

Did #JoeBidenEraseWomen? Yes, but we can stop him

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When President Biden [signed](#) the “Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation” on inauguration day, social media [erupted](#) with the hashtag, #JoeBidenErasedWomen.

The order begins with a policy statement:

“Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love. Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports. Adults should be able to earn a living and pursue a vocation knowing that they will not be fired, demoted, or mistreated because of whom they go home to or because how they dress does not conform to

sex-based stereotypes. People should be able to access healthcare and secure a roof over their heads without being subjected to sex discrimination. All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation."

This may sound kind of innocuous, but is incredibly manipulative, and, I would argue, a form of verbal abuse on the part of the United States government, aimed at its own residents — specifically, women and girls. Please read that again. And again. If you read nothing more of this piece, just let that sentence sink in.

While the statement starts reasonably enough — "Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love" — this language is carefully designed to bait us. We all likely agree with it, such as it is. But that's not why it's there. It is there to manipulate us into believing the order is benign. These words are a warning: If you take issue with anything that follows, you are a bad person. This is an exceedingly effective abuse tactic.

The next sentence reads: "Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports." And of course children should be able to learn without worrying about these things. Who could argue with such a statement? On closer examination, though, it is here where we can read all we need to know about what this order is designed to do: it is designed to trick women and girls into thinking there is something wrong with wanting single-sex spaces. The sentence implies there is a widespread problem, wherein "children" are being prevented from accessing washrooms and locker rooms, but this is not true. This statement is not about ensuring equality, nor is it "gender neutral." What we are talking about, here, is ensuring *boys* are allowed access to *girls'* restrooms, locker rooms, or school sports.

Another seemingly innocuous statement follows: "Adults should be able to earn a living and pursue a vocation knowing that they will not be fired, demoted, or mistreated because of whom they go home to or because how they dress does not conform to sex-based stereotypes." Again, it's difficult to argue with this statement on its face. But this is just another manipulative attempt to make us think protecting "gender identity" in the law is about challenging sex-based stereotypes (sexism). If it were, we could support it. In truth, this sentence furthers the common misunderstanding that the *Bostock* decision was about sex-specific dress codes. It was not. It was about a man demanding to be legally recognized as female.

One could view the sentence, "People should be able to access healthcare and secure a roof over their heads without being subjected to sex discrimination," as rather revolutionary. Indeed, feminists have been fighting for this for decades. But that is not what this is doing. It is suggesting, based on the *Bostock* decision, that these rights exist on the basis of so-called "transgender status." This is just like every other attempt of this administration to erase women's rights and cloak that erasure under the banner of anti-discrimination.

And finally we come to the crux: "All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation." This sentence really does define what Biden's executive order is about — it enshrines "gender identity" in the law.

The order essentially hinges on a misinterpretation of three U.S. laws: Title IX (a statute), the Equal Protection Clause (part of the 14th Amendment to the Constitution), and the Supreme Court's 2020 decision in *Bostock v. Clayton County*. The explicit purpose of [Title IX](#) is to protect women and girls from sex discrimination in the education context (and it has come to be popularly associated with women's athletics). The U.S. Supreme Court decided that the Equal Protection Clause protects women and girls from

sex discrimination in a case called [Reed v. Reed](#) in 1971. The *Bostock* decision, which addressed three cases, including *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission* (a challenge mounted by a trans-identified male against his employer), held that employees have the right not to be discriminated against on the basis of sexual orientation or so-called “transgender status,” because “transgender status” is a protected sex category. The Court did not explain what “transgender status” means.

The order is misleading in how it describes all three laws. It uses some very tricky language, stating, “[t]hese principles are reflected in the Constitution, which promises equal protection of the laws.” It is true that the 14th Amendment to the Constitution guarantees equal protection on the basis of sex (that was decided in 1971). But the Supreme Court has never decided that the equal protection clause guarantees equal protection on the basis of “gender identity.” And it is not strictly true that the Supreme Court held in *Bostock* that [Title VII’s](#) prohibition on discrimination “because of ... sex” covers discrimination on the basis of “gender identity.” What it did do is say that discrimination “because of ... sex” includes discrimination on the basis of “transgender status,” but, again, did not define this phrase. And once we protect so-called “transgender status,” we are no longer able to protect sex.

Then the order goes on to do something deeply pernicious. It states: “*Under Bostock’s reasoning*, laws that prohibit sex discrimination — including Title IX of the Education Amendments of 1972 ... along with their respective implementing regulations — prohibit discrimination on the basis of gender identity and sexual orientation, so long as the laws do not contain sufficient indications to the contrary” [emphasis added]. This is a complete manipulation of *Bostock*, which expressly held that the scope of its decision did not expand beyond the employment context.

To be sure, the Title IX implementing regulations still allow for the

maintenance of sex-segregated spaces in some contexts. For example, recipients of federal funding may "provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." In addition, the law does not "prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact."

This is all good, and it might just save Title IX from being destroyed entirely. But it is important to understand that the Department of Education could choose to *completely revise those regulations and totally destroy the maintenance of sex-segregated sports and spaces in all institutions that receive Title IX funding*. (It has always had the authority to do that, but this order gives it obvious cover.)

So what does the order require in practice?

As a practical matter, the order requires U.S. federal agencies to conduct reviews and evaluations of their own policies and practices, and then make plans to ensure that the word "sex" is defined to include "gender identity" throughout U.S. federal law. It is not immediately obvious from the face of the order, but it appears that the order applies to all federal agencies (and unless we are told otherwise, we should probably assume that is the case).

Boiled down to its bare bones, the order requires agencies to take the following actions:

1. Review existing policies that prohibit sex discrimination and that may be inconsistent with the new "gender identity" policy.
2. Consider whether to revise existing policies in order to be compliant with the new "gender identity" policy.

3. Consider whether there are additional actions that the agency should take to ensure that it is fully implementing the "gender identity" policy.
4. Within 100 days of the date of the order, develop a plan to carry out actions that the agency has identified.

The order does not, in and of itself, actually change existing law, *but is a slap in the face* to women and girls nonetheless. It tells us that we are not entitled to sex-segregated spaces. This could mean teenage girls having to undress in locker rooms with men and boys with penises. It potentially means female inmates will be housed in cells with convicted men who have raped women but now claim to be women.

But all hope is not lost. We have 100 days to tell the agency heads exactly what we think of the order. We can start by [contacting](#) members of the Cabinet.

Beyond that, no matter where you are located, you can [sign](#) the Declaration on Women's Sex-Based Rights, which reminds lawmakers that the majority of countries around the world are legally bound under international law to protect women's sex-based rights. American women can also volunteer to support the WHRC USA [here](#).

The USA chapter of the Women's Human Rights Campaign is working hard to push back against the Executive Order, and to get the Equality for All [Act](#) (which omits "gender identity" from its protections) introduced in Congress. Please join us. It is time to fight.

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