

A LIMITED GOVERNMENT SOLUTION TO THE BATHROOM CONTROVERSY

by Tom Giovanetti

The state of North Carolina has spent the better part of two years embroiled in a controversy over bathroom access for transgendered persons, and now Texas has waded into the fray with Senate Bill 6, which would expand state power into governing access to certain bathroom facilities.

But both North Carolina's HB 2 and Texas' Senate Bill 6 try to solve the wrong problem. The problem isn't that there is too little government involvement in bathroom decisions, but that there is too much—*too much municipal government involvement, anyway*. The controversy over transgendered access to bathrooms was caused by the city of Charlotte, not by the North Carolina legislature or even by transgendered persons themselves.

But that is not to say that the state should do nothing.

Instead of unnecessarily expanding state power over bathroom decisions, a limited-government solution would preclude municipalities from social-justice crusading that creates protected classes and bestows special legal protections upon those classes. Such an approach is workable, and available.

INTRODUCTION

Choosing which bathroom to use is one of the most mundane decisions a person makes. Free people make dozens of more consequential decisions every day.

That's why it's a bit jarring that some conservatives, who claim to believe in limited government, are seeking to expand government power into the mundane realm of who uses which bathroom.

In Texas, Senate Bill 6 would require that, in certain facilities, persons must only use the bathroom that corresponds with their biological sex, which is defined by birth certificate. By implication at least, that means to do otherwise would be a crime if such a bill became law.

While the biological sex requirement might seem the most reasonable guide to choosing a bathroom, it is not hard to imagine circumstances where a person would need to use the "wrong" bathroom if, for instance, the "right" bathroom were

out of order, or if during a public event the women's room had a long line while the men's room was nearly vacant.

Of course, proponents of Senate Bill 6 do not have such circumstances in mind. Senate Bill 6 is a response to a controversy that began in North Carolina about which restrooms are used by transgendered persons. Correctly understanding the history of the debate is key to correctly identifying the problem to be solved. But it remains noteworthy that Senate Bill 6 is an unprecedented expansion of state government power into a very mundane but personal area of private life, which would seem to be a betrayal of limited government principles.

So where did this whole bathroom controversy come from?

THE ORIGIN OF THE PROBLEM

The controversy over transgendered use of bathrooms did not arise naturally, but rather was caused by an intervention of government—specifically, by the city of Charlotte deciding that its powers extended beyond approving building permits, filling potholes and collecting garbage to include social justice crusading. Apparently, the typical duties of municipal government weren't quite fulfilling the ambitions of the Charlotte City Council members.

Before Charlotte's ordinance, there was no national controversy over which bathrooms are used by transgendered persons. That's likely because:

- Transgendered persons represent a tiny 0.3 percent of Americans; and
- Transgendered women pass for women, and transgendered men pass for men.

Subsequently, North Carolina's attempt to override Charlotte's mischief doubled-down on government expansion of power. North Carolina's HB 2, like the Texas Senate Bill 6, extended state government power into bathrooms as a way of blunting Charlotte's ordinance. But an action by the state to determine by law who goes into which bathroom resulted in significant backlash from voters and from important business interests.

The reaction of business interests to changes in policy represents important feedback in a free-market system, but we should not determine whether a policy is “right” based on business interests. States should have the courage to stand up to business interests when they are persuaded that they have made the right policy choices.

But North Carolina’s HB 2 and Texas Senate Bill 6 are the wrong policy choices. They are wrong not because of complaints from businesses or because of controversy, but because they expand government power in a misguided effort to solve the wrong problem.

THE REAL PROBLEM IDENTIFIED

Fundamentally, the problem is not transgendered persons making their own bathroom choices—the problem is municipalities creating protected classes of persons and awarding special rights and privileges to those protected classes.

When cities like Charlotte unnecessarily designate transgendered persons as a protected class and award them special legal privileges, they create opportunities for offenders to claim, “I have a right to be here.” The threat to privacy comes not from transgendered persons, but from predators empowered and shielded by the municipal ordinance.

Indeed, the anecdotes about men dressing as women and entering women’s bathrooms in order to leer at and harass women occurred *after* Charlotte passed its ordinance and gave them a legal right to be there under an assertion of transgenderism. The threat did not come from transgendered persons, but rather from offenders *impersonating* transgendered persons.

Charlotte’s expansion of municipal power created a potential threat to public safety and privacy, and North Carolina’s legislature was trying to proactively address that threat. But the law was largely unenforceable—no one wants police outside each bathroom—which contributes to the erosion of rule of law over time.

Further, if we cannot trust free people to choose their own bathrooms, how can we trust them to make more important choices? If government must step in and determine which bathrooms we use, doesn’t that pretty much undermine the whole case for individual liberty, which is based on rights that logically precede government?

A LIMITED GOVERNMENT APPROACH

It should be no surprise that the best solution to the transgender bathroom controversy is to limit rather than expand government power. Texas and other concerned state legislatures should assert their authority as creators of their municipalities to limit the ability of their municipalities to engage in such civic mischief.

In a March 17 op/ed in the Dallas Morning News, I advocated state legislation that simply states “municipalities may not pass ordinances that have the effect of creating protected classes or of conferring protections or benefits to protected

classes.” Such legislation, written in appropriate language, would have entirely precluded the transgender bathroom controversy in North Carolina, and would preclude unknown future such controversies.

A bill has been introduced in the Texas House that closely tracks with this recommendation. House Bill 2899, introduced by Rep. Ron Simmons, would preclude municipalities from creating protected classes without expanding the power of the state over mundane bathroom decisions. And, because HB 2899 contains neither the words “bathroom” nor “transgender,” it is not a “bathroom bill,” and does not discriminate against any class of persons.

A SUITABLE SOLUTION

Unfortunately, the language of House Bill 2899 has been altered and narrowed in the form of a committee substitute bill, CSHB 2899, which now limits its application to “multiple-occupancy restrooms, showers, or changing facilities.” No doubt these changes were made because of political considerations, but they are disappointing nonetheless. Broader language would have the virtue of precluding all manner of future similar social-justice mischief by cities, and it would also have had the effect of nullifying existing such ordinances.

The state legislature should have full confidence in its authority to limit entire classes of municipal action. In this case, broader application would have been more principled, and less subject to attack from critics.

Nonetheless, CSHB 2899 still retains the essential features I have recommended. It is the limited-government solution, because CSHB 2899 limits municipal government power, as opposed to Senate Bill 6, which expands state government power.

If you believe in limited government, and understand that the original problem was municipal overreach, the superiority of CSHB 2899 over Senate Bill 6 should be obvious.

It is true that CSHB 2899 would still leave open the door for the state to eventually pass a law like Senate Bill 6. But such a law would no longer be necessary and thus highly unlikely with municipal bathroom mischief permanently off-the-table.

Tom Giovanetti is the president of the Institute for Policy Innovation.

Copyright © 2017 Institute for Policy Innovation

Nothing from this document may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission in writing from the publisher, unless such reproduction is properly attributed clearly and legibly on every page, screen or file. IPI requests that organizations post links to this and all other IPI publications on their websites, rather than posting this document in electronic format on their websites.

The views expressed in this publication do not necessarily reflect the views of the Institute for Policy Innovation, or its directors, nor is anything written here an attempt to aid or hinder the passage of any legislation before Congress. The Institute for Policy Innovation (IPI) does not necessarily endorse the contents of websites referenced in this or any other IPI publication.

Institute for Policy Innovation: 1320 Greenway Drive, Suite 820 Irving, TX 75038

www.ipi.org

phone: 972-874-5139

email: ipi@ipi.org