COMMENTARY Gender

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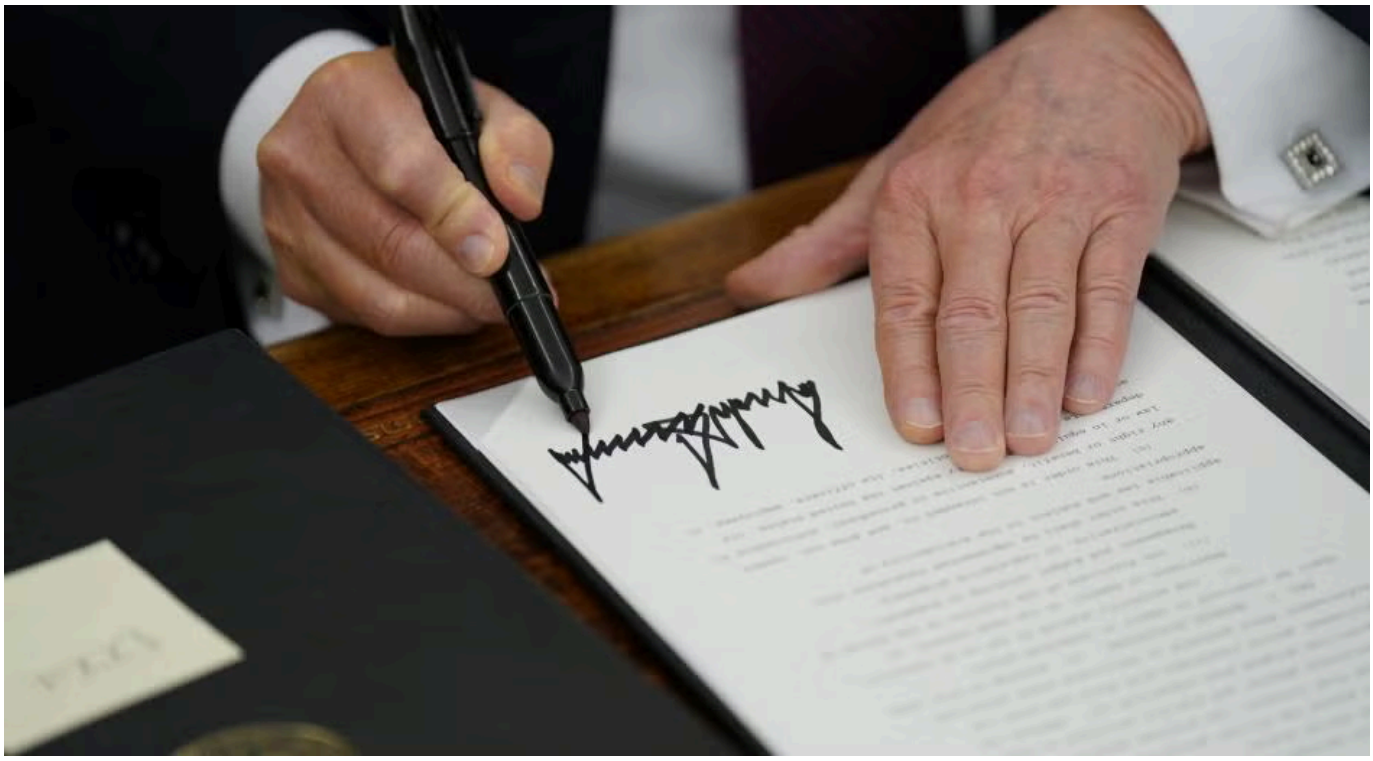

President Donald Trump signs a series of executive orders at the White House on January 20, 2025, in Washington, D.C.

Jabin Botsford / The Washington Post / Getty Images

KEY TAKEAWAYS

2 **Unlike sex, transgender status is not immutable—something even a transgender attorney representing the ACLU had to admit under questioning.**

3 **What the current administration is doing is legal, common-sense and long overdue.**

Under the last presidential administration, progressive politicians made the expansion of transgender rights their raison d'etre. They happily marched in lockstep to President Joe Biden's executive order directing every federal agency chief to prohibit discrimination based on gender expression or identity—case law to the contrary be damned.

Now, however, those same politicians are apoplectic over the current administration's return to biological reality, the rule of law and common sense.

Leading the charge are Reps. Jamie Raskin (D-Md.), Mark Takano (D-Calif.) and Gerry Connolly (D-Va.). In a letter to acting director of the Office of Personnel Management Charles Ezell, the trio stridently assert that President Trump's executive order recognizing a government-wide "two sexes" policy and the accompanying memorandum guiding its implementation are unconstitutional.

One of the three has a law degree, but that certainly doesn't bolster their cock-eyed legal conclusions.

Among its flaws, the letter cites the Supreme Court's 1996 decision in Roemer v. Evans for the proposition that "government policies motivated by animus are clear

executive protection to gays suffering discrimination—leaving them completely without the ability to participate in the political process, in violation of the 14th Amendment's Equal Protection Clause.

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The president's EO and federal directives on gender identity, in contrast, disenfranchise no one. Rather, they restore to women the guarantees of the Equal Protection Clause, motivated by the legitimate government interest in protecting their personal safety, privacy and equality. The EO simultaneously shields religious objectors to gender orthodoxy from being discriminated against for simply following the dictates of their conscience.

What's more, the Supreme Court has never placed transgender identity in the same category as biological sex, requiring the same heightened level of judicial scrutiny. This renders any government action implicating transgender status presumptively constitutional. The court explained this in Frontiero v. Richardson (1973): "[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'"

Unlike sex, transgender status is not immutable—something even a transgender attorney representing the ACLU had to admit under questioning from Justice Samuel Alito during oral arguments just two months ago in United States v. Skrmetti. Gender identity is a subjective, internal, malleable and often transitory sense of oneself. As such, it is an insufficient basis to expand the notion of equal protection or protection of "immutable characteristics"—one that would defy decades of Supreme Court jurisprudence to the contrary.

The congressional letter also cites the court's decision in 2020, Bostock v. Clayton County, which held that an employer who fires an individual merely for being gay or transgender violates Title VII of the Civil Rights Act—a federal law prohibiting employment discrimination on the basis of, among other things, sex. The court in

sex."

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The Bostock decision has repeatedly been cited by the left to argue that the court's ruling on a federal employment law statute forbidding sex discrimination somehow magically transforms every federal law and regulation into one also forbidding gender identity discrimination. The congressmen fail to acknowledge what Justice Neil Gorsuch wrote the majority opinion—that there are indeed "biological distinctions between male and female."

Without exposition or evidence, the congressmen also argue that the "directive to withdraw [Biden's gender identity] regulations in a matter of days contradicts the Administrative Procedure Act."

That APA governs the process by which federal agencies develop and issue regulations and other agency actions such as policy statements and guidances. But if these congressmen fully understood the operation of the APA, they would recognize that rules can only be amended or reversed through a subsequent agency rulemaking process.

That process is precisely what the appropriate agencies have been tasked with doing, pursuant to the EO and associated memorandum. It involves publishing a "notice of proposed rulemaking"—something that can easily be accomplished within 30 days, and which starts the long, detailed process set forth in the APA of recission through new rule construction.

In their quixotic and legally faulty letter, the congressmen are tilting at windmills. What the current administration is doing is legal, common-sense and long overdue.

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