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## MARIJUANA LEGALIZATION AND THE ROLE OF THE MASSACHUSETTS LEGISLATURE

SEAN J. KEALY\*

### ABSTRACT

*The public is often frustrated when Congress or their state legislature is not responsive to their policy priorities. This was especially true during the effort to legalize marijuana in Massachusetts. The legislature consistently refused to take up the issue despite public support. Legalization advocates ultimately bypassed the legislature by turning to the ballot-initiative process on three occasions: first to decriminalize possession of small amounts of marijuana, then to legalize medical marijuana, and most recently to legalize recreational marijuana. After the electorate legalized recreational marijuana, the legislature further frustrated advocates, first by delaying implementation of key parts of the law and later by making significant changes. Despite the fierce criticism of the legislators for attempting to thwart the will of the people, this Essay argues that the Legislature acted in a responsible and effective manner. By giving a detailed history of the legislative activity during the legalization effort, this Essay attempts to show that the state legislature demonstrated valuable traits, including being appropriately cautious when legalizing a range of products that would require extensive regulation, properly considering the concerns of various constituencies, considering the available evidence, and effectively balancing the role of the executive branch.*

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## INTRODUCTION

Marijuana legalization in Massachusetts happened through a series of bills passed by initiative petition over the course of eight years. Legalization became a reality because of campaigns conducted by passionate advocates and the popular vote. Massachusetts policy makers', notably the state legislature's, general avoidance of marijuana legalization became a subject of derision—to the point of being called “regressive.”<sup>1</sup> Still, the Legislature not only fulfilled its role in the lawmaking process but also acted effectively. Even as the Legislature acted cautiously and did not act to pass a bill legalizing marijuana, it was the locus of debate about the issue. It gathered information and prepared for the eventuality of the initiative petition passing. The advocates were again upset when, after their law passed, the Legislature delayed portions of the law and spent seven months considering amendments. But, throughout the process, the Legislature effectively gave weight to public opinion and other important sources of policy demands, deliberated intelligently based on reliable evidence, faced up to the realities of policy choices, and avoided gridlock.

This Essay begins by briefly describing the state of marijuana laws in Massachusetts before the legalization efforts and the state's initiative process began in Part I. Part II is a history of the 2016 legalization effort from the passage of the petition, to the Legislature's delay of parts of the new law, and through the enactment of significant amendments to the original Act. Part III is a brief exploration on what marijuana legalization demonstrates about the nature of the Massachusetts Legislature, and perhaps about legislatures generally.

## I. MARIJUANA LAWS IN MASSACHUSETTS

Massachusetts, along with several other states, passed statutes to control marijuana (called “cannabis” in the statutes) between 1912 and 1915, predating the federal prohibition by twenty-five years.<sup>2</sup> These laws were not due to public demands for the government to control marijuana but were seemingly to prevent

<sup>1</sup> Colin A. Young, *On Marijuana, Steves Knocks State's "Regressive Political Establishment,"* STATE HOUSE NEWS SERV. (Oct. 12, 2016, 5:07 PM) [hereinafter Young, *Steves Knocks State's "Regressive Political Establishment"*], <https://www.statehousenews.com/news/20162267>.

<sup>2</sup> The original Massachusetts laws came in 1912 and 1914. Act of Mar. 21, 1912, ch. 284, 1912 Mass Acts 191; Act of Jun. 22, 1914, ch. 694, 1914 Mass. Acts 704. California, Indiana, Maine, and Wyoming prohibited marijuana in 1913. Act of Jun. 11, 1913, ch. 342, 1913 Cal. Stat. 692; Act of Mar. 6, 1913, ch. 118, 1913 Ind. Acts 306; Act of Apr. 12, 1913, ch. 211, 1913 Me. Laws 300; Act of Feb. 6, 1913, ch. 93, 1913 Wyo. Sess. Laws 101. New York City passed an ordinance in 1914. *Amendments to Sanitary Code*, CITY REC., Aug. 1, 1914, at 6545; *Muzzles the Dogs All the Year 'Round: Health Board Seeks to Stop the Increase of Rabies by Sanitary Law*, N.Y. TIMES, July 29, 1914, at 6. Utah and Vermont prohibited marijuana in 1915. Act of Mar. 17, 1915, ch. 66, 1915 Utah Laws 74; Act of Mar. 12, 1915, No. 197, 1915 Vt. Acts & Resolves 336. The federal government first regulated and prohibited marijuana possession with the Marihuana Tax Act of 1937. See Pub. L. No. 75-238, 50 Stat. 551, *invalidated by* Leary v. United States, 395 U.S. 6 (1969).

future use once other, more dangerous drugs such as opium had been suppressed.<sup>3</sup>

Long before the *Reefer Madness*–inspired hysteria that led to the 1930s federal laws, state lawmakers prohibited marijuana based on very limited scientific information on the effects and social impact of the drug. For instance, in 1914, the *Fitchburg Daily Sentinel* reported on Hahnemann Medical College students, known as the “cannabis squad,” participating in experiments with *Cannabis indica*.<sup>4</sup> The article pointed out potential medical benefits of marijuana as a sedative and noted that students reported effects lasting five hours that included the prolongation of time, a loss of a sense of distance and proportion, “great happiness,” and pleasant sensations.<sup>5</sup> The students later experienced ill effects such as nausea, dry throat, and a “feeling of general discomfort.”<sup>6</sup>

Some considered Massachusetts’s 1914 statute the strictest of its kind in the country.<sup>7</sup> Previously, various drugs required a prescription, but refills were easily obtained unless the druggist refused, often because they believed it was for “a habitual user.”<sup>8</sup> The new law required purchasers of the controlled substances to have a new prescription each time and prohibited doctors and dentists from prescribing, selling, or giving certain drugs to habitual users.<sup>9</sup> Doctors also had to keep a record of patients given or prescribed narcotics.<sup>10</sup>

In 1971, Massachusetts adopted a version of the Uniform Controlled Substances Act.<sup>11</sup> For the next thirty-seven years, Massachusetts law penalized the simple possession of more than one ounce of marijuana with incarceration for up to six months and a \$500 fine.<sup>12</sup> By 2006, 798 people were convicted of simple marijuana possession, with 181 persons sentenced to a period of incarceration for a median sentence of 1.8 months.<sup>13</sup>

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<sup>3</sup> Dale H. Gieringer, *The Forgotten Origins of Cannabis Prohibition in California*, 26 CONTEMP. DRUG PROBS. 237, 260, 266 (1999).

<sup>4</sup> *Weird Visions Result of Drug*, FITCHBURG DAILY SENTINEL, May 15, 1914, at 12 (detailing experiments supervised by Dr. W.A. Pearson, a professor of physiological chemistry).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *See Drug Law of the Strictest Type*, BOS. DAILY GLOBE, Dec. 29, 1914, at 2.

<sup>8</sup> *Id.*

<sup>9</sup> Act of June 22, 1914, ch. 694, § 2, 1914 Mass. Acts 704, 704-05. The regulated drugs included “opium, morphine, heroin, codeine, cannabis indica, cannabis sativa, or any preparation thereof, or any salt or compound of the said substances.” *Id.*

<sup>10</sup> *Id.* § 3, at 705.

<sup>11</sup> Act of Nov. 11, 1971, ch. 1071, 1971 Mass. Acts 1019 (codified as amended at MASS. GEN. LAWS ch. 94C (2006)).

<sup>12</sup> MASS. GEN. LAWS, ch. 94C § 34.

<sup>13</sup> MASS. SENT’G COMM’N, SURVEY OF SENTENCING PRACTICES FY 2006 (2007), <https://www.mass.gov/doc/survey-of-sentencing-practices-fy-2006/download> [https://perma.cc/7EC5-A7FX].

**Table 1.** Convictions and Incarcerations of Possession of Marijuana for Fiscal Years 2004-2013.<sup>14</sup>

Fiscal Year	Convictions	Incarcerations	Incarceration Rate	Median Sentence (months)
2013	18	3	17%	4.0
2012	31	4	13%	0.8
2011	55	11	20%	2.9
2010	78	13	17%	3.0
2009	278	59	21%	1.8
2008	445	101	23%	2.0
2007	678	156	23%	2.0
2006	798	181	23%	1.8
2005	711	126	18%	1.5
2004	609	118	19%	1.5

This changed significantly when marijuana advocates started using the Massachusetts initiative petition process to change the law. In 2008, Massachusetts voters decriminalized the possession of less than one ounce of

<sup>14</sup> These numbers are from Massachusetts's annual Survey of Sentencing Practices. EXEC. OFF. OF THE TRIAL CT., SURVEY OF SENTENCING PRACTICES FY 2013 (2014), <https://www.mass.gov/doc/survey-of-sentencing-practices-fy-2013/download> [https://perma.cc/3A49-WEBQ]; MASS. SENT'G COMM'N, SURVEY OF SENTENCING PRACTICES FY 2012 (2014), <https://www.mass.gov/doc/survey-of-sentencing-practices-fy-2012/download> [https://perma.cc/V3LD-43GH]; MASS. SENT'G COMM'N, SURVEY OF SENTENCING PRACTICES FY 2011 (2012), <https://www.mass.gov/doc/survey-of-sentencing-practices-fy-2011/download> [https://perma.cc/RQJ6-RTK8]; MASS. SENT'G COMM'N, SURVEY OF SENTENCING PRACTICES FY 2010 (2011), <https://www.mass.gov/doc/survey-of-sentencing-practices-fy-2010/download> [https://perma.cc/FU4E-PKMM]; MASS. SENT'G COMM'N, SURVEY OF SENTENCING PRACTICES FY 2009 (2010), <https://www.mass.gov/doc/survey-of-sentencing-practices-fy-2009/download> [https://perma.cc/6THU-Q9JK]; MASS. SENT'G COMM'N, SURVEY OF SENTENCING PRACTICES FY 2008 (2009), <https://www.mass.gov/doc/survey-of-sentencing-practices-fy-2008/download> [https://perma.cc/4JL3-NKBF]; MASS. SENT'G COMM'N, SURVEY OF SENTENCING PRACTICES FY 2007 (2009), <https://www.mass.gov/doc/survey-of-sentencing-practices-fy-2007/download> [https://perma.cc/WC3E-W6FE]; MASS. SENT'G COMM'N, SURVEY OF SENTENCING PRACTICES FY 2006 (2007), <https://www.mass.gov/doc/survey-of-sentencing-practices-fy-2006/download> [https://perma.cc/JNV4-T8QA]; MASS. SENT'G COMM'N, SURVEY OF SENTENCING PRACTICES FY 2005 (2006), <https://www.mass.gov/doc/survey-of-sentencing-practices-fy-2005/download> [https://perma.cc/8FBR-64A2]; MASS. SENT'G COMM'N, SURVEY OF SENTENCING PRACTICES FY 2004 (2005), <https://www.mass.gov/doc/survey-of-sentencing-practices-fy-2004/download> [https://perma.cc/8X5Y-MGUS]. The Massachusetts fiscal year runs from July 1 through June 30. Therefore, Fiscal Year 2013 covers the period July 1, 2012 through June 30, 2013. Unfortunately, the state stopped issuing comprehensive reports after Fiscal Year 2013.

marijuana.<sup>15</sup> In 2012, the voters again changed the state laws to allow the use and sale of medical marijuana.<sup>16</sup>

## II. THE INITIATIVE PETITION PROCESS

Since 1918, Massachusetts voters have had the power to bypass the legislature in order to directly pass or rescind statutes and change the state constitution.<sup>17</sup> A Progressive Era reform, the initiative petition process provides a way to address topics that the Legislature refuses to address and offers voters an opportunity to express popular will directly.<sup>18</sup>

Massachusetts Constitution Amendment Article XLVIII and related provisions provide a detailed process for putting proposed legislation on the biennial state election ballot. First, the petition sponsors must file the proposal with the Office of the Attorney General in August of the year preceding the election.<sup>19</sup> The Attorney General then must review the proposal to determine if the petition is in the correct form and meets other constitutional restrictions.<sup>20</sup> If the proposal meets the constitutional requirements, the Attorney General is

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<sup>15</sup> Act of November 4, 2008, ch. 387, 2008 Mass. Acts 1571 (codified as amended at MASS. GEN. LAWS, ch. 94C § 34 (2009)). Possession of less than one ounce became a civil offense punishable by a fine of \$100. MASS. GEN. LAWS, ch. 94C § 32L (2009).

<sup>16</sup> Act of November 6, 2012, ch. 369, 2012 Mass. Acts 1583, 1583-84; Craig Sandler, *Pot Primer: The Past and Future of Marijuana in Massachusetts*, STATE HOUSE NEWS SERV. (Nov. 9, 2017), <https://www.statehousenews.com/news/20172330>. Medical marijuana cards could be issued for nine specific debilitating diseases and several other psychological or neurological conditions. 2012 Mass. Acts at 1584. Persons with medical marijuana cards could possess a sixty-day supply, defined as the amount that a patient “would reasonably be expected to need over a period of sixty days for their personal medical use” in their home. *Id.* at 1585. Although passing easily, with a majority in every municipality except two, by September 2013, 115 cities and towns (out of 351) enacted temporary local prohibitions on hosting medical marijuana dispensaries. *See* Sandler, *supra*.

<sup>17</sup> MASS. CONST. amend. art. XLVIII, pt. I (“[T]he people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection; and the popular referendum, which is the power of a specified number of voters to submit laws, enacted by the general court, to the people for their ratification or rejection.”).

<sup>18</sup> *See* Stephanie Turnbull, *Amendment Article 48: What It Means for Massachusetts Voters*, STATE LIBR. OF MASS. (Sept. 15, 2014), <http://mastatelibrary.blogspot.com/2014/09/amendment-article-48-what-it-means-for.html> [<https://perma.cc/8NG6-2MV8>]. “Twenty-three other states permit similar forms of ‘direct democracy.’” *See* Tori T. Kim, *Making “Good” Laws Through the Ballot Initiative Process*, BOS. BAR J., Fall 2015, at 32, 32.

<sup>19</sup> MASS. CONST. amend. art. XLVIII, pt. II, § 3; *id.* amend. art. LXXIV, § 3.

<sup>20</sup> Petitions must contain “only subjects . . . which are related or . . . mutually dependent . . .” *Id.* amend. art. XLVIII, pt. II, § 3. The Massachusetts Supreme Judicial Court has interpreted this provision narrowly; the proposal must be a sufficiently unified public policy so that “a reasonable voter [could] affirm or reject the entire petition.” *Carney v. Att’y Gen.*, 850 N.E.2d 521, 532 (Mass. 2006). The state constitution excludes referenda dealing with religion, judges and courts, local issues, and state constitutional rights. *See* MASS. CONST. amend. art. XLVIII, pt. II, § 2.

required to certify the petition and write a concise and accurate summary of the proposal that will appear on the ballot.<sup>21</sup> After certification, the petitioners must gather a fixed number of signatures and submit them to the Secretary of the Commonwealth's Office in early December.<sup>22</sup>

If proponents meet the signature threshold, the Secretary of the Commonwealth must send the petition to the Legislature.<sup>23</sup> The Legislature has until May to consider the petition and may either enact the proposed language or take no action.<sup>24</sup> If the Legislature fails to act, the petitioners must gather and submit another fixed number of signatures to the Secretary of Commonwealth by August to secure a spot on the November ballot.<sup>25</sup> If a majority of general election voters vote in favor of the proposal, the petition's statutory language becomes law.

Between 2000-2018, thirty proposed initiatives made it to the ballot, and twelve became law.<sup>26</sup> Over the course of eight years, advocates for marijuana legalization successfully used the initiative petition process to achieve their goals: decriminalizing possession of small amounts of marijuana in 2008,<sup>27</sup> legalizing medical marijuana in 2012,<sup>28</sup> and legalizing recreational marijuana in 2016.<sup>29</sup>

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<sup>21</sup> MASS. CONST. amend. art. LXXIV. Proponents and opponents are given the opportunity to review and comment on the summary. *Id.*

<sup>22</sup> *Id.* The number is determined by the number of voters who participated in the last statewide election. *Id.* amend. art. LXXXI. In 2016, the proponents of legalized recreational marijuana had to produce 65,604 signatures. See *2014 Governor General Election*, WILLIAM FRANCIS GALVIN: SEC'Y OF THE COMMONWEALTH OF MASS., <https://electionstats.state.ma.us/elections/view/126084/> [<https://perma.cc/FWX2-5UH7>] (last visited Apr. 13, 2021).

<sup>23</sup> MASS. CONST. amend. art. LXXXI.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* In 2016, petitioners needed to submit 10,792 signatures. Lowell Sun, *New Signature Deadline in Mass. for Ballot Question Backers*, SENTINEL & ENTER. (July 11, 2019, 12:00 AM), <https://www.sentinelandenterprise.com/2016/05/04/new-signature-deadline-in-mass-for-ballot-question-backers/>.

<sup>26</sup> A complete list of ballot questions may be found on the Massachusetts Secretary of Commonwealth's web page. *Statewide Ballot Questions — Statistics by Year: 1919 – 2018*, WILLIAM FRANCIS GALVIN: SEC'Y OF THE COMMONWEALTH OF MASS., <https://www.sec.state.ma.us/ele/elebalm/balmresults.html#year1919> [<https://perma.cc/SJY6-26LB>] (last visited Apr. 13, 2021).

<sup>27</sup> That year's Question 2 ("Possession of Marijuana") passed 63% to 33% (1,949,704 to 1,038,523). *Id.*

<sup>28</sup> That year's Question 3 ("Medical Use of Marijuana") passed 60% to 35% (1,914,747 to 1,108,904). *Id.*

<sup>29</sup> That year's Question 4 ("Legalization, Regulation, and Taxation of Marijuana") passed 52% to 45% (1,769,328 to 1,528,219). *Id.*



## III. THE LEGALIZATION CAMPAIGN

A. *Early Days*

The marijuana legalization movement in Massachusetts started in 1989 when the first “Freedom Rally” took place in the western Massachusetts city of North Adams.<sup>30</sup> The Rally moved to Boston Common in 1992 and ultimately became the second-largest legalization event in the country.<sup>31</sup> In 1990, the National Organization for Reform of Marijuana Laws (“NORML”) formed a Massachusetts chapter, MassCann.<sup>32</sup>

In 1999, there was a serious initiative petition effort where voters could vote to legalize marijuana at the 2000 election, but the organizers failed to secure the required number of signatures.<sup>33</sup> However, several nonbinding local questions calling for decriminalizing recreational marijuana and legalizing medicinal marijuana did pass in 2000.<sup>34</sup>

During the 1990s and 2000s, the Legislature passed incremental marijuana reforms.<sup>35</sup> By 2005, Massachusetts State Senator Steven Tolman, the Senate Chair of the Mental Health and Substance Abuse Committee, said that the time had come to decriminalize marijuana.<sup>36</sup>

The effort to legalize recreational marijuana formally began in midsummer 2015.<sup>37</sup> The Campaign to Regulate Marijuana Like Alcohol (“Campaign”), which was financially backed by the national Marijuana Policy Institute, proposed language to set up a regulatory and tax system to oversee marijuana legalization and filed an initiative petition with the Attorney General.<sup>38</sup> The

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<sup>30</sup> Sandler, *supra* note 16.

<sup>31</sup> *Id.* The largest prolegalization rally was Seattle’s Hempfest. *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *See id.* A 1991 law allowed the use of marijuana for glaucoma, cancer therapy, and certain asthmatic disorders. Act of December 31, 1991, ch. 480, 1991 Mass. Acts 1136, 1136-37. In 1996, Massachusetts allowed patients to possess and use marijuana legally for relief of symptoms, but there was no legal way to obtain marijuana. Act of August 8, 1996, ch. 271, 1996 Mass. Acts 1163. A 2002 budget amendment allowed judges to impose civil, rather than criminal, penalties for marijuana possession, but the Governor vetoed the provision. Sandler, *supra* note 16.

<sup>36</sup> *State Capitol Briefs - Monday, June 27, 2005: Marijuana Laws Hit Beacon Hill’s Airwaves Again*, STATE HOUSE NEWS SERV. (June 27, 2005, 12:00 AM), <https://www.statehousenews.com/news/2005671>. This committee was renamed the Mental Health, Substance Use, and Recovery Committee in 2017.

<sup>37</sup> *See* Matt Murphy, *Pot Politics Taking Hold in Mass. with Filing of Ballot Proposals*, STATE HOUSE NEWS SERV. (Aug. 5, 2015), <https://www.statehousenews.com/news/20151568>.

<sup>38</sup> *Id.* The Campaign proposed allowing adults twenty-one and older in Massachusetts to legally possess up to one ounce of marijuana and authorizing marijuana retail outlets and cultivation and testing facilities. *Id.* They also proposed a 3.75% state excise tax on marijuana sales in addition to the 6.25% sales tax, an optional additional local tax of 2%, and allowing municipalities to limit the number of retail outlets. *Id.*

Campaign rejected the “gateway drug” argument and touted legalization as a revenue creator, although it did not have a revenue projection.<sup>39</sup>

The petitions were met with immediate resistance from some of the state’s most powerful elected officials: Governor Charlie Baker, Boston Mayor Marty Walsh, and Attorney General Maura Healey.<sup>40</sup> Governor Baker claimed that the people in the health care and addiction communities thought that legalization was a bad idea, and Mayor Walsh suggested that marijuana was a “gateway drug” to more harmful substances.<sup>41</sup>

By early December, the Campaign submitted far more than the required 64,750 signatures to continue the initiative petition process.<sup>42</sup> The petition then went to the legislature for review,<sup>43</sup> and although Senate President Stanley Rosenberg stated he would rather the Legislature draft a legalization law than use the initiative process, he “also acknowledged little appetite among lawmakers to tackle the issue.”<sup>44</sup>

#### B. 2016: *The New Legislative Session*

At the beginning of 2016, marijuana advocates urged lawmakers to address the issue of legalization before the initiative petition went to the voters in November.<sup>45</sup> In January, the Joint Committee on the Judiciary heard testimony on a legalization bill sponsored by two prominent legislators, Representative David Rogers and Senator Patricia Jehlen.<sup>46</sup> Confident that legalization would happen in 2016 one way or another, advocates urged the Legislature to develop

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

<sup>40</sup> *Id.* Governor Baker, Mayor Walsh, and House Speaker Robert DeLeo later launched the Campaign for a Safe and Healthy Massachusetts to oppose the ballot initiative. Colin A. Young, *Trio Leading Campaign Against Legal Pot, Which Is Favored in New Poll*, STATE HOUSE NEWS SERV. (Apr. 14, 2016) [hereinafter Young, *Trio Leading Campaign Against Legal Pot*], <https://www.statehousenews.com/news/2016856>. There were no formal campaigns created to oppose the initiatives on medical marijuana or the decriminalization of marijuana. *Id.* (noting “almost non-existent” organized opposition to 2008 and 2012 ballot questions).

<sup>41</sup> Murphy, *supra* note 37.

<sup>42</sup> Colin A. Young, *Major Signature Hurdle Cleared by Seven Ballot Question Campaigns*, STATE HOUSE NEWS SERV. (Dec. 18, 2015), <https://www.statehousenews.com/news/20152547> (indicating that legalization initiative petition received 70,739 signatures).

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

<sup>44</sup> Murphy, *supra* note 37.

<sup>45</sup> Colin A. Young, *Pot Legalization Backers Remind Lawmakers Clock Is Ticking*, STATE HOUSE NEWS SERV. (Jan. 13, 2016) [hereinafter Young, *Legalization Backers Remind Lawmakers*], <https://www.statehousenews.com/news/2016100>.

<sup>46</sup> *Id.* Representative Rogers and Senator Jehlen’s bill would have legalized marijuana for adults twenty-one and older and established a system to tax the cultivation and sale of marijuana, and it included criminal justice reforms such as allowing the expungement of marijuana-related convictions from criminal records. H.B. 1561, 189th Gen. Ct. (Mass. 2015).

a better bill rather than wait for voters to make the petition language law.<sup>47</sup> Although the bill had little chance of passage given the vocal opposition of the Governor, House Speaker, and Attorney General, House sponsor Representative Rogers said that he wanted to “have an honest conversation” about legalization because the ballot question was likely to pass.<sup>48</sup>

On March 7, the Judiciary Committee held a hearing on the language in the proposed ballot initiative.<sup>49</sup> Advocates testified that rather than marijuana being a gateway drug, its prohibition exposed people to the black market and dealers who sold harder drugs.<sup>50</sup> They also argued that opponents, such as Governor Baker, were relying on “bad science” and that opposing legalization meant being against “bringing the industry out of the shadows.”<sup>51</sup>

The Committee also heard several people and organizations testify against legalization. Among them were several senators who had recently made a fact-finding tour of Colorado; a police chief who testified that law enforcement was not ready for legalization, specifically raising concerns posed in traffic enforcement;<sup>52</sup> and a district attorney who testified that the state’s district attorneys unanimously believed that legalization would be harmful to young people, especially during the opioid crisis.<sup>53</sup> Shortly after the hearing, the state’s sheriffs unanimously opposed the ballot initiative, with Stephen Tompkins, the Massachusetts Sheriffs’ Association President, stating that legalization would “destigmatize drug use” and cited reports suggesting that chronic marijuana use caused long-term mental and physical harm to the user.<sup>54</sup> Lynn Nichols, President and Chief Executive Officer of the Massachusetts Hospital Association, cited health and safety concerns, especially for young people.<sup>55</sup>

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<sup>47</sup> Young, *Legalization Backers Remind Lawmakers*, *supra* note 45. One activist testified to the Judiciary Committee, “This is something that’s coming. It’s coming one way or another, it’s just a matter of time . . . I just hope the Legislature takes the reins and does it right.” *Id.*

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

<sup>49</sup> Colin A. Young, *Marijuana Legalization Backers Encounter Resistance at Hearing*, STATE HOUSE NEWS SERV. (Mar. 7, 2016), <https://www.statehousenews.com/news/2016548>.

<sup>50</sup> *Id.* Linda Noel, Treasurer of Massachusetts Cannabis Reform Coalition, stated, “The problems we see from cannabis now are caused by cannabis prohibition – you’ve got the black market selling to underage people, you’ve got violence, you’ve got money laundering – all of those things are due to the black market.” *Id.*

<sup>51</sup> *Id.* Dick Evans, chairman of the Campaign, said that legalization opponents were “okay with costing people their job or taking away their scholarship, their housing or even the custody of their kids” over marijuana use. *Id.*

<sup>52</sup> *Id.* Specifically, Walpole Police Chief John Carmichael argued that Colorado experienced an increase in fatal traffic crashes after legalization and that Massachusetts lacked standardized field sobriety testing, drug recognition experts, or implied consent. *Id.*

<sup>53</sup> *Id.* (statement of Michael O’Keefe, Cape and Islands District Attorney).

<sup>54</sup> Michael P. Norton, *Pot Camp Fires Back as Sheriffs, Hospitals Oppose Legal Marijuana*, STATE HOUSE NEWS SERV. (Mar. 15, 2016), <https://www.statehousenews.com/news/2016608>.

<sup>55</sup> *Id.*

A group of senators who had been researching legalization also released a report of their findings.<sup>56</sup> The Special Senate Committee on Marijuana, created in February 2015, was composed of nine senators and was chaired by Senator Jason Lewis.<sup>57</sup> Senator Lewis and seven other senators spent four days in Colorado examining the effects of legalized marijuana, which Senator Lewis called “eye-opening.”<sup>58</sup> The Committee issued a 118-page report that called legalization a “major social change” and urged a “cautious approach.”<sup>59</sup> The report noted that Colorado and Washington officials advised “slowing down the process . . . to help prevent mistakes and achieve the best possible outcomes.”<sup>60</sup> The Committee recommended that if marijuana was legalized by ballot question, the Legislature should delay implementation until the state could collect baseline data, establish a legal limit for tetrahydrocannabinol (“THC”) blood concentration while driving, provide time to staff and train regulatory agencies, implement public health education and prevention campaigns, and engage stakeholders in the policy and regulatory process before retail sales began.<sup>61</sup>

The Committee expressed serious reservations about legalization due to public health concerns such as the increasing potency of edibles and the marketing of marijuana products; public safety concerns such as impaired driving; security problems due to the lack of banking services for marijuana businesses, an ongoing black market, and the difficulties of enforcing the home growing limits; and fiscal concerns that the proposed tax revenues and fees would not cover the full public and social costs of legalization.<sup>62</sup> The Committee concluded that legalization “would consume enormous amounts of time and

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<sup>56</sup> COMMONWEALTH OF MASS. SPECIAL SENATE COMM. ON MARIJUANA, REPORT OF THE SPECIAL SENATE COMMITTEE ON MARIJUANA, S. 189-2479, 2d Sess., at 1 (2016).

<sup>57</sup> *Id.* at 2, 4. Senator Lewis was a committee of one, but once it became clear that marijuana advocates would have enough signatures to put their proposal on the ballot, more senators asked to be part of the effort and help with research. Matt Murphy, *Senators Planning Week in Colorado to Explore Legal-Marijuana State*, STATE HOUSE NEWS SERV. (Dec. 2, 2015) [hereinafter Murphy, *Senators Planning Week in Colorado*], <https://www.statehousenews.com/news/20152416>.

<sup>58</sup> Antonio Caban, *Senator: Legal Marijuana Would Create Many Challenges*, STATE HOUSE NEWS SERV. (Jan. 19, 2016), <https://www.statehousenews.com/news/2016120>. The delegation “met with government officials, toured growing farms, and visited retail shops” during their trip. *Id.*

<sup>59</sup> COMMONWEALTH OF MASS. SPECIAL SENATE COMM. ON MARIJUANA, REPORT OF THE SPECIAL SENATE COMMITTEE ON MARIJUANA, S. 189-2479, 2d Sess., at 6, 88.

<sup>60</sup> *Id.* at 90. These officials noted that they had to work under tight time constraints due to their ballot questions. *Id.* Each state made many revisions to their marijuana policy through new laws and regulation. *Id.*

<sup>61</sup> *Id.* at 87-90. The lack of baseline data was a problem in both Washington and Colorado. *Id.* at 86.

<sup>62</sup> *Id.* at 4-5. These public costs included the regulatory, administrative, legal, and enforcement costs associated with regulating the marijuana industry; data collection and research; public health education and prevention programs; and substance use disorder treatment and the treatment of associated medical and behavioral health conditions. *Id.* at 70.

energy that could otherwise be spent addressing other challenging issues already facing our cities and towns.”<sup>63</sup>

The Committee made several policy recommendations regarding marijuana legalization, including limiting possession to one ounce, even at home,<sup>64</sup> restricting public use,<sup>65</sup> significantly limiting home cultivation,<sup>66</sup> modifying impaired driving laws and procedures,<sup>67</sup> limiting edibles and packaging that may appeal to children,<sup>68</sup> significantly restricting the siting of marijuana business activity,<sup>69</sup> establishing state-certified reference labs for determining potency levels,<sup>70</sup> creating a licensing system for those involved in the new industry,<sup>71</sup> regulating wastewater and odor from growing facilities,<sup>72</sup> and taking steps to minimize the risks from contaminants and pesticides.<sup>73</sup>

Shortly after the Senate Committee’s report, some legalization opponents called for a baseline study on marijuana use, while proponents supported baseline data collection but opposed delaying legalization while data was gathered.<sup>74</sup> Calls for baseline data also came from Professor David Buchanan, a legalization opponent, who said he was “deeply concerned” about making a major shift in drug policy “with very little good scientific data.”<sup>75</sup> Senator Lewis was able to secure an amendment to the Senate budget proposal regarding data collection so that the Legislature would be prepared if the voters adopted the initiative;<sup>76</sup> however, Governor Baker vetoed the study.<sup>77</sup>

After the Legislature failed to act, legalization advocates easily secured the required signatures to put the petition on the fall 2016 ballot, putting the

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<sup>63</sup> *Id.* at 5.

<sup>64</sup> *Id.* at 34.

<sup>65</sup> *Id.* at 36.

<sup>66</sup> *Id.* at 60.

<sup>67</sup> *Id.* at 39.

<sup>68</sup> *Id.* at 41, 43-44.

<sup>69</sup> *Id.* at 62.

<sup>70</sup> *Id.* at 46.

<sup>71</sup> *Id.* at 56.

<sup>72</sup> *Id.* at 48.

<sup>73</sup> *Id.*

<sup>74</sup> Andy Metzger, *Marijuana Opponents, Supporters Back Study Measuring Usage*, STATE HOUSE NEWS SERV. (May 16, 2016), <https://www.statehousenews.com/news/20161064>.

<sup>75</sup> *Id.* Subjects that Professor Buchanan noted as areas for research included driving under the influence of marijuana, how marijuana is used in conjunction with other drugs and alcohol, daily marijuana usage, sources of marijuana, and new ways marijuana is consumed such as vaping and a process called “dabbing.” *Id.* At the time, Professor Buchanan was the chair of the University of Massachusetts Amherst Department of Health Promotion and Policy. *Id.*

<sup>76</sup> *Senate Session - (2:30 P.M. - 7:15 P.M.) - Thursday, May 26, 2016*, STATE HOUSE NEWS SERV. (May 26, 2016), <https://www.statehousenews.com/news/20161181>. Legislators were clearly aware that the measure was likely to pass; a statewide poll in April showed that 57% of voters favored marijuana legalization and 35% were opposed. Young, *Trio Leading Campaign Against Legal Pot*, *supra* note 40.

<sup>77</sup> H.B. 4505, 189th Gen. Ct. (Mass. 2016).

campaign into the final stretch.<sup>78</sup> In early August, advocates rallied outside the State House, claiming that the measure was a matter of fairness and racial justice.<sup>79</sup> Representative Rogers told the crowd that lawmakers “don’t always have perfect data or the empirical evidence to make good policy” and that legislators had to make judgment calls.<sup>80</sup> He pointed out that Massachusetts had decades of data on marijuana and its then-current approach had “failed abysmally.”<sup>81</sup> Meanwhile, legalization opponents released a list of 119 legislators opposed to legalization, most because they reportedly believed it was “the wrong path for their communities.”<sup>82</sup>

The prolegalization campaign also released a rebuttal to the Special Senate Committee on Marijuana’s report, claiming that it contained “inaccuracies and speculative conclusions” from “misinformed public officials.”<sup>83</sup> This rebuttal claimed that the senators ignored statistics on teen marijuana use rates, which had not increased significantly after decriminalization of marijuana or legalization of medical marijuana, and underestimated the possible tax revenues, which would likely cover both the costs of legalization and other public needs, such as public education and treatment for opioid addiction.<sup>84</sup>

In the days leading up to the election, Governor Baker continued to call the legalization measure a “mess” and queried whether policy makers could fix the flaws if it became law.<sup>85</sup> Meanwhile, key officials started to embrace the idea of delaying legalization if voters passed the measure. Under the proposal, Treasurer Deborah Goldberg, who would appoint the proposed Cannabis Control Commission (“CCC”),<sup>86</sup> came to the conclusion that implementation should be delayed by a year to establish a budget and to set up oversight systems.<sup>87</sup> Speaker

<sup>78</sup> Katie Lannan, *ACLU Cites Enforcement Disparities in Endorsing Legalized Marijuana*, STATE HOUSE NEWS SERV. (June 24, 2016), <https://www.statehousenews.com/news/20161393>.

<sup>79</sup> Katie Lannan, *Pols Taking Sides as Marijuana Legalization Campaign Heats Up*, STATE HOUSE NEWS SERV. (Aug. 3, 2016) [hereinafter Lannan, *Pols Taking Sides*], <https://www.statehousenews.com/news/20161784>.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* (quoting Corey Welford, spokesperson for the Campaign).

<sup>83</sup> YES ON 4, REBUTTAL TO THE REPORT OF THE SPECIAL SENATE COMMITTEE ON MARIJUANA 3, 13 (2016). “The . . . rebuttal was assembled by the national law firm Vicente Sederberg LLC,” which specializes in marijuana law. Colin A. Young, *Report: Senate Panel Misinformed Voters About Marijuana*, STATE HOUSE NEWS SERV. (Oct. 12, 2016), <https://www.statehousenews.com/news/20162259>.

<sup>84</sup> YES ON 4, *supra* note 83, at 4-6.

<sup>85</sup> Matt Murphy, *Cardinal, Governor, Mayor Make Final Appeal to Reject Marijuana Question*, STATE HOUSE NEWS SERV. (Nov. 1, 2016), <https://www.statehousenews.com/news/20162420>.

<sup>86</sup> Regulation and Taxation of Marijuana Act, ch. 334, 2016 Mass. Acts 1056.

<sup>87</sup> Michael P. Norton, *Goldberg Says She’d Need Until 2019 to Implement Marijuana Law*, STATE HOUSE NEWS SERV. (June 27, 2016, 4:16 PM), <https://www.statehousenews.com/news/20161411>. Treasurer Goldberg had been identifying digital licensing and tracking

DeLeo stated that he “[would] not hesitate from day one to make changes” if the measure passed.<sup>88</sup> Senate President Rosenberg also expressed openness to making changes to the law if passed.<sup>89</sup> Legalization advocates, however, did not see the need for a delay or a legislative fix, arguing that any concerns could be addressed by the proposed CCC through regulations.<sup>90</sup> If the Legislature disagreed with a policy, it could then make a change through legislation.<sup>91</sup>

After tallying the votes, Massachusetts became the first state on the East Coast to legalize recreational marijuana.<sup>92</sup> Governor Baker stated that the government owed it to the people to “implement the law as quickly and as efficiently as possible.”<sup>93</sup> He also pledged to work with “lawmakers, educators, and public safety and public health professionals” to ensure protection for communities and families during implementation.<sup>94</sup> A dominant narrative, however, was that voters were in favor of legalization as an idea, rather than the details of the new Act.<sup>95</sup> Accordingly, Senate President Rosenberg promised to work with the

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systems and examining best practices in other states. Katie Lannan, *Goldberg Prepping for Possible Role Regulating Marijuana*, STATE HOUSE NEWS SERV. (May 9, 2016, 4:51 PM), <https://www.statehousenews.com/news/20161019>.

<sup>88</sup> *On the Record: Robert DeLeo Segment 2*, WCVB 5 at 3:44 (Oct. 23, 2016, 11:08 AM), <https://www.wcvb.com/article/on-the-record-robert-deleo-segment-2/8271239>. Speaker DeLeo discussed changes regarding edibles, driving while high, and taxes. *Id.*; see also Colin A. Young, *Mass. Voters Agree to Law Legalizing Adult Use of Marijuana*, STATE HOUSE NEWS SERV. (Nov. 9, 2016) [hereinafter Young, *Mass. Voters Agree to Law Legalizing Adult Use of Marijuana*], <https://www.statehousenews.com/news/20162479>.

<sup>89</sup> Andy Metzger, *DeLeo Ready to Change Marijuana Law if It Passes*, STATE HOUSE NEWS SERV. (Oct. 24, 2016) [hereinafter Metzger, *DeLeo Ready to Change Marijuana Law*], <https://www.statehousenews.com/news/20162346>.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* Jim Borghesani, the spokesperson for the Yes on 4 campaign stated, “We mandate that the Cannabis Control Commission make tax recommendations to the Legislature each year, so I think consideration should be given to letting it play out for a little while before determining that it needs some alteration . . . .” *Id.*

<sup>92</sup> Young, *Mass. Voters Agree to Law Legalizing Adult Use of Marijuana*, *supra* note 88.

<sup>93</sup> Matt Murphy, *Weekly Roundup - Trump Towers*, STATE HOUSE NEWS SERV. (Nov. 10, 2016, 5:21 PM), <https://www.statehousenews.com/news/20162499>.

<sup>94</sup> Young, *Mass. Voters Agree to Law Legalizing Adult Use of Marijuana*, *supra* note 88.

<sup>95</sup> See Michael P. Norton, *State Capitol Briefs - Wednesday, Dec. 21, 2016: On Pot, Bump Sees a “Really Tricky Thing” Ahead for the Legislature*, STATE HOUSE NEWS SERV. (Dec. 21, 2016, 6:33 PM), <https://www.statehousenews.com/news/20162768> (suggesting that Massachusetts voters would not have voted for the ballot initiative if they had read it in full). State Auditor Suzanne Bump claimed voters did not consider the structure of the Act, which had “a lot of holes,” and that the legislature had an obligation “make a rational system.” *Id.* Senate President Rosenberg said, “On a ballot question this complicated, people are voting on the principle, they’re not voting on all the fine details.” Michael P. Norton & Colin A. Young, *Legal Home-Grown Marijuana on Track for December Despite Concerns*, STATE HOUSE NEWS SERV. (Nov. 17, 2016, 1:44 PM), <https://www.statehousenews.com/news/20162541>.

Governor and House Speaker DeLeo to “create a best-in-the-nation law” that protected public safety.<sup>96</sup>

Although the Marijuana Act largely went into effect on December 15, 2016,<sup>97</sup> at the last minute, the Legislature delayed key parts of the plan by six months to consider amendments that would modify the tax provisions and add public health and safety measures.<sup>98</sup> The Act’s proponents saw the delay as “an assault on small-d democracy,” especially because the details of the bill were only shared with them the night before.<sup>99</sup> In response, both House and Senate leaders tried to reassure the advocates by promising to preserve the “intent” of the law passed by voters and to make marijuana the dominant issue for the next legislative session.<sup>100</sup> The leaders explained the delay as allowing the Legislature’s committees to work through the law’s implications and “strengthen, refine and improve it.”<sup>101</sup>

### C. *The New Session*

A new legislative session began in January 2017, giving the Legislature an opportunity to deal with marijuana in a more formal and institutional manner.<sup>102</sup> Speaker DeLeo and Senate President Rosenberg created a new Joint Committee on Marijuana Policy to focus on the legislative proposals brought on by legalization.<sup>103</sup> Since the Legislature typically does not alter ballot laws,

<sup>96</sup> Young, *Mass. Voters Agree to Law Legalizing Adult Use of Marijuana*, *supra* note 88.

<sup>97</sup> Act of December 30, 2016, ch. 351, 2016 Mass. Acts 1083. The Act gave the Massachusetts Treasurer until September 1, 2017 to appoint the CCC commissioners, which then had until March 15, 2018 to promulgate regulations and until July 2018 to issue retail marijuana licenses. *Id.* §§ 7, 11, at 1084.

<sup>98</sup> *Id.*; see also Matt Murphy, *Weekly Roundup - What’s Another Six Months?*, STATE HOUSE NEWS SERV. (Dec. 30, 2016, 3:51 PM) [hereinafter Murphy, *What’s Another Six Months?*], <https://www.statehousenews.com/news/20162814> (calling the bill delaying the Act’s implementation “unseen” and a “surprise”). The vote took place the Wednesday between Christmas and New Years Day, with little prior warning to legislators or the public. Murphy, *supra*.

<sup>99</sup> Murphy, *What’s Another Six Months?*, *supra* note 98. Cannabis Law Reform Coalition Press Secretary Andy Gaus said, “Far from respecting the will of the voters, they don’t even respect the legislative process, the democracy, the laws in Massachusetts, or anything else, and for what?” Katie Lannan, *Baker Okays Pot Law Delay amid Grumblings from Activists*, STATE HOUSE NEWS SERV. (Dec. 30, 2016, 2:44 PM), <https://www.statehousenews.com/news/20162813>.

<sup>100</sup> Murphy, *What’s Another Six Months?*, *supra* note 98.

<sup>101</sup> Matt Murphy & Andy Metzger, *Lawmakers Move to Push Back Legal Marijuana Sales Approved by Voters*, STATE HOUSE NEWS SERV. (Dec. 28, 2016, 12:43 PM), <https://www.statehousenews.com/news/20162796> (quoting Speaker DeLeo).

<sup>102</sup> See Matt Murphy, *DeLeo Taps Braintree’s Cusack to Vet Marijuana Proposals*, STATE HOUSE NEWS SERV. (Feb. 16, 2017, 4:54 PM), <https://www.statehousenews.com/news/2017339>.

<sup>103</sup> *Id.* The leaders named Representative Mark Cusack and Senator Patricia Jehlen to chair the committee. *Id.* Though Representative Cusack declined to say how he voted on the



advocates pushed back against arguments that the law needed changes, saying that it was “carefully written and researched” and “require[d] no legislative fixes.”<sup>104</sup> Advocates demanded the Legislature fund the CCC so it could start “writing the regulations that will govern the industry.”<sup>105</sup> Once the CCC had been appointed, Borgeshani and his fellow activists argued that legislators could provide the CCC with an “advisory opinion” on any issue that it wanted the CCC to address.<sup>106</sup>

Once organized, the Joint Committee began to study its bills and gather information. For the first time the Legislature had an official marijuana tax revenue forecast.<sup>107</sup> The Committee also heard from various state officials who identified problems associated with new law. The Secretary of the Commonwealth’s and Attorney General’s Offices testified that the processes the cities and towns were using to adopt local ordinances were inconsistent with state law and sought new processes conforming with the new law’s intent.<sup>108</sup> The Committee also considered more sweeping changes to the appointment and composition of the CCC.<sup>109</sup> Although Treasurer Goldberg argued that she had made preparations to appoint commissioners to the CCC, legislators proposed different models for regulation oversight.<sup>110</sup>

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initiative, Senator Jehlen supported the initiative petition. *Id.* Initiative supporter Representative David Rogers was appointed as the House Vice Chair for the committee. *Id.*

<sup>104</sup> Colin A. Young, *Lawmakers, Pot Activists at Odds over Work of New Marijuana Committee*, STATE HOUSE NEWS SERV. (Mar. 13, 2017, 5:53 PM), <https://www.statehousenews.com/news/2017506> (quoting advocate Jim Borgeshani).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* (“This measure is designed to be regulated, not legislated . . .”).

<sup>107</sup> See Colin A. Young, *State Revenue Chief Lays Out Marijuana Tax Projections*, STATE HOUSE NEWS SERV. (Mar. 21, 2017, 4:11 PM) [hereinafter Young, *State Revenue Chief Lays Out Marijuana Tax Projections*], <https://www.statehousenews.com/news/2017555>. The Department of Revenue reported that legalized marijuana sales would raise approximately \$64 million in tax revenue in the first year and between \$93 and \$172 million in the second year. *Id.*

<sup>108</sup> See Colin A. Young, *Galvin Looks to Clarify Local Process for Controlling Marijuana Sales*, STATE HOUSE NEWS SERV. (Apr. 3, 2017, 6:14 PM), <https://www.statehousenews.com/news/2017646>. The new law required that if a municipality’s voters approved the state ballot question but did not want to host a local marijuana-related activity, the municipality had to adopt a bylaw or ordinance, which then had to be approved by the voters—a process that did not exist in Massachusetts. *Id.*

<sup>109</sup> Katie Lannan & Matt Murphy, *Jostling Continues over Marijuana Industry Oversight Structure*, STATE HOUSE NEWS SERV. (Apr. 4, 2017, 5:06 PM), <https://www.statehousenews.com/news/2017658>. According to the law, the Treasurer would appoint three commissioners “based on their experience or expertise in public health, law enforcement, social justice, the regulation and business of consumer commodities and the production and distribution of marijuana and marijuana products.” Regulation and Taxation of Marijuana Act, ch. 334, sec. 3, § 76(v), 2016 Mass. Acts 1055, 1055-56.

<sup>110</sup> Lannan & Murphy, *supra* note 109. Treasurer Goldberg cited research, met with local and state officials, developed potential budgets, and compiled potential commissioners’ names. *Id.* Senate President Rosenberg suggested that the Legislature could add more

Advocates were not happy with the discussed changes. At a State House rally, one advocate said that the Legislature had twenty years to write their own law but

abrogated that responsibility . . . . We, the voters of Massachusetts, were able to change the law ourselves. And of course, as soon as the law was passed our legislators said, ‘Wow, you guys wrote that law. We don’t like it when you guys write your own laws and it’s an insult to us and it’s an affront to our egos . . . so as soon as it’s written and voted for, we’re going to tell you it’s a crappy law.’<sup>111</sup>

When the House released the bill drafted by the Marijuana Policy Committee,<sup>112</sup> advocates claimed that the House had “repealed and replaced the historic measure . . . with virtually no public discussion or debate.”<sup>113</sup> House leaders, however, argued that “their bill adhere[d] to the spirit of the voter law.”<sup>114</sup>

The Marijuana Policy Committee’s bill reflected House priorities, leaving senators to introduce amendments when the bill came to the Senate.<sup>115</sup> By June 19, the two chambers had each created a version of the marijuana law and were ready to resolve their differences on taxes, the composition of the CCC, local

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commissioners to the CCC and specify areas of expertise, similar to the model used by the state’s Gaming Commission. *Id.* However, Auditor Suzanne Bump criticized this proposed structure, claiming that the Gaming Commission had effectively no oversight. Jordan Graham, *Suzanne Bump Rips ‘No Oversight’ for Pot*, BOS. HERALD, (Nov. 17, 2018, 12:00 AM), <https://www.bostonherald.com/2017/04/20/suzanne-bump-rips-no-oversight-for-pot/>.

<sup>111</sup> Colin A. Young, *Marijuana Activists Say Leave Ballot Law Alone*, STATE HOUSE NEWS SERV. (June 7, 2017, 4:13 PM) [hereinafter Young, *Marijuana Activists Say Leave Ballot Law Alone*], <https://www.statehousenews.com/news/20171158> (alteration in original) (quoting Bill Downing).

<sup>112</sup> H.B. 3751, 190th Gen. Ct., 1st Sess. (Mass. 2017); see also Colin A. Young, *Marijuana Law Rewrite Criticized, DeLeo Postpones Debate*, STATE HOUSE NEWS SERV. (June 14, 2017, 7:33 PM) [hereinafter Young, *Marijuana Law Rewrite Criticized*], <https://www.statehousenews.com/news/20171222>.

<sup>113</sup> Colin A. Young & Michael P. Norton, *Turning To Senate, Marijuana Campaign Slams House Pot Law Rewrite*, STATE HOUSE NEWS SERV. (June 22, 2017, 10:02 AM), <https://www.statehousenews.com/news/20171277> (quoting Jim Borghesani).

<sup>114</sup> *Id.*

<sup>115</sup> Joint Committees in Massachusetts have eleven house members but only six senators, giving the House Chairperson a decided advantage. COMMONWEALTH OF MASS. PUB. EMP. RET. ADMIN. COMM’N, *THE LEGISLATIVE PROCESS 4* (2017), <https://www.mass.gov/files/documents/2017/01/wk/legislativeprocessinmass.pdf> [https://perma.cc/Y6KB-M69F]. Senator Jehlen felt that the Committee bill went too far, especially on taxes, and could increase demand for the black market. See Young, *Marijuana Law Rewrite Criticized*, *supra* note 112. Senate President Rosenberg implied that the senate version would have a lower tax rate and make small changes rather than serve as “a major rewrite.” *Id.*

control, and expungement of past marijuana crime convictions in a conference committee.<sup>116</sup>

**Table 2.**

Issue	Senate	House
Tax Rate	Excise: 3.75%  Local Tax: maximum 2%  Effective Tax Rate: 10-12%  These taxes are the same as the voter-approved measure. <sup>117</sup>	Excise: 16.75% <sup>118</sup>  Local Tax: mandatory 5% <sup>119</sup>  Effective Tax Rate: 28% <sup>120</sup>  Excise tax would apply to accessories such as bongs and pipes. <sup>121</sup>
CCC	Five commissioners, one appointed by the Governor, one by the Attorney General, one by the Treasurer, and two by consensus of the three officials. <sup>122</sup>  The Treasurer appoints the commission chair. Commission chair would be the only full-time and paid member. Commissioners must have certain relevant experience. Commissioners serve a maximum of two four-year terms. <sup>123</sup>	Five paid commissioners: one appointed by the Governor, one by the Attorney General, one by the Treasurer, and two by consensus of the three officials. <sup>125</sup>  The Treasurer appoints the commission chair. Commissioners must have relevant experience. The Commission cannot include more than three members from any one political party. <sup>126</sup> Commissioners serve a maximum of two five-year terms. <sup>127</sup>

<sup>116</sup> Colin A. Young, *Taxes, Local Control Separate Branches Ahead of Marijuana Debates*, STATE HOUSE NEWS SERV. (June 19, 2017, 4:41 PM) [hereinafter Young, *Taxes*], <https://www.statehousenews.com/news/20171245>. Neither bill changed major provisions of the law that went into effect in December 2016. *Id.*

<sup>117</sup> Regulation and Taxation of Marijuana Act, ch. 334, § 4, 2016 Mass. Acts 1055, 1057. *See generally* S.B. 2090, 190th Gen. Ct., 1st Sess. (Mass. 2017).

<sup>118</sup> H.B. 3768, 190th Gen. Ct., 1st Sess. § 27(a) (Mass. 2017).

<sup>119</sup> *Id.* sec. 2, § 27(b).

<sup>120</sup> *See* Young, *Taxes*, *supra* note 116.

<sup>121</sup> Mass. H.B. 3768 sec. 2, § 1(7).

<sup>122</sup> Mass. S.B. 2090 sec. 2, § 76(c).

<sup>123</sup> *Id.* sec. 2, § 76(d)-(e).

<sup>125</sup> Mass. H.B. 3768 sec. 2, § 3(a).

<sup>126</sup> *Id.* sec. 2, § 3(a)-(b).

<sup>127</sup> *Id.* sec. 2, § 3(c).

	A commissioner may be removed for cause, but only by the officer(s) who appointed them. <sup>124</sup>	The Governor may remove any commissioner for cause. <sup>128</sup>
Local Control	<p>Municipal bans or limitations on marijuana facilities must be approved by a town-wide referendum.<sup>129</sup></p> <p>Provides three versions of the language that a town could put on the ballot.<sup>130</sup></p> <p>Creates a process for municipalities to reverse marijuana facility bans.<sup>131</sup></p>	<p>Municipal bans or limitations on marijuana facilities can be approved by a vote of the governing body (city council or board of selectmen), without a town-wide referendum.<sup>132</sup></p> <p>Marijuana facilities are required to negotiate an agreement with host community and pay a “community impact fee.”<sup>133</sup></p>
Sealing Criminal Records	Individuals charged with marijuana crimes in the past that are no longer criminal can have their criminal records sealed. The Executive Office of Public Safety and Security must launch a public awareness campaign informing people that such records can be sealed. <sup>134</sup>	No provisions for sealing records of people convicted of marijuana crimes. The House preferred that its Judiciary Committee address the issue of expungement because the Judiciary Committee was working on criminal justice reform proposals at the time. <sup>135</sup>

After three weeks of negotiation, the conferees released their redraft of the marijuana law, which the Legislature passed.<sup>136</sup>

<sup>124</sup> *Id.* § 76(c).

<sup>128</sup> *Id.*

<sup>129</sup> *See* Mass. S.B. 2090 sec. 11, § 3.

<sup>130</sup> *Id.* sec. 11, § 3(b)(i)-(iii).

<sup>131</sup> *Id.* sec. 11, § 3(c).

<sup>132</sup> Mass. H.B. 3768 § 6.

<sup>133</sup> *Id.*

<sup>134</sup> Mass. S.B. 2090 § 30.

<sup>135</sup> Young, *Taxes*, *supra* note 116.

<sup>136</sup> H.B. 3818, 190th Gen. Ct., 1st Sess. (Mass. 2017), 2017 Mass Acts 516; *Bill H.3818*, 192ND GEN. CT. OF COMMONWEALTH OF MASS., <https://malegislature.gov/Bills/190/H3818> [<https://perma.cc/NH4E-UWZ3>] (last visited Apr. 13, 2021) (describing legislative history of

The new law set a maximum tax rate of 20% on marijuana products,<sup>137</sup> remade the CCC,<sup>138</sup> and came up with a new method by which communities could approve commercial marijuana facilities.<sup>139</sup>

When a reporter asked if the idea of respecting the will of the voters came up during the conference committee negotiations, one of the House negotiators, Representative Ronald Mariano said, “Too much.”<sup>140</sup> Senator Jehlen responded, “Just about the right amount.”<sup>141</sup>

#### IV. WHAT DOES THE MASSACHUSETTS EXPERIENCE SHOW US?

One of the celebrity backers of the legalization campaign was travel writer and television host Rick Steves, who said that he was surprised that “a progressive state” like Massachusetts had such a “regressive political establishment” that “parrot[ed] the . . . same excuses [used by] frightened politicians” in other states.<sup>142</sup> This is too simplistic of a view. The opponents of

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H. 3818); *see also* Colin A. Young, *Marijuana Deal Raises Tax Rate, Alters Pot Shop Ban Rules*, STATE HOUSE NEWS SERV. (July 17, 2017, 6:10 PM) [hereinafter Young, *Marijuana Deal Raises Tax Rate*], <https://www.statehousenews.com/news/20171465>. The conference committee was composed of Representatives Ronald Mariano, Mark Cusack, and Hannah Kane; and Senators Patricia Jehlen, William Brownsberger, and Richard Ross. *See* Colin A. Young, *House Negotiator Sees “Aggressive Timetable” for Marijuana Bill*, STATE HOUSE NEWS SERV. (June 26, 2017, 6:03 PM), <https://www.statehousenews.com/news/20171306>. Senator Jehlen stated that the conferees had removed “barriers to the development of a legal market,” while giving rights to farmers and those affected by the “War on Drugs.” Young, *Marijuana Deal Raises Tax Rate*, *supra*.

<sup>137</sup> The tax consisted of a 10.75% excise on retail marijuana sales in addition to the state’s 6.25% sales tax. §§ 12-13, 2017 Mass. Acts at 522. Communities could also negotiate limited host community agreements with marijuana sellers for up to five years, allowing a community impact fee of up to 3% of the store’s gross sales. *Id.* § 27. Although the tax rate increased, the conferees apparently intended it to mirror Oregon, which they saw as meeting the costs of that state’s program. Young, *Marijuana Deal Raises Tax Rate*, *supra* note 136.

<sup>138</sup> The CCC would consist of five paid commissioners—one appointed by the Governor, one by the Attorney General, one by the Treasurer, and two by a majority of those officials, with the Treasurer choosing the chair. § 1, 2017 Mass. Acts at 516-17.

<sup>139</sup> *Id.* § 27. If a majority of a municipality’s voters supported the ballot measure, the town could only ban marijuana retailers by a majority vote. *Id.* If the town voted against Question 4, the local governing board would be given a short window within which it could simply ban marijuana retailers without a town-wide referendum. *Id.* § 23. Ninety-one communities, comprising 28% of Massachusetts residents, fell into this category. 2016 - *Statewide - Question 4*, WILLIAM FRANCIS GALVIN: SEC’Y OF THE COMMONWEALTH OF MASS., [https://electionstats.state.ma.us/ballot\\_questions/view/7297/](https://electionstats.state.ma.us/ballot_questions/view/7297/) [<https://perma.cc/FC5M-2FZD>] (last visited Apr. 13, 2021); *see also* Will Brownsberger, *The Marijuana Compromise*, WILL BROWNSBERGER — STATE SENATOR (July 16, 2017), <https://willbrownsberger.com/the-marijuana-compromise/> [<https://perma.cc/6GL9-BMM3>].

<sup>140</sup> Young, *Marijuana Deal Raises Tax Rate*, *supra* note 136.

<sup>141</sup> *Id.*

<sup>142</sup> Young, *Steves Knocks State’s “Regressive Policial Establishment,” supra* note 1.

legalization were not “regressive” but rather only moderately progressive.<sup>143</sup> In theory, Massachusetts was the right state to have the Legislature draft and pass a marijuana legalization bill.

Why did the Legislature fail to craft a better marijuana law from the beginning? Why did the Legislature delay and change the new law? What does the Legislature’s activity, both before and after the voters legalized marijuana, teach about the nature of legislatures? Did the Legislature fulfill its role effectively? The process itself is as important as the product, and in this case the law was shaped by both the initiative process and the Legislature’s response to the new law.

The policy making effectiveness of a legislature can be measured in a variety of ways, but some scholars of Congress ask four questions that are relevant here: (1) Does the legislature “give reasonably proportionate weight to public opinion, interest-group pressures, and other sources of policy demands”?<sup>144</sup> (2) Does the legislature “deliberate intelligently” and with relevant evidence?<sup>145</sup> (3) Does the legislature “face up to the real effects of policy choices”?<sup>146</sup> (4) “Does [the legislature] avoid gridlock”?<sup>147</sup>

Although the Massachusetts Legislature refused to act on the legalization petition issue and significantly amended the voter approved law afterwards, it played its proper role in the lawmaking system and proved itself effective at dealing with a controversial and complicated piece of legislation.

#### A. *Lawmakers Must Represent Various Constituencies*

If an effective legislature gives reasonably proportionate weight to the various sources of policy demands, how did the Massachusetts Legislature perform in

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<sup>143</sup> For example, Governor Baker is a fiscally conservative but socially moderate Republican. See Perry Bacon Jr. & Dhruvil Mehta, *How a Massachusetts Republican Became One of America’s Most Popular Politicians*, FIVETHIRTYEIGHT (Mar. 30, 2018, 5:38 AM), <https://fivethirtyeight.com/features/how-a-massachusetts-republican-became-one-of-americas-most-popular-politicians/> (calling Baker “a moderate, or perhaps even a liberal, Republican,” and noting that he opposed efforts by President Trump to repeal Obamacare, favors more gun control measures, and supports abortion rights). The legislative leaders could also be categorized as moderate to very progressive, with Speaker DeLeo in the former category and Senate President Rosenberg in the latter.

<sup>144</sup> Paul J. Quirk & Sarah A. Binder, *Introduction: Congress and American Democracy: Institutions and Performance*, in *THE LEGISLATIVE BRANCH*, at xix, xxii (Paul J. Quirk & Sarah A. Binder eds., 2005).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* The National Council of State Legislatures suggests that an important, but overlooked, tool for improving a legislature’s reputation with the public is to “move expeditiously and efficiently to formulate timely legislative responses to public policy problems,” as opposed to “partisan bickering and deadlock.” See KARL T. KURTZ, *LEGISLATURES AND CITIZENS: PUBLIC PARTICIPATION AND CONFIDENCE IN THE LEGISLATURE* 13 (1997), [https://www.ncsl.org/documents/public/trust/LegCitizens\\_PublicParticipation\\_Kurtz2.pdf](https://www.ncsl.org/documents/public/trust/LegCitizens_PublicParticipation_Kurtz2.pdf) [<https://perma.cc/557P-53JZ>].

this case? The legalization advocates frequently seemed frustrated at the Legislature at first for not taking up the legalization bill and later for amending the initiative petition law.<sup>148</sup> Advocates seemed to assume that, because previous legalization efforts were popular and polling showed majority support among voters, the Legislature would respect the terms of the measure that voters ultimately passed. Still, this is a limited view of representation. Throughout this debate, legislators were acting rationally given the various interests at stake, including those that were actively working against legalization or pessimistic about the effects legalization would have. These groups included law enforcement, church leaders, business leaders, and local officials.<sup>149</sup>

Perhaps the most important and influential of these groups were the local officials. Most legislators start their political careers by holding local office; and so they are naturally sympathetic to the challenges faced by mayors, city councilors, and members of town select boards.<sup>150</sup> Legislators partner with local officials who represent the needs and interests of their districts' municipalities as often, if not more, than the individual constituents.

One relatively small marijuana-related incident highlights the situation that legislators find themselves in when various constituencies collide. As legislators studied the legalization petition, another marijuana debate raged in the small Plymouth County town of Plympton.<sup>151</sup> There, a local farmer planned to add a marijuana cultivation center to his agricultural zoned property, causing a town-wide dispute.<sup>152</sup> The farmer, who was "backed up by town counsel and two of the three members of the Plympton Board of Selectmen, contend[ed] the

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<sup>148</sup> See, e.g., Metzger, *DeLeo Ready to Change Marijuana Law*, *supra* note 89 (noting growing frustration among marijuana advocates in face of regulatory delays); Young, *Trio Leading Campaign Against Legal Pot*, *supra* note 40 (illustrating marijuana advocates' response to mounting opposition for the ballot initiative).

<sup>149</sup> See, e.g., Jim O'Sullivan, *Archdiocese Opens Purse to Fight Bid on Cannabis*, BOS. GLOBE, Oct. 29, 2016, at A1; Charlie Baker, Maura Healey & Martin J. Walsh, Opinion, *Do Not Legalize Marijuana in Massachusetts*, BOS. GLOBE, Mar. 7, 2016, at A9.

<sup>150</sup> For example, prior to his election as Governor of Massachusetts, Baker was a selectman in Swampscott. See Maria Sacchetti, *Swampscott Celebrates Neighbor Turned Governor*, BOS. GLOBE, Jan. 12, 2015, at B1. Prior to becoming a legislator, Massachusetts Senator Jason Lewis served on the Winchester Finance Committee and the Winchester Master Plan Steering Committee, and he is currently an elected member of Winchester Town Meeting. *Senator Jason M. Lewis*, 192ND GEN. CT. OF COMMONWEALTH OF MASS., <https://malegislature.gov/Legislators/Profile/jml0/Biography> [<https://perma.cc/A2K9-XYVU>] (last visited Apr. 13, 2021) (click "Biography").

<sup>151</sup> Abram Neal, *Plympton Locals Hash It Out over Marijuana*, PLYMPTON-HALIFAX EXPRESS (Jan. 28, 2016), <http://www.plymptonhalifaxexpress.com/plympton-locals-hash-it-out-over-marijuana/> [<https://perma.cc/8M2T-2VRP>].

<sup>152</sup> Katie Lannan, *Lawmakers Asked to Settle Marijuana's Status Under Agriculture Laws*, BERKSHIRE EAGLE (Apr. 13, 2016) [hereinafter Lannan, *Lawmakers Asked to Settle*], [https://www.berkshireeagle.com/archives/lawmakers-asked-to-settle-marijuanas-status-under-agriculture-laws/article\\_fd26c259-0393-5f50-a65a-bdf97d1eab91.html](https://www.berkshireeagle.com/archives/lawmakers-asked-to-settle-marijuanas-status-under-agriculture-laws/article_fd26c259-0393-5f50-a65a-bdf97d1eab91.html) [<https://perma.cc/6RJS-QVNB>]; Neal, *supra* note 151.

agricultural zoning [gave] him the right to grow marijuana without a special permit.”<sup>153</sup> Other Plympton residents, the third selectman, and the police chief argued that there was no right to grow marijuana—even on agricultural property.<sup>154</sup> In response, the Plympton legislators filed a bill that would have excluded marijuana cultivation from the term “agriculture.”<sup>155</sup> At the legislative hearing, the Committee chair told the farmer that she wanted to be “a neutral broker” on the issue and that she would consult with the parties, the Department of Public Health, and the Attorney General.<sup>156</sup>

Ultimately, this bill was the vehicle that the legislature used to delay the implementation of the marijuana law by six months.<sup>157</sup> It also highlighted for legislators how marijuana issues could pit neighbor against neighbor and showed how difficult and time-consuming implementation of a major legalization bill—one that allowed marijuana related businesses to open and operate in municipalities—would be. It is not surprising that when local officials opposed legalization, legislators were naturally not only going to listen but also going to give the local officials’ opinions great weight.

This dynamic was also central to the legislators’ desire to delay and change the Act. The process for allowing or disallowing marijuana related businesses in the new Act was at best confusing and at worst contrary to existing state law.<sup>158</sup> The six-month delay allowed the Legislature to carefully consider the proposals and be a “neutral broker” between the legalization advocates, local officials, law enforcement, and those who were to be charged with regulating the industry.

#### B. Legislatures Are Cautious

Rather than regressive, legislatures are naturally cautious. The legislative process winnows down the issues that the legislature will devote time to and ultimately pass into law. Committees are the initial gatekeepers and are expected

<sup>153</sup> Lannan, *Lawmakers Asked to Settle*, *supra* note 152. The farmer, Jeff Randall, testified to the Joint Committee on Municipalities and Regional Government that farmers should have the opportunity to grow agricultural products to maintain their family farms, rather than leaving marijuana production to “big pharma.” *Id.*

<sup>154</sup> *Id.* The local newspaper reported that the Plympton Select Board meeting was “tense throughout, and although [it] never got out of hand, there were certainly some raised voices.” Neal, *supra* note 151 (“[C]oncerns included odors, the impact of such a facility on area land values, the proximity of the proposed facility to the Dennett Elementary School sending a mixed-message to children in town, concerns of abutters and neighbors and the opposition of the police chief.”).

<sup>155</sup> H.B. 4186, 189th Gen. Ct., 2d Sess. (Mass. 2016); *see also* Lannan, *Lawmakers Asked to Settle*, *supra* note 152. The bill clarified that the term “agriculture” does not “include the growing, cultivation, distribution or dispensation of marijuana.” Mass. H.B. 4186.

<sup>156</sup> Lannan, *Lawmakers Asked to Settle*, *supra* note 152 (quoting Representative Barbara L’Italien, Chair of the Joint Committee on Municipalities and Regional Government).

<sup>157</sup> H.B. 4326, 189th Gen. Ct., 2d Sess. (Mass. 2016). Unlike the original bill, the House also applied the prohibition to “aquaculture, floriculture, or horticulture.” *Id.*

<sup>158</sup> *See supra* notes 60-63 and accompanying text.



to produce quality legislation ready for consideration by a chamber and to release bills in a manner that does not overwhelm the system. Ways and means committees then decide which of the measures the state can afford. Legislative leadership bring bills to the floor according to the time available, the needs of the members, and the intentions of the Governor.<sup>159</sup> At each stage, leadership must decide not only which issues will get precious time and attention but also what proposals are ready for passage and have strong support, if not consensus.<sup>160</sup> During his tenure, Speaker DeLeo carefully “built a reputation over the years as a go-slow consensus builder on major policy issues.”<sup>161</sup> In fact, he “rarely put legislation on the floor of the House for a vote unless he was confident it was supported by a supermajority of the House.”<sup>162</sup> Before the initiative petition passed, it was therefore unlikely that Speaker DeLeo would have brought legalization to a vote, even if a majority of representatives were prepared to vote yes.

Caution, however, does not mean creating gridlock. Once the Act passed, the Legislature could have repealed the new law or delayed implementation indefinitely; but, once the will of a clear majority of the voters went from a theoretical possibility to a reality, it changed the political calculus. Accordingly, the legislature delayed implementation of only those parts of the law that other stakeholders argued needed amending, and it set a very short window to make changes.

### C. Legislatures Deal with Problems

Legislatures consider bills and pass legislation in order to address problems.<sup>163</sup> When a legislator formulates a bill, it is almost always because they have identified a social issue that requires a legislative fix.

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<sup>159</sup> Although Massachusetts regularly overrides the vetoes of its Governor, this means a further commitment of time, possibly preventing other measures from consideration. *See, e.g.*, Shira Schoenberg, *How Often Were Mitt Romney's Massachusetts Vetoes Overridden?*, MASS LIVE (Mar. 24, 2019), [https://www.masslive.com/politics/2012/07/how\\_often\\_were\\_mitt\\_romneys\\_ma.html](https://www.masslive.com/politics/2012/07/how_often_were_mitt_romneys_ma.html) [<https://perma.cc/8RXM-RARD>] (stating that during his time as Governor of Massachusetts, Mitt Romney's vetoes were overridden 707 out of 844 times).

<sup>160</sup> *See* Rachel Caufield, *What Does the Speaker of the House Do?*, CONVERSATION (Jan. 3, 2019, 2:15 PM), <https://theconversation.com/what-does-the-speaker-of-the-house-do-94884> [<https://perma.cc/HJP7-2U4Z>].

<sup>161</sup> Matt Murphy, *Mariano Prepares for 'Culmination' of Life in Public Service*, STATE HOUSE NEWS SERV. (Dec. 29, 2020, 2:02 PM), <https://www.statehousenews.com/news/20202691>. This is the role of a chamber's leader—to make sure that the limited time and energy of the body is not wasted or misused and, to some extent, to protect the members from taking bad votes, that is, expending political capital on an issue without a guarantee of passing a bill that accomplishes a needed policy change.

<sup>162</sup> *Id.*

<sup>163</sup> *See* ANN SEIDMAN, ROBERT SEIDMAN & NALIN ABEYSEKERE, *ASSESSING LEGISLATION - A MANUAL FOR LEGISLATORS* 64, 68-69 (2003). Professors Ann and Bob Seidman developed the Institutional Legislative Theory and Methodology to assist people in drafting effective

Although the legalization advocates argued that this change in the criminalization of marijuana had to happen, a rational lawmaker could have come to the conclusion that the status quo did not present a significant enough problem to take attention away from other issues. A concern voiced early in the process—that people should not be arrested, punished, and stigmatized for using marijuana because it has few negative effects on both the user and society—was resolved through the first two marijuana initiative petitions. The number of marijuana possession convictions dropped from 798 in 2006 to just 18 in 2013, and the number of incarcerations went from 181 to 3 during the same period.<sup>164</sup> The median sentence for simple possession in 2013 was four months.<sup>165</sup> It is hard to argue that a criminal statute affecting a handful of people serving a relatively short sentences was more urgent or important than dozens of other proposals. One could argue that supporting a black market was a problem, that the state was foregoing tax revenues, or that the quality and potency of marijuana should be regulated; but, none of these issues was necessarily important enough to cause large numbers of legislators to focus on legalization.

Another significant argument is that legalization created far more problems than it solved. Was it necessary to create a complicated and expensive tax and regulatory scheme in order to prevent a handful of people from being arrested each year for possession of marijuana?

#### D. *Done Well, Legislation Requires a Lot of Information*

Legislatures require a tremendous amount of information to create, debate, and pass bills. Committees spend most of their time gathering evidence to understand, redraft, explain, and debate the bills it considers.<sup>166</sup> The need for

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legislation. *Id.* at 63. The first step of this methodology is to identify the social problem to be addressed and the behaviors that constitute the social problem. *Id.* at 68.

<sup>164</sup> See *supra* Table 1 (showing the number of marijuana possession convictions and incarcerations in Massachusetts from 2004 through 2013).

<sup>165</sup> See *supra* Table 1.

<sup>166</sup> Many legislatures seek to practice “evidence-based legislation,” although there is no consensus as to what that means or even what evidence is reliable, especially in the internet age. See Sean J. Kealy & Alex Forney, *The Reliability of Evidence in Evidence-Based Legislation*, 20 EUR. J.L. REFORM, no. 1, 2018, at 40, 42. In a prior work, I suggested a hierarchy of evidence for legislation from most reliable to least reliable. These are:

1. Experiments within the jurisdiction / lessons from other jurisdictions.
2. Information on a topic or issue that was formally requested by the legislature or produced to the legislature under oath or under the penalties of perjury.
3. Studies / information provided by a government agency.
4. Expert or scientific studies.
5. Economic or mathematical models and statistics.
6. Information provided by special interests.
7. Stories, apocrypha and uncorroborated tales.

*Id.* at 52. Each type of evidence could be found in the legalization debate. Effective legislatures are in a constant search for reliable evidence on which to base policy decisions.

information, and the unwillingness to act without it, permeated the legalization debate. Even if it angered the advocates, this ongoing desire for evidence again demonstrated that the Legislature was working effectively. Reliable information was even more important to this issue because one could argue that marijuana possession was both criminalized and overenforced based on incomplete or incorrect information.<sup>167</sup>

Before the initiative petition even formally came to the Legislature, the Senate formed a committee to research legalization and investigate the lessons that Colorado's officials learned from their experience.<sup>168</sup> One of the recommendations the Senate Committee took from its research was that Massachusetts should delay legalization until it had baseline data on marijuana usage, how it was used in conjunction with other drugs and alcohol, and the sources of marijuana.<sup>169</sup> Both sides eventually agreed this would be important, and Senator Lewis sponsored a budget amendment to fund the needed research before the initiative passed.<sup>170</sup> Other key pieces of information that the Legislature needed, but did not have in early stages, were a reliable revenue projection from legalization and a cost estimate for Campaign's regulatory scheme.<sup>171</sup> Throughout the initiative process and Legislature's follow-up bill, there was a debate about how much money legalized marijuana taxes would generate and if it would be enough to cover the infrastructure that the new industry would require.<sup>172</sup> Granted, the Campaign could point to the Colorado experience for a model of both revenue and costs. Still, there were very divergent viewpoints on this incredibly important point. The Campaign consistently painted a rosy picture of the potential for revenue, to the extent that it claimed marijuana taxes would provide funds for other issues such as education.<sup>173</sup>

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For instance, Congress employs the Congressional Budget Office and Congressional Research Service ("CRS") for reliable information. "In 2015, CRS answered over 62,046 requests for custom analysis and research; hosted over 7,400 Congressional participants at seminars, briefings and trainings; and summarized over 8,000 pieces of legislation." *Id.* at 55.

<sup>167</sup> See *supra* note 7 and accompanying text (noting Massachusetts' history of stringent marijuana laws, beginning with the 1914 Massachusetts marijuana statute); *supra* Table 1 (listing the convictions and incarceration rates for marijuana possession related charges from 2004 through 2013).

<sup>168</sup> See Murphy, *Senators Planning Week in Colorado*, *supra* note 57; see also *supra* note 57 and accompanying text.

<sup>169</sup> COMMONWEALTH OF MASS. SPECIAL SENATE COMM. ON MARIJUANA, REPORT OF THE SPECIAL SENATE COMMITTEE ON MARIJUANA, S. 189-2479, 2d Sess., at 88 (2016).

<sup>170</sup> See *Senate Session – (2:30 P.M. – 7:15 P.M.) – Thursday, May 26, 2016*, *supra* note 76.

<sup>171</sup> See Murphy, *supra* note 37; *supra* note 39 and accompanying text.

<sup>172</sup> See *supra* note 39 and accompanying text.

<sup>173</sup> For instance, Rick Steves claimed that a conservative estimate of tax revenues would bring Massachusetts \$100 million a year that the state would not otherwise receive. Young, *Steves Knocks State's "Regressive Policial Establishment," supra* note 1. The Department of Revenue estimate for the first year was far lower, only coming into line with Steves's prediction in year two. Young, *State Revenue Chief Lays Out Marijuana Tax Projection*,

As it turned out, the Legislature did not get an official projection from the state's Department of Revenue until March 2017, during its research and debate on how to change the legalization law.<sup>174</sup> This lack of key information was yet another reason that the Legislature was justified in taking a cautious approach to legalization.

Of course, a time eventually comes when the Legislature must stop gathering information and must act. As Representative Rogers correctly observed, lawmakers do not always have the data or evidence they need to make good policy, and sometimes it comes down to a "judgement call[]."175 Once the Act passed, the Legislature allocated just six months to gather the information it needed and to amend the law.

#### E. *Lawmaking Is Not Easy*

A legislature performs two functions while making laws: it determines the best policy, and it determines the best legislative language to effectuate that policy. Both aspects take time and are best done when many actors actively contribute to a process that is sometimes adversarial but often collaborative. The intentionally difficult and lengthy legislative process affords many people with different perspectives and interests the opportunity to shape both the policy and the language. Policy gaps and drafting flaws in legislation can be fixed, and potential unintended consequences can be identified and addressed. This does not happen with the initiative process once the bill has gone to the voters. There is no mechanism for amendments, and the voters must vote for or against the policy and statutory language in its entirety. This is a tremendous flaw in the initiative petition system, and it has led to some well-meaning but poorly thought out and drafted initiatives becoming law.<sup>176</sup>

Despite legalization advocates insisting that the Act was both well researched and written and that it should not be amended by the Legislature that had "abrogated that responsibility," there were clearly defects in both the initiative's

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*supra* note 107 (noting Revenue Commissioner's projection of only \$64 million in revenue one year after legalization followed by \$132 million revenue in second year).

<sup>174</sup> Young, *State Revenue Chief Lays out Marijuana Tax Projection*, *supra* note 107.

<sup>175</sup> Lannan, *Pols Taking Sides*, *supra* note 79.

<sup>176</sup> A good example of such a policy passed by initiative petition was a ban on trapping animals, including beavers. Massachusetts Wildlife Protection Act, ch. 453, 1996 Mass. Acts 1584, 1584-85 (banning the use of traps "for the purpose of capturing fur-bearing mammals," including beavers). After this became law, the beaver population increased dramatically and they started to dam rivers and streams, as beavers tend to do. Aaron Wasserman, *Rise in Beaver Population After Trapping Ban Leads to Flooded Property*, MILFORD DAILY NEWS (June 7, 2009, 7:04 AM), <https://www.milforddailynews.com/x313677670/Rise-in-beaver-population-after-trapping-ban-leads-to-flooded-property> [<https://perma.cc/ZPW5-XMMX>] ("[T]he number of beavers went from 24,000 in 1996 to about 70,000 five years later . . ."). This caused flooding in several municipalities and the law was repealed. *Id.* The Legislature significantly amended the law in 2000. See Act of July 21, 2000, ch. 139, 2000 Mass. Acts 219.

policy and its drafting.<sup>177</sup> The Special Senate Committee called into question several of the policies early in the process, and the Secretary of the Commonwealth pointed out the defects of the local approval process.<sup>178</sup>

I do not intend to be overly critical. The advocates included talented lawyers well versed in marijuana law and people who were veterans of the legislature. I have drafted many bills, and none became law without numerous revisions and amendments. In fact, it is comforting to know that others will be there to point out potential problems and suggest better language in drafted legislation.

Even when the Legislature delayed a portion of the Act to make amendments, the process was far more complicated than most observers would have anticipated. Those limited issues dominated discourse within the State House during the first seven months of the new session. The Legislature had to address difficult issues of taxes, local control, and who would regulate the new industry. Lawmakers had to set the excise tax rate on marijuana products, the local tax rate, and the effective tax rate—each one filled with policy decisions.

Lawmakers also had to ask several questions in making these determinations. First, what tax rate would be sufficient to fund the infrastructure of the new market but not so high that it would drive people to the black market? Second, how would municipalities allow or prevent newly legal marijuana businesses? Third, who would control the CCC?<sup>179</sup>

Once the voters spoke, the Legislature not only faced that reality but also dealt with key, and complicated, policy choices, rather than entrusting those decisions to the CCC as the advocates wanted. Again, the Legislature proved its effectiveness by intelligently confronting the issues before it.

In the final stretch, the Legislature had to choose the best policy and legislative language among three different versions of the law: the initiative petition passed by the voters, the House version, and the Senate version. To complicate things even more, the Legislature had to consider the two previous marijuana laws passed by initiative petitions and all of the existing Department of Public Health regulations that implemented those initiatives.<sup>180</sup>

Finally, the Legislature acknowledged that the structure of the Legislature itself had to permanently change in order to competently address marijuana issues going forward. Thus, just months after the Act became law, the Legislature created the Joint Committee on Marijuana Policy that would continue to investigate and draft changes to the marijuana laws.<sup>181</sup>

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<sup>177</sup> Young, *Marijuana Activists Say Leave Ballow Law Alone*, *supra* note 111 (quoting Bill Downing).

<sup>178</sup> See *supra* note 104 and accompanying.

<sup>179</sup> This was a question of not only how to structure a new executive branch department but also how the Legislature would oversee the new entity.

<sup>180</sup> See Colin A. Young, *Lawmakers Finally Push Legal Marijuana Bill to Baker's Desk*, STATE HOUSE NEWS SERV. (July 20, 2017, 6:07 PM), <https://www.statehousenews.com/news/20171512>.

<sup>181</sup> The Committee is now called the Joint Committee on Cannabis Policy. *Joint Committee on Cannabis Policy*, 192ND GEN. CT. OF COMMONWEALTH OF MASS., <https://malegislature.gov>

F. *The Legislature Must Balance and Check the Executive*

One of a legislature's most important tasks is to establish and oversee executive branch departments and officers, ensuring implementation of the legislature's policy choices. A legislature must ensure that the executive branch is working with the right policy, people, and budget.<sup>182</sup> Studies of various legislatures, however, show that this important role is not always carried out as well as it should be.<sup>183</sup> Three significant issues throughout the case of marijuana legalization were how the CCC commissioners would be appointed, how the CCC would be composed, and what oversight the CCC would have.

The Campaign envisioned a fairly independent CCC appointed by the Treasurer, like the commission that regulates alcohol in Massachusetts. The Campaign also intended to endow the CCC with an outsized role in creating marijuana policy, filling in the many gaps in the new law through regulation. On a few occasions, the Campaign insisted that the law was well written and implored the Legislature to simply fund the CCC and allow it to start regulating. They suggested that if the Legislature did not approve of a policy, they could send the CCC an advisory opinion.<sup>184</sup> Frankly, this concept of the legislature's role is backwards—agencies should take direction from the legislature, not vice versa. To be sure, legislatures often leave terms and provisions vague for a variety of reasons, such as to allow flexibility to give agencies discretion and encourage political expediency. Any legislature, however, would be leery of allowing a new commission, composed of people appointed by and overseen by

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/Committees/Detail/J50/Members [https://perma.cc/L98N-NBBN] (last visited Apr. 13, 2021). Before establishing this Committee, marijuana-related legislation could have been referred to several committees, including Revenue, Public Safety, Judiciary, Public Health, Health Care Finance, Economic Development, and Environment & Agriculture.

<sup>182</sup> ALAN ROSENTHAL, *HEAVY LIFTING: THE JOB OF THE AMERICAN LEGISLATURE* 165 (2004) [hereinafter ROSENTHAL, *HEAVY LIFTING*]. Rosenthal identifies the three principal functions of a legislature as “representing, lawmaking, and balancing the power of the executive.” *Id.* at 9 (emphasis omitted). In a later work, Rosenthal added two other aspects: legislative oversight, “which involves . . . ongoing review and evaluation of how effectively enacted policies are being implemented and how effectively they are working,” and legislative maintenance, “which involves attention to the well-being and strength of the legislative institution.” ALAN ROSENTHAL, *ENGINES OF DEMOCRACY: POLITICS & POLICYMAKING IN STATE LEGISLATURES* 408 (2009). In Massachusetts, the Legislature's Joint Rule 1 states, in part,

[E]ach joint committee shall review and study, on a continuing basis, the implementation, administration, execution and effectiveness of those laws, or parts of law, the subject matter of which is within the jurisdiction of that committee, the administrative regulations adopted to implement those laws, and those state agencies or entities having responsibilities for the administration and execution of such laws . . . .

*Joint Rules*, 192ND GEN. CT. OF COMMONWEALTH OF MASS. <https://malegislature.gov/Laws/Rules/Joint> [https://perma.cc/K3TX-ST6X] (last visited Apr. 13, 2021).

<sup>183</sup> ROSENTHAL, *HEAVY LIFTING*, *supra* note 182, at 233 (finding that only 41% of surveyed legislators felt that their legislature did a good job balancing the power of the executive).

<sup>184</sup> *See supra* note 106 and accompanying text.

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just one official, to dictate the creation of an industry that had so many policy questions swirling around it.

Giving the Treasurer the power to appoint the CCC was a viable option, but it was not the only, or perhaps the best, option. Massachusetts splits the executive power amongst five independently elected officers.<sup>185</sup> Despite the Campaign's protests, it made sense to include the Governor, who controls the Department of Revenue and State Police, and the Attorney General, who has sweeping criminal and civil powers at her disposal, to work with the Treasurer to appoint and oversee the CCC. The Legislature also made a policy decision to limit the power of CCC members by imposing term limits on the commissioners.

Far from merely issuing advisory opinions to the CCC, the Legislature ultimately had an important and ongoing role shaping marijuana policy. The Joint Committee on Marijuana—now the Joint Committee on Cannabis Policy—has become a permanent part of the Legislature's committee structure. Each legislative session, the Joint Committee on Cannabis Policy considers dozens of bills that would change state cannabis policy in large and small ways. The Joint Committee on Cannabis Policy can also work with and provide oversight over the CCC, serving as another check on this new part of the executive branch.

#### CONCLUSION

People often take a dim view of legislatures. In fact, distrust of and frustration with the Legislature was the reason that the initiative petition process became part of the Massachusetts Constitution. The marijuana legalization movement has very effectively used the initiative petition process to bypass the legislature. During the recreational marijuana legalization Campaign, advocates were often frustrated with the Legislature: that the Legislature had not previously passed legislation, that it did not address the petition language when it had a chance, and then that it delayed and amended the popularly passed law. It is understandable that the advocates would be frustrated with the process. Still, the Legislature's actions and response to the initiative petition could be expected and was actually quite effective in its role. The Legislature was cautious, but it gave proper weight to the various constituencies involved, gathered and used evidence, did the hard work of lawmaking, balanced and checked the executive branch effectively, and dealt with problems—even if in some legislators' minds, the problem was legalization itself.

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<sup>185</sup> MASS. CONST. pt. II, ch. II; *id.* amend. art. XVII.