-nc-gov-pat-mccrorys-office/> [<http://perma.cc/H2ZC-WAHC>].

161. For an overview of how such arguments were used to support laws that barred women from certain professions and to justify other types of discrimination against women, see Teresa Godwin Phelps, *Gendered Space and the Reasonableness Standard in Sexual*

D. Appeals to the “Traditional” Definition of Sex

Just as marriage equality opponents sought to defend a “traditional” view of marriage, defined by biological procreation, so transgender equality opponents are now seeking to defend a “traditional” view of sex, defined by the “physiological differences between men and women, rather than differences in gender identity.”¹⁶² In the past, state officials and conservative groups argued that courts must defer to the “traditional” procreation-based definition of marriage.¹⁶³ Today, cases challenging the equal treatment of transgender people in restrooms similarly rest almost exclusively on appeals to the so-called “traditional” view of the term “sex” in federal nondiscrimination laws.¹⁶⁴

In the long run, this appeal to tradition is unlikely to succeed, just as it ultimately proved unsuccessful in halting the nationwide recognition of marriage equality for same-sex couples. In the marriage cases, courts ultimately recognized that the so-called “traditional” view of marriage simply could not be reconciled with contemporary marriage and family law, which had long since recognized that marriage serves many purposes other than procreation and extended equal parental protections to adopted children and those born through assisted reproduction.¹⁶⁵

Similarly, as many courts have already recognized, sex discrimination jurisprudence has long since abandoned the “traditional” definition of sex as defined only or even primarily by a person’s anatomical or biological sex. In older cases, courts often adopted such a narrow, biological view of the term sex. In *Ulane v. Eastern Airlines, Inc.*,¹⁶⁶ for example, the Seventh Circuit rejected a sex discrimination claim by a transgender plaintiff, holding that Title VII prohibits only

Harassment Cases, 12 NOTRE DAME J.L. ETHICS & PUB. POL’Y 265, 279–80 (1998); *see also In re Bradwell*, 55 Ill. 535, 542 (1869), *aff’d sub nom. Bradwell v. Illinois*, 83 U.S. 130 (1872) (upholding an Illinois law barring women from being lawyers based upon their purported fragility and need for protection). For an examination of the outsized role such arguments have played in efforts to oppose equality for LGBT people, including in marriage, see Anthony Niedwiecki, *Save Our Children: Overcoming the Narrative That Gays and Lesbians Are Harmful to Children*, 21 DUKE J. GENDER L. & POL’Y 125, 128 (2013).

162. *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 640–41 (M.D.N.C. 2016).

163. *See supra* text accompanying notes 125–33.

164. *See, e.g., G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 736 (4th Cir. 2016) (Niemeyer, J., dissenting) (“The text of Title IX and its regulations allowing for separation of each facility ‘on the basis of sex’ employs the term ‘sex’ as was generally understood at the time of enactment.”), *vacated and remanded in part*, ___ S. Ct. ___ (2017) (mem.), 2017 WL 855755.

165. Joslin, *supra* note 68, at 1471.

166. 742 F.2d 1081 (7th Cir. 1984).

discrimination “against women because they are women and against men because they are men.”¹⁶⁷ But in *Price Waterhouse v. Hopkins*,¹⁶⁸ the U.S. Supreme Court rejected that narrow view and held that Title VII also prohibits discrimination based on an individual’s nonconformity to gender stereotypes.¹⁶⁹ In the wake of *Price Waterhouse*, courts have overwhelmingly recognized that the term “sex” in federal antidiscrimination law must be construed broadly and cannot be reduced to a person’s biological or anatomical sex.¹⁷⁰ As a result, they have held that older cases excluding transgender persons from protection under sex discrimination statutes are no longer good law.¹⁷¹ In *Grimm*, the Supreme Court would have faced this issue directly once again, in the first case since *Price Waterhouse* to pose the question of whether the term “sex” in federal antidiscrimination laws can be reduced to a narrow biological definition.¹⁷² Especially in light of the considerable lower court precedent now resting on the Court’s prior rejection of such a narrow view,¹⁷³ it seems unlikely that the Court would have turned back the clock on such a foundational principle of contemporary sex discrimination law.

167. *Id.* at 1085; *id.* at 1086 (holding that the term “sex” “should be given a narrow, traditional interpretation, which would also exclude transsexuals”).

168. 490 U.S. 228 (1989).

169. *Id.* at 255.

170. See G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 727 (4th Cir. 2016) (Davis, J., concurring) (citing cases), *vacated and remanded in part*, ___ S. Ct. ___ (2017) (mem.), 2017 WL 855755. As the Fourth Circuit recently noted, “the weight of circuit authority” rejects such a narrow biological interpretation of the term “sex” and holds that discrimination against transgender individuals constitutes discrimination on the basis of sex. *Id.* *But see id.* at 736–37 (Niemeyer, J., dissenting) (arguing that the term “sex” in Title IX means “the physiological distinctions between males and females”); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) (holding that “discrimination against a transsexual based on the person’s status as a transsexual is not discrimination because of sex under Title VII”); *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015) (citing *Etsitty*, 502 F.3d at 1221).

171. See, e.g., *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (“[W]e find that the district court erred in relying on a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection.”); *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) (“[T]he initial judicial approach taken in [such] cases . . . has been overruled by the language and logic of *Price Waterhouse*.”).

172. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 369 (2016) (mem.), 2016 WL 4565643, at *1.

173. See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011); *Smith*, 378 F.3d at 572; *Fabian v. Hospital of Central Connecticut*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016).

E. Claims That Exclusionary Policies Reflect Biology, Not Bias

As the marriage cases show, biological arguments provide a way to gloss over the complex histories that have shaped institutions such as marriage and gender-segregated restrooms.¹⁷⁴ Acknowledging those histories would require equality opponents to concede that those institutions did not simply fall from the skies, but rather have been shaped by changing cultural and legal norms. In turn, such a concession would require them to defend their normative vision of how those institutions should be structured—and in particular, to explain why the exclusion of same-sex couples or transgender people is justified. Instead, equality opponents invoke biology in order to bypass the need for such explanations. Rather than offering substantive justifications for limiting marriage only to male-female couples or for requiring transgender people to use separate restrooms, they tell a timeless “origin story” that—no matter how dubious as a historical matter—resonates with deeply held popular beliefs about purportedly “natural” differences between men and women.¹⁷⁵

1. Biological Justifications for State Marriage Bans

For supporters of state marriage bans, that origin story was simple: marriage exists because “sex between men and women makes babies.”¹⁷⁶ According to this view, laws barring same-sex couples from marriage merely reflected the biological reality that men impregnate women through sexual intercourse. As a New Jersey Superior Court judge explained, “[p]rocreative heterosexual intercourse is and has been historically through all times and cultures an important feature of [the] privileged status [of marriage], and that characteristic is a fundamental originating reason why the [s]tate privileges marriage.”¹⁷⁷

174. See text accompanying *infra* notes 194–95.

175. See text accompanying *infra* notes 190–91.

176. Maggie Gallagher, *What Marriage Is For*, WKLY. STANDARD, Aug. 4–Aug. 11, 2003, at 22.

177. *Lewis v. Harris*, 875 A.2d 259, 276 (N.J. Super. Ct. App. Div. 2005) (Parrillo, J., concurring), *aff'd as modified*, 908 A.2d 196 (N.J. 2006); see also *In re Marriage Cases*, 183 P.3d 384, 430 (Cal. 2008) (describing and rejecting the argument that “because only a man and a woman can produce children biologically with one another, the constitutional right to marry necessarily is limited to opposite-sex couples”), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 (2008); *Morrison v. Sadler*, 821 N.E.2d 15, 25–26 (Ind. Ct. App. 2005) (“The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed.”). Before *Obergefell*, some state courts also invoked this view of marriage to invalidate the marriages of transgender people. See, e.g., *In re Estate of Gardiner*, 42 P.3d 120, 121 (Kan. 2002) (“A traditional marriage is the legal relationship between a biological man and a biological woman for the discharge to each other

In these and other cases, those defending marriage bans argued that laws barring same-sex couples from marriage were not based on bias or animus against gay people, but rather simply reflected the biological realities of procreation.¹⁷⁸ In the words of one state supreme court justice, “[t]he ancient definition of marriage as the union of one man and one woman has its basis in biology, not bigotry.”¹⁷⁹ In briefs as well as public arguments, defenders of “traditional” marriage argued that their goal was simply to preserve the defining link between marriage and biological procreation, not to discriminate against same-sex couples whose exclusion from the freedom to marry was purportedly merely incidental to that goal.¹⁸⁰

At least initially, some courts agreed. For example, in *Hernandez v. Robles*,¹⁸¹ the New York Court of Appeals held that same-sex couples could be excluded from marriage based on their inability to procreate through sexual intercourse.¹⁸² The court explained,

Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. Despite the advances of science, it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman, and the Legislature could find that this will continue to be true.¹⁸³

Ultimately, however, most courts—including the U.S. Supreme Court—rejected this ahistorical account of marriage, recognizing that it bore little if any resemblance to the rich, varied, and ongoing evolution

and the community of the duties legally incumbent on those whose relationship is founded on the distinction of sex.”).

178. See, e.g., Brief for the Respondents (No. 14-571), *supra* note 68, at 43–46; Brief of Amicus Curiae Idaho Governor C.L. “Butch” Otter, *supra* note 68, at 9–10.

179. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 516 (Conn. 2008) (Zarella, J., dissenting).

180. Brief for the Respondents (No. 14-571), *supra* note 68, at 42–43 (“Michigan’s marriage laws are focused on the unique capacity of opposite-sex couples to procreate, not animus toward same-sex couples.”); Brief of Amicus Curiae Idaho Governor C.L. “Butch” Otter, *supra* note 68, at 9–10; see *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015). Of course, some defenders of state marriage bans openly conceded that the true purpose of such bans was to favor opposite-sex couples. See, e.g., George W. Dent, Jr., *Straight Is Better: Why Law and Society May Justly Prefer Heterosexuality*, 15 TEX. REV. L. & POL. 359, 409–11 (2011).

181. 855 N.E.2d 1 (N.Y. 2006).

182. *Id.* at 7.

183. *Id.* State supreme courts in Washington and Maryland agreed, issuing similar opinions accepting the view that marriage is defined by its link to heterosexual procreation. *Andersen v. King Cty.*, 138 P.3d 963, 982 (Wash. 2006); *Conaway v. Deane*, 932 A.2d 571, 621 (Md. 2007), *opinion extended after remand*, No. 24-C-04-005390, 2008 WL 3999843 (Md. Cir. Ct. Jan. 7, 2008).

of marriage as a legal and social institution over time and across different cultures.¹⁸⁴ In *Obergefell*, the Supreme Court addressed this issue directly, noting that marriage “has not stood in isolation from developments in law and society,” but “has evolved over time.”¹⁸⁵ The Court especially emphasized how profoundly marriage has altered in response to the changing “role and status of women[,]” including the abolition of coverture.¹⁸⁶ The Court further noted that “[t]hese and other developments . . . worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential.”¹⁸⁷ Such a view is far removed from attempts to portray marriage as a timeless, cross-cultural vehicle for channeling biological procreation.

2. Biological Justifications for Laws and Policies Barring Transgender Persons from Shared Restrooms

Today, transgender equality opponents seek to rely on a similarly timeless and universal tale about the supposedly biological origins of gender-separated restrooms. In this account, gender-separated bathrooms are simply the natural reflection of the physiological differences between men and women.¹⁸⁸ Because men and women have different bodies, this story goes, they require different restrooms. In *Grimm*, for example, the Fourth Circuit upheld the guidance issued by the Department of Education and the Department of Justice requiring schools to permit transgender students to use the same restrooms that corresponds with their gender identities.¹⁸⁹ A dissenting judge, however, disagreed, citing the supposedly universal history of gender-segregated

184. *Varnum v. Brien*, 763 N.W.2d 862, 883–84 (Iowa 2009) (noting the multiple purposes of marriage under contemporary marriage laws); *In re Marriage Cases*, 183 P.3d 384, 427–28 (Cal. 2008) (recognizing that marriage serves multiple purposes and must be understood in light of changing social and legal views of gay people), *superseded by constitutional amendment*, CAL. CONST. art. I § 7.5 (2008); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 481–82 (Conn. 2008) (explaining that courts must take into account social changes including evolution in the “conventional view” of marriage).

185. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015).

186. *Id.*

187. *Id.*

188. See, e.g., Maya Rhodan, *Why Do We Have Men’s and Women’s Bathrooms Anyway?*, TIME (May 16, 2016), <http://time.com/4337761/history-sex-segregated-bathrooms/> [<http://perma.cc/AQ3C-NQKL>] (describing the widely held belief that the existence of separate restrooms for men and women reflects “basic biological differences”); Frank Turek, Commentary, *Six Reasons North Carolina Got It Right*, ONENESSNOW (Mar. 30, 2016), <https://www.onenewsnw.com/perspectives/guest-commentary/2016/03/30/six-reasons-north-carolina-got-it-right> [<http://perma.cc/7VTL-KHS7>] (“The reason we’ve always had separate bathrooms is because of biological sexual differences, not because of feelings or ‘gender identity.’”).

189. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016), *vacated and remanded in part*, ___ S. Ct. ___ (2017) (mem.), 2017 WL 855755.

restrooms: “Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females.”¹⁹⁰

In fact, as scholars from a variety of disciplines have documented, this ahistorical narrative ignores the evolving legal and cultural norms that have shaped the modern conception of public restrooms.¹⁹¹ Gender-separated restrooms have not been a universal feature either of all other cultures across time or of our own culture. In this country, Massachusetts passed the first law mandating gender-segregated restrooms in 1887.¹⁹² By 1920, forty-three other states had followed suit.¹⁹³ Along with related laws providing separate reading rooms for women in libraries and separate cars for women in public trains, these laws were based on now discredited beliefs about women’s inherent fragility, modesty, and need for shelter from men.¹⁹⁴ Like regulations limiting the hours that women could work and the types of jobs they could hold, laws mandating separate restrooms reflected widespread cultural anxieties about the entry of women into public workplaces.¹⁹⁵ Far from simply reflecting biological differences between the sexes, these laws were “deeply bound up with early nineteenth century moral ideology concerning the appropriate role and place for women in society.”¹⁹⁶

Recognizing that gender stereotypes have played a powerful role in the history of gender-segregated restrooms does not necessarily compel their abolition any more than recognizing the history of gender inequality in marriage compelled the elimination of marriage as legal

190. *Id.* at 734 (Niemeyer, J., dissenting).

191. See, e.g., Kathryn H. Anthony & Meghan Dufresne, *Potty Privileging in Perspective: Gender and Family Issues in Toilet Design*, in *LADIES AND GENTS: PUBLIC TOILETS AND GENDER* 48, 48–55 (Olga Gershenson & Barbara Penner eds., 2009); Olga Gershenson, *The Restroom Revolution: Unique Toilets and Campus Politics*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING* 191, 199–202 (Harvey Molotch & Laura Norén eds., 2010). As sociologist Erving Goffman long ago noted, “[t]he *functioning* of sex-differentiated organs is involved, but there is nothing in this functioning that *biologically* recommends segregation; that arrangement is totally a cultural matter.” Erving Goffman, *The Arrangement Between the Sexes*, 4 *THEORY & SOC’Y* 301, 316 (1977).

192. Act of Mar. 24, 1887, ch. 103, § 2, 1887 Mass Acts, 668, 669; Terry S. Kogan, *Sex-Separation in the Public Restrooms: Law, Architecture, and Gender*, 14 *MICH. J. GENDER & L.* 1, 15 (2007).

193. Kogan, *supra* note 192, at 39. See, e.g., Act of May 25, 1887, ch. 462, § 13, 1887 N.Y. Laws 575, 577; Act of June 3, 1893, No. 244, § 10, 1893 Pa. Laws, 276, 278.

194. Kogan, *supra* note 192, at 30–32.

195. *Id.* at 50.

196. *Id.* at 55.

institution. Rather, just as eliminating gender inequality in marriage has strengthened marriage as an institution, eliminating discrimination against transgender people is compatible with the continued existence of gender-segregated restrooms. By acknowledging that institutions such as marriage and gender-segregated restrooms are shaped by evolving legal and cultural norms, courts can fulfill their constitutional role of ensuring that when the government restricts equal access to important social institutions, it has sufficient justifications for doing so.¹⁹⁷ Where no sufficient justifications exist, such restrictions violate the requirement of equal protection and must be struck down.¹⁹⁸ In contrast, claims that such institutions merely reflect biological realities improperly insulate such restrictions from meaningful review. Such claims mask the social and legal choices that privilege certain groups and harm others by falsely portraying those choices as neutral biological imperatives.

Similar to the argument that marriage bans did not discriminate against gay couples but merely reflected the biological reality of procreation, those seeking to defend policies that require individuals to use restrooms corresponding to their “biological sex” contend that such policies do not intentionally discriminate against transgender people, but merely reflect the biological reality of sexual difference.¹⁹⁹ According to this view, restricting access to restrooms based on biological differences between men and women does not amount to discrimination. Although such policies would exclude many transgender people from using

197. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015). The Court explained in *Obergefell*,

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. . . . it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. . . . History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.

Id. (citing *Lawrence v. Texas*, 539 U.S. 558, 572 (2003); *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

198. See, e.g., *United States v. Virginia*, 518 U.S. 515, 533–34 (1996) (holding that the Commonwealth of Virginia lacked a sufficient justification for excluding women from the Virginia Military Institute); *Romer v. Evans*, 517 U.S. 620, 631 (1996) (holding that Colorado lacked a sufficient justification for excluding gay persons from “protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society”); *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding that Texas lacked a sufficient justification for excluding undocumented children from public schools); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that states lack a sufficient justification for excluding black children from the same public schools attended by white students).

199. See, e.g., ‘*Myths vs Facts*’ About House Bill 2 Released by NC Gov. Pat McCrory’s Office, *supra* note 160 (noting efforts by proponents of H.B. 2 to describe the legislation as a “common sense” measure).

restrooms consistent with their identities as men or women, those who support them claim that they are not intended to discriminate, and that their negative impact on transgender people is merely an incidental effect of a neutral biology-based rule.²⁰⁰

In short, by casting gender-segregated restrooms as a mere reflection of biological truths, opponents of transgender equality seek to insulate certain laws and policies—such as those basing restroom access on a person’s “biological sex”—from any meaningful scrutiny. But just as the Supreme Court ultimately recognized that appeals to biology could not justify laws excluding same-sex couples from marriage, it is likely that most courts will recognize that such appeals also cannot justify discrimination against transgender people in restrooms. Already, a growing number of courts have recognized that the question of how to incorporate transgender people within our culturally dominant system of gender-segregated restrooms is a real question that deserves serious consideration.²⁰¹ And because gender-segregated restrooms are not simple reflections of biology, it cannot be answered simply by pointing to the physiological differences between men and woman.

F. *Claims That Exclusionary Policies Protect Women*

Proponents of biology-based arguments about marriage and gender-segregated restrooms also frequently argue that maintaining a discriminatory exclusion is justified by the gender-based vulnerability of women and girls. For example, defenders of state marriage bans often portrayed women as uniquely vulnerable based on their biological ability to become pregnant and give birth.²⁰² Because of that biological vulnerability, they argued, women require protection from being

200. See, e.g., Bd. of Educ. of Highland Local Sch. Dist.’s Response in Opposition to Intervenor Third-Party Plaintiffs’ Motion for Preliminary Injunction at 13, Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ., No. 2:16-cv-00524-ALM-KAJ (S.D. Ohio Sept. 6, 2016), ECF No. 61; Defendant Patrick L. McCrory’s Initial Response in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 10–11, Carcaño v. McCrory, 203 F. Supp. 3d 615 (M.D.N.C. 2016).

201. See, e.g., G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 721–22 (4th Cir. 2016), *vacated and remanded*, ___ S. Ct. ___ (2017) (mem.), 2017 WL 855755; Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ., No. 2:16-cv-00524, 2016 WL 5372349, at *3–4 (S.D. Ohio Sept. 26, 2016); Whitaker v. Kenosha Unified Sch. Dist., No. 1 Bd. of Educ., No. 2:16-cv-00943-PP, 2016 WL 5376330, at *9–15 (E.D. Wis. Sept. 25, 2016).

202. See, e.g., Brief of Amici Curiae for 100 Scholars of Marriage in Support of Respondents at 22, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574) (arguing that the primary purpose of marriage is to ensure that men do not abandon their children and leave women to raise them alone); Brief of Amicus Curiae Idaho Governor C.L. “Butch” Otter, *supra* note 68, at 13–14 (arguing that limiting marriage to opposite-sex couples is needed to protect women who become pregnant through heterosexual intercourse and to “encourage the father to stick around”).

harmed by men who—absent the pressure to marry—would not take responsibility for the children they father.²⁰³ In its most robust and far-fetched formulation, this argument claimed that permitting same-sex couples to marry would deter men from taking responsibility for children and fatally undermine the link between marriage and procreation, effectively destroying marriage as a viable institution.²⁰⁴ In *Obergefell*, for instance, those defending state marriage bans contended that “licensing same-sex marriage severs the connection between natural procreation and marriage.”²⁰⁵

Similarly, defenders of policies that exclude transgender people from restrooms often portray women and girls as uniquely biologically vulnerable to sexual predation and harassment, while portraying men as inherently more violent and dangerous.²⁰⁶ Proponents of this view claim that permitting transgender people to use restrooms based on their gender identity will render women and girls more vulnerable to sexualized, gender-based violence.²⁰⁷ Generally, they do not contend that transgender women pose a threat to others. Rather, the argument is that permitting transgender people to use shared restrooms is such a radical alteration of current biology-based norms that it effectively destroys the very institution of gender-segregated restrooms, opening the door to men masquerading as women (or falsely claiming a

203. Brief for 100 Scholars of Marriage as Amici Curiae Supporting Respondents, *supra* note 202, at 21 (suggesting that marriages of opposite-sex couples are directly responsible for “lower rates of fatherlessness”); Brief of Amicus Curiae Idaho Governor C.L. “Butch” Otter, *supra* note 68, at 13–14.

204. See, e.g., *Latta v. Otter*, 771 F.3d 456, 468–69 (9th Cir. 2014) (describing “claim that same-sex marriage will undermine . . . norms [that] . . . encourage people in opposite-sex relationships to place their children’s interests above their own and preserve intact family units, instead of pursuing their own emotional and sexual needs elsewhere” and “will adversely affect opposite-sex marriage by reducing its appeal to heterosexuals, and will reduce the chance that accidental pregnancy will lead to marriage”); Gallagher, *supra* note 176 (claiming that permitting same-sex couples to marry “would enshrine in law a public judgment that the desire of adults for families of choice outweighs the need of children for mothers and fathers” and “put our most basic social institution at risk”).

205. *Obergefell*, 135 S. Ct. at 2606–07.

206. See Candice Norwood, *Bathroom Bills: Yet Another Attempt to Use Women as a Shield for Discrimination*, VOX (Apr. 20, 2016, 9:20 AM), <http://www.vox.com/identities/2016/4/20/11420950/womens-safety-bathroom-bills> [<http://perma.cc/YK3T-79KP>].

207. See Jeff Brady, *When a Transgender Person Uses a Public Bathroom, Who Is at Risk?*, NPR (May 15, 2016, 7:48 AM), <http://www.npr.org/2016/05/15/477954537/when-a-transgender-person-uses-a-public-bathroom-who-is-at-risk> [<http://perma.cc/8W46-PJ8C>] (reporting that one pastor suggested that a transgender woman might want to use the women’s restroom “to look at the anatomy of the opposite sex . . . because he’s a sex pervert . . . [seeking] to bring damage to a young girl”); Katy Steinmetz, *Why LGBT Advocates Say ‘Predators’ Argument Is a Red Herring*, TIME (May 2, 2016), <http://time.com/4314896/transgender-bathroom-bill-male-predators-argument/> [<http://perma.cc/XBH3-WTHE>].

transgender identity) in order to gain access to women’s restrooms for improper purposes.²⁰⁸

In the marriage cases, most courts ultimately rejected arguments based on the supposed vulnerability of women and children.²⁰⁹ These courts held that permitting same-sex couples to marry furthered the core purposes of marriage—including encouraging couples that have children to enter into a committed family relationship.²¹⁰ They rejected the notion that giving equal protection to children of same-sex couples would somehow undermine the connection between marriage and children, dismissing such fears as irrational: “It is wholly illogical,” one court observed, “to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples.”²¹¹ As the Supreme Court held in *Obergefell*, those asserting such claims “have not shown a foundation for the conclusion that allowing same-sex marriages will cause the harmful outcomes they describe.”²¹²

Similarly, it is likely that most courts will reject the equally unfounded fear that treating transgender people equally will bring an

208. See, e.g., Bd. of Educ. of Highland Local Sch. Dist.’s Response in Opposition to Intervenor Third-Party Plaintiffs’ Motion for Preliminary Injunction, *supra* note 200, at 22 (claiming that a school district “has an important interest in preventing biological males from professing a female gender identity in order to enter female restrooms and locker rooms for nefarious purposes”). In reality, however, this fear is unwarranted. Opponents have failed to show any increase in public safety concerns in the many jurisdictions that protect transgender people. See, e.g., Emanuella Grinberg & Dani Stewart, *3 Myths That Shape the Transgender Bathroom Debate*, CNN (Mar. 7, 2017, 9:19 PM), <http://www.cnn.com/2017/03/07/health/transgender-bathroom-law-facts-myths/> [<https://perma.cc/4XW6-LFTN>] (disproving claims that anti-discrimination protections covering gender identity “lead to attacks in public facilities”). In contrast, studies have shown that transgender people are much more likely than others to be harassed in public restrooms. See Brady, *supra* note 207.

209. See, e.g., *Latta v. Otter*, 771 F.3d 456, 476 (9th Cir. 2014) (rejecting arguments suggesting “children of opposite-sex couples will be harmed” by same-sex marriages); *Kitchen v. Herbert*, 755 F.3d 1193, 1225 (10th Cir. 2014) (“We cannot embrace the contention that children raised by opposite-sex parents fare better than children raised by same-sex parents . . .”).

210. See *Obergefell*, 135 S. Ct. at 2600; *Latta*, 771 F.3d at 473–74 (explaining that allowing same-sex couples to marry provides resources and benefits to those families); *Kitchen*, 755 F.3d at 1226 (explaining how marriage benefits children and how allowing same-sex couples to enter into marriage would provide the children of same-sex couples with financial and emotional security).

211. *Kitchen*, 755 F.3d at 1223. In the federal district court decision striking down Proposition 8 in California, the judge similarly found that barring same-sex couples from marriage “does not make it more likely that opposite-sex couples will marry and raise offspring biologically related to both parents.” *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 999–1000 (N.D. Cal. 2010), *aff’d sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

212. *Obergefell*, 135 S. Ct. at 2607.

end to gender-segregated restrooms. While some advocates have urged that many people (both transgender and non-transgender) would benefit from the availability of more gender-neutral restrooms,²¹³ transgender men and women generally seek to be integrated into gender-segregated restrooms, not to abolish them.²¹⁴ Moreover, they seek to do so on the same terms and conditions as others.²¹⁵ In practice, schools, businesses, and employers do not require non-transgender persons to produce birth certificates, medical records, or other evidence of their gender; rather, in everyday life, individuals simply use the restrooms that correspond to their lived identity as male or female. Transgender persons generally wish to do the same—to be treated as the men and women they are.

In addition, just as any attempt to restrict marriage to persons capable of biological procreation would create untenable—and blatantly unconstitutional—intrusions into private matters, so any attempt to restrict access to restrooms based on so-called “biological sex” would do the same. In the marriage cases, courts noted that neither the ability nor the desire to procreate has ever been a prerequisite for marriage.²¹⁶ Further, imposing any such requirement would impermissibly burden the privacy rights of individuals and couples, requiring unthinkable governmental intrusions into the most personal and sensitive areas of medical and decisional privacy.²¹⁷

In the restroom cases, courts have recognized that litmus tests based on so-called “biological sex” would create similar problems. In a recent decision holding that public schools must permit transgender students to use the same restrooms as other students, the Fourth Circuit noted that a rule restricting access to gender-segregated restrooms based on a person’s “biological sex” would raise a number of questions.²¹⁸ For instance, “which restroom would a transgender individual who had

213. See generally Kogan, *supra* note 6 (manuscript at 131–35) (discussing recent proposals for gender neutral restrooms).

214. See, e.g., Carcaño v. McCrory, 203 F. Supp. 3d 615, 622 (M.D.N.C. 2016) (“All parties agree that sex-segregated bathrooms, showers, and changing facilities promote important State privacy interests, and neither Plaintiffs nor the United States contests the convention.”).

215. See, e.g., Corrected Brief of Plaintiff-Appellant at 20, G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016) (No. 15-2056) (arguing to use the restroom “just like any other boy would”), *vacated and remanded in part on other grounds*, ___ S. Ct. ___ (2017) (mem.), 2017 WL 855755; Editorial Board, *For Transgender Americans, Legal Battles over Restrooms*, N.Y. TIMES (July 27, 2015), <https://www.nytimes.com/2015/07/27/opinion/for-transgender-americans-legal-battles-over-restrooms.html> [<https://perma.cc/N3X5-5SRP>] (quoting Grimm’s statement that being able to use the same restrooms as other boys would allow him to “be a normal child and use the restroom in peace”).

216. See *Kitchen*, 755 F.3d at 1219.

217. *Id.* at 1222.

218. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 719–20 (4th Cir. 2016), *vacated and remanded in part on other grounds*, ___ S. Ct. ___ (2017) (mem.), 2017 WL 855755.

undergone sex-reassignment surgery use? What about an intersex individual? What about an individual born with X-X-Y sex chromosomes? What about an individual who had lost external genitalia in an accident?”²¹⁹ Moreover, any attempt to enforce such tests would run into serious constitutional problems, exposing individuals to untenable infringements of privacy and dignity.²²⁰

CONCLUSION

Just as most courts eventually rejected similar biology-based claims in the marriage cases, most are likely to reject them in transgender cases as well. Such claims may resonate with deeply held popular beliefs; ultimately, however, they serve only to insulate exclusionary policies from meaningful review and to obscure the actual choices and values that underlie decisions to limit access to important social institutions to certain groups. In schools, workplaces, and the public square, equal access to public restrooms is a precondition of full participation in our shared communal life. So long as transgender people are denied that equal access, they cannot participate in the larger society on equal terms. That inequality is not caused by biology, but by the choice to treat transgender persons differently than others.

The alternative—to relegate transgender people to separate restrooms—is as untenable as the now-rejected proposal to relegate same-sex couples to a separate family law status other than marriage. In both debates, those defending exclusionary policies argued that because same-sex couples and transgender people differ from opposite-sex couples and cisgender persons with respect to certain biological traits, they should be given separate accommodations. In the marriage cases, several states defended the provision of a separate legal status for same-sex couples, arguing that states should be permitted to reserve the institution of marriage for different-sex couples while providing a

219. *Id.* at 719–20.

220. See *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374 (2009) (holding that school’s strip search of student was unreasonable); *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 498 (6th Cir. 2008) (holding that school’s videotaping of students in locker room violated the Fourth Amendment). Some opponents of transgender equality argue that permitting transgender students to use the same communal restrooms as others would violate the privacy rights of other students. See, e.g., Duaa Eldeib, *Judge Sides Against Parents Who Want to Ban Transgender Student from Locker Room in District 211*, CHI. TRIB. (Oct. 16, 2016, 6:55 AM), <http://www.chicagotribune.com/news/local/breaking/ct-transgender-student-locker-room-palatine-20161018-story.html> [<https://perma.cc/V9T5-SBA4> (staff-uploaded archive)]. For a response to those arguments, see Brief of Amici Curiae GLBTQ Legal Advocates & Defenders et al. in Support of Respondent at 4–6, *Gloucester Cty. Sch. Bd. v. G.G.*, ___ S. Ct. ___ (2017) (mem.) (No. 16-273), 2017 WL 855755.

separate and yet substantively equal legal status for same-sex couples.²²¹ But as courts recognized, relegating same-sex couples to a separate status is inherently unequal.²²²

Similarly, in *Grimm* and many of the other pending cases involving transgender students, school districts and those challenging equal restroom policies argue that they should be permitted to provide transgender students with separate facilities and that doing so is sufficient to meet the requirement of equal protection.²²³ The arguments against such an approach are similar to those against civil unions and domestic partnerships: such a “solution” imposes inequality and stigma by singling out transgender students for disparate treatment based on a characteristic that has no relevance to their ability to use the same restrooms as others, or more broadly, to participate in public life on equal terms.

Perhaps in the not-too-distant future, the notion that our nation once seriously debated whether to permit schools, employers, and businesses to isolate transgender persons and treat them differently than others will seem as antiquated to future generations as the marriage equality debate seems to many young people today. If so, both our nation and our democracy will be stronger for it.

221. See, e.g., *In re Marriage Cases*, 183 P.3d 384, 398 n.2 (Cal. 2008) (“[C]urrent California statutes grant same-sex couples who choose to become domestic partners virtually all of the legal rights and responsibilities accorded married couples under California law.”), *superseded by constitutional amendment*, CAL. CONST., art. I, § 7.5 (2008); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 413 (Conn. 2008) (noting enactment of law “established the right of same sex partners to enter into civil unions and conferred on such unions all the rights and privileges that are granted to spouses in a marriage”).

222. As the Connecticut Supreme Court explained in *Kerrigan*,

[w]e do not doubt that the civil union law was designed to benefit same sex couples by providing them with legal rights that they previously did not have. If, however, the intended effect of a law is to treat politically unpopular or historically disfavored minorities differently from persons in the majority or favored class, that law cannot evade constitutional review under the separate but equal doctrine.

Kerrigan, 957 A.2d at 418; see also *In re Marriage Cases*, 183 P.3d at 444–46.

223. See, e.g., Petition for Writ of Certiorari at 35–38, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, __ S. Ct. __ (2017) (mem.) (No. 16-273), 2017 WL 855755; Bd. of Educ. of Highland Local Sch. Dist.’s Response in Opposition to Intervenor Third-Party Plaintiffs’ Motion for Preliminary Injunction, *supra* note 200, at 22.