Applying *Bostock*: The Queer Case Against Public Single-Sex Schooling

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ABSTRACT

Public single-sex schooling in the United States is a relatively novel phenomenon purporting to provide a tailored pedagogy that segregates students by their "sex" and teaches according to prescribed gender norms. While some education policy scholars have debated the question of public single-sex schooling as a matter of policy, scholars have yet to confront the potential legal challenges following the United States Supreme Court's *Bostock v. Clayton County* decision. This is especially notable as students increasingly defy gender norms on which single-sex schooling is based. This Article seeks to provide a queer perspective on public single-sex schooling by questioning its pedagogical foundations and challenging the idea that public sex-segregated schooling can adequately distance itself from sex-essentialist pedagogies that exclude queer, trans, intersex, and non-binary students.

First, this Article offers a historic overview of the modern advent and recent expansion of single-sex schooling in United States public schools. Second, this Article provides a critique of single-sex schooling, especially of the harm it causes to queer, trans, intersex, and non-binary students. By critiquing "school choice" models of single-sex schooling and focusing on the harms of single-sex schooling to straight and cisgender students as well as queer, trans, intersex, and nonbinary students, this Article reveals how sex-stereotyping harms all students, albeit through varied and dynamic means. The United States Supreme Court's *Bostock v. Clayton County* decision expanding the definition of "sex" to include "sexual orientation" and "gender identity" renders public single-sex schools newly vulnerable to Title IX and Equal Protection Clause challenges. The Article concludes by comparing the harms of single-sex schooling experienced by students with distinct

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identities and proposes an update to single-sex schooling jurisprudence to account for contemporary conceptions of gender and sexuality.

I. A BRIEF HISTORY OF MODERN SINGLE-SEX PUBLIC EDUCATION INTRODUCTION

Discussion of public K–12 single-sex schooling in the United States, historically confined to closed-door school board meetings, has rapidly expanded over the past two decades into a debate that draws passionate responses from across the political spectrum.[1] Many conversations surrounding public single-sex schooling have focused on the viability of gender-oriented pedagogies, with some fringe proponents suggesting such schooling be made compulsory.[2] Contemporary legal literature debating the benefits and harms of single-sex schooling has not yet centered the experiences of queer, trans, intersex, and non-binary students, a glaring omission in light of these students' increasing visibility and persistent vulnerability.[3]

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1. *See* CORNELIUS RIORDAN ET AL., EARLY IMPLEMENTATION OF PUBLIC SINGLE-SEX SCHOOLS: PERCEPTIONS AND CHARACTERISTICS ix (2008).

2. *See, e.g.*, Joanna L. Grossman, *Single-Sex Public Schools and Classes: A Dangerous Lesson in Stereotypes?*, VERDICT (Sept. 18 2012), https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1657&context=faculty_scholarship (pointing out that various public schools have gone so far as to attempt to unlawfully implement compulsory single-sex classrooms or schooling for students).

3. For the purposes of this paper, I define "queer" to be consistent with Merriam Webster's third proffered definition, defining the word to mean "of, relating to, or being a person whose sexual orientation is not heterosexual and/or whose gender identity is not cisgender." *queer*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/queer (last visited Oct. 6, 2022). I define "trans" to be consistent with Stonewall's definition of the term "describ[ing] people whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth," but want to note that trans identities are diverse and that such short definitions are frequently unable to account for the plethora of identities included in the phrase. *What does trans mean?*, STONEWALL (Mar. 27, 2019), https://www.stonewall.org.uk/what-does-trans-mean. As used in the following paragraphs, this paper adopts Planned Parenthood's definition of the term "intersex" to describe bodies that fall "outside the strict male/female binary," noting that there are many distinct ways that someone may identify as intersex. *What does intersex mean?*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/teens/all-about-sex-gender-and-gender-identity/what-does-intersex-mean (last visited Oct. 6, 2022). Finally, this paper adopts the Human Rights Campaign's definition of "non-binary" to mean an identity embraced by some people "who do[] not identify exclusively as a man or a woman," *Glossary of Terms*, HUMAN RTS. CAMPAIGN, https://www.hrc.org/resources/glossary-of-terms (last visited Oct. 6, 2022), but point out that, as with all terms defined here, the usage of "non-binary" is fluid and used in a multitude of different contexts. It is plausible to predict that many of these terms may change in meaning or adapt with time and may become popularly outdated in the years to come.

This Article outlines the contemporary history of public K–12 single-sex schooling in the United States, reexamining notions of brain (or neuro) essentialism and school choice in the context of sex-segregated schooling. Most importantly, this Article provides an overview of how the current doctrine surrounding public single-sex schooling harms cisgender-heterosexual, queer, non-binary, intersex, and trans people, and concludes by applying the Supreme Court's recent *Bostock v. Clayton County* decision to single-sex public education. Although the legal boundaries between permissible and impermissible sex-segregated schooling remain somewhat unclear, this Article explores identifiable harms of single-sex schooling on potential classes of plaintiffs.

A. The Advent of Modern Public Sex-Segregated Schools

Although only a small number of selective and vocational public single-sex schools existed prior to the 1970s[4], the advent of modern-day sex-segregated schooling dates back to the landmark Title IX provisions of the Education Amendments of 1972. Title IX stipulates that "no person in the United States 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."[5] Although the constitutional limitations on sex-segregated schooling derive from the Equal Protection Clause of the Fourteenth Amendment through its language stipulating that "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws,"[6] Title IX was the first federal statute interpreted to explicitly prohibit sex discrimination in public educational programs, including schools that exclude students from enrollment on the basis of sex.[7]

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4. Rosemary C. Salomone, *Rights and Wrongs in the Debate over Single-Sex Schooling*, 93 B.U.L. REV. 971. 973–74 (2013).

5. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) ("No person in the United States 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 . . . .").

6. U.S. CONST. amend. XIV, § 1.

7. 34 C.F.R. § 106.31 (1975).

Two years after Title IX's passage, the Equal Educational Opportunity Act (EEOA) of 1974 declared that "all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin."[8] This language was, to some scholars' surprise, later dismissed by courts in its application to sex-segregated schooling.[9] Only a year later, the U.S. Department of Education Office of Civil Rights issued regulations that prohibited single-sex schooling except in narrow contexts.[10] School districts then began to defend their practices against lawsuits in court, such as the School District of Philadelphia's backing of the all-male Central High School, which would become the centerpiece of the *Vorchheimer v. School District of Philadelphia* case in 1977.[11] In *Vorchheimer*, the Supreme Court passed up an opportunity to provide clear jurisprudence on the constitutionality of single-sex schooling, with an equally-divided Court affirming the Third Circuit's holding without opinion.[12] State courts later found Central High School's all-male admissions policy unconstitutional as courts across the United States began to prohibit unequal sex-segregated schooling.[13] The United States Supreme Court also ruled that Title IX's prohibition on discrimination as a condition for federal assistance did not infringe upon the First Amendment rights of educational institutions.[14] Despite these legal defeats, advocates for gender-essentialist pedagogies nonetheless continued to argue that essential biological differences in learning styles between boys and girls justified single-sex schooling.[15]

Beginning in the 1990s, shortly before the United States Supreme Court began to produce doctrine expanding plaintiffs' interests in Title IX claims by allowing for monetary damages through sex

8. Equal Educational Opportunity Act of 1974, 20 U.S.C. § 1701(a).

9. Nicholas Benham et al., *Single-Sex Education*, 20 GEO. J. GENDER & L. 509, 514 (2019).

10. Salomone, *supra* note 4, at 979.

11. Vorchheimer v. Sch. Dist., 532 F.2d 880, 881–82 (3d Cir. 1976), *aff'd by an equally divided cour*t, 430 U.S. 703 (1977).

12. Benham et al., *supra* note 9, at 515–16.

13. Newberg v. Bd. of Pub. Educ., 26 Pa. D. & C.3d 682, 711–12 (Pa. C.P. 1983); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982); Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981).

14. Grove City Coll. v. Bell, 465 U.S. 555 (1984), *superseded by statute*, Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687, *as stated in* Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999).

15. *See* Daniel P. Banu, *Secondary School Students' Attitudes Towards Science*, 4 RSCH. SCI.& TECH. EDUC.195, 195–201 (1986).

discrimination claims,[16] plaintiffs filing suit in the Eastern District of Michigan reignited the single-sex schooling debate in *Garrett v. Board of Education of School District of City of Detroit*.[17] Although *Garrett* provided thorough reasoning behind granting an injunction that prevented Detroit from operating multiple all-boys academies, in part because of the irreparable harm that girls would face if they were denied benefits available to males, the case proved particularly contentious among those involved in the single-sex schooling debate.[18] Media coverage framed the *Garrett* decision as striking down a first-of-the-kind single-sex educational program.[19] Proponents of public single-sex schooling as a mechanism to improve achievement outcomes for disadvantaged students were quick to point out that the constitutional scrutiny applied to sex-based discrimination remained lower than race-based discrimination, and that there was not yet a "gender-based decision analogous to *Brown*."[20]

The single-sex schooling debate would rise to a new degree of public prominence five years later in the 1996 landmark *United States v. Virginia* decision authored by feminist Justice Ruth Bader Ginsburg.[21] In *Virginia*, the state-run Virginia Military Institute (VMI) maintained a male-only admissions policy for applicants seeking to attend the prestigious higher-education institution. After Justice Ginsburg outlined the need for Virginia to prove an "exceedingly persuasive justification" for VMI's gender-based admissions policy, the Court found in a seven-to-one decision that Virginia violated the Equal Protection Clause of the

16. *See* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60 (1992).

17. *See* Garrett v. Bd. of Educ. of Sch. Dist. of City of Detroit, 775 F.Supp. 1004 (E.D. Mich. 1991).

18. *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 HARV. L. REV. 1741, 1743–44 (1992).

19. The Associated Press, *U.S. Judge Blocks Plans for All-Male Public Schools in Detroit*, N.Y. TIMES (Aug. 16, 1991), https://www.nytimes.com/1991/08/16/us/us-judge-blocks-plan-for-all-male-public-schools-in-detroit.html ("The proposed schools would have been the first of their kind in the nation. All-male curriculums have been developed in Milwaukee, San Diego and Baltimore. But single-sex schools similar to those planned in Detroit stalled in Miami and Milwaukee after officials sought legal opinions from the United States Department of Education.").

20. Michael John Weber, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 4 5 STAN. L. REV. 1099, 1126 (1993).

21. United States v. Virginia, 518 U.S. 515 (1996).

Fourteenth Amendment.[22] Most notably, the Court found that Virginia failed to prove that single-sex education contributes to educational diversity because it did not show that VMI's male-only admissions policy was created or maintained to further educational diversity.[23]

Despite Virginia's contention that its alternative all-female Virginia Women's Institute for Leadership (VWIL) would provide equal benefits for women, the Court concluded that the institute could not offer women the same benefits as VMI offered men, noting that VWIL would not provide women with the same training, faculty, courses, facilities, and opportunities that VMI grants males. Equally notable, however, was the Court's holding that the Fourth Circuit's "substantive comparability" standard incorrectly displaced the Court's new and more exacting standard, requiring that "*all* gender-based classifications" be evaluated with "heightened scrutiny."[24] Under such heightened scrutiny, Virginia's plan to create an alternative institution for women would nonetheless fail to provide women with the same opportunities as men attending VMI and therefore failed to meet the requirements of the Equal Protection Clause.[25] Despite the *Virginia* Court leaving open the possibility of a narrow range of educational programs that discriminate based on sex passing constitutional muster, some commentators speculated that the decision could have an influence on public perception of single-sex schooling.[26]

Such speculation would soon recede into the background as the 2002 No Child Left Behind (NCLB) Act promulgated sweeping rules for schooling.[27] NCLB permitted using federal funds for single-sex programs as long as such programs were "consistent with applicable law."[28] This relatively flexible provision of NCLB led the Department of Education in 2002 to publish a notice of intent to revise Title IX

22. *Id.* at 534.

23. *Id.* at 534–40.

24. *Id.* at 555 (emphasis added).

25. *Id.* at 557.

26. Joan Biskupic, *Supreme Court Invalidates Exclusion of Women by VMI*, WASH. POST (June 27, 1996), https://www.washingtonpost.com/archive/politics/1996/06/27/supreme-court-invalidates-exclusion-of-women-by-vmi/f2d9a024-7198-40ad-9dc5-88d70ab3018d/ (noting that much of the public observed the decision to "[s]ee how it could affect the fate of single-sex schools and other programs based on sex").

27. *See generally* No Child Left Behind Act of 2001, 20 U.S.C. § 6301.

28. *Id.*

regulations governing single-sex programs.[29] Following this notice of intent, the Department of Education promulgated the most recent 2006 Department of Education Office of Civil Rights Regulations permitting single-sex schools and classrooms under certain circumstances.[30] More specifically, the regulations permitted single-sex non-vocational elementary and secondary schools as long as they offer "substantially equal" opportunities for the "excluded sex" through a single-sex or co-educational setting.[31] The regulations, therefore, permitted more freedom for local school districts to establish single-sex schools. Nonetheless, the regulations limit that freedom with the language of substantially equal, which creates a higher burden than the formerly commonplace Fourth Circuit "comparable" standard.[32]

These regulations underscore the paradoxical nature of public single-sex schools—if single-sex schooling is permitted *only* through establishing substantially equal opportunities for the excluded sex, in a world where such "opportunities" will have materially distinct impacts on individual students within the same sex, what benefits could single-sex schooling offer that would not inherently disadvantage those students who do not conform to the rigidly-gendered pedagogies offered? Equally important, would queer, non-binary, intersex and trans students ever be able to be provided a substantially equal alternative that grants the same perceived benefits derived from sex-segregated schooling?

29. Notice of Guidelines on Current Title IX Requirements Related to Single-Sex Classes and Schools, 67 Fed. Reg. 31101 (May 8, 2002).

30. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62529, 62530 (Oct. 25, 2006) (to be codified at 34 C.F.R. pt. 106).

31. Benham et al., *supra* note 9, at 520 n.90 (citing 34 C.F.R. § 106.34(c)(l)–(3)) ("In assessing the 'substantial equality' of single-sex schools, OCR will consider the same factors as in the single-sex class analysis, plus an additional factor: quality and range of extracurricular offerings.").

32. Cnty. of Washington v. Gunther, 452 U.S. 161, 202 (1981) (Rehnquist, J., dissenting) ("A remedy would not be available where a lower paying job held primarily by women is 'comparable,' but not substantially equal to, a higher paying job performed by men."); 34 C.F.R. § 106.34(b)(l)(iv).

B. Brain Differentiated Essentialism: The Rationale Behind Single-Sex Schooling

Despite these important questions surrounding the impact of sex-segregated schooling practices on queer, trans, intersex, and non-binary students whose parents are often the sole actors tasked with any measurable degree of "choice," proponents of single-sex schooling continued to rely on outdated "brain essentialist" sex-stereotypes in promoting such programs. Although brain essentialism was introduced as a method of explaining certain differences between boys and girls prior to the advent of public single-sex schooling, some doctors and psychologists alike continued into the twenty-first century to apply claims that "female brain tissue is 'intrinsically different' from male brain tissue in our species" to the context of education, arguing that these "built-in gender differences" should be the pedagogical basis for educators developing sex-based learning strategies in schools.[33]

Applying questionable, largely unfounded scientific conclusions to the classroom resulted in recommendations ranging from guidance that "if you're teaching girls, don't raise your voice" to setting the classroom temperature "a little bit warmer" to supposedly accommodate girls' learning styles.[34] Similar outdated and unproven applications of faulty research to classrooms have found their way into sex education courses.[35] Even notable single-sex schooling proponent Rosemary Salomone expressed disapproval of such sex-based essentialism, concluding, "The 'neuroscience of pedagogy' was spinning out of control."[36] As this Article discusses in the following sections, even 21st century advocates of sex-segregated schooling who rejected hardline sex-based essentialism used similarly problematic rationales to support single-sex schooling. Salomone stated that proponents originally "imagined this new crop of [single-sex] programs growing slowly and organically as educators developed a set of 'best practices' through

33. LEONARD SAX, WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES 20 (2005); Michele McNeil, *Single-Sex Schooling Gets New Showcase*, EDUC. WK. (May 6, 2008), https://www.edweek.org/policy-politics/single-sex-schooling-gets-new-showcase/2008/05.

34. SAX, *supra* note 33, at 18–36.

35. *See generally* Jennifer S. Hendricks & Dawn Marie Howerton, *Teaching Values, Teaching Stereotypes: Sex Education and Indoctrination in Public Schools*, 13:3 U. PA. J. CONST. L. 587, (2011).

36. Salomone, *supra* note 4, at 983.

experience with different populations of students."[37] Salomone herself acknowledges, "'As one of the people who let the horse out of the barn, I'm now feeling like I really need to watch that horse . . . . Every time I hear of school officials selling single-sex programs to parents based on brain research, my heart sinks.'"[38] Despite these well-meaning intentions and acknowledgments of mistakes by single-sex education proponents, school districts across the country continued to apply such sex-based essentialism to their learning practices.[39] With sex-based brain essentialism as its foundation, what was once only an estimated twelve public schools offering *any* single-sex classrooms in 2002 spread rapidly into over an estimated 283 public single-sex schools by the 2014–2015 academic year.[40]

C. ACLU Opponents of Sex-Segregated Schooling Respond

The early 2000s brought with it new challenges to loosening guidelines and regulations allowing for sex-segregated schooling. Beginning with the ACLU's 2006 "Letter to the Department of Education on Single-Sex Proposed Regulations Comments," opponents of sex-segregated schooling responded with considerable force to both the leniency in the proposed 2006 Department of Education Guidelines and the sex-based essentialism found in sex-segregated schooling proposals.[41] In 2008, the ACLU Women's Rights Project released a flyer citing Leonard Sax's debunked sex-based pedagogical teaching framework, concluding, "Sex segregation based on theories of gender differences is the wrong approach because it encourages educators to oversimplify the issue of learning style differences . . . ."[42] Three years later, the ACLU achieved a notable victory in persuading the Vermilion

37. *Id.* at 981.

38. Elizabeth Weil, *Teaching Boys and Girls Separately*, N.Y. TIMES MAG. (Mar. 2, 2008), https://www.nytimes.com/2008/03/02/magazine/02sex3-t.html.

39. *See* Salomone, *supra* note 4, at 980–83.

40. *See* Benham et al., *supra* note 9, at 509–10.

41. Laura W. Murphy et al., *ACLU Letter to the Department of Education on Single-Sex Proposed Regulations Comments*, ACLU (Oct. 24, 2006), https://www.aclu.org/letter/aclu-letter-department-education-single-sex-proposed-regulations-comments.

42. *Boys' Brains vs. Girls' Brains: What Sex Segregation Teaches Students*, ACLU (May 2008), https://www.aclu.org/other/boys-brains-vs-girls-brains-what-sex-segregation-teaches-students.

Parish School Board to enter a consent decree guaranteeing that it would not institute sex-segregated programs at any schools in Parish through the 2016–2017 school year and to notify the ACLU if it intends to revive sex-segregated activities at any school in the years following.[43] Shortly following this victory by the ACLU Women's Rights Project, the ACLU formulated an entirely separate campaign named "Teach Kids, Not Stereotypes" that would devote its resources to fighting sex-segregation in schooling.[44] Teach Kids, Not Stereotypes concluded in a 2012 report that "[l]ack of compliance with these [Title IX] requirements is widespread," pointing out that some schools "[f]ailed to alert parents that they at least theoretically had the ability to opt-out of the [segregated] classes."[45]

In the same year, the ACLU Women's Rights Project secured one of its victories in *Doe v. Wood County Board of Education*. There, the ACLU filed a lawsuit on behalf of a mother and her daughters who attended Van Devender Middle School, claiming that the school's practice of separating boys and girls on the basis of sex was unlawful, rooted in discredited theories, and impaired the students' education.[46] Importantly, the complaint alleged that the board of education "relied on faulty research, including numerous articles espousing the view that hard-wired differences between boys and girls necessitate the use of different teaching methods in single-sex classrooms" and that the stark differences in gender-segregated learning environments harmed children who do not conform to prescribed gender stereotypes, including students with learning disabilities, boys who prefer to discuss literary characters' emotions, or girls who need or prefer to move around in classrooms.[47] These harms, as the ACLU alleges and as addressed later in this Article, irreparably deprive individual plaintiffs of unique educational opportunities—girls are denied opportunities available to

43. Doe *ex rel.* Doe v. Vermillion Parish Sch. Bd., 421 F. App'x 366, 375–77 (5th Cir. 2011); *Doe v. Vermilion Parish School Board*, ACLU (Oct. 18, 2011). https://www.aclu.org/cases/doe-v-vermilion-parish-school-board.

44. *ACLU Launches* "*Teach Kids, Not Stereotypes" Campaign Against Single-Sex Classes Rooted in Stereotypes*, ACLU (May 21, 2012), https://www.aclu.org/press-releases/aclu-launches-teach-kids-not-stereotypes-campaign-against-single-sex-classes-rooted.

45. Galen Sherwin & Christina Brandt-Young, *Preliminary Findings of ACLU "Teach Kids, Not Stereotypes Campaign*", ACLU (Aug. 20, 2012), https://www.aclu.org/fact-sheet/preliminary-findings-aclu-teach-kids-not-stereotypes-campaign.

46. *See generally* Complaint, Doe v. Wood Cnty. Bd. Of Educ., 888 F. Supp. 2d 771 (S.D.W. Va. 2012) (No. 6:12-4355).

47. *Id.* ¶ 36, 85.

boys, and boys are denied opportunities available to girls. Although these practices particularly impact gender non-conforming students, Salomone points out that even among conforming students, "researchers have found no convincing evidence that boys and girls, as distinct groups, actually learn differently."[48] Despite these important victories throughout the 2010s for opponents of sex-segregated learning environments, proponents of single-sex schooling are quick to note, "No federal court to date has affirmed, in a decision on the merits, the proposition that single-sex programs [as a whole] constitute per se violations of either Title IX or the Equal Protection Clause."[49]

II. PRESENT DAY INCARNATION OF SINGLE-SEX SCHOOLING

Presently, there is conflicting data on the estimated total number of single-sex schools in the United States. The underlying calculations vary in methodology for classifying what "counts" as a single-sex school, with estimates ranging from 283 total single-sex schools in 2014 to only eighty in 2016, according to Professor Juliet Williams.[50] Despite disagreements in methodologies for classifying what constitutes public single-sex schools, most scholars agree that such programs have increased in the United States.[51]

Department of Education regulations relating to single-sex schooling have remained largely unchanged since the 2006 substantially equal guidelines. In 2016, Congress rewrote and disregarded large portions of the NCLB through the "Every Student Succeeds Act" (ESSA), casting into doubt the existing Department of Education regulations relating to single-sex schooling.[52] Following the passage of ESSA, though, scholars were quick to note that ESSA generally kept

48. Salomone, *supra* note 4, at 990.

49. *Id.* at 987.

50. Benham et al., *supra* note 9, at 509; Juliet Williams, *Op-Ed: What's Wrong with Single-Sex Schools? A Lot.*, L.A. TIMES (Jan. 25, 2016, 5:00 AM PT), https://www.latimes.com/opinion/op-ed/la-oe-0125-williams-single-sex-schools-20160125-story.html.

51. Grace Chen, *Why Single-Sex Public Schools are Growing in Popularity*, PUB. SCH. REV., https://www.publicschoolreview.com/blog/why-single-sex-public-schools-are-growing-in-popularity (last updated May 10, 2022).

52. Benham et al., *supra* note 9, at 533.

intact the existing guidelines relating to single-sex schooling, including the 2006 guidance from the Department of Education.[53]

Finally, the landmark 2020 *Bostock v. Clayton County* decision, along with President Joe Biden's 2021 Executive Order implementing *Bostock*, significantly expanded the definition of "sex" to include "sexual orientation" and "gender identity," which has major implications for all areas of the law that prohibit discrimination on the basis of sex.[54] The facts at issue in *Bostock* relate to discrimination on the basis of sex in the context of employment through Title VII of the Civil Rights Act of 1964, but legal experts across the board have interpreted *Bostock* to apply to all areas of the law that prohibit discrimination on the basis of sex, including public education in the context of Title IX.[55] Even prior to the *Bostock* decision, the Department of Education's Office for Civil Rights issued guidance that expressly interpreted Title IX as protecting transgender students from discrimination in education.[56] The *Bostock* decision also effectively negated the Trump Administration's 2017 withdrawal of the Obama Administration's 2016 Dear Colleague letter that set standards for accommodations to protect trans students from non-discrimination by stipulating that "a school must not treat a transgender student differently from the way it treats other students of the same gender identity."[57] The 2020 *Bostock* decision temporally and legally superseded the Trump Administration's guidelines and essentially reinstated the Obama Administration's Dear Colleague letter guidelines. This decision culminated in President Biden signing the 2021 "Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation" that expanded the newly-created protections from *Bostock* to other

53. *Id.* at 524–25.

54. *See generally* Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (2020); Exec. Order No. 13988, 86 C.F.R. 7023 (2021).

55. Memorandum from Principal Deputy Assistant Att'y Gen. Pamela S. Karlan Civ. Rts. Div., U.S. Dep't of Just., to Fed. Agency Civ. Rts. Dir. and Gen. Couns. 1 (Mar. 26, 2021).

56. *Questions and Answers on Title IX and Sexual Violence*, ED.GOV (Apr. 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

57. Dear Colleague Letter from Catherine E. Lhamon, Assistant Sec'y for Civ. Rts., Off. of Civ. Rts., U.S. Dep't of Educ. (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

> [l]aws that prohibit sex discrimination including Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 et seq.), the Fair Housing Act, as amended (42 U.S.C. 3601 et seq.), and section 412 of the Immigration and Nationality Act, as amended (8 U.S.C. 1522), along with their respective implementing regulations . . . ."[58]

Bostock's prohibition on discrimination based on sexual orientation and gender identity raises important questions surrounding the compatibility of sex-essentialist and binary-based single-sex schooling. This brief overview of the shifting guidance and jurisprudence surrounding single-sex schooling raises more questions than it provides answers, but nonetheless offers a foundation to advance the proposition that public single-sex schooling remains harmful to straight cisgender students and queer, intersex, non-binary, and trans students alike.

III. THE "SCHOOL CHOICE" PARADOX REVISITED

Although originally promoted in the 1990s, another recently-popularized trend in American schooling that proponents' have used to reinforce calls for single-sex schooling is the notion of school choice. Proponents of single-sex schooling argue that implementing sex-segregated schooling promotes school choice for students and their families.[59] The concept of school choice is familiar to most education policy scholars and has important implications for all students and families engaging in the American schooling system. The term school choice was first popularized in 1990 with John Chubbs' book, "*Politics, Markets, & America's Schools*," which advocated for a free-market competition approach to American public schooling.[60] Notably, Chubbs advocated for "a new system of public education, built around parent-student choice and school competition," which he claimed "would promote school autonomy" and provide "a firm foundation for genuine

58. Exec. Order No. 13988, 86 C.F.R. 7023 (2021).

59. *See* Teresa A. Hughes, *The Advantages of Single-Sex Education*, 23 NAT'L F. OF EDUC. ADMIN. & SUPERVISION J. 5, 7–8 (2006–2007).

60. *See generally* JOHN CHUBBS & TERRY MOE, POLITICS, MARKETS, & AMERICA'S SCHOOLS (1990).

school improvement and superior student achievement."[61] Such logic provided an important backdrop to proponents of implementing single-sex schooling as a choice for students and their families, who frequently pointed to single-sex schooling for its potential to improve literacy and graduation rates.[62]

Although many school choice reforms purported to improve students' experiences in schools, their proponents ultimately underestimated the swiftness of criticism to come regarding the application of "free-market" economics to children's education. Within most of these criticisms, one question remained central: who exactly has choice? First, education policy scholars were quick to point out that this newly-discovered school choice discourse was construed to reimplement segregation along socioeconomic, racial, and gendered lines, with wealthy, white families having access to choice, contrary to the experiences of low-income Black and Brown families.[63] School choice was in large part promoted by wealthy parents' "anxiety about the scarcity of high-quality educational options combined with the design of school choice policies" which facilitated "opportunity hoarding that functioned as a collective strategy of class preservation."[64] Altogether, schooling policies centered on the doctrine of school choice have contributed to increased race and income-based segregation, with "more than one in six students attend[ing] schools where the vast majority of their classmates were both poor and black or Hispanic [in 2013–2014]—over twice as many as in 2000 . . . ."[65]

School choice framings of educational opportunity in the context of single-sex schools are likely to produce the same disparate outcomes

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61. *Id*.

62. Hughes, *supra* note 59, at 7, 10.

63. Patrick Wall, *The Privilege of School Choice*, ATLANTIC (Apr. 25, 2017), https://www.theatlantic.com/education/archive/2017/04/the-privilege-of-school-choice/524103/ (discussing how wealthy families choose where to live and settle in districts where most children look like theirs); Jarrett Skorup, *Rich Families Have Choice; Poor Families Need It*, MACKINAC CTR. FOR PUB. POL'Y (Aug. 25, 2020), https://www.mackinac.org/rich-families-have-choice-poor-families-need-it.

64. Carolyn Sattin-Bajaj & Allison Roda, *Opportunity Hoarding In School Choice Contexts: The Role of Policy Design in Promoting Middle-Class Parents' Exclusionary Behaviors*, 34(7) EDUC. POL'Y 992, 992 (2018). *See also* Nancy Maclean, '*School choice' developed as a way to protect segregation and abolish public schools*. WASH. POST (Sept. 27, 2021, 6:00 AM EDT), https://www.washingtonpost.com/outlook/2021/09/27/school-choice-developed-way-protect-segregation-abolish-public-schools/.

65. Wall, *supra* note 63.

that reinforce inequality. For school districts that "offer" single-sex schooling as a choice for students and their families, many low-income families of color choose educational opportunities not based on school quality, but rather on geographical distance, transportation ease, operational hours, and other socioeconomic factors.[66] This association with choice and socioeconomic status has the dual effect of students being heavily incentivized to attend either coeducational schools or single-sex schools based solely on their families' ease of access to schooling opportunities, even in situations where both schooling opportunities are offered. It is therefore unsurprising that when public single-sex schooling is offered as an educational opportunity, they "tend to attract larger numbers of . . . [more] involved parents."[67]

School choice proponents fail to acknowledge the mechanisms by which parents and guardians use choice to influence their children. In the context of K–12 schooling, it is not students who choose their school, but their parents or guardians.[68] Although parents' involvement in their children's choice of schooling likely reflects students' youth and perceived inability to make an informed decision, such deference to parents raises serious concerns for the "as long as it is voluntary" principle behind school choice in the context of single-sex education, especially as it relates to the safety and well-being of queer, trans, and gender non-conforming students.[69] This concern with "voluntariness" will be discussed in more depth in the forthcoming sections, but it is crucial to note that courts have already interpreted voluntariness in the context of requiring that public single-sex schools be "voluntary" to

66. Inst. of Educ. Sciences, *Use of School Choice,* NAT'L CTR. FOR EDUC. STATS. (June 1995), https://nces.ed.gov/pubs/web/95742r.asp ("Parents with lower socio-economic status were more likely to select schools for convenience than families with higher socio-economic status.").

67. Salomone, *supra* note 4, at 1005.

68. Inst. of Educ. Sciences, *supra* note 66.

69. Deepa Bharath, *Parents Opposed to Comprehensive Sex Education Pull Children Out of Schools, Stage Rallies across Southern California*, ORANGE CNTY. REG. (May 17, 2019), https://www.ocregister.com/2019/05/17/parents-opposed-to-comprehensive-sex-education-pull-children-out-of-schools-stage-rallies-across-southern-california/ (highlighting the experience of parents in Southern California being opposed to and protesting sex-education that is inclusive of the LGBTQ+ experience).

mean that *parents* have choice in deciding where their children attend school, not the students themselves.[70]

IV. THE HARMS OF PUBLIC SINGLE-SEX SCHOOLING

With reference to the contentious history of single-sex schooling in the United States and the harms caused by brain essentialist pedagogies and faulty notions of school choice, we can establish a critical framework for evaluating the harms of single-sex schooling on students through gender stereotyping, pre- and post-*Bostock*. This Article discusses the gender-based harms to straight and cisgender students and concludes by discussing the unique harms to queer, non-binary, intersex, and trans students.

A. Harms to Straight and Cisgender Students

Straight cisgender students experience gender-based harm when encountering single-sex schooling. Students who identify as straight and cisgender may nonetheless not conform or be perceived to conform to stereotypical gender roles. Single-sex schooling environments rooted in notions of "inherent differences" between biological sexes reinforce the bifurcation of gender, labeling students who do not conform to gendered standards associated with their sex as outcasts, deviations from the norm, or inferior.

Additionally, although courts have been careful not to directly analogize sex-based discrimination with race-based discrimination, *A.N.A. ex rel. S.F.A. v. Breckinridge County Board of Education* (2011) exemplifies courts' failure to see how sex-based discrimination produces unique but nonetheless serious harms that impact cisgender and straight children in schools. The debate over single-sex schooling is frequently centered on these comparisons between race and sex discrimination. Proponents of single-sex schooling and some courts

70. Doe v. Wood Cnty. Bd. Of Educ., 888 F. Supp. 2d 771, 775–76 (S.D.W. Va. 2012) (relying on discussions leading up to the adoption of the regulation, particularly the following statement: "In order to ensure that participation in any single-sex class is completely voluntary . . . the recipient is strongly encouraged to notify parents, guardians, and students about their option to enroll in either a single-sex or coeducational class *and receive authorization from parents or guardians to enroll their children in a single-sex class*." (emphasis added) (quoting Nondiscrimination on the Basis of Sex Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,530, 62,537 (Oct. 25, 2006))).

have been quick to dismiss opponents' comparisons of discrimination based on sex to race-based discrimination.[71] While there are many important distinctions between race and sex discrimination both in history and in law, proponents and courts alike have used these distinctions to accomplish ends that do not reflect or outright minimize the damage brought by sex-segregated schooling. Importantly, by minimizing the harm of sex discrimination through comparisons to race-based discrimination, proponents fail to recognize that sex discrimination does not need to operate identically to race discrimination to nonetheless be harmful. One of the most notable examples of drawing upon distinctions between race and sex discrimination is found in Salomone's defense of public single-sex schooling:

> The *Science* authors cite, for example, research on the negative effects of racially segregated schools on African American students. This commonly asserted analogy to sex separation is not only false, but it turns the law of single-sex schooling on its head. Racially segregated schools historically were not voluntary for African Americans and existed within a social and economic context that was hostile and physically endangering to them. Racially separate schools carried a message of disempowerment and inferiority, causing students, as the Supreme Court found in *Brown v. Board of Education*, irreparable educational and psychological harm.

Salomone is appropriate to imply that there are notable and important distinctions that should be recognized between race and sex-based discrimination in education, but many of the very harms she references as being unique to race-based discrimination—involuntariness, hostility, physical endangerment, disempowerment, and inferiority—are similarly implicated in students' encounters with sex-segregated education.[72] Although no reasonable person would argue

71. Salomone, *supra* note 4, at 978, 986–89.

72. *See* Diane Halpern et al., *The Pseudoscience of Single-Sex Schooling*, 333 SCIENCE 1706, 1707 (2011).

that the history of sex discrimination in the United States readily fits neatly into the history of oppression faced by Black and Brown students, the aforementioned themes found in the 1954 *Brown v. Board of Education* decision that outlawed "separate-but-equal" schooling are present in the experiences of students at single-sex schools.[73] These comparisons, when explained carefully, help to illuminate the harms of sex-segregated schooling that might otherwise be difficult to identify.[74] Even without these similarities, sex discrimination need not produce similar harms to that of race discrimination to be considered reprehensible, and debates that rely on such faulty litmus tests inevitably minimize the harms of sex discrimination that stand on their own.

In the *Breckinridge* case, the court rejected the plaintiffs' argument that students were harmed by single-sex schooling by pointing out a perceived difference between race and sex discrimination, stating that "individuals are harmed when they attend schools in which students are separated on the basis of race because such separation 'generates a feeling of inferiority . . . that may affect hearts and minds in a way unlikely to ever be undone.'"[75] Although courts may be right to point out important distinctions both in history and doctrine as it relates to sex and race discrimination in education, the *Breckinridge* decision underscores how courts continue to remain largely uninformed on the tangible "feeling[s] of inferiority" that detrimentally impact straight and cisgender students who do not adequately perform assigned gender roles.[76]

Moreover, straight cisgender students whose mere pedagogical preferences do not conform with their assigned single-sex school will inherently be denied the benefits available through the other single-sex program that they do not attend. The *Wood County* complaint points to numerous cases within a single family of presumably straight cisgender students who do not prefer or cannot be benefited from the alleged pedagogical benefits offered in their assigned single-sex school.[77] Under single-sex schooling proponent Leonard Sax's own ideal single-

73. Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483, 494 (1954).

74. Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 233–35 (1965).

75. A.N.A. ex rel. S.F.A. v. Breckinridge Cnty. Bd. of Educ., 833 F. Supp. 2d 673, 678 (W.D. Ky. 2011).

76. *Id.*

77. Complaint, *supra* note 46.

sex schooling model, boys are taught to play with trucks and cars while girls should be spoken to in a softer tone and learn in rooms with warmer lighting.[78] In this model, there will be students in both environments that do not fit the stereotype-based assumptions that the learning environment is founded on.[79] Equally important is the reality faced by many students with disabilities, such as one of the plaintiffs in the *Wood County* complaint, and who would frequently be either actively harmed by the allegedly "beneficial" single-sex pedagogical environments they are placed in, or are denied the perceived benefits of the learning styles and structures offered in the other non-attending single-sex environment.[80] Although disability-based discrimination does not receive heightened scrutiny under the Equal Protection Clause, this harm nonetheless has the potential to produce numerous classes of plaintiff students who may have the option to instead frame their arguments as sex-discrimination claims against public schools that deprive them of benefits offered in the non-assigned single-sex school. These plaintiffs could potentially turn to the Equal Protection Clause's anti-subordination analysis to argue that sex-segregated educational programs in public schools disadvantage or subordinate straight cisgender men and women. Anti-subordination analysis as employed in the *Virginia* decision focuses on "conditions of pervasive social stratification and argue[s] that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups," including women.[81] As noted by late education law scholar Denise Morgan, the United States Supreme Court's anti-subordination principle in *Virginia* "is important because that element of the intermediate scrutiny test is likely to be the decisive factor in litigation over the constitutionality of the new generation of single-sex public schools."[82] The *Virginia* decision clearly outlined that sex-segregated programs cannot be used "for denigration of the members of

78. SAX, *supra* note 33, at 12.

79. *Id*.

80. Complaint, *supra* note 46.

81. Jack M. Balin & Reva Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 9 (2003).

82. Denise C. Morgan, *Anti-Subordination Analysis after United States v. Virginia: Evaluating the Constitutionality of K-12 Single-Sex Public Schools*, 1999 UNIV. CHI. LEGAL F. 381, 418 (1999).

either sex," suggesting that rather than following a strictly-historical analysis of subordination of women in educational programs, courts should take part in a more present-day anti-subordination analysis that determines whether sex-segregated programs denigrate men or women.[83]

Even in the context of single-sex schooling for straight cisgender students, the reality that the choice to enroll in single-sex schooling most likely lies with the parents may harm students who have their own preference on whether to attend a coeducational alternative, or who simply prefer the pedagogical structure offered in the unavailable alternative single-sex program. Students may often be persuaded, or indeed required, to attend the school of their parents' choosing, even considering the disability status or preference of the student that they believe would better support their attendance at the substantially equal alternative school. These harms reveal an underlying flaw of single-sex education: assuming that men and women uniformly and predictably conform to prescribed gender stereotypes and therefore will uniformly and predictably benefit by sex-segregated learning environments.

B. Applying *Bostock*: Impermissible Segregation of Queer & Trans Students

The United States Supreme Court's 2020 *Bostock* decision importantly broadened the definition of sex to include sexual orientation and gender identity in the context of Title VII, but has been interpreted and implemented through President Biden's 2021 Executive Order to cover all laws and regulations prohibiting sex-based discrimination, including in public education.[84] As such, by inserting sexual orientation and gender identity into the language of Title IX, one can read the federal statute to assert that no person on the basis of sexual orientation or gender identity shall "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."[85] Equally influential to *Bostock*'s impact on public education, the work of queer and trans advocates and youth in advocating for their inclusion in all

83. United States v. Virginia, 518 U.S. 515, 533 (1996).
84. Exec. Order No. 13988, 86 C.F.R. 7023 (2021).
85. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–86.

aspects of public educational opportunities has led scholars to point out that "while long consigned to the margins of the debate, questions concerning the educational interests and needs of gender non-conforming students have been gaining visibility in recent years."[86] No doubt, conflict surrounding gender and sexuality and their intertangling with schooling have become front-and-center in queerphobic "Don't Say Gay" legislation and attacks on trans students that seek to erase the experiences of queer and trans children.[87]

As these questions regarding the intersection of queer visibility and education arise, skeptics of single-sex schooling should be rightly curious as to how *Bostock*'s application to Title IX does not inherently prohibit binary-based public single-sex schools. More specifically, this Article questions how schooling designed to uniquely benefit cisgender men and women avoids inherently depriving queer, intersex, non-binary, and trans students of their alleged "tailored" schooling benefits that are not offered in co-educational contexts. The premise of single-sex schooling relies on minimizing the vast array of gender and sexual identities into two faulty biological, stereotype-riddled pedagogies. For too long, courts and policymakers presumed that all students fit into a "boy or girl" framework of opportunities, incorrectly assuming that all students will be able to fit into one of the two options offered within the binary. This binary-based presumption of single-sex schooling produces tangible harms to queer, intersex, non-binary, and trans students through multiple mechanisms explained below. Even if we incorrectly assumed that single-sex schooling's reliance on sex-based learning pedagogies could tangibly benefit cisgender-straight students, neither single-sex schooling environment tailors its teaching to already-marginalized queer, non-binary, intersex, and trans students.

Students who do not identify as straight—including lesbian, gay, and bisexual students—face unique, unparalleled challenges. Social norms reinforcing heterosexuality and punishing deviations are foundational to single-sex schooling. As education scholar Janna Jackson posits, "Embedded in many of the arguments for single-sex

86. JULIET WILLIAMS, THE SEPARATE SOLUTION? SINGLE-SEX EDUCATION AND THE NEW POLITICS OF GENDER EQUALITY, 160 (2016).

87. Amber Phillips, *Florida's law limiting LGBTQ discussions in schools, explained*, WASH. POST (Apr. 22, 2022, 4:00 PM EDT), https://www.washingtonpost.com/politics/2022/04/01/what-is-florida-dont-say-gay-bill/.

schooling are statements that expose underlying assumptions of normative heterosexuality."[88] Proponents of single-sex schooling utilize cisgender-heterosexual assumptions of student behavior to advocate for the perceived benefits of sex-segregated learning environments. For example, these assumptions translate into claims that students will inherently have fewer "distractions" without the "other" sex present and that students will have less incentive to "compete" for the other sexes' attention.[89] These presumptions likely permeate the minds of some parents deciding whether to send their children to single-sex schools.[90] Cisnormative and heteronormative presumptions also infiltrate into sex-segregated schooling through gendered "sex education" courses that frequently miseducate cisgender-heterosexual students, while simultaneously erasing the lived experiences and existences of queer and trans people.[91] Not only do these gendered and heteronormative pedagogies deprive students who are not straight of their perceived benefits, but they also reinforce heterosexuality as the norm, while casting the experiences of lesbian, gay, bisexual, and pansexual students to the side, or ignoring those students' experiences altogether.

Although coeducational schools are far from blameless in erasing queer students and enforcing heteronormativity, Jackson convincingly points out that "setting up a school situation based on these assumptions can institutionali[z]e this invisibility."[92] Gay, bisexual, and pansexual men uniquely face the consequences of standards of masculinity that are reinforced in single-sex learning environments.[93] For both queer boys and girls, these students face the reality that parents unaccepting of their

88. Janna Jackson, '*Dangerous Presumptions': how single-sex schooling reifies false notions of sex, gender, and sexuality*, 22 GENDER & EDUC. 227, 232 (2010).

89. DIANA MEEHAN, LEARNING LIKE A GIRL: EDUCATING OUR DAUGHTERS IN SCHOOLS OF THEIR OWN 51 (2007); Jim Farrell, *Class Divide: Single-Sex Schoolrooms Take Off*, HARTFORD COURANT (June 12, 2007, 12:00 AM), https://www.courant.com/news/connecticut/hc-xpm-2007-06-12-0706120760-story.html.

90. BARBARA HEATHER, GENDER IN POLICY AND PRACTICE: PERSPECTIVES ON SINGLE SEX AND EDUCATIONAL SCHOOLING 593, 611 (2002) (Heather noted that parents chose single-sex schooling for their daughters largely out of fear: fear of discrimination, fear of harassment, and fear of pregnancy. Parents believed these "distractions of male behavior" would lead to a "loss of confidence and decline in grades." They based these fears on news accounts, their own youth, and stories from their daughters. Heather reports that parents saw these presumed male behaviors, and presumed female responses, as "natural" and "accept[ed] the naturalness of sex difference.").

91. Bharath, *supra* note 69.

92. Jackson, *supra* note 88, at 233.

93. *Id.*

queerness and empowered with school choice can effectively force their children to attend single-sex schools as a punitive form of masculinization or feminization.

With the application of *Bostock* to Title IX, these harms to queer boys and girls have the potential to be addressed through claims both under Title IX and the Equal Protection Clause. Given that Title IX now prohibits discrimination based on sexual orientation and gender identity, courts may be willing to challenge school districts with public single-sex schools that explicitly reinforce heteronormative pedagogies, exclude queer perspectives in sex-education classes, or promulgate the development of their programs without offering substantially equal opportunities for queer students. Similarly, plaintiffs can argue that single-sex schooling inherently violates the Equal Protection Clause where students who are not straight are deprived of the benefits of schooling offered by the state and its local schooling organizations.[94] A state or school district would be hard-pressed to find an exceedingly persuasive justification for discriminating on the basis of sex when such discrimination tangibly harms the queer students who attend them by explicitly reinforcing heteronormativity.

Non-binary and intersex students are also harmed by public single-sex schooling through their essential and pedagogical preclusion from either of the sex-segregated schools offered. Single-sex schooling inherently reinforces gender as both biologically-rooted and as a binary, harming non-binary and intersex students. While some proponents of single-sex schooling do not even seek to untangle the distinctions between conceptions of sex and "gender" (accounting for why single-sex schooling may be a misnonmer for what is in fact "gendered" schooling), Janna Jackson points out that sex is, in fact, a construction of gender:

> Some who describe gender as socially constructed believe that anatomical sex is '"the biological raw material" [Rubin 1975] that culture transforms into gender' (Corber and Valocchi 2003, 8) and assume that people's

94. Doe v. Wood Cnty. Bd. of Educ., 888 F. Supp. 2d 771, 775 (S.D.W. Va. 2012) (revealing that opponents of single-sex schooling already reference the Equal Protection Clause when filing complaints against sex-segregated learning environments).

> anatomical sex matches their gender. Butler, however, argues that 'sex itself is a gendered category' (1990, 7) and that 'sex is not gender's biological foundation, but one of its most powerful effects. The category of sex works to naturalize the binary organization of gender by functioning as the seemingly neutral referent of gendered identity' (Corber and Valocchi 2003, 8).[95]

Instead of appropriately constructing our schools to account for the fact that sex and gender identity "exists on a spectrum, like so much of human behavior,"[96] single-sex schooling signals to non-binary and intersex students who frequently do not fall neatly into sex constructs of "maleness" and "femaleness" or gender binaries that their personhood is a deviation from the norm.[97] As Jackson points out, categorizations of non-binary and intersex students as "exceptions to the rule" operate as to "reify the bifurcation of male and female."[98] This bifurcation of sex and gender inherently considers "people who act outside of their norms . . . a 'problem,'" if they are seen at all.[99]

Non-binary and intersex students face tangible harms adjacent to the psychological effects of their erasure and labeling as a "deviation," including challenges with assignment or placement by the school district to a single-sex opportunity that does not align with the students' preferences. If the student or family does have a choice in the matter, these challenges only reify the dilemmas faced by non-binary and intersex students in their experiences at single-sex schools that do not account for their identities in the first place. Students who are intersex are entirely unaccounted for in proponents' "sex-as-a-binary" pedagogical constructs, and these students would neither benefit from

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95. Jackson, *supra* note 88, at 229.

96. Julie L. Nagoshi, *Deconstructing the Complex Perceptions of Gender Roles, Gender Identity, and Sexual Orientation Among Transgender Individuals*, 22(4) FEMINISM & PSYCH. 405, 413 (2012); *see also* Richard A. Friedman, *Opinion: How Changeable is Gender?*, N.Y. TIMES (Aug. 22, 2015), https://www.nytimes.com/2015/08/23/opinion/sunday/richard-a-friedman-how-changeable-is-gender.html ("Recent neuroscience research suggests . . . that gender identity has a neural basis and that it exists on a spectrum, like so much of human behavior").

97. Jackson, *supra* note 88, at 229 (arguing that proponents of single-sex education rest their arguments "on the unfounded assumption that humans come in two varieties – male and female – and ignores historical and current patriarchal systems.")

98. *Id.*

99. *Id.*

the alleged "tailored" learning styles offered in many single-sex schools nor would they directly benefit from the more progressive models of single-sex schooling that seeks to overcome gender stereotypes affecting cisgender-straight men and women.[100] Moreover, similarly to challenges faced by students who are not straight, parents who do not accept their children's identities could assign their children to attend binary-based schools as a punitive and psychologically damaging form of gendering in a flawed and frequently-catastrophic attempt to gender their non-binary children.

Given Title IX's newly-derived protections covering gender identity, it is apparent that single-sex schools per se discriminate against students who do not fall into the binary-based sex and gender categorizations on which sex-segregated schools rest their foundations. Although proponents might argue that coeducational alternatives offer a solution to this dilemma, there are multiple problems with this line of thinking. If a school district offers a coeducational alternative, this still deprives non-binary and intersex students of the alleged benefits offered by single-sex schools. Single-sex schools are premised on the idea that *all* students would, if desired, be able to attend "one or the other," without considering the unique needs or pedagogical frameworks that would benefit non-binary and intersex students. Because of this absence of a substantially equal alternative for non-binary and intersex students, a coeducational alternative would not adequately remedy the absence of tailored or substantially equal schooling for non-binary and intersex students. Some notable scholars have argued that single-sex schooling should continue to be permissible in public education because single-sex educational programs must follow Department of Education Guidelines requiring they be "voluntary . . . [so that] all students have the option of coeducational classes, while students who wish to claim binary gender identities can opt into segregated classes."[101] Such reasoning does not address lopsidedness of benefits given to cisgender students, who are permitted to choose between tailored single-sex and coeducation schooling, while non-binary and intersex students would frequently be given no such choice of tailored schooling. Additionally, if single-sex schools do permit their attendance, non-binary and intersex

100. Salomone, *supra* note 4, at 976.

101. Jessica E. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 963–64 (2019).

students may have the option to attend only one of the single-sex schools offered, where many of these students may be deprived of the pedagogical frameworks offered at the alternative single-sex school that could be more beneficial for their unique learning needs.[102]

Finally, trans students face especially unique and tangible challenges in single-sex schools. If one mistakenly accepts the biological-essentialism behind sex-based learning pedagogies, trans students falling within the binary will either paradoxically attend a single-sex school that allegedly matches their neural "biology" but that does not align their gender identity or attend a single-sex school that affirms their gender identity but fails to conform to their dubious "biological" pedagogical learning styles. Such challenges also erase trans students who are assigned to schools based on their biological sex, but who have undergone gender-affirmative care that in many cases would negate altogether the alleged and faulty presumption that the students' biological learning pedagogies match their sex assigned at birth. These important realities faced by trans students would put districts offering single-sex schooling in an untenable position of investigating and policing students' "appropriate" single-sex school, and trans students in the damaging and unethical position of defending their identity.

Even if we were not skeptical of the existence of any relevant biological differences between men and women that warrant the promulgation of sex-based pedagogies, trans students nonetheless face the challenge of being sent or assigned by their parents or the school district itself to schools or classrooms that do not affirm their gender identity. Such harm is already readily visible in the repulsive transphobic attacks by states and school districts on trans students seeking to use restrooms that align with their gender identity.[103] In *Adams v. School Board of St. Johns County, Florida,* Andrew Adams, a trans boy, was required by his school to use gender neutral restrooms

102. Doe v. Wood Cnty. Bd. Of Educ., 888 F. Supp. 2d 771, 778 (S.D.W. Va. 2012) (revealing that straight cisgender students are also deprived of the benefits offered by the single-sex school that does not align with their sex or gender identity).

103. Joellen Kralik, *School Bathroom Access for Transgender Students*, NAT'L CONFERENCE STATE LEGISLATURES (July 2016), https://www.ncsl.org/research/education/school-bathroom-access-for-transgender-students.aspx.

and was not allowed to use the boys' restroom.[104] Andrew's counsel, Lambda Legal, argued in its successful complaint to the United States District Court for the Middle District of Florida that the school's restroom policy sends a purposeful message that transgender students in the school district are undeserving of privacy, respect, and protections afforded to other students.[105] Lambda Legal also argued that the school district's policy of excluding trans students from restrooms that match their gender identity is unconstitutional because it discriminates based on sex in violation of the Equal Protection Clause and Title IX.[106] Andrew Adams succeeded in court even prior to *Bostock*'s expansion of Title IX protections to trans and queer people. The *Adams* case suggests that single-sex schools that altogether preclude trans students from attending the school that matches their gender identity would violate Title IX and the Equal Protection Clause.[107] Conversely, trans students who would be permitted to attend the single-sex school matching their gender identity have the potential to be harmed by pedagogies that are not tailored to their identity, also raising concerns that single-sex schools can never offer a substantially equal alternative as stipulated in Title IX guidance for trans students.[108]

V. CONCLUSION

This Article concludes with important questions for legal scholars and education policymakers alike: Following *Bostock*, is all sex-segregated schooling inherently harmful to many of the students who attend them? Equally important, are such sex-segregated educational frameworks always a violation of Title IX or the Equal Protection Clause because of the harms identified in this Article?

As for the status of Title IX following *Bostock*, public single-sex schools will be hard-pressed to defend schooling models that discriminate, either through attendance policies or the teaching pedagogies themselves, based on sexual orientation and gender identity.

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104. Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 318 F. Supp. 3d 1293, 1298–310 (M.D. Fla. 2018), *aff'd*, 3 F.4th 1299 (11th Cir. 2021).

105. *Id.*

106. *Id.*

107. *Id.*

108. Dear Colleague Letter from Catherine E. Lhamon, *supra* note 57.

These challenges faced by cisgender-heterosexual students and queer, non-binary, intersex, and trans students alike will prove to be novel issues of the law, and where courts will likely have to examine past Department of Education guidance and adjacent jurisprudence, including notable "bathroom controversy" decisions. In any case, Title IX "denied the benefit of" language should prove particularly useful to queer and gender non-conforming students who are unable to access the perceived benefits offered by binary-based single-sex schooling. It is also possible that the previously disregarded language of The Equal Educational Opportunities Act of 1974 stipulating that "all children enrolled in public schools are entitled to equal educational opportunity without regard to ... sex" will be reexamined considering the application of *Bostock* to Title IX.

Legal scholars appropriately note that intermediate scrutiny in the context of sex-discrimination under the Equal Protection Clause was designed to permit benign classifications based on sex. Through past court decisions such as *Vorchheimer v. School District of Philadelphia* and *United States v. Virginia*, courts have been tasked with drawing the lines of when schools are able to offer an "important justification" for segregating based on sex. With the experiences of queer and trans individuals becoming more present in courts across the United States, there remains some hope that courts may eventually heighten the standard of scrutiny for discrimination based on gender identity and sexual orientation when evaluating Equal Protection claims.

Although the Equal Protection standard of scrutiny applied to queer and trans claims remains uncertain, as more literature comes to center the experience of these students, hope remains that plaintiffs will challenge single-sex schools that effectively exclude and erase students who do not conform to gender and sexual norms. More specifically, as districts begin to shift their framing of single-sex schooling away from explicitly binary-based learning pedagogies and to a "progressive" model that dubiously challenges norms that harm cisgender boys and girls, how will school districts respond to claims that no such remedial programs are offered or tailored toward the experiences of queer, non-binary, intersex, and trans students? The evidence outlined in this Article suggests that single-sex schooling is inherently incompatible with schooling that meaningfully accounts for the diverse experiences and needs of queer, non-binary, intersex, and trans students. The experiences of queer and trans students also reveal why single-sex

educational programs are problematic for people on the binary, too. As cases such as *Wood County* case in rural West Virginia or the *Adams* case in St. Augustine Florida show, educational programs that segregate based on sex subject straight and queer students alike to stereotyping and labeling that frequently has devastating consequences.

Legal and education policy scholars alike must be careful to not slip into heteronormative and binary-based arguments that fail to reflect the level of diverse students' schools are meant to serve. With education law being only one example among many, this larger challenge of heteronormativity and cisnormativity riddled in our legal institutions persists in formulating a judiciary and profession that is well-equipped to understand, respect, and adapt to the evolving language and pedagogies surrounding sex, gender, and sexual orientation. Specifically, the textualist approach in *Bostock* itself does not meaningfully account for the unique identities of queer and trans people, and those in the legal profession must bear the responsibility of first acknowledging the existence of queer and trans individuals to effectively account for their experiences in jurisprudence.

As long as single-sex schools operate under a "male-female" framework, students will remain excluded and denied the alleged benefits of such programs, regardless of an existing coeducational "alternative." Coeducational schooling does not resolve every challenge faced by cisgender-straight, queer, non-binary, intersex, and trans students, but this does not mean that sex-segregated schooling is the answer.