

a conservative position on the “bathroom battles”*

WE ARE ALL FAMILIAR with the use of the term “liberal” to refer to those falling toward the left-hand side of the American political spectrum, but not to those on the right. But there is another sense of the term that is widely (though not universally) applicable to both left and right. Roughly, “liberalism” in this sense conveys a vision of government as secular, limited, representative, and constitutional, and a vision of citizens as free and equal. It’s a political philosophy generally endorsed by those on the left (“Progressives,” as I shall term them) and on the right (“Conservatives”) alike.

But if a liberal political philosophy serves as common ground uniting left and right, liberal *social* philosophy is what distinguishes them. For Progressives and Conservatives often differ in their attitudes toward illiberal social realities—those (non-governmental) practices and institutions *not* organized according to (for example) norms of democratic governance, or the free and equal status of their members. Think, for example, of institutions and practices like marriage, the family, the church, the firm, and the military. Progressives are what we might call “complete liberals”¹: they wish for a society in which not only the public institutions, but also the private ones, are liberal in character. (This is the sense in which “liberal” serves as an apt label for left-leaning Progressives: they are both political *and* social liberals.) Liberalizing these private institutions and practices might include, for instance, disallowing certain “traditional” ways of dividing domestic labor along gendered lines, or legally mandating that Catholics ordain and hire female priests. Conservatives, on the other hand, are often more accepting of such institutions. In fact, rather than merely *tolerating* certain illiberal practices, they might actually go so far as to endorse or celebrate them. For example, Conservatives may admire these institutions’ “pedigrees”—seeing the fact that they have evolved, survived, or flourished over many generations as signs that they embody a certain internal practical logic or wisdom. To refashion them according to the Progressive’s demands could jeopardize much or all of their value and function. Call this the “traditionalist” strand within Conservatism.

The practice of sex-segregating public restrooms and locker rooms is one further example of a putatively illiberal social custom, and it’s the most recent field on which the battle between Progressives and traditionalists has been waged. I am not certain which side has the stronger forces in this particular battle, but I do believe that the strength of the traditionalists’ arsenal has been underestimated. Thus, in this chapter I offer what I take to be the most powerful argument in favor of a generally traditionalist, Conservative position on what has come to be known as the “bathroom battles.”

This argument consists of two tactics: an “offensive maneuver” and a “defensive maneuver.” In the former, I show how the traditionalists’ standard warnings about the disruptive consequences of

¹ I have borrowed this term from Mark Henrie: see .pdf p. 15 of his “Understanding Traditionalist Conservatism”, available at http://www.hoover.org/sites/default/files/uploads/documents/0817945725_3.pdf.

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overturning longstanding custom (warnings sometimes too-hastily dismissed by opponents as “mere ‘slippery-slope’-style reasoning”) apply to matters of bathroom access. Specifically, the Conservative worries that Progressive intervention here will initiate a sequence of reforms with respect to other domains of sex segregation, and that the natural outcome of these reforms will be the elimination of sex segregation in athletics, college dormitories, beauty pageants, and a host of other areas not (presently) considered to be problematic. With the latter maneuver, I try to convince the Progressive that he ought not be too dismissive of traditionalist-style reasoning, as he is likely attracted to traditionalist arguments in other domains. Specifically, I suggest that an appeal to traditionalism is an indispensable part of any defense of the familiar (but highly illiberal) practice of *higher education*.

Before exploring these two tactics, though, we should ensure we understand precisely what’s under dispute in the so-called bathroom battles. So let’s begin in Section 1 with a brief overview of the recent debate surrounding the “bathroom bills” (emphasizing a famous bill from North Carolina as a case study), before developing in Sections 2 and 3 the Conservative’s “offensive” and “defensive” maneuvers.

1. Bathroom Battles: What

Historically, the segregation by sex of restrooms, locker rooms, changing rooms, and other such spaces has been largely a matter of social custom.² However, North Carolina’s March 2016 passage of House Bill 2—the “Public Facilities Privacy and Security Act” (hereinafter “HB2”)—is one prominent piece of recent legislation seeking to ratify this received social custom. HB2 directs local boards of education and public agencies in North Carolina to “require every multiple occupancy bathroom or changing facility . . . to be designated for and only used by [students/persons] based on their biological sex,” where “biological sex” is defined as “[t]he physical condition of being male or female, which is stated on a person’s birth certificate.”³ This has the practical effect of requiring that transgender persons⁴ utilize bathrooms or changing facilities matching their sex, rather than (as they

² Though the law has not been entirely absent from this domain. The primary means by which bathroom segregation has been subject to lawful regulation is via the enforcement of *building* and *plumbing codes*—which, since the latter portions of the 19th Century, have generally mandated the provision of separate, sex-segregated facilities. University of Utah law professor Terry Kogan has nicely documented this history in a series of publications spanning the past two decades. The “Research” page on his website offers a collection of hyperlinks to these publications (see https://faculty.utah.edu/u0028895-TERRY_STUART_KOGAN/research/index.html); of particular interest is his May 16, 2016 article at the website “The Conversation” titled “How Did Public Bathrooms Get to Be Segregated by Sex in the First Place?”: <https://theconversation.com/how-did-public-bathrooms-get-to-be-separated-by-sex-in-the-first-place-59575>.

³ These quotations are assembled from Sections 1.2 and 1.3 of HB2, which mandate changes to Article 37 of Chapter 115C and to Chapter 143 of the North Carolina General Statutes, respectively. The quoted language can be found in the newly-added paragraphs 115C-521.2(a)(1), 115C-521.2(b), 143-760(a)(1), and 143-760(b), found on the first two pages of the bill, which is available at <http://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v4.pdf> (accessed February 24, 2017).

⁴ For purposes of this discussion, I define “transgender person” in a manner congruent with the North Carolina law under discussion—namely, as anyone who identifies with a gender at odds with the one customarily associated with the biological sex recorded on his or her birth certificate. This definition, like any, raises certain complications. For example, transsexual individuals—those who have changed (at least certain central aspects of) their sex via, e.g., gender reassignment surgery and/or hormone treatments, and who have had their birth certificates updated to reflect this fact—fall outside the scope of our discussion (as they fall outside the scope of HB2). Defining “transgender person” in this

may often prefer) those matching their gender. HB2 was itself precipitated by another act of (municipal) legislation that sought to modify this same social custom: Charlotte’s “Ordinance 7056.”⁵

The state law did not fare well in the court of public opinion. Popular and elite sentiment seemed predominantly opposed to the bill, and corporate pressure (from organizations like PayPal, the NCAA, and the NBA) played a large role in persuading the legislature to quickly modify the measure. On March 30, 2017, North Carolina’s governor signed into law House Bill 142, which among other things rescinded the portions of HB2 that concerned bathroom access. At the time, a number of other U.S. state legislatures had been considering similar bills. However, the March 2017 demise of HB2 seemed to arrest whatever momentum these bills may have had: as of spring 2018, it does not appear that any comparable bathroom bill is under serious consideration anywhere in the U.S. (However, it may be too hasty to conclude that the issue has been forever laid to rest. Controversial social issues sometimes take a zig-zagging path to final resolution—variously advancing onto, and receding from, societal consciousness before public opinion and policy becomes settled. Consider, for example, the “fits-and-starts” history of the recent debate about same-sex marriage.⁶)

In any event: now that local and state governments have assumed responsibility for legislating the proper segregation of such spaces, we can appreciate the need to examine the fundamental legal and philosophical issues that arise here. One such basic issue concerns the nature of what we might term “legal-ization.” Legal-ization is different than *legalization*. The latter (and more familiar) notion refers to making legal something that was formerly illegal, as when reformers advocate for the legalization of marijuana. The former, though, is the notion of using legal measures to formalize or modify a social custom that had previously been maintained principally by social convention. When should we ratify social practices by enshrining them into law? When might we use the law to alter or abolish certain social institutions? These are the questions that lie at the heart of understanding *legal-ization*.

The matter of legal-ization becomes especially important when we consider HB2’s precedent-setting potential. For the position we ultimately adopt in response to this controversy, and the considerations we invoke to support that position, will likely bear upon many other forms of sex

fashion, then, raises worries about potential inequities: persons with more disposable resources will be better-positioned, compared to those who are poorer, to align their sex (and their birth certificates) with their gender. But as any definition seems apt to raise difficulties—and since the substance of the argument should apply regardless of the definition—I will simply adopt the formulation that best aligns with the legislation in question.

⁵ This was passed on February 22, 2016. The text of this city ordinance, which prohibited discrimination in public facilities on the basis of (among other things) gender identity (having the practical effect that transgender persons could not be prohibited from using the public bathrooms and locker rooms of their choice), is available at <http://charlottenc.gov/CityClerk/Ordinances/February%202022,%202016.pdf> (accessed February 24, 2017).

⁶ This issue first entered national consciousness in 1993, after a Hawaiian court found a state law prohibiting same-sex marriage incompatible with Hawaii’s constitution. But it largely retreated from view after the 1996 passage of the federal Defense of Marriage Act. State-level developments in Vermont and Massachusetts in 2003 and 2004 again brought the issue to the fore—it was a campaign issue during the 2004 Presidential election—but again the matter seemed to fade from attention after George W. Bush’s re-election. Sometime around 2008, then—and accelerating rapidly around 2012, until climaxing in the U.S. Supreme Court’s *Obergefell* ruling in June 2015—the issue finally resurfaced in a manner that settled it seemingly once and for all.

segregation too. Although the bathroom battles presently appear to be dormant, we may someday recognize them as having been the first in a series of challenges to other forms of sex segregation. The arguments and reasons invoked to settle the bathroom battles will doubtless prove attractive to future disputants attacking or defending sex segregation in (for example) dorm rooms or college athletics. The Conservative worries that if we err in the arguments and reasons we take to have settled the bathroom issue, we may shortly find ourselves committed to other sorts of social reforms (or to existing forms of segregation) with which we are uncomfortable. It is this fear of thus carelessly setting precedent that lies at the heart of the principled Conservative's reluctance to incautiously legal-ize our bathroom segregation practices. Let's turn, then, to a more detailed examination of this Conservative position.⁷

2. The Conservative on Offense: *Contra* Progressivism

The Conservative's "offensive" maneuver consists of three sub-tactics. First, she argues that the only consistently Progressive position on the issue is a fully-fledged policy of *Integration* with respect to public bathrooms. Second, she alleges that the Progressive case for bathroom *Integration* generalizes: it applies likewise to all other forms of sex segregation. And lastly, the Conservative performs what I shall term the "Burkean Maneuver": arguing that the Progressive's desire to overturn in one fell swoop every practice of sex segregation is reckless. For any attempt to radically disrupt so many deeply-ingrained social conventions is bound to bring about unforeseen and unintended consequences, many unwelcome. Far better, then, to refrain from legislating at all in this domain, or at least to legislate only cautiously and experimentally, in piecemeal fashion.

2.1 The Progressive Commitment to *Integration*

A significant amount of early trans advocacy with respect to bathroom justice pressed for the creation of gender-neutral restrooms. That is, many argued for a regime of fully *integrated* bathrooms. More recently, though, trans advocates have transitioned to calling for recognition (and enforcement) of transgender individuals' right to utilize the (segregated) restroom or locker room matching their gender identity. That is, trans advocates shifted from pursuing the cause of sex and gender bathroom *Integration*, to pursuing the cause of *Trans-Accessible Segregation* of bathrooms. One reason for this shift was the recognition that a central aspect of living out one's true gender identity is the ability to access and enjoy the single-gendered spaces (both metaphorical and literal) typically reserved for one's fellow men and women. Relegating transgender individuals to "merely neutral" "third spaces" deprives them of this opportunity.

⁷ Before proceeding, though, I would like to offer one final introductory note: throughout this discussion, I will formulate matters primarily in terms of access to bathrooms. This is in keeping with the fact that, in the wider culture, these are the terms in which the controversy is most commonly expressed. However, it would be more fortunate if the controversy were to be widely understood in terms of *locker room* access—particularly since HB2 explicitly applied to locker rooms as well as bathrooms. While admittedly my evidence here is merely anecdotal, I have observed in private conversation that by far the most common "position" on this issue is actually a kind of *non*-position. That is, many people invoke some version of the following (evasive) maneuver: "Well, I don't even see what the big deal is. After all, no one can really see you in a public restroom; who *cares* about the sex or gender of the person in the adjacent stall anyway?" Formulating the issue always in terms of locker room access would pre-empt this (non-)response. Readers are therefore encouraged, in what follows, to keep the locker room question always at the forefront, even when the issue is expressed in terms of restrooms.

Appealing though this rationale may appear from the trans perspective, we might ask: can a Progressive, consistently with his social liberalism, endorse a regime of Trans-Accessible Segregation? The Conservative says “no”: *any* regime that preserves and enforces (via legal and/or social sanction) any variety of sex or gender segregation stands in tension with the Progressive ideal of equal treatment—an ideal requiring the equal treatment of *all* citizens, in *all* spaces.

To appreciate this, let’s compare two scenarios: one where we maintain Trans-Accessible Segregated bathrooms, and another where we have Integrated bathrooms. Now, let’s think about individuals who are non-binary, gender-queer, or otherwise gender-nonconforming. In the Trans-Accessible scenario, which of the two choices—“Men’s” or “Women’s”—best respects their identities? It doesn’t seem like either does, and what’s worse, this scenario involves perpetuating the gender binary that gender-nonconforming individuals find stifling, or even oppressive. Next, let’s consider the case of disabled persons who have differently-gendered caregivers: the situation where we have sex-segregated bathrooms deprives them the opportunity of that assistance. However, if we switch to fully Integrated bathrooms, we don’t disadvantage either population, and instead offer a neutral solution. Granted, it isn’t one that positively affirms (by enshrining into legal doctrine) any particular individual’s conception of gender, but crucially, the Integrated bathroom scenario serves these populations’ bathroom needs.⁸

There’s an analogous argument you’ve perhaps encountered with respect to another recent social controversy: same-sex marriage. Way back in the early 2010’s, when debates on this subject were still raging, some defended a similarly neutral response to the question of expanding civil marriage to include same-sex unions along with heterosexual ones. These scholars called for the “disestablishment” of marriage.⁹ On this proposal, the State—rather than taking a stand on the (then-controversial) question as to which types of life-partnership properly deserve the title “marriage”—instead side-steps this contentious issue by “getting out of the marriage business” altogether. Institutions of civil society—churches, mosques, and synagogues, e.g.—could decide for themselves which domestic unions to sanctify as marriages. But it would not be an issue for legislatures or courts to decide. Such “marital disestablishmentarians” argued that their solution was most congruent with the basic liberal norm of the equal treatment of all citizens. Granted, it wouldn’t positively affirm (by enshrining into legal doctrine) any particular individual’s conception of marriage. But it has the virtue of neutrality—it neither affirms *nor* undermines any faction’s treasured conception of the institution. Supposing disestablishmentarians are correct, then, it would seem that the Progressive ought, by parity of reasoning, to favor a regime of Integrated bathrooms as the proper response to controversies concerning bathroom access.

⁸ For the points in this paragraph, and in particular for helping me to appreciate the challenges raised by the case of opposite-gendered caretakers, I am indebted to discussants (especially Terry Kogan and Mary Ann Case) at a panel on this topic at the March 2018 meeting of the Philosophy, Politics, and Economics Society in New Orleans, LA.

⁹ Prominent representatives of this approach include Tamara Metz, *Untying the Knot: Marriage, the State, and the Case for Their Divorce* (Princeton: Princeton University Press, 2010) and Elizabeth Brake, *Minimizing Marriage: Marriage, Morality, and the Law* (New York: Oxford University Press, 2012). The language of “disestablishment” here is borrowed from the First Amendment to the U.S. Constitution, wherein the Congress is expressly prohibited from passing any law “respecting an establishment of religion.” In other words: just as the proverbial “separation of Church and State” results in *religion’s* being “disestablished” in the U.S., so also do the Progressive theorists discussed in the main text maintain that *marriage* ought to be similarly “disestablished.”

Consider finally the “Overturning Patriarchy” rationale, which might be seen as akin to the U.S. Supreme Court’s finding in 1954’s historic *Brown v. Board of Education* ruling. There, the Court ruled that a regime of “separate but equal” is incoherent—that, in virtue of declaring that facilities for Black citizens had to be separate, segregated institutions were thereby declaring that Black citizens were *not* equal. Likewise, a regime of segregated restrooms might express a conviction that the sexes are, in important respects, not equals. Only a regime of fully-Integrated restrooms and locker rooms could really express the sexes’ equal status.

Of course, an opponent could point out a dis-analogy here. For while racial segregation reinforced an asymmetrical view of the two races’ relative worths (specifically, the view that Blacks were inferior to Whites), contemporary practices of sex- and gender-segregation do not generally reflect a belief that one or the other is superior. In response, we might point out that—though a regime of sex-/gender-segregated bathrooms does not itself express a vision of either male or female superiority—ours is a society with a history of discriminatory, sexist norms that typically favored males. Given this heritage of patriarchy, we might regard with justifiable suspicion any remnants of sex- and gender-based separation as themselves connected to this history of male dominance.

At any rate, the *Brown*-inspired bathroom Integrationist holds that *any* regime of sex segregation, including the current regime of segregated bathrooms, is tantamount to an affirmation of the “separate but equal” ideology. It should be just as shameful when applied to the sexes as when applied to races. And if restroom Integration expresses a repudiation of “separate but equal”—and if furthermore it helps to ameliorate our legacy of patriarchy—then seemingly the Progressive should endorse it.

To review: the Conservative argues that the consistent Progressive must, in accordance with his social liberalism, embrace a fully-fledged commitment to bathroom Integration for at least three reasons. The first is considerations of fairness to gender-non-conforming individuals and those with disabilities; the second is recognition of the parallels between the case for *Integration* and the (Progressive) case for *Marital Disestablishment*; and the third is consideration of the affinity between the regime of gender-segregated bathrooms (even a comparatively more humane regime of *Trans-Accessible Segregation*) and the now-discredited doctrine of “separate but equal” facilities for Blacks and Whites. However, the Progressive’s complete liberalism is not completed by this endorsement of bathroom Integration. Rather, much more is required—as we shall now see.

2.2 The Case for Integration Generalizes

Since each of these three reasons in support of Integrationism applies with similar (if not equal) force to other domains of sex segregation, the Progressive seems committed to overturning these practices too. Aren’t sex-specific college dormitories discomfiting for gender non-conforming students? Don’t sex-separated athletic competitions and sex-sensitive TSA screenings express something like the doctrine of “separate but equal”? Doesn’t it seem that hiring and admissions policies premised on distinctions between the sexes run afoul of the liberal norm of equal treatment? For the Progressive, there seems to be considerable pressure to embrace a thoroughgoing policy of Integration *anywhere* sex-based distinctions are found.

At this point the Progressive might deny that any of these considerations *does* generalize. He might assert that each domain of sex segregation is unique, and that what is true with respect to the prudence of bathroom and locker room integration may not apply to the cases of college

dormitories and athletic competition. It's a mistake, then, to think that a Progressive commitment to bathroom Integration requires a commitment to Integration across the board.

As with the “Overturning Patriarchy” rationale discussed just above, though, comparison with the past century's struggle for civil rights in the U.S. offers an instructive parallel. For do we think that the 20th Century's great advocates for racial integration should have reasoned as follows? “Look, we shouldn't press for *all* forms of integration, all at once! Since each domain of segregation is unique, and raises distinct concerns, let's just take these issues one at a time. They can't be meaningfully or helpfully bundled together. Perhaps we'll start with the cause of lunch-counter segregation, then move on to schools and buses ...” Doesn't this seem odd? In retrospect, we all agree that it was indeed a right and a good thing that the Civil Rights movement pushed for the elimination of racial segregation *across the board*. But then why would present-day Progressives favor so contrary a stance with respect to today's prevailing “separate but equal” regime? (Unless they secretly believe that this *would* have been a better tactic in the fight for civil rights, and that the movement's leaders erred in lumping all forms together into a single heterogeneous category inartfully labeled “racial segregation.”)

So it seems the Progressive is committed to a fully-generalized stance of Integrationism after all. If his complete liberalism were the complete Truth of liberalism, we might consider the matter closed: full Integrationism is the only stance acceptable to anyone with any liberal leanings. However, the Progressive's picture is *not* the complete Truth of the matter: there is room within (political) liberalism for a principled tolerance of (social) illiberalism. This is the more nuanced liberalism of the Conservative. So let us now turn to an examination of the right's (perfectly coherent, if oft-overlooked) position that, where the reach of law and public policy ends, allegedly “illiberal” values and practices need not (necessarily) yield to considerations of, say, fairness and equal treatment—norms that must prevail where the coercive arm of the State operates, but which need not prevail elsewhere or everywhere.

2.3 The Burkean Maneuver

The first thing to note here is that the liberal Conservative does not tolerate or endorse illiberal practices *because* they are illiberal. Rather, it's that their illiberality is not always sufficient warrant for a “liberalizing intervention.” Partly, the Conservative's reluctance to forcibly liberalize results from her desire to respect the freely-made choices of the parties involved in the institution or practice—including, even, the choice to live or behave in an illiberal fashion. But this reluctance also stems from a sense that such intervention is often liable to cause as much harm as good. The recognition that such liberalizing interventions often cause significant disruption and upheaval is at the heart of the Conservative's “Burkean maneuver.”

Invoking a strain of thought famously associated with Edmund Burke, the Conservative argues that it is quite proper for liberal societies to tolerate, and sometimes even to encourage, long-established social conventions and customs.¹⁰ For these institutions arose spontaneously, over repeated generations of interaction, as ways of accommodating a variety of conflicting societal and individual

¹⁰ This strain of thought is also famously associated with Friedrich Hayek. For a comparison of the Burkean and Hayekian versions of this argument, see Jeremy Garrett, “History, Tradition, and the Normative Foundations of Civil Marriage,” *The Monist* 91, no. 3-4 (2008): 446-474. The distinctions between Burkean- and Hayekian-flavored appeals to tradition need not concern us here.

needs—without anyone’s having explicitly designed them for that purpose. Accordingly, there is a presumption in favor of preserving these time-honored and naturally-evolved traditions. (Hence the “conserving” impulse that lends Conservatism its name.) Applying this Burkean insight here, the Conservative holds that our received practices of maintaining various single-sex spheres embodies a certain internal practical logic that solves numerous social coordination problems—some of which we can identify and articulate, but others of which undoubtedly remain obscure to us. Obscure though this “internal practical logic” may be now, the valuable social-coordination role of sex-segregation would likely become swiftly and vividly apparent to us, in retrospect, were we to incautiously rip it apart. The Progressive’s proposed liberalizing, legal-izing intervention on behalf of an uncompromising regime of sex-Integration thus risks sacrificing the social efficacy of institutions and practices that embed many generations’ worth of accumulated wisdom.

3. The Conservative on Defense: In Support of Burkeanism

Progressives who think themselves disinclined to such maneuvers should check their own Burkeanism. For there are likely practices and customs dear to them that are likewise vulnerable to the charge of illiberality, and institutions whose best defense likewise rests on appeal to tradition and custom. Consider the *Academy*, for instance. There are few social practices less egalitarian than the admissions policies of contemporary colleges and universities in the United States. For our practice is to systematically deny admission to those whose cognitive and/or social misfortune has rendered them ill-prepared for the rigors of college life. Our practice, in other words, is to systematically deny admission to those individuals *most in need* of a higher education—further contributing to a densely-woven web of oppressive practices by which they are already disadvantaged. And focusing just on those students lucky enough to gain admission: there are few practices more cut-throat, more “socially Darwinian,” than making recurring categorical distinctions among these students according to academic performance (irrespective of any relevant background conditions, and insensitive to any extenuating circumstances) and sorting them into a brutal hierarchy according to something called “GPA.” And focusing now on just those students who survive this gauntlet and manage to graduate: our society has perhaps no mechanism better-suited for conferring advantage and marking privilege than the current system of rampant inter-institutional inequality *among* institutions of higher education. For those fortunate enough to earn their college degrees, post-graduation life offers ample evidence that those touting degrees from “elite” colleges and universities fare much better compared to those who enjoy less prestigious pedigrees. Thus, the institution of American higher education is complicit in—nay, is a central driver of—the systematic oppression of the socioeconomically disadvantaged, and the ongoing maintenance of privilege and enforcement of class distinctions.

Or so one might argue, at any rate. I happen to think such an argument would be misguided.¹¹ But the crucial point here is this: anyone wishing to argue in this fashion may do so in perfect conformity with argumentative and rhetorical standards currently prevalent in certain communities of Progressive critique. Anyone rejecting this critique—anyone wishing to resist (even well- and

¹¹ The reason I would not actually condemn the Academy for its illiberalism is because I believe this critique rests on fundamental misunderstandings of notions like *equality*, *fairness*, *discrimination*, *oppression*, and *privilege*. But clearly, such a critique could be made—and perhaps soon *will* be commonly made—using currently widespread (mis-)understandings of these words. If and when that critique materializes, the defender of the Academy could—besides mounting a defense grounded in a clarification of the proper understandings of such notions, or founded on reclaiming their proper application—also mount a defense of a broadly Burkean nature, along the lines sketched in this chapter.

Progressively-intentioned) efforts to remake the internal norms, standards, and practices of higher education in line with prevailing liberal principles—must come to grips with his own Burkean impulse. For the justification of these (widespread) inegalitarian and illiberal norms—norms that are centrally constitutive of current practices in higher education—may rest on no greater, or no worse, foundation than the one appealed to by our traditionalist Conservative in making her Burkean maneuver.

4. Conclusion

This defense of a “right-ward” position on the bathroom battles may not be the strongest argument you’ve ever encountered. It certainly has its vulnerabilities. (For instance: unless suitably refined, the Burkean rationale could seemingly likewise legitimate all sorts of unjustifiable and sexist discrimination and oppression. So it is a very powerful—perhaps *too* powerful—maneuver.) It is also modest in its aims—perhaps, for some Conservative readers, disappointingly so. If valid, this argumentative strategy establishes less than certain rival Conservative strategies might hope to secure. For one thing, it is merely “anti-anti-Bathroom Bill,” rather than (say) “pro-HB2.” And it is very nearly as skeptical of bills (like HB2) that seek to incautiously ratify the received practices of sex segregation, as it is of those laws (like the city of Charlotte’s Ordinance 7056) that seek to overturn such customs. (It merely counsels caution, in other words.) And finally, this argument no doubt leaves a number of Conservative readers cold for failing to support their conviction that transgender access to bathrooms is to be blocked because the very notion of being transgender is suspect.¹² I offer no apology to such Conservatives for my failure to cheer; they will have to look elsewhere (or within) for the buttressing of *that* view. All I can say in defense of this defense is that it has the virtues of being reasonable, measured, plausible, and (perhaps) original. And who knows? It might even be correct.

¹² While I do not harbor any skepticism with respect to the notion of being transgender, and while I certainly do not bear any shred of animus towards transgender individuals, I *will* confess to sharing with many Conservatives a sense of befuddlement—a feeling doubtless shared too by many non-Conservatives, but one whose expression appears *verboten* in certain non-Conservative quarters—as to the seeming incoherence of a certain mantra that I do associate with some trans advocates: “Gender isn’t real; it’s only a social construct—a construct, furthermore, that was created and maintained for the specific purpose of oppressing women. *Now please recognize the fact that my gender is an immutable part of my essence!?*”