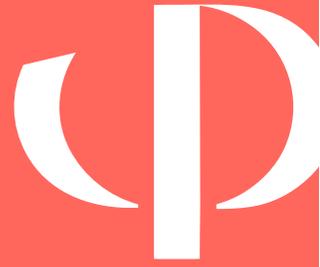


LGBTQ Issues in Philosophy



FALL 2017

VOLUME 17 | NUMBER 1

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CALL FOR PAPERS

Potty Humors: Melancholic and Choleric Presidents, Sclerotic Voters, and the Federal Courts on Title IX in School Bathrooms

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Bathroom bills and other transphobic legislative measures have become, as many have observed, the latest battleground in social conservatives' efforts to regain some of the lost ground in the marriage equality war. It is an odd and ultimately quixotic enterprise in a culture that becomes increasingly secular as a direct result of these misguided efforts to impose a loosely evangelical Christian religious orthodoxy on public policy. Just as newspapers are now reporting increasing acceptance of same-sex marriage even among conservative communities, the day will come when there is broad acceptance of the moral legitimacy

of trans identity. Politically engaged social conservatives ultimately hasten that evolution by drawing increased attention to their mean-spirited targeting of a long-abused “discrete and insular” minority.¹

In the meantime, however, there is a serious question as to just how far the targeting efforts might go, and how prolonged they might be with respect to our legal environment, especially with the current ascendancy of Trumpism: an unreflective (and largely headless) lashing out at “others” as the alleged sources of social ills. As is becoming increasingly apparent, Donald Trump’s impulsive populist demagoguery is more a reflection of such attitudes embedded in a fearful, insular, and equally unreflective segment of the electorate, than their root cause. (Trump’s rhetoric, however, together with that of increasingly right-wing Republicans, certainly fans the flames and reaffirms these attitudes). To what extent might our social institutions put the brakes on transphobic legislative excesses in the meantime?

In this article I review the three most widely publicized recent developments in this area with regard to the legal landscape, and what they might portend in the near term: (1) North Carolina’s “bathroom bills”; (2) the Obama Administration’s interpretation of Title IX’s mandate for non-sex-discriminatory policies in educational institutions, its fallout in Gavin Grimm’s Fourth Circuit case, and in the preliminary injunction issued by a Texas federal district court judge; and (3) Jeff Sessions’s reversal of the Obama Administration’s Title IX interpretation, in his capacity as Donald Trump’s attorney general. (This was almost certainly done at Sessions’s own initiative. Trump himself appears to be indifferent to policy questions governing sex and gender, except to the extent that they afford him opportunities to score points with Republican lawmakers and conservative voters who Trump and his acolytes assume to be ripe for endless manipulation.)

I. NORTH CAROLINA’S H.B. 2 AND H.B. 142

In the short run, the news is not good. This is particularly in evidence in the North Carolina case, where newly elected Democratic Governor Roy Cooper signed H.B. 142 into law to replace H.B. 2, the original product of the state’s Republican legislature, which incurred so much popular antipathy and corporate retaliation. Despite campaigning against incumbent Republican Pat McCrory with a promise to repeal that odious bill, Cooper signed a replacement bill, also crafted by the Republican legislature, which was arguably just as bad.

The original provocation for H.B. 2 was a Charlotte municipal ordinance that prohibited LGBTQ discrimination within the city’s borders. H.B. 2 nullified this particular ordinance and any other local ordinance that might provide greater protection than state law did. This was on top of the more famously notorious element of H.B. 2: requiring that individuals had to use public multiple-occupancy restrooms that corresponded to their “biological sex” as listed on their birth certificates, a provision that applied not just to highway rest stops and facilities in government office buildings, but also in public K-12 schools and universities. The replacement bill modifies this practice in name, but

not in deed. Instead of ordering *individuals* to conform to prescribed bathroom behavior by requiring state agencies to enforce anti-trans usage policies in all multiple-occupancy bathrooms, the legislature’s new dispensation prohibits state *agencies*, all the way down to local boards of education, from regulating “access to multiple occupancy restrooms, showers, or changing facilities.” So, in the event of public hostility towards trans users of multiple-occupancy bathrooms, of *any* kind, the agencies that function as the custodians of those bathrooms have to await permission to institute protective policies. Such permission is unlikely to be granted in the foreseeable future in North Carolina’s overtly transphobic, heavily Republican, and heavily gerrymandered, state legislature.

Even more critically, because more broadly, the new legislation imposes a ban on any future local ordinances or administrative initiatives designed to protect LGBTQ residents against any employment or public accommodation discrimination. Under H.B. 142, this ban, which didn’t exist prior to H.B. 2, will be in force through 2020, with the potential for future extensions by a hostile state legislature. In other words, just for starters, advocates of local anti-discrimination measures are being asked to wait for permission *for almost four years*.

This last feature of the bill may prove its eventual downfall in the federal courts. On April 14, 2017, Jeff Sessions, behaving true to form, dropped the federal suit against H.B. 2 instituted nearly a year earlier by Loretta Lynch on behalf of the Obama Administration, on the specious excuse that the lawsuit was now irrelevant, since the North Carolina legislature had nullified H.B. 2, even though H.B. 142 bears many of the same constitutional defects. Joaquin Carcaño and his fellow citizen plaintiffs, with the support of the ACLU and Lambda Legal, have already filed notice, on April 28, 2017, that they will amend their previous complaint to replace H.B. 2 with H.B. 142.²

The central difficulty for the North Carolina legislature, as I see it, is that this kind of preemptively anti-democratic move by a state government has already been litigated unsuccessfully before the US Supreme Court in *Romer v Evans*,³ more than two decades ago. There the issue was a 1992 amendment to the Colorado State Constitution: “Neither the state nor its subdivisions could enact or enforce any ‘statute, regulation, ordinance or policy’ according anti-discrimination protection to lesbians, gay men or bisexuals.” The Court’s decision turned partly on the inability of Amendment 2 to satisfy even the low-level deferential rational basis standard of judicial review, and partly on its anti-democratic nature. In his majority opinion, Anthony Kennedy framed the issue in this way:

[The amendment’s] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests. . . . The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. . . . A law declaring that in general

it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. . . . A State cannot so deem a class of persons a stranger to its laws. (*Romer v. Evans*, 633, 635)

It is just conceivable, I suppose, that today's Court might circumvent applying the rational basis standard to H.B. 142's targeting of trans-identified individuals' access to public accommodations for the exercise of basic bodily functions, if it chooses to buy into the fiction that H.B. 142 doesn't actually do that because, unlike H.B. 2, the new bill no longer overtly prohibits individual choice of most appropriate public access multiple-occupancy bathrooms. But even then it is unlikely that the Court would regard a bill that excludes LGBTQ individuals generally from access to democratic means of vindicating their equal protection rights at the local level for such a prolonged (and potentially indefinite) period as constitutionally permissible. To do otherwise would be to reverse the *Romer* precedent.

II. GAVIN GRIMM AND THE OBAMA ADMINISTRATION'S READING OF TITLE IX'S BATHROOM PROVISION

During the 2013-2014 academic year, his first year in high school, Gavin Grimm began hormone therapy treatment as part of a parentally supported transition to more fully realize his own sense of his true gender identity. When he returned for his sophomore year, school administrators were supportive of Grimm's request to be treated as a boy, allowing him to use the boys' bathrooms at the school. (Locker rooms were not an issue, as Grimm did not participate in the school's physical education program.) This continued without incident for seven weeks, until community members complained to the local school board, which then issued a mid-year directive requiring all students to use bathrooms and locker rooms assigned to their biological sex. For students like Grimm, the board carved out a private bathroom exception: "students with gender identity issues shall be provided an alternative appropriate private facility." This policy, of course, ignores the message it delivers to trans students: that they are freakish anomalies unfit to consort with other students with whom they share a gender identity, a policy which brings racially segregated bathrooms of the Jim Crow era to mind (although the parallels are not identical).

While Grimm and the school administration were trying to accommodate themselves to the new regime, Emily Prince, a D.C.-area trans rights lawyer, wrote to the US Department of Education on December 14, 2014, the day the Gloucester County School Board's new policy went into effect, inquiring as to the DOE's interpretation of the relevant provision of the 1972 Education Amendments to Title IX, which states, "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" (20 U.S.C. §1681(a)). More specifically, the Department of Education's Title IX implementation regulations take this particular Title IX language to require provision for "separate toilet,

locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex" (34 C.F.R. §106.33). So, the relevant question becomes, what does the DOE mean by "sex" in this context?

On January 7, 2015, the DOE's Office for Civil Rights (OCR) issued an administrative opinion letter responding forthrightly to Price's query about how DOE's implementation regulation should apply to transgender individuals: "When a school elects to separate or treat students differently on the basis of sex in those situations [sex-segregated restrooms, locker rooms, shower facilities], a school generally must treat transgender students consistent with their gender identity."⁴ Under this gloss, not previously explicit in DOE regulations, the Gloucester County School Board's bathroom policy was in clear violation of the DOE's understanding of Title IX. On the strength of that interpretation, Deirdre Grimm, Gavin's mother, filed suit on his behalf against the school board in June 2015, at the end of his sophomore year. The suit was based in part on the new Title IX interpretation, a matter of statutory and administrative law, and in part on a constitutional claim under the Fourteenth Amendment's equal protection clause.

In September 2015 Robert Doumar, in the East Virginia Federal District Court, ruled against Grimm's request for a preliminary injunction against the school board's policy on Title IX grounds. Judge Doumar reasoned that Title IX prohibits discrimination on the basis of sex and not on the basis of other concepts such as gender, gender identity, or sexual orientation. In making this argument, he relied on the Department of Education's official implementation language permitting restroom facilities segregated by sex. Doumar argued that the new interpretation of that language issued by the DOE was mistaken, because "on the basis of sex" means, at most, on the basis of sex and gender together, it cannot mean on the basis of gender alone.⁵ This lack of judicial deference to executive branch interpretation of the language of its own administrative law, at the district court level, is quite unusual. The Obama Administration argued that it was merely resolving statutory ambiguity. Finally, exhibiting a lack of imagination and empathy echoed later in the US Supreme Court, Doumar also contended that requiring Grimm to use the unisex restrooms while his lawsuit was pending was not unduly burdensome, that it was at least less burdensome than requiring other students made uncomfortable by his presence in the boys' restroom to themselves use the unisex restrooms. (Doumar did not address Grimm's equal protection claim.)

In its April 2016 review of the District Court dismissal of Grimm's preliminary injunction request, the Fourth Circuit Court remanded the question to the District Court for further consideration, pointing out first that federal courts already have a standard for deference to administrative interpretation of administrative law in place. That standard is articulated in *Auer v. Robbins*, 519 US 452 (1997), which requires that an agency's interpretation of its own ambiguously worded regulations be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute. The Fourth Circuit declined to regard the interpretation as unreasonable:

We conclude that the regulation is susceptible to more than one plausible reading because it permits both the Board’s reading—determining maleness or femaleness with reference exclusively to genitalia—and the Department’s interpretation—determining maleness or femaleness with reference to gender identity.” (*G.G. v. Gloucester Co. School Board* 20)

Conceding that, the Court points out that at least the Obama Administration’s DOE/OCR interpretation has the virtue of providing a clear resolution of the ambiguity, while the School Board’s approach does not:

It is not clear to us how the regulation would apply in a number of situations—even under the Board’s own “biological gender” formulation. For example, which restroom would a transgender individual who had 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 lost external genitalia in an accident?” (*G.G. v. Gloucester Co. School Board* 20)

Paul Niemeyer, the lone Fourth Circuit panel dissenter in this case, argued that the OCR standard would render enforcement of bathroom segregation impossible because it “would require schools to assume gender identity based on appearances, social expectations, or explicit declarations of identity.”⁶ But Henry Floyd, the author of the majority opinion, points out that this is no less true of the board’s standard, despite its vague expression of “amorphous” safety concerns (*G.G.* 25, fn8). If the issue is hypothetical concern about sexual responses “prompted by students’ exposure to the private body parts of students of the other biological sex,” such arguments apply with equal plausibility to the presence of gay and lesbian students in traditionally segregated bathrooms (*G.G.* 28, fn11). In his concurrence, Senior Judge Andre Davis went further, arguing that the Fourth Circuit could itself order a preliminary injunction, instead of remanding (*G.G.* 37, ff.).

On May 13, 2016, shortly after the Fourth Circuit’s remand on the injunction question, the Obama Administration reaffirmed the DOE/OCR Title IX interpretation more formally in a “Dear Colleague” letter issued jointly by the Departments of Justice and Education, again taking the position that the prohibition against discrimination “on the basis of sex” in Title IX’s §1681 requires access to sex-segregated facilities based on gender identity. In light of the Fourth Circuit’s advice, and the Obama Administration’s reaffirmation of its interpretive gloss on Title IX’s sex discrimination language, the Eastern Virginia District Court then reversed itself and granted Gavin Grimm’s preliminary injunction request a month later.

But on August 3, just prior to the start of the 2016-2017 school year the US Supreme Court inserted itself, granting an emergency stay of the District Court’s preliminary injunction against implementation of the school board’s restrictive bathroom policy. Less than three months later, the Court followed this up by granting *certiorari* to review

the policy’s merits, with oral arguments scheduled for March 28, 2018.

III. THE OBAMA ADMINISTRATION’S READING OF TITLE IX AND ORIGINAL INTENT

The Supreme Court may have felt compelled to take up *G.G. v. Gloucester Co. School Board* as much out of concern about jurisdictional conflict between federal courts, as by the dispute actually before it from the Fourth Circuit Court in Richmond, although that was not a formal reason for the Court’s decision to review the case. The reasons explicitly given for that decision were the procedural question: Should the courts accept an executive branch interpretation of administrative law in the form of a “Dear Colleague” letter as authoritative? as well as the substantive question, should this particular interpretation of Title IX’s sex discrimination language be accepted as a reasonable interpretation of the statute? The Supreme Court avoided the more comprehensive challenge from the school board plaintiffs: that the policy of judicial deference to executive branch interpretation of its own regulations set forth in *Auer* should be reversed.

The separate jurisdictional conflict issue arose on August 21, 2016, when Reed O’Connor, a forum-shopped North Texas Federal District Court judge with a prior history of defying the Obama Administration, granted thirteen plaintiff states, state agencies, and school authorities preliminary injunctive relief against Obama Administration’s May 13, 2016, interpretation of Title IX’s mandate for non-sex-discriminatory policies in educational institutions and Title VII’s prohibition of sex discrimination in employment contexts.⁷ O’Connor applied the injunction nationwide, which is a pretty breathtaking scope of authority for a district court to take upon itself, when the complaining parties were confined to thirteen states.⁸

O’Connor granted his injunction partly on procedural grounds concerning inadequate notice by the executive branch, but also, and much more contentiously, on grounds of contradicting existing legislative and regulatory texts concerning the plain meaning of “sex” in Title IX’s (and Title VII’s) language about discriminatory practices. The first of these concerns blends into the second in O’Connor’s language:

Although Defendants have characterized the Guidelines as interpretive, post-guidance events and their actual legal effect prove that they are “compulsory in nature”. . . . The Guidelines are, in practice, legislative rules—not just interpretations or policy statements because they set clear legal standards. As such, Defendants should have complied with the APA’s [Administrative Procedure Act] notice and comment requirement. Permitting the definition of sex to be defined in this way would allow Defendants to “create de facto new regulation” by agency action without complying with the proper procedures. (*Texas v. US* 26-27)

The idea that “merely clarificatory” interpretation of statutory language would not have compulsory legal

consequences, while the Obama Administration's interpretation is "legislative" because the "Plaintiffs . . . are legally affected in a way they were not before . . . the [Obama Administration] issued the [new] Guidelines" (27) is a pretty incoherent contention on its face. Interpretive policies might reasonably be accompanied by grace periods for adjustments, but interpretations with no consequences are pointless.

O'Connor's ruling on the merits of the interpretation is a much more philosophically interesting argument because it invites questions about the appropriateness of interpretive discretion over time. "Auer deference is warranted only when the language of the regulation is ambiguous," O'Connor informs us (*Texas v. US* 30).⁹ But the relevant Title IX DOE implementation language is not ambiguous, in his view: "It cannot be disputed that the plain meaning of the term sex as used in §106.33 when it was enacted by DOE following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth." Since it is unlikely that, back in the early 1970s, either Title IX legislators or Nixon Administration DOE officials ever gave any thought to the idea that gender might be distinct from biological sex or from physical genitalia, O'Connor offers this categorical denial on the strength of what commonly recognized usage would have been at the time: "When a term is not defined, courts may generally give the words their common and ordinary meaning in accordance with legislative intent" (*Texas v. US* 30).

As an interpretive principle, this presumption has its attractions. It gives the appearance of judicial deference to the deliberations of elected officials in the absence of more direct evidence of their intentions, and provides a seemingly neutral substitute for more ideologically motivated opinions that individual judges might otherwise craft. In actuality, it constitutes a socially or politically conservative form of judicial activism disguised as judicial deference. The assertion that legislators thought X, in the absence of any evidence that X even occurred to them, let alone that they endorsed X, is not deference but an expression of judicial preference for X. One of the most notorious problems with original intent is the unreflective presumption that it exists in the first place. Different legislators frequently vote for particular legislative compromises for different reasons, precisely because statutory language almost always *is* a compromise. The idea that there ever was a clearly recognizable underlying intent is just a pious fiction offered as a distraction from the subsequent judicial choices that are actually being made, quite ahistorically, or rather, heavily dependent on the cultural history of the present moment, as it has influenced the judge or judges in question.

O'Connor's decision is a nice illustration of this point. If, contrary to fact, X were to have occurred to legislators or administrative actors of a particular era, how should we expect them to have behaved with regard to X? Bear in mind that the legislators in question were less politically divided than they are today. Both Democrats and Republicans voted for Title IX. Although both houses had Democratic majorities, the Senate supported the Education

Amendments of 1972 overwhelmingly (88-86), and the House of Representatives by a much larger margin than the party split (275-125, where Democrats enjoyed a 255-180 edge). A Republican president signed the bill into law and directed his administration to formulate implementation regulations, including the language at issue in *Texas v. US*. Imagine what might ensue, if the question were framed to Republican executive branch appointees during the pre-Watergate Nixon era, or to the bill's Democratic and Republican legislative authors, in such a way that contemporary cultural attitudes were brought to bear, if they were informed of the view that a sense of one's own gender identity, and consequently one's gender presentation, might not depend exclusively on genitalia. How might they respond to that contention? Would they simply dismiss it out of hand, as Reed O'Connor apparently has done?

It's not actually clear that they would. In the first place, Nixon-era Republicans don't much resemble contemporary Republican legislators or political appointees. The Republican Party of that era was still significantly laced with moderate Nelson Rockefeller Republicans (who are now almost all Democrats). Richard Nixon himself was no Barry Goldwater. The Reagan Administration, and more importantly, the rhetoric of Gingrich's Republican Revolution, and polarizing aspects of both the Bill Clinton and George W. Bush administrations, the extreme gerrymandering of congressional districts, and the unobvious Republican race-baiting rhetoric employed during the Obama years have all contributed to a cesspool of political viciousness that Nixon-era administrative employees or legislators would probably find pretty alien.

In addition to the problem of indulging in culturally ahistorical attributions to people who arguably did not much resemble 2017 Republicans, there is the further question of just how we are to evaluate the hypothetical in question. Should we apply our best guesses about the political sensibilities of earlier Republican administrative appointees directly involved in the crafting of Title IX implementation language? Or should we make such guesses about the political sensibilities of the various legislative factions who supported Title IX in the first place? The latter is a much taller order, and probably not something of which any flesh-and-blood federal judge is actually capable.

And to what should we apply those guesses? Should we rely on early 1970s attitudes about "transsexuals," when the most sympathetic popular view might have been that such individuals were a species of circus freaks burdened with an unfortunate psychological affliction that was more to be pitied than censured? (Thinking about trans identity had not evolved much since Ed Wood's exploitation "documentary" *Glen or Glenda?*, amateurishly but somewhat sympathetically cobbled together twenty years earlier to capitalize on Christine Jorgensen's notoriety.) Or should we ask those administrative appointees or legislators from a bygone era to reflect instead on contemporary accounts of trans identity by contemporary trans theorists like Kate Bornstein, Dean Spade, Shannon Minter, Julia Serano, Rachel McKinnon, and other non-trans-phobic

feminist gender theorists? Somehow, we should then ask these time-traveling legislators or administrators to bring their own political sensibilities to bear on the issue, so understood. Otherwise, the principle of original intent has no traction left.

Of course, this task is impossible. We cannot reliably resurrect the political sensibilities of such people from the cultural graveyard of the early 1970s and apply them to contemporary cultural debates quite alien to that era. But why would it be any more sensible to rely on prevailing attitudes concerning trans-identified individuals from that earlier era? If the *Carolene Products* footnote 4 rhetoric about a judicial responsibility to protect “discrete and insular minorities” from majoritarian tyrannies means anything, as it did in US Supreme Court vindication of the rights of oppressed groups in the 1950s through the 1970s, it means not relying exclusively on hostile majoritarian characterizations of those minorities in the first place. The Warren Court defied prevailing racist sentiment about the intellectual abilities and appropriate social roles for African Americans in *Brown v. Board of Education*, and prevailing sexist sentiment about the proper social roles for women and girls throughout the 1970s. When judges like Reed O’Connor make decisions to reaffirm different majoritarian tyrannies today, they are acting on their own initiative, their own cultural sensibilities, against the principle expressed in *Carolene Products*, not out of judicial deference to the imaginary content of nonexistent original intent of elected officials.

IV. THE PHENOMENON OF NATIONALLY APPLICABLE DISTRICT COURT INJUNCTIONS

O’Connor’s ruling was also noteworthy because despite the social conservatism, and alleged judicial conservatism, of its content, it was strikingly nonconservative in its reach: a district court issuing a nationally applicable injunction. The injunction’s reach was sufficiently unusual that O’Connor had to resort to a 1979 Supreme Court precedent, *Califano v. Yamasaki*,¹⁰ for an alleged authority for such comprehensive action: “Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction” (*Califano v. Yamasaki*, 705).

The question at issue is just how far that jurisdiction extends. O’Connor uses the language of the earlier decision to contend that even a district court could sometimes issue nationally applicable injunctions: “[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.” This is because “federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction” (O’Connor quoting *Califano v. Yamasaki*, 702, 705, at *Texas v. US*, 36). But *Califano* is an implausible precedent for O’Connor’s action for two reasons. First, the injunction applied there covered Hawaii residents only, a region which clearly falls within the Hawaii Federal District Court’s geographic jurisdiction. That court certified a class protected by the injunction consisting of “all social security old age and disability benefit recipients resident in the State of Hawaii, who are being or will be subjected to adjustment

of their social security benefits pursuant to 42 U.S.C. 404 (a) and (b) without adequate prior notice of the grounds for such action and without a prior hearing on disputed issues relating to such actions” (*Califano v. Yamasaki*, 688).

The other sense in which this case is an inappropriate precedent has to do with the line quoted by O’Connor to the effect that injunctive relief is restricted only by the extent of the violation established, not by “the geographical extent of the plaintiff class.” That line concerns the possibility that plaintiffs in a case may be similarly affected because of their activities in multiple jurisdictions, not just the one governed by a particular court, in which case they may also receive protection covered by the injunction in those other jurisdictions.¹¹ That is not the issue in *Texas v. US*, since the actions of school boards, school administrators, and even state legislatures are confined to their own jurisdictions. Thus, *Califano* is a very narrowly tailored precedent for expanding the scope of injunctions beyond the established geographic boundaries of the court issuing the injunction, limited to providing relief on the plaintiff complaint before the court within its customary geographic jurisdiction, and applied in other jurisdictions only to the extent that those local plaintiffs are directly affected in those jurisdictions via the complaint before the court. The plaintiffs themselves are customarily expected to have residence or evidentiary connections to the presiding court’s geographic jurisdiction.

Geographic latitude is not cast more broadly than this because it would otherwise invite forum shopping of precisely the sort that has occurred in *Texas v. US*, where numerous government plaintiffs involved with school jurisdictions far beyond the court’s North Texas boundaries joined the litigation. If such behavior runs unchecked, federal district courts in one part of the country can potentially interfere with higher court deliberations in another part of the country, as was theoretically in play with O’Connor’s injunction with regard to Fourth Circuit deliberations in Richmond on the G.G. case. It would also empower federal district courts to interfere nationally with executive and legislative branch policies, which would be a pretty extraordinary power to invest in district courts.

The US Supreme Court has yet to address this issue of District Court overreach. In the wake of the Trump Administration’s rescinding of the Obama Administration’s interpretation of the meaning of “sex” in Title IX (discussed below), the various state plaintiffs withdrew their Texas federal court suit on March 3, 2017, so it is no longer a live case.

Subsequent to O’Connor’s decision, however, a similar issue has arisen on the liberal end of the political spectrum, beginning with James Robart’s decision in Seattle to grant national injunctive relief in the form of a temporary restraining order against the Trump immigration ban executive order of January 27, 2017, in the Western District of Washington. That injunction, issued within a week of Trump’s initial ban against entry of all foreign nationals from seven predominantly Muslim countries, was promptly upheld by the Ninth Circuit in a three-judge *per curiam* decision on February 9, 2017.¹² After such swift court action, the Trump Administration withdrew its initial ban, recrafted its language to be less overtly hostile to

Islam, and issued a revised ban against six nations (having withdrawn Iraq from the list) on March 6, 2017. The second ban was challenged in turn by Maryland and Hawaii federal district courts. The Maryland injunction was subsequently upheld in an *en banc* review by the Fourth Circuit, on First Amendment establishment clause grounds, and the Hawaii injunction upheld in the Ninth Circuit, but on statutory rather than constitutional grounds: such a sweeping executive order probably exceeded presidential authority under the Immigration and Nationality Act.¹³

These cases are of interest with respect to the present discussion because of the national sweep of the Washington, Minnesota, Maryland, and Hawaii district court injunctions. Unlike *Texas v. US*, the Maryland and Hawaii cases, via their respective Circuit Court reaffirmations, remained live issues, and were subsequently taken up by the US Supreme Court in *Trump v. International Refugee Assistance Project* and *Hawaii v. Trump*.¹⁴ On June 26, 2017, the Court agreed to review both cases on the merits and consolidated them, but also partially reversed the lower court injunctions in the meantime. They allowed the injunctions to remain in place for individual plaintiffs who had already established US ties, and for future similarly situated foreign nationals applying for entry from any of the six countries still designated as falling under Trump's ban. But they struck down the injunction for any such foreign nationals "who lack any bona fide relationship with a person or entity in the United States" (*Trump v. IRAP & Hawaii* 9).

What is striking about the Supreme Court's response is its failure to address the question of the national scope of the Hawaii and Maryland district court injunctions. Although the Supreme Court called for a balancing test between competing interests, and thus narrowed the scope of the injunctions considerably, it did not restrict the national scope of the injunctions with respect to foreign nationals petitioning for entry when they possessed a genuine relationship with, say, a family member resident in the US, or a US university which had extended an invitation to the petitioner as a student, researcher, or faculty member.

The only (oblique) comments on the inadvisability of district court injunctions of national scope came from Clarence Thomas in partial dissent, joined by Alito and Gorsuch. Thomas's first instinct would be to quash the injunctions in their entirety. He conceded that they might be maintained for the particular plaintiffs already involved in the litigation, but not for an amorphous class of foreign nationals who might in future claim some relationship with US persons or institutional entities, in part, because he anticipated a flood of such litigants clogging the courts with an unworkable standard for establishing a relationship, and, in part (citing *Califano v. Yamasaki*, 702) because "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs" (*Trump v. IRAP & Hawaii* dissent 3). The implication of this quoted passage, not made explicit by Thomas, and certainly not in the Court's *per curiam* decision, is that injunctions should be quite limited in scope. Whether that rules out national injunctions issued by lower courts, outside class action suits, is simply unclear (Thomas also notes on 3 that "no class has been certified" in *Trump v. IRAP* or *Trump v. Hawaii*). What Thomas

might have said if Reed O'Connor's national injunction against the Obama Administration's reading of "sex" as including self-determined gender identity for Title IX purposes were before the Court instead of the immigration ban cases is, of course, also unclear.

The Supreme Court generally, and Thomas in particular, may be wary of taking a firm position on the issue of broad national injunctions issued by lower courts because of our current political circumstances: a mercurial and unpredictable president surrounded by a dubiously inexperienced set of high level executive branch appointees, likely at any time to entertain constitutionally, or statutorily, outrageous policies. Turning a blind eye to lower court injunctions of perhaps overly broad scope has its advantages. Lower courts can act quickly to slow Trump Administration excesses, and buy the Supreme Court some time to deliberate on the novel issues that may come before it in the near future. The Court may also be mindful of what can happen when it intervenes in haste, the most famous recent example being *Bush v. Gore*. The Court's swift intervention into the 2000 presidential election results in Florida, when it really did not need to put itself in the position of effectively appointing George W. Bush on its own initiative, resulted in roughly half the nation, and the bulk of legal commentators at the time, concluding that the Court had behaved badly, a result that probably still makes the Court somewhat cautious about precipitous action.

The negative side of this judicial pragmatism is that it does open the door for lower courts to be broadly, rather than narrowly, obstructionist to administrative policies for which they have ideological distaste. The Trump Administration's immigration ban was so clearly motivated by political calculations rather than genuine national security concerns, and so clearly antithetical to both our laws and the political traditions we like to think we (mostly) embrace, that the sweeping lower court injunctions were welcomed. But if such judicial behavior becomes frequent, it will inevitably injure the reputation of the federal courts, and embroil them in political disputes at a level we like to think the courts are above. Even though that's not really true, even of the Supreme Court, maintaining the fiction does help the courts to sustain some distance from the ideological warfare into which American politics has now descended, and from the majoritarian tyrannies we are capable of exercising against discrete and insular minorities.

V. THE TRUMP ADMINISTRATION'S REVERSAL OF THE OBAMA TITLE IX INTERPRETATION

So what will happen next with transphobic public and school restroom policies? The short-term prospects are not good. On February 22, 2017, the legal terrain shifted again when Jeff Sessions, eleven days after becoming Donald Trump's attorney general, coordinated with Secretary of Education Betsy DeVos to jointly rescind the Obama Administration's interpretation of Title IX's sex discrimination language. The next day the Supreme Court responded to this, Sessions's first significant official act, by inviting briefs from both sides in *G.G. v. Gloucester County School Board* as to how it should proceed. Two weeks later, on March 6, the Supreme Court sent the case back to Fourth Circuit, preferring to

hear from the lower court on the merits, despite responses from both the Gloucester School Board and Gavin Grimm that the Supreme Court should proceed.

Such a response is not that unusual for the Court. There were really two issues before it: (1) whether federal courts should be deferential to executive branch interpretation of its own administrative law, in this case Title IX single-sex school bathroom implementation regulations; and (2) whether Title IX's statutory language which gave rise to this interpretation in the first place, the language prohibiting any federally supported education program from engaging in discriminatory policies based on sex, should be regarded as including gender identity as part of the word "sex" for regulatory purposes "on the merits"—i.e., regardless of administrative interpretation. The Fourth Circuit had really addressed only the first of these, obliquely, by issuing the temporary injunction against the school board's policy in the first place because of the presence of the Obama Administration's inclusive interpretation of Title IX single-sex school bathroom implementation regulations. Sending the case back, while bathroom bill debates are still going on in other jurisdictions, is a prudent way for the Supreme Court to get more input from the lower courts.

That's where matters rest at present writing, except for the formal judicial action of the Fourth Circuit vacating the District Court's June 2016 preliminary injunction against the school board policy, the injunction which was itself provoked by the Fourth Circuit's reversal of the District Court's original position (deferring to the school board) back in April 2016. That injunction, which would have permitted Gavin Grimm to use the boys' restrooms at his high school during his senior year, had the injunction itself not been stayed by the Supreme Court in August 2016, was finally laid to rest near the end of Grimm's senior year on April 7, 2017. Grimm had presumably long since given up hope of being treated like any other male at his high school. The order to vacate was accompanied by an eloquent concurrence by Andre Davis, joined by Henry Floyd. As a brief coda to this sad chapter in our legislative and judicial history, it is well worth reading.¹⁵

The merits of the case, the two issues summarized above, are still before the Fourth Circuit, not yet addressed, and the Court has refused to fast-track its deliberations. Oral arguments will not be scheduled earlier than fall 2017, and Gavin Grimm has now graduated. In light of the Fourth Circuit's near unanimous *en banc* confirmation of its initial support of an injunction against the Gloucester School Board's misguided policy, perhaps it will eventually rule positively on (2), and take the position that Title IX's statutory language should indeed include gender identity as part of the word "sex" for regulatory purposes. But that is a tall order, requiring the Fourth Circuit to take a position on bathroom policies not unlike the Supreme Court's 1954 ruling on the fiction of "separate but equal" racial segregation of public schools, a novel reading of the language of existing law in light of new cultural developments. It is more likely that the Fourth Circuit will simply reaffirm (1), citing *Auer*, and defer to the new executive branch reading of the law, however odious the individual judges on the Fourth Circuit bench may find Jeff Sessions's behavior in this matter. That would be the more conventional approach. If instead the Fourth

Circuit decides to press the US Supreme Court on (2), the Supreme Court is not likely to affirm, given its own current collective politics. But as I said at the outset, the negative public exposure of hostile legislative and administrative transphobia, even if reaffirmed in the federal courts in the short run, may ultimately hasten the evolution toward more tolerant policies.

NOTES

1. See Harlan Fiske Stone's famous footnote 4 in *US v. Carolene Products* 304 US 144 (1938), at 152, in which Stone asserted that the Supreme Court did not need, in that particular decision, to assess, in cases involving "statutes directed at particular religious, or national, or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." The implication, of course, relied on by the Court in a number of cases since, is that a higher standard of judicial review might be in play when majoritarian tyrannies target such minorities, a natural inference with respect to the legislative and administrative initiatives under review here.
2. *Carcaño v. Cooper*, NC Federal Middle District 1:16-CV-00236-TDS-JEP; formerly *Carcaño v. McCrory*.
3. 517 US 620 (1996).
4. http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf
5. *G.G v. Gloucester Co. School Board*, No. 4:15cv54 (Eastern District of Virginia, Sept. 17, 2015), at 8, as reported in *G.G v. Gloucester Co. School Board*, No. 15-2056 (4th Circuit, April 19, 2016), at 17.
6. The Court as a whole subsequently declined to conduct an *en banc* review (a review by all members of the Fourth Circuit bench), again with Niemeyer as the only dissenter.
7. On December 31, 2016, O'Connor blocked a fictitious interpretation of the Affordable Care Act for a "likely" violation of the Religious Freedom Restoration Act because its nondiscrimination clause allegedly violated doctors' religious freedoms by forcing them to perform gender transition procedures and abortions, again by means of a national injunction. (What the ACA actually requires is nondiscriminatory treatment of trans patients and women who previously had abortions. They can't be denied general medical care or health insurance coverage because of their prior medical histories.)
8. *Texas v. US* (2016), Civil Action 7:16-cv-00054-O. In addition to Texas, litigants include varying State authorities for Arizona, Alabama, Georgia, Kentucky, Louisiana, Maine, Mississippi, Oklahoma, Tennessee, Utah, West Virginia, and Wisconsin.
9. Citing *Christensen v. Harris County*, 529 US 576 (2000), at 588, elaborating on the 1997 *Auer* decision.
10. 442 US 682 (1979).
11. For a more detailed commentary on this point, see Vikram David Amar & Courtney G. Joslin, "The Problem With the Texas Federal Court's Nationwide Order Regarding Bathroom Access for Transgender Students," *Verdict*, September 9, 2016, <https://verdict.justia.com/2016/09/09/problem-texas-federal-courts-nationwide-order-regarding-bathroom-access-transgender-students>
12. *Washington v. Trump*, 2017 WL 462040 (WD Wash., February 3, 2017), and *Washington v. Trump*, 847 F. 3d 1151 (2017). A similar national injunction was undertaken almost simultaneously in a Minnesota federal district court.
13. *International Refugee Assistance Project v. Trump*, ___ F. Supp. 3d ___, 2017 WL 1018235 (D Md., March 16, 2017), reviewed in 857 F. 3d 554 (three dissenters to the full Fourth Circuit review); *Hawaii v. Trump*, ___ F. Supp. 3d ___, 2017 WL 1167383 (D Haw., Mar. 29, 2017); reviewed in 857 F. 3d 554 WL 2529640 (June 12, 2017), unanimous 3-judge panel on Ninth Circuit.
14. Case numbers 16-1436 and 16-1540 were granted cert. on June 26, 2017, and consolidated as 582 U. S. ___ (2017). Since

scheduled for US Supreme Court oral argument on October 10, 2017. Referred to hereafter as Trump v. IRAP & Hawaii.

15. <https://www.ca4.uscourts.gov/Opinions/Published/161733R1.P.pdf>

