

2007

Democracy's Harvest: Resources for Massachusetts Voters' Initiatives and Referendums

Spencer E. Clough

University of Massachusetts School of Law - Dartmouth, sclough@umassd.edu

Follow this and additional works at: http://scholarship.law.umassd.edu/fac_pubs

 Part of the [Election Law Commons](#), [Legal Writing and Research Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Spencer E. Clough, *Democracy's Harvest: Resources for Massachusetts Voters' Initiatives and Referendums*, 26 *Legal Reference Serv. Q.* 113 (2007).

This Article is brought to you for free and open access by Scholarship Repository @ University of Massachusetts School of Law. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Scholarship Repository @ University of Massachusetts School of Law.

**Democracy's Harvest:
Resources for Massachusetts Voters'
Initiatives and Referendums**

Spencer E. Clough

SUMMARY. Massachusetts¹ initiatives and referendums, based upon a lengthy and complicated constitutional amendment, present legal and historical researchers with a number of questions and issues to resolve. This review of the resources on initiatives and referendums attempts to provide guidance for these researchers, while provoking critical thinking about issues past, present, and future.

Spencer E. Clough, JD, MLS, MA, is Director of the Law Library and Assistant Professor of Law, Southern New England School of Law, 333 Faunce Comer Road, North Dartmouth, MA 02742-1252 (E-mail: sclough@snesl.edu).

The author wishes to thank and acknowledge the following librarians for their valuable assistance: Stephen Fulchino, State Librarian, and Pamela Schofield, Reference Librarian, the State Library for Massachusetts; Jennifer Fauxsmith, Reference Archivist, the State Archives; Karin Thurman, Director of the Law Library, the Office of the Massachusetts Attorney General; and Cathy O'Neill, Reference Librarian, and Howard Senzel, Public Services Librarian, Southern New England School of Law.

KEYWORDS. Massachusetts, ballot question, initiative petition, referendum, constitutional amendment, policy question, General Court, Article XLVIII

Democratic nations care but little for what has been, but they are haunted by visions of what will be; in this direction their unbounded imagination grows and dilates beyond all measure ...

Alexis de Tocqueville, *Democracy in America*, vol. 2, sec. 1, ch. 17 (1840).

And thou shalt not glean thy vineyard, neither shalt thou gather every grape of thy vineyard, thou shalt leave them for the poor and stranger.

Exodus 19:10

I shall enter on no encomium upon Massachusetts: she needs none.. - There she is. Behold her and judge for yourselves.

Daniel Webster,
Second Speech on Foote's Resolution, January 26, 1830.

INTRODUCTION

On a crisp, clear October morning, any Bay Stater¹ reaching into her or his mailbox found, along with the usual circulars, bills, and L. L. Bean's Holiday catalogs, a mailing from the Secretary of the Commonwealth regarding the 2006 election.² While the main focus for the electorate has been on a contentious and historic gubernatorial race,³ other issues confront this voter as the result of the time, energy and financial resources of several different interest groups. Whether the recipient of the Secretary's brochure takes the time to read it, or that brochure follows the same fate as much of the rest of the daily mail, this could be the earliest connection for that voter with what is now recognized as a vital democratic institution in this state, the initiative and referendum, also known colloquially as a "ballot question." The Secretary has just delivered to him or her, more than a reminder about the rights and procedures, for electing other governmental officials as the bulk of this brochure describes in detail the current ballot questions created largely outside of

the legislative processes and presented to the citizenry of the commonwealth for approval as new, directly made law.

Ballot questions for the past ninety years, have changed the legal landscape of Massachusetts on an array of issues, frequently having an impact on the social guidelines that reflect both the changing beliefs, thoughts and mores of the Commonwealth, as well as shaping State government itself. In 2006, the three questions offered reflect just these desired legal effects. They include a proposal to allow wine sales in grocery stores, another on multiple ballot listings for electoral candidates, and a final question on collective bargaining rights for state-subsidized child care workers.⁴ So too, do the questions missing from this year's ballot reflect the shifting concerns of the State: a ban on greyhound racing,⁵ a proposed universal healthcare system,⁶ and a constitutional amendment to ban same-sex marriages.⁷ Even the gubernatorial candidates look to fuel their political campaigns by debating the meaning of a prior ballot question that concerned reducing the state's individual income tax.⁸

Will the child care worker, the nominee, the vintner, and the voter, find reasons to raise a glass in toast to this year's new crop of statutes? What will become of these and other ballot questions over time as they are either implemented or they are forgotten? What situations give rise to the need for these or other proposals? Who authors them, pays for their consideration, and works to get them on the ballot? These questions represent a basic level of curiosity about Massachusetts' initiatives and referendums; other more subtle or sophisticated inquiries may be entertained by later researchers. However, these questions serve as a way to focus this work on a sampling of the documents and electronic resources available to legal and historical researchers who need more information on these laws. It is hoped that this will be a useful guide to researchers since, as these laws are passed directly by the people of the Commonwealth of Massachusetts, and as their documentation is not otherwise found among the usual legislative history sources, these resources might otherwise be obscure or difficult to locate.

GLOSSARY

As alluded to by the use of the terms "Bay Stater" and "ballot question" in the introduction above, some of the terminology used here is unique to Massachusetts or has a special significance to this aspect of

statutory research and requires some definition for use by-researchers otherwise unfamiliar with this subject or territory.

Article XLVIII: is the legal, constitutional authority for publicly created initiative petitions, referendums and constitutional amendments;⁹ a reform study in 1975 by the General Court described this amendment as: "the longest and most complicated article in the Massachusetts Constitution."¹⁰

Attorney General: the chief legal officer for the state; her role in initiatives and referendums is to certify that the proposed law or amendment is legal and constitutional, and then must draft a summarized version of it for the public.¹¹

Ballot Question Committee: a public interest group formed specifically to move their initiative or referendum through the process to final law,¹² e.g., Grocery Stores and Consumers for Fair Competition, which promoted -wine sales in supermarkets and grocery stores in the 2006 election.¹³

Commonwealth: this is largely a cosmetic distinction, Massachusetts would be known as a state except that the John Adams labeled it a Commonwealth when he wrote the Massachusetts Constitution of 1780;¹⁴ both "state" and "commonwealth" will be used here interchangeably, but Commonwealth is the preferred official designation, though it contains no special privileges and powers.¹⁵

Constitutional Amendment: private citizens in Massachusetts may propose their own amendment to the constitution.¹⁶ During the 2006 election some groups had hoped to promote an amendment to prohibit same-sex marriage; that move defeated when the General Court recessed until after the election without taking action on the amendment.¹⁷

Constitutional Convention of 1917: originated the initiative and referendum process and first used it to add Article **XLVIII** to the constitution.¹⁸

General Court of Massachusetts: this is the State legislature;¹⁹ the name continues from its colonial predecessor when it was both a court of general jurisdiction and a legislature. There was debate during the Constitutional Convention of 1917 to change the name to "the Legislature" but tradition won out.²⁰

Initiative Petitions: are created for an entirely new statutory proposal or to repeal or amend a section of another statute as opposed repealing a statute in its entirety.²¹

Proposition 2 1/2: statewide this is the most famous of the initiative petitions; it was a "tax revolt" measure authored and promoted by "Citizens for Limited Taxation."²² Enacted in 1980, this law holds annual property tax increases by municipalities at 2.5 of the full, fair value of all property in the community.²³

Public Policy Questions: allows voters to send non-binding instructions to their state senator or representatives.²⁴ By example, the 7th Norfolk District voters during the 2006 election were offered a question on instructing their representative as to the medical use of marijuana.²⁵

Referendum Petition: is used when the petitioner wants to repeal an entire law not just a section of it as the repeal of a section would be dealt with in an initiative petition.²⁶ The legislature views this as "the people's power to *refer* legislation recently enacted by the General Court to the voters for their approval."²⁷

Secretary of the Commonwealth: is the chief information officer for the Commonwealth; this office also oversees the Elections Division, with responsibility for printing petitions, ballots, and distributing ballot question information to the electorate, and also operates the State Archives.²⁸

Supreme Judicial Court: is the court of final resort for the Commonwealth; the court has the authority to challenge the Attorney General's certification on the legality of initiative and referendum proposals, ensuring that the Attorney General's decisions are made by applying the standards in Article XLVIII, and not as a matter of policy.²⁹

HISTORY

The kernels for initiatives and referendums were planted early; Massachusetts, with some puffery, claims to be the first state³⁰ to use a public referendum as the proposed first Massachusetts constitution was offered to and then rejected by voters in 1778.³¹ Those early seeds lay dormant for a long time, until the fourth constitutional convention of

1917, when labor unions and Progressives joined to push for greater control over the legislature impartial response to an opinion of the Supreme Judicial Court from twenty years earlier, *In re Municipal Suffrage to Women*.³² The ensuing constitutional debates cover thousands pages of text involving issues which still seem familiar today.³³ The questions disputed then included the desirability of social welfare legislation, the role of lobbyists in a representative government, the effectiveness of the legislature, the intent of the framers of the constitution, the interests of the wealthy few versus the majority, *and the power of corporations versus individuals.³⁴ As a subtext, the convention took place during an era when the Protestant status quo was increasingly threatened by the expanding immigrant and Roman Catholic populations.³⁵ Ultimately the convention voted 163 to 125 to deliver the amendment for initiatives and referendums to the electorate for ratification. The voters were less impressed with the amendment than the representatives to the convention as the ratification slipped into law by a slim majority of 8,543 ballots, or merely 2.5% of the 332,749 votes cast on the issue.³⁶ A further 96,698 voters casting votes in that election did not vote either yes or no; and when the returns are broken down by county, only two, Suffolk, containing Boston, and Plymouth actually passed this amendment.³⁷ Thus, indicating that there was a major difference between the urban and rural voters over initiatives and referendums, and regional differences between eastern interests and western, as well as pitting the North Shore versus South Shore.

Subsequent initiative and referendum petitions filed with the Secretary of the Commonwealth, both voted on or not, provide testimony to the ingenuity for legal innovation, as well as to the social concerns of the Bay State over time. A sampling of these includes "Sport and Games on the Lord's Day" in 1928, "Restricting low level radioactive waste disposal in nuclear power plant construction" in 1982, and the "Opening of retail stores on Sunday mornings and certain holidays" in 1994.³⁸ A search through these petitions reveals a history of the Commonwealth's society in flux throughout the 20th century, particularly as it shed the assumptions, protocols, and conventions of its earlier Puritanical and patriarchal forefathers.

While these aspects of social life and the law are significant, the yield from these initiative and referendum petitions filed tells a significant political story of its own. One study found that of 47 proposed constitutional amendments filed between 1933 and 2000 only two were successful in negotiating the entire procedure to a place on the ballot;³⁹ one more appeared after time study.⁴⁰ Of these proposed constitutional

amendments only two have been passed by the voters into law. There have been 18 referendum questions, to repeal a law entirely, on the ballot with a positive vote on ten of these. Of initiative petitions, 51 have been sent to the voters, and 24 have been adopted by them.⁴¹ Such activity indicates that voters of the Commonwealth are adaptable but not easily swayed by just any legal novelty or innovation that is tossed in their direction.

Petition filings also chart an aspect of the life cycle of Massachusetts' political activism. Filings with the Secretary of the Commonwealth for both constitutional amendment initiatives and other initiative petitions between 1919 and 2002 totaled 301, indicating that only about 17% reach the ballot, and a mere 8% become law. Bay Staters have only sought to overturn existing legislation through referendums on 48 occasions in the same time period, though with 10 having been passed by the electorate, their success rate is a respectable 20%. In the decades through the 1940s and during the 1960s there were usually about twenty to thirty petitions filed every ten years, although the 1950s were unusually quiet period for political activists with only three petitions filed during that decade. Since the 1970s however, the numbers of petitions filed have exploded: 1970s = 62, 1980s = 72, 1990s = 89. During the first couple of years of this century, 2000 to 2002, sixteen petitions were filed.⁴²

Spending on initiatives and referendums has also been explosive proving that such activism does not come easily or cheaply. Statewide ballot spending reached \$10 million in 1998 and \$15 million in the 2000 election.⁴³ Grocery stores seeking to put wine on their shelves and those seeking to prevent wine sales had reached nearly \$8 million one month prior to the 2006 election, thereby nearly reaching the \$9 million record for spending on a single ballot question set in 1988.⁴⁴

As a tool for Massachusetts voters the initiatives and referendums process grants them some governance over the legislature and provides an avenue to statutory and constitutional change on topics the General Court is unwilling or unable to bring itself to consider. Though, being New Englanders, our voters combine a mixture of conservatism and a love of tradition with their concern for social issues and a tolerance for eccentricity. These characteristics are fully apparent in this manner of law making.

PROCEDURE

The rigorous procedure for initiatives and referendums takes no less than sixteen months from the start to the final tally, more if the initiative concerns a constitutional amendment. Activists usually officially begin

their work in an odd-numbered year as ballot questions may only be presented to the electorate in even-numbered years. As may be seen below, the ballot question process is challenging, with two rounds of signature-gathering, and a great deal of scrutiny by officers of the Commonwealth. It is a process that could only attract the most dedicated or motivated, as well as financially well-supported, activists.

Year One: An Odd Numbered Year

1. August: by the first Wednesday, the newly proposed law, accompanied by ten valid registered voters' signatures, must be submitted to the Attorney General.
2. September: by the first Wednesday, a determination that the proposal meets constitutional requirements and a summary of the law is made by the Attorney General.
3. The proposal is then filed by the petitioners with the Secretary of the Commonwealth who prints petition form blanks within fourteen days of receipt of the filing.
4. Late November: Petitioners must gather certified voter signatures equal to 3% of the voters in the last gubernatorial election, of which no more than one fourth can be from any single county, to be filed with the respective local election officials for certification of the voters' registration.
5. December: by the first Wednesday, the voters' signatures gathered in November are then filed with the Secretary of the Commonwealth.

Year Two: An Even Numbered Year

6. January: the Secretary of the Commonwealth sends the ballot question to the House clerk by the first meeting of the General Court for the year. The General Court sends the proposal to committee for consideration after which the legislature may approve, disapprove, formulate a substitute proposal, or take no action. If approved by the legislature and then signed by the Governor an initiative becomes law at this point without being sent to the electorate.
7. May: Legislative activity on the proposal must conclude by the first Wednesday.
8. July: Early in the month, petitioners must gather another .5% of the signatures of the registered voters from the past state election for filing with the Secretary of the Commonwealth.

9. October: The Secretary of the Commonwealth sends information regarding the ballot questions to registered voters.
10. November: the proposal appears as a ballot question on the election ballot.
11. Passage requires that 30% of voters must vote on the question and a majority of those voters must pass favorably on it.
12. December: unless the ballot question specifically stated that it shall become effective immediately, the law becomes effective 30 days after either the election or certification of the election by the Governor's Council.⁴⁵

Constitutional amendments follow a similar path, but carry an additional legislative requirement of passage by 25% of both houses of the General Court in two successive legislative sessions. This later step adds another two years to this process.⁴⁶

Resources on the Procedure Include

State Ballot Question Petitions, Secretary of the Commonwealth, Elections Division, 2005, at www.sec.state.ma.us/ele.

This is an official state source from the Secretary of the Commonwealth's subdivision, with detailed descriptions of the transactions for each type of ballot question, and includes the specific dates and voter requirements for a ballot question.

The Initiative Petition Process, 2005-2006, from the office of the Massachusetts Attorney General, at <http://www.ago.state.ma.us/sp.cfm?pageid=1246>.

Another official source that is worth using in conjunction with the Secretary of the Commonwealth's publication. The Attorney General's material is more synthetic in its organization and gives more detail about her role in the process.

Legislative Procedure in the General Court of Massachusetts, 2003.

Prepared jointly by the Clerks of the House and the Senate, this work outlines the basics of the procedure with more detail given to the legislative actions in §§ 13.1 and 13.2; this print source is not generally distributed beyond the members of the legislature and their staff, but may be found at the State Library.

Issue: Ballot Questions, at <http://www.issuesource.org/issue.cfm?ID=135&Mode=Background>.

An unofficial source from the policy group MassINC, this publication provides a broad overview of the process with points about current ballot questions.

**LEGAL AUTHORITY: THE CONSTITUTION,
STATUTES, REGULATIONS, A PENDING BILL,
AND THE RECORDS RETENTION SCHEDULE**

Several sources provide the legal authority for the activities that surround the initiative and referendum process, its administration and subsequent treatment. Here are several fundamental documents of which a researcher concerned with ballot questions needs to be aware.

Article XLVIII: Created by the 1917 Constitutional Convention, this is the authority in the Massachusetts Constitution giving the citizenry the power to submit laws and constitutional amendments to the electorate. The bulk of this amendment deals with the procedure but also limits the subject matter of such proposals in section 2 by excluding laws about religion, judges, judicial decisions or the operation of a specific municipality; it has also been further amended by Articles LXVII, LXXIV, LXXXI and CVIII. An official version of the Massachusetts Constitution is found in volume 1 of the *Massachusetts General Laws 2004*, which is republished every two years. Unofficial versions may be found in the *Massachusetts General Laws, Annotated* (MGLA), by Thomson/West, or the *Annotated Laws of Massachusetts* (ALM), by Lexis Publishing, or online at www.mass.gov/legis/const.htm.

Mass. Gen. Laws ch. 53 §22A: This statute addresses petition signatures, voter certification, and the publication of petition forms by the Secretary of the Commonwealth. Versions of this statute may be found in the same sources as the constitutional amendment above.

Mass. Gen. Laws ch. 55 §6B: Defines the purpose of a ballot question committee including restricting its financial activities solely to that of the question for which it was formed and restricting any involvement with the campaigns of a candidate.

Further statutory sections may be found by consulting the indexes to either of the unofficial statutory sources. Under the subject heading "Initiative and Referendum" in the Mass. Gen. Laws Ann: there are two columns of references to codified statutes in other chapters of the *General Laws*.

Senate Bill 2251 "An act providing further public information and strengthening petition anti-fraud safeguards for initiative and referendum questions" Mass. S.2251, 184th General Court, 1st Session (2005): Currently pending in the House of Representatives Committee on Ways and Means, this a redraft of an earlier bill, sponsored by Senator Edward J. Augustus, Jr., and is a proposed antidote to "bait and switch" tactics used by some ballot question groups to obtain signatures from voters; it is alleged that some groups represent themselves as collecting for a more popular issue when in fact they are collecting signatures for another that was more controversial; the bill also attempts to limit the method of reimbursement for professional signature collectors.⁴⁷ No action has been taken on this legislation since November 7, 2005.⁴⁸

950 CMR sec. 48 et. seq.: The Secretary of the Commonwealth has promulgated regulations, under Mass. Gen. Laws c.53, §7 that address issues of "accuracy, uniformity and security from forgery and fraud" in the gathering of signatures; these regulations are published in the Code of Massachusetts Regulations at Chapter 950, §§ 48.01 to 48.08, and deal largely with the format of the petition forms, the signatures, and finally defining the point at which the ballot questions actually become a public-record.

Massachusetts Statewide Records Retention Schedule 06-06: Subtitled "A publication of the Records Conservation Board produced in conjunction with the Massachusetts Archives and the Supervisor of Public Records Office," this body of standards sets out the retention and disposal scheme for records from many state agencies including the Secretary of the Commonwealth and the Attorney General's office. The files used by these two offices during the initiative and referendum process are also covered in these schedules. Copies of this document are available in print at the Supervisor of Public Records Office, the State Archives, or the State Library.

THE SECRETARY OF THE COMMONWEALTH

As noted in sections above, the Secretary of the Commonwealth is the state officer most substantially involved in the entire initiative and referendum process. This office serves as a center for public information within the state, and also oversees all elections. These functions fall under the jurisdiction of different subdivisions within the Secretary's authority, each with its own separate sphere of responsibility, as well as separate offices in different sections of Boston. The main administrative office for the Secretary is on the third floor of the State House on Beacon Street in Boston, with online access provided at www.sec.state.ma.us/.

Elections Division: This subdivision of the Secretary's office administers all aspects of elections including voter registration, voting equipment, primaries, electoral districts and ballot questions. The main elections office is located at the main location for many state agencies, One Ashburton Place, room 1705, in Boston, near the State House, or it can be located online at www.sec.state.ma.us/ele. Online resources include *How to Place a Public Policy Question on the 2006 State Election Ballot*, *How to Request a Recount*, and *A Guide to State Ballot Questions*. This later publication is a valuable 19 page guide to the entire process. An electronic version of *The Official Massachusetts Information for Voters 2006*, the brochure sent to all voters, can also be found online at www.sec.state.ma.us/ele/elepdf/IFV_2006.pdf. The Elections Division holds petition files for the most recent ballot questions at their office until they are sent later, usually within a few years, to the State Archives.

State Archives: Organizes and preserves the official records of Massachusetts government including the Secretary's records, legislative materials and the records from the Governor's office and executive agencies. Among these are the initiative and referendum petitions and records from the Secretary's office from 1919 to 2002, as well as records from the Attorney General's office from 1919 to 1953. The archives are located on Morrissey Boulevard at Colombia Point in Dorchester, south of Boston, between the campus of the University of Massachusetts at Boston, and the John F. Kennedy Library and Museum. The archive requires all visitors to register in order to use materials in the reading room or from the vault. Online they may be located at www.sec.state.ma.us/arc/arcidx.htm, though as of this writing they have not loaded any materials related to ballot questions on this site, so the documents held by this agency need to be viewed in person.

THE ATTORNEY GENERAL

Information available from the Attorney General's office, especially online, overlaps somewhat with that from the Elections Division of the Secretary of the Commonwealth's office. However, there are some differences and for anyone interested in proposing a ballot question it would be worth looking at the information and materials from both offices together. The Attorney General's main office is located in One Ashburton Place, near the State House, in Boston. Online information may be found at www.ago.state.ma.us/. The Attorney General's description of the process is available at www.ago.state.ma.us/sp.cfm?pageid=1246, and offers further information from Assistant Attorney General Peter Sacks at peter.sacks@ago.state.ma.us. Currently filed petitions are also listed at www.ago.state.ma.us/sp.cfm?pageid=2144, this provides links to the text of the ballot questions and contact information for the sponsors. Three recent Attorney General's opinions regarding initiatives and referendums may also be found online by searching from the main page under "ballot questions" or from www.ago.state.ma.us/sp.cfm?pageid=1019.

Attorney General opinions may also be found online in Lexis' Mass AG database; searching under the term "ballot question" produces slightly less than a dozen decisions from between 1980 and 2001; alternatively they may also be found in hard copy at the State Library, the State Archives, or through the Attorney General's office. Initiative petition files for the period from 1919 to 1953 are kept at the State Archives; however, petition files from that period to the present are kept at the Attorney General's office or stored offsite and may require a "Freedom of Information Act" petition to gain access to them.

THE OFFICE OF CAMPAIGN AND POLITICAL FINANCE

, Established in 1973 under the Campaign Finance Law,⁴⁹ the Office of Campaign and Political Finance is an independent agency charged with supervising compliance with this law located in Room 411, One Ashburton Place, on Beacon Hill in Boston, or online at www.mass.gov/ocpf.⁵⁰ For ballot question committees this means reporting on all financial matters related to their promotion of any initiatives and referendums. Online the OCPF provides *Statewide Ballot Question-Committees: a Listing of Committees and CPF ID Numbers, June 2006* at www.mass.gov/ocpf^omm/bq0606.pdf; this lists all currently operating committees with their address and treasurer, e.g., 95331, Wine Merchants and

Concerned Citizens for S.A.F.E.T.Y. (Stopping Alcohol's Further Extension To Youth), One Beacon Street, Suite 1320, Boston, MA, 02108, Richard Goldstein. Campaign finance reporting forms for ballot question committees are available at www.mass.gov/ocpf/forms/102bq.pdf; and a guide for the rules governing these committees is found at www.mass.gov/ocpg/guides/statebql203.pdf.

THE GENERAL COURT

As the legislature reviews initiative and referendum proposals before they are presented to the electorate, and is substantially involved in the constitutional amendment process, some materials concerning these proposals will make an appearance in official legislative sources. Missing from these materials are the written committee reports required by law but uncollected in a central place, though they may be available through the reviewing committee. Those existent legislative documents are found at the State Archives or, more proximate to the legislature, in the State Library at the State House on Beacon Street in Boston.

The State Library: is found in room 341 on the third floor of the State House, next to the Secretary of the Commonwealth's office; here researchers will find copies of the official session laws contained in the *Massachusetts Acts and Resolves*, bills, and from the Legislative Reference Council, reports contained in the *House and Senate Documents*, records of the legislative activity in the *House and Senate Journals*, as well as *The Debates in the Massachusetts Constitutional Convention, 1917-1918*. With the growth of initiative and referendum activity in the 1970s a movement to revise the procedure produced an exhaustive 179 page report by the now defunct Legislative Research Council that appears in the *House Documents, 1975*, as House Bill 5435, titled "Revising Statewide Initiative and Referendum provisions of the Massachusetts Constitution." The object of the report was to "identify any problem areas attributable to vagueness or contradictory requirements..";⁵¹ the report also examines two prior reform efforts in 1932 and in 1967.⁵² At times the General Court has also submitted questions regarding a ballot question to the Supreme Judicial Court for certification of the law's constitutionality; an example of the justices' opinion on a policy question regarding the repeal of Prohibition, may be found in the *House Documents, 1928*, at HB 1101.

COURT DECISIONS

With as many state officers holding some oversight powers over, or an interest in the outcome of, some part of the initiative and referendum process it is no small wonder that many conflicts have required adjudication by the Massachusetts Supreme Judicial Court. Below are a few cases that illustrate the conflicts that arise and how they may be used by interested parties to maneuver. While searching for these cases may be easily done by reference to annotated versions of the constitutional amendments or statutes on which their authority rests, the digest system does provide an alternative method of searching for these cases. It is also possible to perform term searches online using phrases like: "initiative petition," "referendum petition," "initiative amendment," "article 48," or "ballot question."

Schulman v. AG, 447 Mass. 189 (2006).

The plaintiff sought to block the proposed constitutional amendment banning same-sex marriages by challenging the Attorney General's certification as the amendment would be in conflict with a prior judicial decision; the Court ruled against the plaintiff by finding the Attorney General's certification was within his purview under Article XLVIII.

Opinion of the Justices to the Acting Governor, 438 Mass.1201 (2002).

The justices answered the Governor's question as to whether the legislature's adjournment by roll call vote constituted a "final action" upon a constitutional amendment such that she would not have the authority to compel the legislature to reconvene to consider the amendment; the Court responded that as no vote was taken on the amendment, and that the legislature had only voted to adjourn, it was not possible to find that a final action had occurred. The justices then declined to answer a related question about the governor's power as having been answered in a prior case.

Opinion of the Justices to the House of Representatives, 422 Mass. 1212 (1996).

The House asked the Court to rule on the constitutionality of an initiative that attempted to cut legislative salaries and expenses in half while effectively reducing the legislative work to six months per year; finding several constitutional deficiencies with the proposal the

court rejected it in part for being in conflict with another two year old law on term limits that had been passed by a state-wide ballot question.

Limits v. President of the Senate, 414 Mass 31 (Mass 1992).

Plaintiffs sought to use the court to compel the legislature to come to a final vote on a constitutional amendment requiring term limits; the court found that Article XLVIII specified the Governor was the state officer with the power to compel such a final action.

In re Municipal Suffrage to Women, 160 Mass. 586 (1894).

Leading the Way, credits this case with inspiring the drive to create initiative and referendums in the Commonwealth; the case is interesting reading for the majority's argument in favor of a representative government with delegated powers to the legislature superior to that of the people; at times the majority opinion is just unabashedly snobbish.⁵³ Another reason to read the case is for Oliver Wendell Holmes, Jr's dissent.

Massachusetts Digest 2d: If a researcher uses the West digest system in print or online, the topic for finding cases about initiatives in "Statutes," and the key number range is 301 to 327, e.g., "Initial certification by Attorney General," Statutes key 304. Referendums are covered by the topic statutes under the key numbers 344 to 367, e.g., "Certification of sufficiency of petition," Statutes key 355.

ESSENTIAL REFERENCE TOOLS

New Englanders throughout the years have relied upon a publication from our New Hampshire neighbors for "useful information for people in all walks of life," *The Farmer's Almanac*.⁵⁴ In a more sophisticated format, similar kinds of general political forecasts, suggestions, common sense, and information are available for novices and veterans alike here in the Bay State. These are several sources that are essential guides for anyone working in the field of Massachusetts politics.

The Massachusetts Political Almanac, edited by Kenneth G. Morton and Paplinka Paradise, from the Center for Leadership Studies, is an important guide to the entire apparatus of Bay State government; how the

branches are related and operate together; who is who and where they sit; "if you can't tell the players without a scorecard," this is the scorecard to have when playing on Beacon Hill; purchase of a copy provides the owner with a password for online access at www.masspa.com.

Lobbying on a Shoe String, by Judith Meredith, from the Massachusetts Law Reform Institute, is a wonderful primer on the Massachusetts legislature written for grassroots political activists from an insider's view point; while it is not directly on point for initiatives and referendums, it informs readers about the wordings of the General Court that are essential to understand before proceeding with a ballot question issue.

The Handbook of Massachusetts Legal Research, edited by Mary Ann Neary and produced by Massachusetts Continuing Legal Education, (MCLE), is available online from Lexis or in print from the publisher; although it does not deal at length with initiatives and referendums this source is the most complete single guide available for conducting research on any legal topic in Massachusetts.

Leading the Way, edited by Cornelius Dalton, unfortunately, this history of the General Court ends in 1980, has not been updated and is out of print since 1984; however, it is still the best narrative history on the legislature, considering both the political and social context of this body; this work includes an entire chapter devoted to the Constitutional Convention of 1917.⁵⁵

JOURNAL ARTICLES AND NEWS ARTICLES

It is no surprise that the Massachusetts initiative and referendum process as a local political issue has attracted little attention in law reviews. The topic has been more thoroughly explored in other sources that are full of practical information, including one medical journal article! Most common of all articles are the myriad of editorials and news stories that have tracked this issue over time. Researchers would be advised to spend time using related key terms to search periodical indexes and newspapers for more information on specific issues.

Robert G. Stewart, *The Law of Initiative Referendum in Massachusetts*, 12 New Eng. L. Rev. 455 (1977).

While this is a dated work, it is one of the few to look at the entire initiative and referendum process from a legal standpoint and realize

that growing numbers of activists would use this law in the future; at the time, the author was able to state that: "(Article XLVIII's) use has been modest." The situation has changed.

Kenneth Bresler, *Rediscovering the Right to Instruct Legislators*, 26 New Eng. L. Rev. 355 (1991).

This author believed that the right to instruct legislators, contained in the public policy questions, was another power underutilized by voters; part of the article examines the similarities and differences between this power and initiatives and referendums.

John McDonough, *Taking the Laws into Their Own Hands*, 7 Cmmw. 52-62 (MassINC, Fall 2002).

This piece analyzes the problems of initiatives and referendums, including the actions of the state legislature, growing numbers of petitions, and "booby traps"; this author also lays out five arguments, against the process and then three for it; where one of the earlier authors, Robert Stewart, saw growing activism in the future, this author stands at the other end of a time period and foresees diminishing activism observing: "It's possible the initiative surge since 1976 is a spent forced This is a void into which he sees corporate interests as rapidly entering."⁵⁶

William E. Dorman, *Questions as to the Meaning of the Amendments*, 4 Mass. L.Q. 142(1918-19).

These were likely the first legal writings on ballot questions and were meant as instructions to the bar.⁵⁷ This article poses and answers twelve questions about biannual elections, the role of the Attorney General, and the timing of parts of the procedure.

Blake Cady, M.D., *History of Successful Ballot Initiatives-Massachusetts*, 83 Cancer 2685 (1998).

The author presents a review of the activities that led to acceptance of a \$.25 increase in the excise tax on cigarettes, by way of a ballot question. This is interesting and useful as it recounts what is needed for a successful grass-roots campaign, and is written from the viewpoint of someone standing outside the legal or political mainstream. It serves as an example of the way in which initiatives were intended to be used as they were developed by the Progressives as a vehicle for social change.

Barbara Anderson, *Celebrating Prop 2 1/2*, Bos. Globe A23 (Nov. 4, 2005).

A recounting of the history and achievements of the most successful ballot question by the head of Citizens for Limited Taxation, the author of this initiative. This, too, is an example of the potential power for change for which initiatives may be used.

CONCLUSION: SWEET SUCCESS OR SOUR GRAPES?

Election Day was an unusually warm and beautiful November day for our voter to make her or his way to the polls. By week's end, if he or she had not already done so, that copy of *The Official Massachusetts Information for Voters* became useless and then was tossed out with the newspapers for recycling, or became the subject of some form of political archaeology.⁵⁸

As life settled into the routine preparations for the Thanksgiving holiday, the Commonwealth had changed historically, and yet had also stayed the same. Massachusetts had overwhelmingly elected its first African-American Governor, Deval Patrick. However, the vintner had nothing to cheer about as the ballot question to put wine in supermarkets failed; child care workers also lost their bid for union representation; and political candidates would still only be listed once on ballots. All of this year's ballot questions were defeated.⁵⁹ While the voter may be the only one with a reason to raise her or his glass in celebration it will still only be with a libation purchased from what is known colloquially as a "packie."⁶⁰ The cost of the campaign was historic: both sides of the wine sales question spent a record breaking \$13 million total.⁶¹ Keeping with the eccentricities of the Commonwealth, voters in those districts with a policy question about the decriminalization of marijuana voted to send such instructions to their state representatives.⁶²

Since the ballot questions considered were finally tallied and accepted, the continuing political fall-out has been over the unresolved constitutional amendment to ban same-sex marriages. Two days after the election the General Court convened in a joint session voted by a simple majority to recess without considering the amendment. A vote by the legislature to openly oppose the amendment would have required better than a three-fourths majority; a vote to submit the amendment to the voters would only have required better than 25% of the members.

The General Court's actions though have failed to quell the political maelstrom.⁶³

Ultimately, after nearly ninety years of ballot questions, the story is that this story continues to develop. In *The Boston Sunday Globe*, one month after the election, our voter read this observation on the topic: "And if the Legislature-and perhaps the governor-have no confidence in Article 48's rules, wouldn't it at least make sense to try to change them?"⁶⁴ For legal researchers this question is ripe with implications for the future.

NOTES

1. Mass. Gen. Laws. ch. 2 § 35 (2004); "Bay Staters shall be the official designation of citizens of the commonwealth."

2. This author received his brochure in the mail from the Secretary of the Commonwealth on October 6, 2006.

3. *Seven Weeks to History*, Boston Globe editorial, AF2., September 20, 2006. "One thing is certain: Voters will make history in November by electing either the first woman or first black governor of Massachusetts."

4. The Office of the Secretary of the Commonwealth, *The Official Massachusetts Information for Voters: the 2006 Ballot Questions*, (2006).

5. Ari Bloomekatz, *SJC Rules That Initiative to Ban Dog Racing Illegal*, Boston Globe, B8, (July 14, 2006).

6. Jeffrey Krasner, *Group to Back Healthcare Law's Implementation*, Boston Globe, D3, (July 6, 2006). ^

7. Andrea Estes and Russell Nichols, *Lawmakers Delay Vote on Gay Marriage Measure*, Boston Globe, A1, (July 13, 2006).

8. Scot Lehigh, *Campaign Fun With Tax Cuts*, Boston Globe, A19, (May 5, 2006). "Fifty-six percent of the voters did say yes to the tax cut six years ago."

9. Mass. Const, amend. XLVIII, §1 et seq.

10. Mass. H. 5435, 169th General Court, 1st Session, 21 (1975), *Revising Statewide Initiative and Referendum Provisions of the Massachusetts Constitution*.

11. Mass. Gen. Law ch. 12 §1 et seq.; Mass. Gen. Law ch. 54 §53.

12. Mass. Gen. Law ch. 55 §6.

13. *Supra*, *The Official Massachusetts Information for Voters: the Ballot Questions*, at 5.

14. David McCullough, *John Adams*, 221 (Touchstone, 2002). "It was titled 'A Constitution or Form of Government for the Commonwealth of Massachusetts,' Adams having chosen the word 'commonwealth' rather than 'state,' as had Virginia, a decision that he made on his own and that no one was to question."

15. Mass. Const., Part the Second, *The Frame of Government*, Title of the body politic. 'The people ... agree with each other, to form themselves into a free, sovereign, and independent body politic, or state by the name of 'The Commonwealth of Massachusetts'.'

16. Mass. Const, art. XLVIII, ch. I.

17. *Supra*, *Campaign Fun with Tax Cuts*, n. vii.

18. *The Debates of the Massachusetts Constitutional Convention of 1917* (Wright and Potter Printing Company, State Printers 1918) vols. I-IV.

19. Mass. Const. Part 2, Chapter 1, §1, Article 1 "The legislative body shall assemble every year... and shall be stiled [sic], The General Court of Massachusetts."

20. Cornelius Dalton, editor, *Leading the Way: a History of the Massachusetts General Court 1629-1980*, 222 (Office of the Massachusetts Secretary of State, 1984). "Former Senator Henry Parkman of Boston opposed the Pillsbury proposal. Parkman said that he was 'old fashioned enough to hope that the words 'General Court' may be retained."

21. Mass. Const, art. XLVIII, ch. IV.

22. Barbara Anderson, *Celebrating Prop 2 1/2*, A23 Boston Globe, Nov 4, 2005.

23. Mass. Gen. Law ch. 51 §22 c.

24. Mass. Gen. Law ch. 53 § 19.

25. Fred Hanson, *Medical Marijuana-Timilty: No Stance Yet on Pot Question*, Patriot Ledger, 9 (Oct. 24, 2006).

26. Mass. Const. Article XLVIII, The Referendum, ch. III.

27. Patrick Scanlon and Steven T. James, *Legislative Procedure in the General Court of Massachusetts*, 52 (Senate Clerk and Clerk for the House of Representatives, 2003). This booklet is held in the collection of the State Library.

28. Mass. Gen. Law ch. 9, §§ 1-20A.

29. Mass. Gen. Law ch. 211 §§ 1-28.

30. Massachusetts possesses an elder sibling's strong psychological need to be first in many areas, for evidence of this see: *Famous Firsts in Massachusetts*, from the Secretary of the Commonwealth's Citizen Information Service at <http://www.sec.state.ma.us/cis/cismaf/mf4.htm>.

31. *\$Laws for Sale\$: A Study of Money in the 1994 Ballot Questions*, 3 (Money and Politics Project, Commonwealth Coalition).

32. *In re Municipal Suffrage of Women*, 160 Mass. 586, 587 (Mass. 1894). In this advisory opinion the Supreme Judicial Court stated: "By the constitution of Massachusetts, as originally adopted, not only were the powers of the representatives of the people limited," but the powers of the people themselves were limited."

33. *Supra, Debates of the Constitutional Convention of 1917*; Vol. II is devoted to the initiative and referendum debates alone.

34. *Supra, Leading the Way*, at 211-215.

35. *Id.*, at 215. Quoting Raymond L. Bridgman on another issue before the convention: "Though the official record cannot show the truth, yet the real cause of the collision over the Anti-aid Amendment was *the* antagonism of Catholic and Protestant."

36. *Id.*

37. Executive Department, Council Chamber, *The Official Returns of the Votes and Blanks Cast Upon the Nineteen Constitutional Amendments Submitted by the Constitutional Convention and Adopted at the State Election, November 5, 1918*. 4Mass. L. Q. 120 (1918-1919).

38. Mass. Elections Division, index to initiatives and referendums on file at the State Archives.

39. Robert G. Miller, *Legislative History of Petitions for Initiative Petition Amendments to the Massachusetts Constitution, 1933 to 1992*, 3 (1993). This, unpublished study is in the collection of the State Library for Massachusetts.

40. John McDonough, *Taking the Laws into Their Own Hands*, 7 Cmmw. 52-62, (MassINC, Fall 2002).

41. *An Overview of Massachusetts Statewide Ballot Measures: 1919-2004* (Office of the Secretary of State) <http://wwwrsec.state.ma.us/ele/elebalnVbalmpdf/balmtree.pdf>.

42. Mass. Elections Division, initiative and referendum petitions 1919 to 1902, on file at the State Archives.

43. Mass. Office of Campaign and Political Finance, *Statewide Ballot Question Spending Reaches Almost \$10 Million*, Press Release (Dec. 22, 1998) www.mass.gov/ocpf/Ypr_bqsp.pdf; and *Statewide Ballot Question Spending Exceeds \$15 Million*, Press Release (Dec. 20, 2000).

44. Andrew Ryan, *Wine Sale Question Nearing Record on Campaign Spending*, Boston Globe D4 (October 12, 2006).

45. Mass. Secretary of the Commonwealth, *State Ballot Question Petitions*, http://www.sec.state.ma.us/ele/elepdf/state_ballot_question_petitions.pdf (April 2005); and Mass. Atty. Gen., *The Initiative Process, 2005-2006: An Overview for Interested Members of the Public*, <http://www.ago.state.ma.us/sp.cfm?pageid=1246> (2006).

46. *Supra*, *The Initiative Process, 2005-2006*.

47. Email from Marissa Goldberg of Senator Edward Augustus' office to the author, (October 27, 2006, 11:31 a.m. EDT) (copy on file with the author): "As a Fox News Undercover report recently revealed, I strongly believe that unscrupulous, out-of-state paid signature gathering firms have hijacked the Commonwealth's initiative petition process. I am deeply concerned that paid signature-gatherers are using unscrupulous tactics-including "bait and switch" fraud-to deceive voters and use any means necessary to acquire the signatures they need to push their narrow agenda on Massachusetts citizens." Senator Augustus is the Senate chair of the Joint Committee on Election Law.

48. The status of this bill was found at <http://www.mass.gov/legis/184history/s02251.htm>. This bill will likely die in committee if it is not enacted before the end of the session January 2, 2007.

49. Mass. Gen. Laws ch. 55 §1.

50. Kenneth G. Morton and Papalinka Paradise, editors, *Massachusetts Political Almanac, 2005 edition* 554 (Center for Leadership Studies 2005).

51. *Supra*, Mass. H. 5435 at 2.

52. *Id.* at 22.

53. *In re Municipal Suffrage to Women*, 160 Mass. 586, at 587; "But the model adopted was in other respects the English form of government. While a purely democratic form of government existed in the towns of New England, few if any persons seem to have been in favor of such a form of government for the state." Also, at 589, "Apparently, it was thought that the persons selected for the executive, legislative, and judicial offices,...., would be men of good character and intelligence, of some experience in affairs, and of some independence of judgment, and would have a better opportunity of obtaining information, taking part in discussion, and carefully considering conflicting opinions, than the people themselves; _____"

54. *The Farmer's Almanac*, Yankee Publishing Inc., Dublin, N.H.

55. *Supra*, *Leading the Way*, chapter 48, "Constitutional Reform," at 211.

56. *Supra*, *Taking the Laws into Their own Hands*, at 62, McDonough's closing anticipates the conclusions of the Sunday Globe article four years later cited in this article's final paragraph. However, McDonough is more favorably disposed to keeping initiatives and referendums in their current form: "It's hard to see how we could make the Massachusetts ballot-initiative process better. But it's easy to see how we could make it worse."

57.F.W.G. *The Significance of the Returns*, 4 Massachusetts Law Quarterly 140 (1918-1919). "The people of Massachusetts have got the I. and R. and they have got to learn to live under it and make it work as wisely as they can. In order to do this, it is necessary for most of them to learn more about the structure of their government and how it works than they know today. This is true of all of us at the bar as well as the rest of the community."

58>Your author picked a spare copy out of the recyclable bin at the town's transfer station, (the town dump), that Saturday.

59.Brace Mohl, *Law Allowing Wine in State Food Stores is Rejected*, Boston Globe, November 8,, 2006; Lane Lambert, *Question 2: Multiple Listing of Candidates is Soundly Rejected*, Patriot Ledger, November 8, 2006; Lane Lambert, *Question 3: Effort to Allow Child Care Union Comes Closest*, Patriot Ledger, November 8, 2006.

60.In Massachusetts liquor is sold at a retail store known as a package store, or more familiarly called a "packie."

61.Mass. Office of Campaign and Political Finance, *\$15.3 Million Spent on Statewide Ballot Questions in 2006* Press Release (December 14, 2006) www.mass.gov/ocpf/bq2006.pdf.

62.Tamara Rice, *Nonbinding Question: Decriminalizing Marijuana Favored*, Patriot Ledger, November 9, 2006. "yoters would rather have a little dope in their pockets than wine in the supermarkets."

63.Andrea Estes and Scott Helman, *Legislature Again Blocks Same-Sex Marriage Ban: Lawmakers Recess without Voting on Constitutional Amendment*, Boston Globe, AI, November 10,2006. "Shortly after the vote, (Governor) Romney called a press conference and blasted the 109 lawmakers who voted to recess, saying, 'we have witnessed the triumph of arrogance over democracy'."

64.Dave Denison, *Coming to Grips with the Grass Roots*, Boston Sunday Globe, K4,December 10, 2006.