

Three reasons to vote No on Question 3



Gender-neutral bathrooms on the fifth floor of Boston City Hall, across from the reception area for the mayor's office.



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QUESTION 3 on the Nov. 6 ballot in Massachusetts asks voters whether they want to retain or repeal [a 2016 state law](#) that makes it illegal to discriminate against transgender people in places of public accommodation. That law specifies that any place with separate facilities for males and females, such as bathrooms and locker rooms, must allow access to individuals on the basis of their gender identity, regardless of their biological sex.

The measure doesn't appear to be very contentious. If a [Suffolk University/Boston Globe poll](#) released on Monday is correct, 68 percent of Massachusetts voters intend to vote yes on Question 3, to keep the law on the books.

I'm with the 28 percent who plan to vote no. In my view, there are at least three reasons why the transgender-identity law was a mistake and should be rejected.

1. When antidiscrimination laws are expanded, freedom of association — a core human liberty — is infringed.

I oppose laws that force private businesses or organizations to serve customers or accept patrons against their will. Private vendors, employers, and places of public accommodation should have broad legal freedom to decide for themselves whom they wish to deal with. The only exception I support is banning discrimination based on race, since

American law for so many generations *mandated* racial repression and discrimination. Otherwise, there should be no “protected” categories at all. Where liberty and free choice flourish, bigotry and xenophobia tend to recede. Society should rely on the power of markets and public sentiment to eliminate invidious discrimination, not the iron fist of regulators and prosecutors.

Granted, this is theoretical. The wholesale repeal of anti-bias statutes is not in the cards. But at least the pressure to expand those laws by adding more and more demographic groups to the [already lengthy list of protected classes](#) should be resisted.

Transgender individuals should always be treated with respect; that should go without saying. But Massachusetts should also respect its citizens' freedom of association, and trust them to use their own judgment when gender identity is at issue.

2. Massachusetts has already shown that it can accommodate transgender access — no law required.

Addressing Question 3 in [a statement](#) Monday, the University of Massachusetts assured the “100,000 students, faculty, staff, and guests” who are on UMass campuses each day that, regardless of the referendum result, bathrooms and changing facilities will continue to be open to anyone who wants to use them.

“We will retain our present policy on restroom and locker room access on our campuses by allowing transgender and gender-nonconforming students, faculty, staff, and guests to choose facilities consistent with their gender identity,” the statement said.

What is true of UMass is true of every establishment in Massachusetts: They can sort this out for themselves. [Supporters of the Yes on 3 campaign](#) include many of the largest corporations, sports teams, labor unions, and colleges in the state. None of them needs Beacon Hill to tell them how to operate their bathrooms or other intimate spaces.

Everyone in Massachusetts goes to the bathroom, and 99.9 percent of the time, people use the facilities suited to their needs [without causing problems](#) for anyone else. They were doing so before the 2016 law was passed. They’ll do so if the law is overturned.

That leaves the 0.1 percent of instances when the presence of an anatomical male in a space meant for females does cause genuine distress, and leads to my third argument for voting no on Question 3:

3. The gender-identity law ignores sensitive issues of privacy and vulnerability.

Opponents of the 2016 law didn’t mobilize to put this referendum on the ballot because they object to transgender people being served in coffee shops, bookstores, or hotels. The opposition is fueled solely by concern about the tiny fraction of cases in which the mismatch between someone’s bodily sex and gender identity is not only obvious, but makes women or girls uneasy.

Such cases may be rare, but they are real. In December 2017, a biological male who identifies as a woman sought out a women’s spa in Milton for a “full Brazilian” waxing. When the spa was unwilling to perform a pubic waxing on a customer with male genitalia, the customer filed a complaint under the public accommodations law with the attorney

general’s office. (The complaint was withdrawn before the case went to litigation.)

When the Legislature added gender identity to the public accommodations law, it could have exempted private spaces that are routinely segregated by sex. Its refusal to do so is the sole reason the law is now being challenged. The 2016 law rides roughshod over the discomfort, reserve, and modesty of women and girls at the presence of male bodies in a place meant for females only.

This is not an illegitimate concern. Indeed, Massachusetts legislators acknowledged as much when they passed a 1988 law [exempting women’s gyms](#) from the state’s public-accommodations law. Normally there is no justification for discrimination by sex or gender. But it is only common sense that bathrooms, showers, waxing salons, and other intimate environments require special sensitivity.

The gender identity law jettisons that sensitivity. Voters, in response, should jettison the law.

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