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Extra Legal

The Constitutionality of Section 23 of Massachusetts's Recreational Marijuana Law

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This article explores whether an equal protection claim under the Massachusetts Constitution could be brought to successfully challenge the local control provision currently included in Chapter 55, Section 23 of the Massachusetts Acts of 2017 ("marijuana law") regarding adult use marijuana. The local control provision ("Section 23") of the marijuana law differentiates between Massachusetts municipalities based on how they voted on Question 4 of the 2016 election ballot, which was titled "Legalization, Regulation, and Taxation of Marijuana." Specifically, Section 23 allows local elected officials in municipalities that voted against the legalization of marijuana to adopt ordinances that limit the number of marijuana establishments within their borders without first submitting the ordinances for approval by the voters. On the other hand, Section 23 requires officials in municipalities that voted in the affirmative on ballot Question 4 to first submit such ordinances to voters for approval. A claimant seeking to challenge Section 23 on state equal protection grounds would argue that the local control provision burdens the fundamental right to vote.

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Using this argument, an equal protection claim challenging Section 23 is unlikely to succeed under the strict scrutiny standard; and the provision would likely pass muster under a rational basis review standard. This article will expand on these arguments and possible counter-arguments.

I. Introduction

In 2008, Massachusetts decriminalized the possession of one ounce or less of marijuana.[1] Four years later, in 2012, the Commonwealth legalized marijuana for medical use.[2] In the November 2016 election, by voting "yes" on ballot Question 4, the constituents of Massachusetts voted to legalize adult use marijuana and permit licensing of certain cannabis shops.[3] They also voted to establish a state commission to regulate it all.

a. The Question 4 Ballot Initiative Design

After voters approved Question 4 at the November 2016 elections, portions of the recreational marijuana law went into effect on December 15, 2016, although the regulatory bodies were not in place. Under the law created by the Question 4 ballot initiative, individuals 21 years and older would have been able to use, grow, and possess marijuana.[4] Additionally, retail marijuana would have been subject to the state sales tax with an additional 3.75% excise tax[5] and a local options tax would have allowed municipalities to add an additional 2% tax.[6]

Additionally, the law allowed localities to submit initiative measures

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1 MASS. GEN. LAWS ch. 94C, § 32L (2016).

2 2012 Mass. Acts ch. 369.

3 *Massachusetts Question 4 — Legalize Marijuana — Results: Approved*, N.Y. TIMES (Aug. 1, 2017, 11:25 AM), https://www.nytimes.com/elections/results/massachusetts-ballot-measure-4-legalize-marijuana; Matt Murphy & Andy Metzger, *Mass. House and Senate Agree to Delays in Retail Pot Shop Licensing*, WBUR NEWS (Dec. 28, 2016), http://www.wbur.org/news/2016/12/28/legislature-delays-marijuana-retail-licensing.

4 *See* WILLIAM FRANCIS GAVIN, SECRETARY OF THE COMMONWEALTH, QUESTION 4: LEGALIZATION, REGULATION, AND TAXATION OF MARIJUANA 14 (2016) https://www.sec.state.ma.us/ele/elepdf/IFV_2016.pdf.

5 *Id.* at 15.

6 *Id.*

questioning the sale of marijuana on certain premises and adopt ordinances or by-laws regarding: 1) time, place, and manner of a marijuana establishment; 2) the limit on the number of marijuana establishments in a city or town; 3) the restriction of the licensed cultivation, processing, and manufacturing that could be considered a "public nuisance"; 4) standards for public signs related to marijuana establishments; and 5) the consequences for violating marijuana ordinances.[7] The only way to opt out of marijuana sales completely was through a local vote.[8]

Soon thereafter, the state Senate and House of Representatives began working on a draft bill that would clarify the ballot initiative. Both the House and the Senate subsequently passed different bills to amend the voter-approved marijuana law. As a result, the legislature met for a conference committee in order to resolve the differences between both bills.

b. H.3818

On July 20, 2017, the legislature voted on H.3818, the bill that resulted from the conference committee set up to reconcile the differences between the House and Senate bills that passed the prior month. The bill was signed into law by the Governor on July 28, 2017 as Chapter 55 of the Acts of 2017. Under the new session law, the legislature reached a compromise regarding local control provisions and the process for banning marijuana establishments. This compromise, codified in Section 23 of Chapter 55, included the local control provision, which stipulates that municipalities where voters approved marijuana legalization last November are required to hold a voter referendum to ban or limit commercial marijuana operations.[9] In municipalities where voters rejected Question 4, local elected officials, without prior voter approval, may limit or ban the

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7 *Id.* at 17.

8 *Id.*

9 2017 Mass. Acts ch. 55, § 23; *see also* MASS. CANNABIS CONTROL COMM'N, GUIDANCE FOR MUNICIPALITIES REGARDING MARIJUANA FOR ADULT USE 9 (2018), https://www.mass.gov/files/documents/2018/01/11/010918CNB-Guidance-Municipalities-Adult-Use.pdf.

number of marijuana establishments by passing a bylaw or ordinance prior to December 31, 2019.[10] This local control provision has prompted a debate on whether or not it may be challenged as unconstitutional under the Equal Protection Clause of the Massachusetts Constitution.

II. Review Standards Under the Equal Protection Clause

This article first explore the argument that Section 23 violates the fundamental right to vote and is therefore subject to strict scrutiny. Because a court may find that there is no fundamental right at stake, it then evaluates whether Section 23 can survive an equal protection challenge under the rational basis standard.

a. The Classification

Classifications "made in the interests of practicality and administrative convenience are permissible and rational purposes for legislation."[11] Opponents of the marijuana law would argue that Section 23 creates two sets of similarly situated people and treats them differently. Specifically, cities and towns that voted in the affirmative on the ballot Question 4 can only limit the number of marijuana businesses with majority voter approval, while cities and towns that voted against Question 4 can limit the number of businesses through an ordinance or by-law approved only by city officials. In other words, the former requires a majority of votes by the voters of the city or town, while the latter only requires approval by the city or town's officials.

However, proponents of the marijuana law would argue the cities and towns are not similarly situated because they voted differently on the ballot question and have an interest in limiting marijuana use within their borders. Thus, they have separate and distinct policy considerations regarding adult use of marijuana.

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10 2017 Mass. Acts ch. 55, § 23; *see also* MASS. CANNABIS CONTROL COMM'N, *supra* note 9, at 9.

11 Mass. Fed'n of Teachers v. Bd. of Educ., 767 N.E.2d 549, 562 (Mass. 2002).

b. Strict Scrutiny Standard

A statute that implicates a fundamental right is subject to strict scrutiny.[12] The Massachusetts Supreme Judicial Court has made clear that voting is a fundamental right and "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."[13] Unlike the right to vote in federal elections, which is conferred by Article I, § 2 of the United States Constitution, the right to vote in state elections is not expressly enumerated.[14] It may be argued that "the right to vote in state elections is implicit by reason of the First Amendment . . ." through the freedom of political expression.[15] Voting "is regarded as a fundamental political right, because [it is] preservative of all rights."[16]

The local control provision in the marijuana statute burdens the fundamental right to vote.[17] Because the provision allows local elected officials of cities and towns that voted against Question 4 to limit the number of marijuana establishments without a vote, the proposed legislation is taking away the fundamental right to vote from the citizens of those cities and towns.

Despite the fundamental right at stake, a statute can survive strict scrutiny if the state demonstrates that the legislative classification is narrowly tailored to serve a compelling government interest.[18] Here, the compelling state interest is to ensure public safety and allow the self-determination of local governments. However, limiting or eliminating the public's right to vote on the number of marijuana businesses and only allowing the state officials to decide is not narrowly tailored to the

12 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 960 (Mass. 2003); *see also* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 311–12 (1976).

13 Mass. Pub. Interest Research Grp. v. Sec'y of the Commonwealth, 375 N.E.2d 1175, 1182 (Mass. 1978) (quoting Dunn v. Blumstein, 405 U.S. 330, 337 (1972)).

14 Harper v. Virginia Bd. of Elections, 383 U.S. 663, 664 (1966).

15 *Id.*

16 Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

17 *See* MASS. CONST. amend. art. III.

18 *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

government interest, because public safety and self-determination can be ensured through alternate means and policies, including voting itself.

Additionally, whether or not the constituents of a town or city may vote on the ordinance or by-laws is entirely dependent on how the municipality voted previously on the November 2016 ballot. This sets a dangerous precedent in which a past vote may be used to determine a future vote.

Those who oppose Section 23 would first have to prove that there is a fundamental right at stake—the right to vote in state elections. Once proven, they must then prove that Section 23 violates that fundamental right. Should they surpass the first hurdle, Section 23 is likely to withstand an equal protection claim under strict scrutiny because the state has a compelling interest in limiting the consumption of marijuana and ensuring public safety. Additionally, Section 23 has not effectively taken away constituents' right to vote, as they exercised voting rights on the November 2016 ballot. Of course, if those opposing the provision cannot clear the first hurdle, then Section 23 will stand. The court may then examine the challenge to Section 23 using the rational basis standard.

c. Rational Basis Standard

Under the rational basis standard, an equal protection claim will fail if the classification in the statute is rationally related to a legitimate state interest.[19] This standard of review is significantly lower than the strict scrutiny standard: at a minimum, a statute must serve "a legitimate purpose in a rational way," or put another way, a statute must "bear a reasonable relation to a permissible legislative objective."[20] An equal protection claim arises under selective enforcement of a statutory or regulatory scheme when "'1) the person, compared with others similarly situated, was selectively treated; and 2) . . . such selective treatment was based on impermissible

19 Chebacco Liquor Mart, Inc. v. Alcoholic Beverages Control Comm'n, 711 N.E.2d 135, 136 (Mass. 1999); *see also* McGowan v. Maryland, 366 U.S. 420, 425–26 (1961).

20 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 960 (Mass. 2003).

considerations such as race, religion, [gender], intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.'"[21] An equal protection claim under the Massachusetts Constitution is subject to the same standard of review as an equal protection claim under the Fourteenth Amendment of the United States Constitution.[22]

Opponents of the marijuana law argue that Section 23 violates the Equal Protection Clause of the Massachusetts Constitution as amended[23] because it treats localities differently depending on how they voted on the November referendum. For the reasons that follow, this article concludes that Section 23 does not violate the Equal Protection Clause and would survive rational basis review.

The rational basis standard of review requires that "an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class."[24] The Equal Protection Clause allows states wide latitude when the legislation at issue is of a social or economic nature.

i. Rationally Related to a Legitimate State Interest

Legislation will not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.[25] The purpose of the Section 23 provision is to ensure public safety and allow local governments to have self-determination in the regulation of marijuana businesses that operate within their borders. This argument would be hard to counter and a court will likely deem it as legitimate because local governments have considerable authority with regard to tobacco and alcohol sales. The next question would be whether the mechanism proposed

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21 DuPont v. Comm'r of Correction, 861 N.E.2d 744, 752 (Mass. 2007) (quoting Cote-Whitacre v. Dept. of Pub. Health, 844 N.E.2d 623, 647–48 (Mass. 2006)).

22 *Chebacco Liquor Mart, Inc.*, 711 N.E.2d at 136–37.

23 MASS. CONST. amend. art. CVI.

24 *Goodridge*, 798 N.E.2d at 960.

25 *See* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174 (1980) (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).

in the legislation is rationally related to furthering that interest.

The classification may be rational because voters initially approved or disapproved of the ballot question. Therefore, constituents have already expressed their approval or disapproval of marijuana business establishments and their interests are reflected through the decisions of local officials. Further, defining a class of persons subject to a regulatory requirement "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative . . . consideration."[26]

Thus, it is inevitable that persons within a city or town that voted in the negative majority actually favored the affirmative and vice versa. However, because the majority of the city or town voted in the negative, such definition of the classes delineates the bounds of the regulatory field in a rational way. This is unavoidable where the legislature has to draw a line somewhere to accurately represent the voters. As such, the 'line drawing' would not be in violation of the Equal Protection Clause simply because of that fact. Additionally, it may be argued that the actions are rationally related because they aim to diminish the practicality and administrative burdens, which are permissible and rational under the Equal Protection Clause.[27]

Opponents of Section 23 argue that the restriction on voting is not rationally related to local self-determination and public safety. They argue that these dual interests are respected when voters have a say in the ordinances and by-laws enacted within their localities. Opponents would also point out that ballot Question 4 never separated the two questions of (i) whether voters approved the legalization of adult use marijuana and (ii) whether, in the future, constituents could vote on local ordinances

26 F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (quoting U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 176 (1980)).

27 Murphy. v. Dep't of Corr., 711 N.E.2d 149, 152 (Mass. 1999).

regulating marijuana establishments within their jurisdictions. Thus, ballot Question 4 question never singularly rested upon the local control provision. Opponents would argue that because Section 23 was not discretely supported by voters and because it is not rationally related to a legitimate state purpose, the provision would fail to survive an equal protection claim under even the rational basis standard. Given that a) Section 23 seeks to ensure public safety and local government independence, b) voters already expressed their approval or disapproval of the marijuana law, and c) administrative 'line drawing' is permissible to accurately represent the voters, this claim is likely to fail and Section 23 will survive an equal protection challenge under the rational basis standard.

ii. Precedent in Massachusetts

The Massachusetts legislature has in the past made distinctions between different towns or cities.[28] For example, the legislators looked to gaming law precedent to justify Section 23. In 2011, former Governor Deval Patrick signed "An Act Establishing Expanded Gaming in the Commonwealth." Under this Act, an applicant for a gaming license to operate a casino must first enter into an agreement with the host community and then the community must approve the license through a ballot vote.[29]

Although legislators looked to gaming law precedent to justify Section 23, it is distinguished from the marijuana provision in several respects. The question in the gaming act is whether or not a particular town wants to grant a gaming license based on an agreement with the host community. On the other hand, the marijuana provision mandates that, depending on how constituents voted on the November 2016 ballot question, they do or do not have the ability to vote on ordinances that limit the number of marijuana establishments within their towns. The two

28 *See, e.g.*, MASS. GEN. LAWS ch. 46, § 22 (2016); MASS. GEN. LAWS ch. 32B, § 11 (2016); An Act Protecting Certain Public Commons, 1990 Mass. Acts 852.

29 MASS. GEN. LAWS ch. 23K, § 15(13) (2016).

statutes are not analogous. In the gaming law, all localities must follow the same process to issue a gaming license, even if the outcome is different between each locality. Conversely, under Section 23, citizens of different localities do not have a uniform process. Voters in towns or cities that voted against the marijuana law are entirely precluded from voting on a local ordinance or by-law because of their vote on the November 2016 ballot. There is little argument that Massachusetts gaming laws establish a precedent and therefore the current issue may be regarded as an issue of first impression.

Arguments that the language of Section 23 furthers a legitimate state interest do not rely on any past case or statutory law in the Commonwealth. However, the courts allow the legislature a wide breadth of authority on matters that are of economic and social welfare. Under a rational basis standard, Section 23 would likely survive because it is well within the purview of the legislature to regulate marijuana production, sale, and consumption in the Commonwealth.

III. Conclusion

Section 23 will likely be held as unconstitutional if a court finds that the provision violates the fundamental right to vote and that the state's classification is not narrowly tailored to serve a compelling interest. Even if opponents to Section 23 can successfully prove that the fundamental right to vote has been burdened, Section 23 is likely to survive strict scrutiny because the state has a compelling interest in public safety and limiting the consumption of marijuana. However, the court is more likely to find that the provision does not in fact violate the fundamental right to vote and is therefore subject to the lower rational basis review standard. Section 23 is likely to survive rational basis review because the provision serves the legitimate state interests of local self-determination and public safety and the legislature has wide latitude to enact legislation in the sphere of economic and social welfare. Therefore, the statute allowing certain

municipalities to limit marijuana establishments in accordance to their 2016 vote on Question 4 is likely here to stay.