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### Title IX and the Challenges of Educating for Equality

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## TITLE IX AND THE CHALLENGES OF EDUCATING FOR EQUALITY

LINDA C. MCCLAIN\*

Educating for equality to foster practicing equality must be a vital task for the next fifty years of Title IX. It is also a task that fits into the mission and expertise of schools as educational institutions. I use “educating for equality” as shorthand for the role of schools in preparing children, adolescents, and college students to participate in and build a world in which—to echo Title IX’s “37 words that changed everything”<sup>1</sup>—“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.”<sup>2</sup> While Title IX’s mandate of participation and inclusion<sup>3</sup> has a specific reach, educating for equality should aspire to reach more broadly to prepare children, adolescents, and college students to *practice* equality—and equity—in their daily lives. In describing this task as educating *for* equality, I borrow from the recent “Educating for American Democracy” initiative, aimed at educating young people “to participate in and sustain our constitutional democracy” in order—in the language of the Constitution’s Preamble—to make our union “more perfect.”<sup>4</sup> While that initiative seeks to foster “reflective patriotism” and “excellence” in U.S. civics and history, its emphasis on cultivating critical thinking and awareness of “hard histories” of inclusion and exclusion and issues of agency, power, and oppression are pertinent also to educating for equality aimed at fostering Title IX’s goals.<sup>5</sup>

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<sup>1</sup> Steve Wulf, *Title IX: 37 Words that Changed Everything*, ESPN (Mar. 22, 2012), [https://www.espn.com/espnw/title-ix/story/\\_/id/7722632/37-words-changed-everything](https://www.espn.com/espnw/title-ix/story/_/id/7722632/37-words-changed-everything) [<https://perma.cc/LZ3J-BPMA>].

<sup>2</sup> Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88.

<sup>3</sup> For an argument that Title IX has not been sufficiently inclusive and intersectional, see Kelsey Scarlett & Lexi Weyrick, *Transforming the Focus: An Intersectional Lens in School Response to Sex Discrimination*, 57 CAL. W. L. REV. 391 (2021).

<sup>4</sup> EDUCATING FOR AM. DEMOCRACY INITIATIVE, EDUCATING FOR AMERICAN DEMOCRACY: EXCELLENCE IN HISTORY AND CIVICS FOR ALL LEARNERS 1, 9, 25 (2021), <https://www.educatingforamericandemocracy.org/wp-content/uploads/2021/02/Educating-for-American-Democracy-Report-Excellence-in-History-and-Civics-for-All-Learners.pdf> [<https://perma.cc/RB4Y-Z599>].

<sup>5</sup> *Id.* at 6, 17, 20-21, 26, 28-29.

In the context of the Title IX responsibility of higher educational institutions to prevent and address sexual harassment, my colleague Naomi Mann has criticized traditional approaches that are “identity-neutral” and “power-evasive.”<sup>6</sup> She calls instead for schools to analyze how power and identity interact, studying the broader college ecosystem. In *Sexual Citizens: A Landmark Study of Sex, Power, and Assault on Campus*, growing out of the pioneering SHIFT study (Sexual Health Initiative to Foster Transformation), Jennifer S. Hirsch and Shamus Khan also argue for an “ecological model,” which “situates individuals, along with their problem behaviors, in the broader context of their relationships, their pre-college histories, the organizations they are a part of, and the cultures that influence them.”<sup>7</sup> It is an approach attentive to the multiple dimensions of power and the “multiple hierarchies” in the “ecosystems” in which sexual assault occurs.<sup>8</sup> They persuasively argue that institutions have a responsibility to foster young people’s “sexual citizenship,” which denotes “the acknowledgement of one’s own right to sexual self-determination and . . . recognizes the equivalent right in others.”<sup>9</sup>

In this essay, I will argue that these recommendations offer helpful guidance for a proactive, ecological, and intersectional approach to the education that schools should undertake to help realize Title IX’s goals of equal participation and inclusion and to prevent problems of sex discrimination—including the ongoing problem of campus sex-based harassment and sexual violence. I will also observe that, while the legislative climate in some states seems conducive to such education, the climate in other states—evidenced by laws restricting what may be taught in schools about race, gender, and sexual orientation—presents obstacles to such education.

On the fiftieth anniversary of Title IX, President Biden spoke of “more work to do” in the next fifty years to “achieve full equality, inclusion, and dignity for women and girls, LGBTQI+ Americans, and all Americans.”<sup>10</sup> Part of that work is choosing forms of education to further those goals and to prevent forms of discrimination that hinder them. Prevention is a key component of institutional

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<sup>6</sup> Naomi Mann, *Classrooms into Courtrooms*, 59 HOUS. L. REV. 363, 418 (2021) (quoting Jessica C. Harris & Chris Linder, *Preface* to INTERSECTIONS OF IDENTITY AND SEXUAL VIOLENCE ON CAMPUS xii (Jessica C. Harris & Chris Linder eds., 2017)).

<sup>7</sup> See JENNIFER S. HIRSH & SHAMUS KHAN, *SEXUAL CITIZENS: A LANDMARK STUDY OF SEX, POWER, AND ASSAULT ON CAMPUS*, at xi (2020). For results from the underlying study, see JENNIFER S. HIRSCH & CLAUDE ANN MELLINS, *SEXUAL HEALTH INITIATIVE TO FOSTER TRANSFORMATION (SHIFT) FINAL REPORT* (Colum. Univ., Mar. 2019), available at [https://www.publichealth.columbia.edu/sites/default/files/shift\\_final\\_report\\_4-11-19.pdf](https://www.publichealth.columbia.edu/sites/default/files/shift_final_report_4-11-19.pdf) [<https://perma.cc/SGU3-WBBT>].

<sup>8</sup> HIRSCH & KHAN, *supra* note 7, at xii, 229-30.

<sup>9</sup> *Id.* at xvi.

<sup>10</sup> Press Release, Joseph R. Biden Jr., President of the United States, Statement by President Joe Biden on the 50<sup>th</sup> Anniversary of Title IX (June 23, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/23/statement-by-president-joe-biden-on-the-50th-anniversary-of-title-ix/> [<https://perma.cc/A4CU-MPM7>].

obligations under Title IX, but—as my colleague Katharine Silbaugh has argued—Title IX’s framework has provided incentives to be more “reactive” than “proactive”: to focus on addressing assaults that have already occurred and preventing their reoccurrence, rather than adopting a public health perspective to use “research-based best prevention practices” to prevent assaults from occurring in the first place.<sup>11</sup> Consider, for example, the U.S. Department of Education’s 2022 Notice of Proposed Rulemaking (the “Proposed Rule”) to amend Title IX’s regulations.<sup>12</sup> “Prevent” or “prevention” appears over 150 times in the Proposed Rule. Though there are some references to preventing sex discrimination (including sexual harassment) before it occurs, the largest number of references concerns institutions acting to “end any sex discrimination” that *has occurred* in educational programs or activities and to “prevent its recurrence.”<sup>13</sup>

By comparison, in the context of pregnancy discrimination, the Proposed Rule includes more proactive measures, such as informing a student of their ability to request “reasonable modifications” to prevent discrimination and ensure equal access.<sup>14</sup> Again, in the context of pregnancy, the Proposed Rule also states that institutions would benefit from increased clarity on “what proactive steps they must take to prevent intentional or inadvertent discrimination” under Title IX.<sup>15</sup> The Proposed Rule mentions that measures designed to “eliminate subtle and even unconscious forms of discrimination are particularly useful to ensure that students who are pregnant” have access to a recipient institution’s educational programs and activities.<sup>16</sup> Additional proactive measures to prevent such discrimination—including against employees—focus on allowing space and time for lactation.<sup>17</sup>

Notably, the Department of Education has recognized the need for this kind of proactive, preventive approach to sex discrimination in the context of “Resolution Agreements” that the Office of Civil Rights reaches with schools who have had problems with Title IX violations.<sup>18</sup> Such agreements have included commitment by “outreach and educational activities” before sexual harassment and other sexual misconduct occurs—rather than only in reaction to it.<sup>19</sup> Tufts University, for example, agreed that its Misconduct Prevention Task

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<sup>11</sup> Katharine Silbaugh, *Reactive to Proactive: Title IX’s Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U. L. REV. 1049, 1049-50 (2015).

<sup>12</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41432 (July 12, 2022) (to be codified at 34 C.F.R. pt. 106) [hereinafter “The Proposed Rule”].

<sup>13</sup> See, e.g., *id.* at 41433.

<sup>14</sup> *Id.* at 41431.

<sup>15</sup> *Id.* at 41523.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 41579.

<sup>18</sup> Thanks to my colleague Naomi Mann for sharing this observation with me.

<sup>19</sup> See Voluntary Resolution Agreement, Tufts University, Complaint No. 01-10-2089, at 4, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01102089-b.pdf>

Force will “identify and recommend strategies for the prevention of sexual harassment, sexual assault incidents, and other sexual misconduct” and will “use information garnered from the student population . . . to recommend future proactive steps to provide a safe educational environment in compliance with Title IX.”<sup>20</sup>

OCR should live up to the ecological (or quasi-ecological) model reflected in some of these Resolution Agreements. In this regard, the National Women’s Law Center’s (“NWLC”) commentary on the Biden administration’s Proposed Rule is instructive.<sup>21</sup> On the topic of prevention, NWLC observes that the current Title IX rules require only a “narrow group of employees” to receive training on Title IX and “do not discuss prevention and monitoring of sexual harassment.”<sup>22</sup> The Proposed Rule would require schools to train “all employees on a school’s duties under Title IX to address sex discrimination” and about what constitutes sex discrimination. It would also require schools to “prevent sex discrimination, which includes sex-based harassment, from reoccurring”—which could include steps like conducting campus climate surveys about barriers to reporting sex discrimination.<sup>23</sup> Even so, the Proposed Rule could go further in emphasizing a duty to prevent sex discrimination from occurring at all, which could embrace more robustly the ecological models discussed above and those advocated by the Centers for Disease Control (“CDC”).<sup>24</sup>

What form might a more general proactive approach to preventing sex discrimination—in *all* its forms—take? First, such an approach would interpret sex discrimination broadly. Departing from the Trump Administration’s approach,<sup>25</sup> the Proposed Rule affirms the Biden administration’s announced

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[<https://perma.cc/PEA7-TDAK>].

<sup>20</sup> *Id.* at 4.

<sup>21</sup> NAT’L WOMEN’S L. CTR., THE BIDEN ADMINISTRATION’S PROPOSED DEPARTMENT OF EDUCATION TITLE IX RULES, EXPLAINED (July 2022), <https://nwlc.org/wp-content/uploads/2022/07/Biden-Title-IX-proposed-rule-explainer-8.3.22-vF.pdf> [<https://perma.cc/KL4U-NFZL>].

<sup>22</sup> *Id.* at 8-9.

<sup>23</sup> *Id.*

<sup>24</sup> *See, e.g.*, NAT’L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, SEXUAL VIOLENCE ON CAMPUS: STRATEGIES FOR PREVENTION 6-8 (2016) [hereinafter CDC, STRATEGIES FOR PREVENTION], <https://www.cdc.gov/violenceprevention/pdf/campusvprevention.pdf> [<https://perma.cc/3V75-EAC9>].

<sup>25</sup> The Proposed Rule, *supra* note 12, at 41392 (citing Exec. Order No. 14021, 86 Fed. Reg. 13803, 13803 (Mar. 11, 2021)). For example, while the Obama Administration had issued “Dear Colleague” letters instructing schools that “sex” discrimination under Title IX included discrimination on the basis of gender identity and sexual orientation, the Trump Administration rescinded those letters and championed a definition of “sex” as confined to sex assigned at birth. *See* Andrew Kreighbaum, *Transgender Protections Withdrawn*, INSIDE HIGHER ED (Feb. 23, 2017), <https://www.insidehighered.com/news/2017/02/23/trump-administration-reverses-title-ix-guidance-transgender-protections> [<https://perma.cc/8WBG-B2EQ>].

policy to guarantee all students “an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity.”<sup>26</sup> Additionally, they reference the administration’s commitment to “preventing and combating discrimination on the basis of gender identity or sexual orientation” so that persons are treated “with respect and dignity” in schools, workplaces, healthcare facilities, and elsewhere regardless of “who they are and who they love.”<sup>27</sup> The proposed regulations also include discrimination based on sex stereotypes, sex characteristics, and pregnancy or related conditions.<sup>28</sup> Similarly, sex-based harassment is defined expansively to include sexual harassment, harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity, and certain other sex-based conduct.<sup>29</sup> In 2023, and looking to the future, Title IX’s mandate that educational institutions reached by Title IX provide educational environments free from discrimination “on the basis of sex” should reflect evolving understandings of the scope of such discrimination.

Second, such a model would be “ecological” (as explained above) in analyzing sexual assault on campus as a public health problem. Hirsch and Khan elaborate that analyzing the “ecosystems” in which sexual assault occurs requires examining “the forces that influence young adults’ sexual lives; the relationships people share; the power dynamics between them; how sex fits into students’ lives, and how physical spaces, alcohol, and peers produce opportunities for sex and influence the ways in which sex is subsequently interpreted and defined by those having it.”<sup>30</sup> This ecological approach, as noted above, attends to how multiple forms of power relationships and hierarchies shape persons’ ability to be “sexual citizens.”<sup>31</sup> The CDC has also advanced a public health model—a “social ecological model” for preventing sexual violence that calls for activities and strategies to take place at four levels: the individual, relationship, community, and society level.<sup>32</sup> So too, while Mann’s argument for an approach to addressing campus sexual assault that is not power-evasive or identity-neutral, but instead intersectional, focuses primarily on how institutions should investigate and address the “contours” of sexual assault on their campuses,<sup>33</sup> an ecological approach to educating for equality should also attend to questions of power and identity. As one example, Hirsch and Kahn report a “cognitive dissonance” between many students’ absorbing knowledge the legal

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<sup>26</sup> Exec. Order No. 14021, 86 Fed. Reg. 13803, 13803 (Mar. 11, 2021).

<sup>27</sup> Exec. Order No. 13988, 86 Fed. Reg. 7023, 7023 (Jan. 25, 2021).

<sup>28</sup> The Proposed Rule, *supra* note 12, at 41390.

<sup>29</sup> *Id.* at 41571.

<sup>30</sup> HIRSH & KHAN, *supra* note 7, at xii.

<sup>31</sup> *Id.* at xii, 229-30.

<sup>32</sup> CDC, STRATEGIES FOR PREVENTION, *supra* note 24.

<sup>33</sup> Mann, *supra* note 6, at 421.

standard of affirmative consent, and their consent practices, which they “know to be suboptimal.”<sup>34</sup> Their research echoes familiar gendered scripts about heterosexuality that frame the experience of heterosexual students: “men are the ones who move the sexual ball down the field, and women are the blockers.”<sup>35</sup> Yet while most heterosexual men, their research finds, “fear . . . doing consent wrong,” socially specific reasons relevant to identity—such as “racial inequality”—make some men fear “their consent practices are more likely to be judged as falling short” because of who they are, rather than what they do.<sup>36</sup> This example illustrates the crucial task of “rendering visible and helping students critique the power dynamics at play in sex, which are about gender but also about race, years in school, and other forms of privilege—or precariousness.”<sup>37</sup> An ecological model has broader potential to educate for equality beyond the context of preventing specific kinds of harm, such as sexual harassment.

Third, educating for equality should be more than just educating about “consent” in sexual encounters. As Hirsch and Khan argue, “schools’ prevention work should be integrated into their core mission of education, in both skills and critical thinking.”<sup>38</sup> They use the term “sexual citizenship” (explained earlier) to capture a more proactive focus by institutions. They use the additional concept of a “sexual project” to refer to “the reasons why anyone might seek a particular sexual interaction or experience,” or why they wish “*not* to have sex;” such projects could include exploring one’s gender or sexual identity, as well.<sup>39</sup> Their proposed framework would help young people to “think about their sexual projects and how they fit into their broader life projects” and about how to cultivate “their own sexual citizenship” and to recognize that same citizenship in others.<sup>40</sup> Hirsch and Khan also deploy the term “sexual geographies” to include the role of the “built environment” in students’ experiences: “the range of spaces that shape sexual interactions and the ways in which a student’s resources and social positions affects their experience of the same space.”<sup>41</sup> Proactive educating would help students to “think critically about geographies of experience and their relationship to power.” Additionally, Hirsch and Khan argue that while such education to encourage critical thinking and cultivating sexual citizenship should begin before college, too often it does not; thus, higher education institutions “have a moral obligation to make such discussions a fundamental part of the curriculum.”<sup>42</sup>

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<sup>34</sup> HIRSH & KHAN, *supra* note 7, at 116.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> HIRSH & KHAN, *supra* note 7, at 256.

<sup>39</sup> *Id.* at xiv.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at xix-xx.

<sup>42</sup> *Id.* at 256.

With respect to K-12 education, Hirsch and Khan observe that “the partisan capture of sex education policy reflects the preferences of politicians, not the public.”<sup>43</sup> For example, while American parents broadly support school-based “comprehensive sex education,” the landscape of sex education is “patchy,” “imperfect,” and “worsening.”<sup>44</sup> As I observed nearly two decades ago in *The Place of Families*, “struggles over how to teach sexual and reproductive responsibility among youths are a constant feature in public debate over educational and family policy.”<sup>45</sup> At that time, I argued that the abstinence-only until marriage model of sex education (approved as the only method that would receive federal funding under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996)<sup>46</sup> reflected the triumph of a “conservative sexual economy.”<sup>47</sup> In addition to advancing the norm of sexual abstinence until marriage (as the “expected standard”), other components were “that girls and women are gatekeepers, responsible for the proper regulation of boys’ and men’s sexuality;” and that “men and women differ not only in sexual desire, but also in their capacities, needs, and ambitions.”<sup>48</sup> In addition to advancing cultural scripts of rigid gender roles of female responsibility and male irresponsibility, the model rendered LGBTQ+ sexual desires and relationships as invisible and deviating from the expected standard. I argued that the vision of gender roles in abstinence-only curricula perpetuated stereotypes and conflicted with the public value of sex equality, and I advocated for a comprehensive approach to sex education that encouraged critical reflection upon gender issues.<sup>49</sup>

Looking at the landscape in 2023, on the one hand, although some funding for abstinence-only sex education remains, federal support for comprehensive sex education has grown—as evidenced by the Obama administration’s support of evidence-based approaches to teen pregnancy prevention and sex education, for example.<sup>50</sup> Even so, a more robust commitment to supporting comprehensive

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<sup>43</sup> *Id.* at 267.

<sup>44</sup> *Id.*

<sup>45</sup> LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 256 (Harvard Univ. Press, 2006) [hereinafter *THE PLACE OF FAMILIES*].

<sup>46</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105 (codified as amended in scattered sections of 7, 8, 21, 25, 34, and 42 U.S.C.).

<sup>47</sup> McClain, *THE PLACE OF FAMILIES*, *supra* note 45, at 257.

<sup>48</sup> *Id.* at 257.

<sup>49</sup> *Id.* at 263–76; see also Linda C. McClain, *Some ABCs of Feminist Sex Education (in Light of the Sexuality Critique of Legal Feminism)*, 15 COLUM. J. GENDER & LAW 64 (2006).

<sup>50</sup> See Brenda Wilson, *Proven Sex Ed Programs Get a Boost from Obama*, NAT’L PUB. RADIO (June 6, 2010), <https://www.npr.org/templates/story/story.php?storyId=127514185> [<https://perma.cc/U8F7-RMUM>]; *Fact Sheet: Federally-Funded Sex Education: Strengthening and Expanding Evidence-Based Programs*, GUTTMACHER INSTITUTE (June 2021), <https://www.guttmacher.org/fact-sheet/sex-education> [<https://perma.cc/A5M4-V239>] (explaining that while there is currently no federal programs dedicated to comprehensive sex education (the “gold standard of sex education”), the majority of programs funded by the Personal Responsibility Education Program incorporate “elements of comprehensive sex



sex education is needed.<sup>51</sup> As one example, the Real Education and Access for Healthy Youth Act, sponsored by Senator Cory Booker in 2021, resonates with the sexual citizenship approach urged in this essay.<sup>52</sup> It sought to help young people attain “lifelong sexual health and healthy relationships” by promoting and upholding their “rights” to “information and services that empower them to make decisions about their bodies, health, sexuality, families, and communities in all areas of life.”<sup>53</sup> It was attentive to power and identity, recognizing how many existing programs fail to meet the needs of “marginalized young people” and how “white supremacy” had shaped the lack of comprehensive, equitable, and accessible sex education and sexual health services.<sup>54</sup> Such education and services would have also been “culturally responsive, trauma-informed and resilience-oriented.”<sup>55</sup> In describing the parameters of sex education, it would have required that sex education “promote gender equity and be inclusive of young people with varying gender identities, gender expressions, and sexual orientations,” and that it “promote racial equity and be responsive to the needs of young people who are Black, Indigenous, and other People of Color.”<sup>56</sup> Although this Act failed to become law, it provides a useful blueprint for future federal and state legislative effort. By analogy to the Proposed Rule’s aim that “Title IX must function as a strong and comprehensive measure to effectively address sex discrimination,”<sup>57</sup> comprehensive sex education should be one component of strong effort to educate for equality.

On the other hand, there are also troubling new challenges to educating for equality and helping to prepare young people to be “sexual citizens.” A number of state legislatures have enacted laws modeled on former President Trump’s executive order, “Combatting Race and Sex Stereotyping,” which prohibited certain trainings on a set of “divisive concepts” about race and sex.<sup>58</sup> Although revoked by President Biden,<sup>59</sup> its list of “divisive concepts” lives on in such state laws that restrict how schools may teach about racism and sexism.<sup>60</sup> Some states,

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education”).

<sup>51</sup> See *Federally-Funded Sex Education*, *supra* note 50 (proposing increased funding and for passing the Real Education and Access for Healthy Youth Act).

<sup>52</sup> Real Education and Access for Healthy Youth Act, S. 1689, 117th Cong. (2021). Representative Barbara Lee introduced the U.S. House version of the bill. Real Education and Access for Healthy Youth Act of 2021, H.R. 3312, 117th Cong. (2021).

<sup>53</sup> S. 1689 § 2.

<sup>54</sup> *Id.* § 2.

<sup>55</sup> *Id.* § 2.

<sup>56</sup> *Id.*

<sup>57</sup> The Proposed Rule, *supra* note 12, at 41414.

<sup>58</sup> Combating Race and Sex Stereotyping, Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020).

<sup>59</sup> Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13,985, 86 Fed. Reg. 7009, 7012 (Jan. 20, 2021).

<sup>60</sup> See Sarah Schwartz, *MAP: Where Critical Race Theory Is Under Attack*, EDUC. WEEK (Sept. 28, 2022), <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is->

such as Florida, have not only the so-called “Stop WOKE Act,”<sup>61</sup> but also have so-called “Don’t Say Gay” laws.<sup>62</sup> The latter law provides: “Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in kindergarten through grade 3 or in a manner that is not age-appropriate or developmentally appropriate for students [above grade 3] in accordance with state standards.”<sup>63</sup>

Such laws—in their speech-chilling restrictions on what may be taught about U.S. history—are at odds with educating for democracy and are the antithesis of proven practices for effective civic education.<sup>64</sup> They are also antithetical to educating for equality and teaching about discrimination; instead, they render certain identities invisible. Tellingly, conservative activist Christopher Rufo — largely responsible for the campaign against Critical Race Theory and the effort to rebrand it as “toxic”— is also a major force behind laws like “Don’t Say Gay.”<sup>65</sup> Indeed, he believes that a fight over “gender ideology”—such as including LGBTQ+ issues in school curricula—has even greater potential than his anti-CRT efforts to excite voters and energize Republicans. In an interview, he stated: “The reservoir of sentiment on the sexuality issue is deeper and more explosive than the sentiment on the race issues.”<sup>66</sup> He has provocatively asserted that “parents have good reason” to worry that schoolteachers are “grooming” young children to commit sexual misconduct or sexual abuse against them.<sup>67</sup> Other state measures that cut against educating for equality and narrow, rather than broaden, understanding of sex discrimination and of participation in education without such discrimination require the use of sex assigned at birth as a criterion for purposes of restrooms and sports. The Department of Justice has

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under-attack/2021/06 [https://perma.cc/ST69-EKY4].

<sup>61</sup> Individual Freedom Act, 2022 Fla. Laws Ch. 72, <http://laws.flrules.org/2022/72>. However, key provisions of the law have been preliminarily enjoined. In August 2022 a federal court preliminarily enjoined a portion of the law targeted at private businesses, and in November 2022 a federal court preliminarily enjoined the portion of the act targeting higher education. See Andrew Ross Sorkin, Vivian Giang, Stephen Gandel, Lauren Hirsch, Ephrat Livni, & Jenny Gross, *Florida’s ‘Stop WOKE’ Act Gets Pushback in Court*, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/2022/08/19/business/dealbook/florida-desantis-stop-woke-act.html>; Selene San Felice, *Judge Blocks Florida “Stop WOKE Act” from Being Enforced in Higher Ed*, AXIOS (Nov. 17, 2022), <https://www.axios.com/local/tampa-bay/2022/11/17/florida-stop-woke-act-blocked-universities> [https://perma.cc/RPK3-7LME].

<sup>62</sup> 2022 Fla. Laws Ch. 22, <http://laws.flrules.org/2022/22>.

<sup>63</sup> *Id.*

<sup>64</sup> For discussion of these “best” or “proven” practices and their embrace by the Educating for American Democracy Initiative, see James E. Fleming & Linda C. McClain, *Civic Education in Circumstances of Constitutional Rot and Strong Polarization*, 101 B.U. L. REV., 1771, 1785-1991 (2021).

<sup>65</sup> Trip Gabriel, *He Fuels the Right’s Cultural Fires (and Spreads Them to Florida)*, N.Y. TIMES (Apr. 24, 2022), <https://www.nytimes.com/2022/04/24/us/politics/christopher-rufo-crt-lgbtq-florida.html>.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

warned that such restrictions contravene Title IX and has previously filed statements of interest in lawsuits brought against such state laws.<sup>68</sup>

On the other hand, some states (such as Massachusetts) have explicit commitments to nondiscrimination on the basis of gender identity, along with other sex, sexual orientation, race, and other protected identity characteristics.<sup>69</sup> Notably, before she was elected Governor of Massachusetts in November 2022, Maura Healy, as Massachusetts Attorney General, joined a multistate brief challenging Florida’s “Don’t Say Gay Law.”<sup>70</sup> Some school districts and states are also trying to expand their curricular efforts around diversity, equity, and inclusion and to more robustly address sexism and racism.<sup>71</sup>

Some states have already expanded their diversity, equity, and inclusion curricula. The amicus brief filed by Massachusetts and other states recognizes how inclusion—instead of stigmatization and silence—reflects better “legitimate pedagogical concerns” and is critical to educating for equality:

Amici States’ experiences undermine Florida’s assertions that the Act has a legitimate pedagogical purpose and that it is reasonably related to any such purpose . . . . Recognizing that LGBTQ Americans ‘cannot be treated as social outcasts or as inferior,’ . . . Amici States’ policies foster an educational environment that is inclusive and respectful of LGBTQ people. . . . Amici States also recognize the indisputable fact that LGBTQ people are part of American life and therefore include LGBTQ experiences and contributions in history and social studies education. . . . As Amici States’ efforts reflect, LGBTQ people are part of American history and society, and “in the preparation of students for citizenship,” it is “entirely rational” for schools to include their experiences in an age-appropriate manner.<sup>72</sup>

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<sup>68</sup> John Raby, *DOJ: 2 States Transgender Restrictions Unconstitutional*, ASSOCIATED PRESS (June 17, 2021), <https://apnews.com/article/college-sports-west-virginia-laws-sports-education-a3e8852ced2bf0c3bd8ce546bfe70d2b> [<https://perma.cc/6PPR-XG4C>] (Arkansas and West Virginia).

<sup>69</sup> *See Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment*, MASS. DEP’T ELEMENTARY & SECONDARY EDUC. (last visited Jan. 5, 2023), <https://www.doe.mass.edu/sfs/lgbtq/genderidentity.html> [<https://perma.cc/3T85-8AVD>].

<sup>70</sup> *See* Press Release, Maura Healey, Attorney General, A.G. Healy Backs Challenge to Florida’s “Don’t Say Gay” Law (Aug. 4, 2022), <https://www.mass.gov/news/ag-healey-backs-challenge-to-floridas-dont-say-gay-law> [<https://perma.cc/SE56-D54X>]; Brief for the District of Columbia et al. as Amici Curiae Supporting Plaintiffs, *Equality Florida. v. Fla. State Bd. of Educ.*, No. 4:22-cv-134-AW-MJF (N.D. Fla. filed Aug. 3, 2022).

<sup>71</sup> *See* Cathryn Stout & Thomas Wilborn, *CRT Map: Efforts to Restrict Teaching Racism and Bias Have Multiplied Across the U.S.*, CHALKBEAT (Feb. 1, 2022, 7:20 PM), <https://www.chalkbeat.org/22525983/map-critical-race-theory-legislation-teaching-racism> [<https://perma.cc/WK36-AD8M>] (including map showing efforts in seventeen states to “expand education on racism, bias, the contributions of specific racial or ethnic groups to U.S. history, or related topics”).

<sup>72</sup> Brief for the District of Columbia et al., *supra* note 70, at 6-10.

As we look ahead to the next 50 years of Title IX, similar commitments to educating for equality will be critical to realizing Title IX's aims.