

# Fair Elections and the Law for the Commonwealth of Massachusetts



A Project of  
FairVote

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## **I. Introduction**

This document is intended to educate reformers and elected officials as to the changes necessary for implementing voting reform in their state and community. The reforms advocated are to use IRV (instant runoff voting) for executive offices and full representation (a.k.a. proportional representation) for legislatures, councils, and committees. The reader should be familiar with common voting systems: plurality voting and bloc voting. The reader should also be familiar with fair elections systems: IRV, choice voting (a.k.a. single transferable vote or preference voting), cumulative voting, one-vote (a.k.a. single non-transferable vote or limited voting), and list voting.

While this document is intended to give a legal overview to voting reform, the reader should be cautioned that state statutes and constitutions can be confusing, complex, ambiguous, and subject to more than one interpretation. Further, although the author of this document has attempted a thorough analysis, he may have missed important statutes that would change the analysis herein.

Please send feedback to [info@fairvote.org](mailto:info@fairvote.org).

## **II. Summary of Findings**

- Almost all elections are either by plurality in single-member districts or by bloc voting. Exceptions are that Cambridge uses choice voting to elect their city council and school committee and Boston has a second runoff election for mayor.
- IRV can probably be enacted for statewide executive offices through legislation and without amending the state constitution. A constitutional amendment may be required if the phrase “the person having the highest number of votes shall be deemed and declared to be elected” is interpreted to preclude rank-order voting.
- A constitutional amendment is required to implement any method of full representation for the state legislature because the constitution specifies single-member districts.
- Cities and towns can implement any voting system compatible with the state and U.S. constitutions by amending their charter. IRV, choice voting, cumulative voting, and one-vote are all constitutional for local elections.

## **III. Reformers**

The following are known voting reform groups.

- Boston Vote (<http://www.bostonvote.org/>)
- Common Cause Massachusetts (<http://www.commoncause.org/ma>)
- Fair Vote Mass. (<http://ma.fairvote.org/>)
- Mass. IRV (<http://www.massirv.org/>)
- IRV Email List (<http://groups.yahoo.com/group/MassIRV/>)

In 2003, Rep. Ellen Story submitted a bill to implement IRV for statewide executive elections (HB 2784) and another for primaries (HB 2785). Please see <http://www.massirv.org/> for more information. We believe that this bill should be changed to avoid a possible conflict with the phrase in the state constitution “the person having the highest number of votes shall be deemed and declared to be elected.” Our suggestion is to describe the process as running the count until two candidates remain instead of requiring a majority of the vote.

Fair Vote Massachusetts is currently developing a working paper on full representation for Massachusetts.

## IV. Court Holdings

- Moore v. Election Comm'rs of Cambridge, 309 Mass. 303 (1941) – The court upheld the constitutionality of choice voting.
- Contakos v. Election Com. of Lowell, 331 Mass. 254 (1954) – The court interpreted ranked ballots where the voter used a number and an “x.”
- McSweeney v. City of Cambridge, 422 Mass. 648 (1996) – The Supreme Judicial Court upheld the procedure for filling vacancies in Cambridge’s city council using choice voting.

## V. General Provisions

### A. Plurality Requirement

- “In all elections of civil officers by the people of this commonwealth, whose election is provided for by the constitution, the person having the highest number of votes shall be deemed and declared to be elected.” M. Const. Art. XIV (2003).
- “[T]he person receiving the highest number of votes for an office shall be deemed and declared to be elected to such office.” M.G.L. ch. 50, § 2 (2003).

The above constitutional and statutory provisions define the winner as the person receiving the “highest number of votes.” Whether this requirement is compatible with IRV is not clear. One could argue that the winner of an IRV election has received the highest number of votes after all rounds of counting have been completed. However, a court could interpret this provision as requiring traditional plurality elections.

The language used to describe the process of counting IRV ballots could affect whether IRV is constitutional. If the process for counting the votes is described as requiring a majority of the vote, then this could be perceived as conflicting with the plurality requirement of the constitution. However, the process could instead be described in terms of rounds of counting and stopping the count when only two candidates remain. The winner would then be the person having the highest number of votes in the final round. An approach that may pass muster is to have the IRV tally proceed automatically,

rather than conditioned on the lack of a majority, reducing to two finalists, with the candidate then having a plurality being elected.

The above provisions could also be interpreted to require single-member districts due to the singularity of "person." However, until 1975 there were multi-member districts for the House of Representatives who were elected with bloc voting, so the above provisions must also apply to multi-member districts. As will be discussed below, the constitution specifies single-member districts for the state legislature, so a constitutional amendment is needed to implement any method of full representation.

The constitutional provision applies only to offices whose election is provided for by the constitution. This includes state executive offices and the legislature but does not include city and town governments. The statutory provision does apply to city and town elections, but cities and towns can override state election law by amending their charter. See the section on Local Government below for more information.

## **B. Ballots**

- There are several statutes that require the voter to mark a cross (X) in a square. See M.G.L. ch. 53, § 35 (2003); M.G.L. ch. 54, § 41A (2003); M.G.L. ch. 54, § 42 (2003); M.G.L. ch. 54, § 77-78 (2003).
- For electronic voting systems, other marks may be made in conformity with the approved electronic voting system in use." M.G.L. ch. 54, § 33E (2003).
- "If he votes for more candidates than the number to be elected, his vote shall not be counted." M.G.L. ch. 53, § 35 (2003).

These statutes govern how a voter must mark a ballot and may be incompatible with ranked ballots. One could argue that a person's vote consists of ranking candidates and the ranking is achieved through the use of several marks on a ballot. One could also argue that a vote is to be made with a single mark on a ballot and this would be incompatible with ranked ballots. This is unlikely to be a barrier to voting reform, but it may be desirable to explicitly allow for ranked ballots.

## **C. Voting Machines**

- A city or town may purchase or lease voting machines subject to approval by the state. M.G.L. ch. 54, § 32, 34, 37 (2003).

A city or town desiring to implement a fair-election voting system may purchase their own voting equipment if their current equipment is not able to implement their desired voting system. For example, the City of Cambridge uses an optical scanning system by AccuVote and a software program by Voting Solutions to implement choice voting for city council and school committee. This system was approved for field testing by the Secretary of the Commonwealth in May, 1997. It was implemented for the first time the following November and was subsequently certified by the Commonwealth for use in all Cambridge elections.

## **VI. State Government**

### **A. Executive Offices**

There are six executive offices elected every four years: Governor, Lieutenant Governor, Secretary of the Commonwealth, Treasurer and Receiver General, State Auditor, and Attorney General.

- "The governor, lieutenant-governor, secretary, treasurer and receiver-general, attorney general, and auditor shall be elected quadrennially." M. Const. Art. LXIV § 1 (2003).

The plurality requirement of the constitution may need to be changed before IRV can be implemented for state executive offices. Legislation defining the implementation of IRV would also have to be enacted.

### **B. Legislature**

The Senate consists of 40 Senators elected from single-member districts every two years by plurality vote. The House of Representative consists of 160 Representatives elected from single-member districts every two years by plurality vote.

- The single-member districts of the Senate and the House are prescribed by the constitution. M. Const. Art. CT (2003).

To implement any system of full representation, the constitution needs to be changed to allow for multi-member districts. For example, the house could be changed to have 40 four-member districts instead of 160 single-member districts. Thus, the strategy in proposing a method of full representation to be implemented should be based on the merits of the system and the likelihood of success rather than on statutory considerations.

## **VII. Local Government**

### **A. General Provisions**

- "[A]ny change in a charter relating in any way to the composition, mode of election or appointment, or terms of office of the legislative body, the mayor or city manager or the board of selectmen or town manager shall be made only by the procedure of charter revision set forth in section three." M. Const. Art. CXXXIX § 4 (2003). See also Art. CXXXIX § 7.
- "[N]o change in the composition, mode of election or appointment, or terms of office of the legislative body, the mayor or city manager or the board of selectmen or town manager, may be accomplished by by-law or ordinance." M.G.L. ch. 43B, § 13 (2003). See also ch. 43B, § 18.
- "[T]he provisions of this chapter [home rule] shall prevail where they are in conflict with any applicable provisions of said chapters fifty to fifty-seven, inclusive." M.G.L. ch. 43B, § 17 (2003).

It seems that cities and towns can implement any voting system as long as it satisfies the state and U.S. constitutions and they do so by amending their charter. IRV, choice voting, cumulative voting, and one-vote should all be constitutional. The home rule provisions allow cities and towns to effectively override all of the statutory requirements for elections by amending their charter, including the requirements for marking ballots.

Many cities and towns use bloc voting in electing their city council, school committee, and town meeting representatives. However, this does not seem to be mandated anywhere in state law or in the constitution. Thus, one could argue that the one-vote system is just as compatible with state law as bloc voting. Thus, a city or town could implement the one-vote system by by-law or ordinance and would not need to amend its charter.

Note that the plurality requirement discussed above, only applies to offices provided for by the constitution. City and town offices are not provided for by the constitution, thus the constitutional plurality requirement does not apply. There is a similar plurality requirement in ch. 50 of the election code, but cities and towns can override this requirement by amending their charters.

## **B. City Government**

- Description of city charters. M.G.L. ch. 43, § 2 (2003).
  - Plan A - Government by Mayor and City Council Elected at Large
  - Plan B - Government by Mayor and City Council Elected by Districts and at Large
  - Plan C - Commission Form of Government (mayor, commissioner of finance, commissioner of health, commissioner of public works, and commissioner of public property)
  - Plan D - Mayor (elected from and by the city council), City Council, and City Manager (appointed by the city council)
  - Plan E (REPEALED) - Plan D with City Council and School Committee Elected with Proportional Representation
  - Plan F - Plan B with party primaries.

Despite the above requirements for city governments, there is considerable variation in practice. For example, Newton's city government is quite different from all of the above charters. As described above, a city can implement any voting system that is compatible with the constitution as long as it does so by amending its charter.

## **C. Town Government**

- Towns elect a variety of offices including a town manager and board of selectmen. M.G.L. ch. 41, § 1 (2003).

- Towns with a Representative Town Meetings will have 240 members divided equally over the town precincts. One-third of the members will be elected each year for a term of three years. M.G.L. ch. 43A, § 4 (2003).

There is also variation in practice here. For example, Chelmsford has only 162 town meeting representatives. As described above, a town can implement any voting system that is compatible with the constitution as long as it does so by amending its charter.

#### **D. School Committee**

- School committees shall consist of six members elected at-large and with staggered terms. M.G.L. ch. 43, § 31 (2003).

“School committee” is notably absent from M. Const. Art. CXXXIX § 4 and M.G.L. ch. 43B, § 13. However, school committees are probably within their scope and a charter amendment is probably required for implementing a fair-election voting system for school committee. Medford deviates from the above requirement and elects their entire school committee every two years.

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