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THE MASSACHUSETTS SUPREME JUDICIAL COURT INTERPRETS "OR" NOT TO BE DISJUNCTIVE IN ARTICLE XLVIII.

ANDERSON V. ATTORNEY GENERAL, 99 N.E.3D 309 (MASS. 2018)

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I. INTRODUCTION

In *Anderson v. Attorney General*, the Supreme Judicial Court of Massachusetts ("SJC") held that an initiative petition, seeking to amend the state constitution by imposing a graduated tax on citizens earning

more than $1 million annually and allocate those funds raised to education and transportation priorities, violated article XLVIII of the Massachusetts Constitution ("article 48") and was therefore improperly certified by the Attorney General.[1] The SJC's holding rested on two determinations. First, the SJC determined that article 48's language requiring initiative petitions to "contain only subjects 'which are related or which are mutually dependent'" should not be read disjunctively.[2] Instead, the relatedness requirement was a necessary condition for passing constitutional muster, regardless of the mutual dependence of subjects therein.[3] Second, the two spending provisions attached to the proposed graduated tax were not sufficiently related to each other, or the tax itself, to give a reasonable voter the opportunity to "accept or reject the petition as a unified statement of public policy."[4] Rather, should the initiative petition appear as a ballot question, a voter would be "in the 'untenable position of casting a single vote on two or more dissimilar subjects.'"[5]

This Comment will discuss the various approaches laid out in *Anderson* by the majority, concurrence, and dissent; analyze the soundness of the constitutional interpretation employed by the majority; and consider the impact this decision may have on future initiative petitions under article 48 of the Massachusetts Constitution.

II. STATEMENT OF THE CASE

The dispute in *Anderson* centered around Massachusetts Attorney General Maura Healey's decision to certify a voter led initiative to amend the flat-tax requirement in article 44 of the Massachusetts Constitution ("article 44").[6] The initiative petition sought to impose a graduated tax on income over $1 million and to allocate those funds for two purposes: education and transportation.[7] After the Attorney General certified the

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1. Anderson v. Attorney Gen., 99 N.E.3d 309, 311, 326 (Mass. 2018).
2. *Id.* at 312–19; *see* MASS. CONST. amend. art. XLVIII, pt. II, § 3.
3. *Anderson*, 99 N.E.3d at 318–19.
4. *Id.* at 323–24.
5. *Id.* at 324.
6. *Id.* at 312–13; *see* MASS. CONST. art. XLIV ("Full power and authority are hereby given and granted to the general court to impose and levy a tax on income . . . . Such tax . . . shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property.").
7. Initiative Petition 15–17 stated:

> To provide the resources for quality public education and affordable pubic colleges and universities, and for the repair and maintenance of roads, bridges and public transportation, all revenues received in accordance with this paragraph shall be

petition was "in proper form for submission to the people," the petition's proponents collected enough additional signatures to place it in front of the Massachusetts Legislature.[8] Following the requisite twenty-five percent of members in both houses' approval of the proposed amendment,[9] an opposition group ("Plaintiffs") challenged the initiative petition, seeking a declaration in county court that it did not meet the requirements of article 48.[10] The registered voters supporting the petition were permitted to intervene in the case and it was reported to the SJC for decision.[11]

Plaintiffs advanced three arguments as to what made the initiative petition improperly certified.[12] The SJC's decision, however, considered only one: whether the petition contained "only subjects 'which are related or which are mutually dependent,'" in accord with article 48's requirements.[13] The SJC ultimately held the subjects in the initiative petition insufficiently related to satisfy article 48's requirements.[14] But this holding followed some interesting constitutional interpretation wherein the majority declined to read the article 48 language, "which are related or which are mutually dependent," as presenting a disjunctive test.[15] In other words, an initiative petition's subjects had to be

> expended, subject to appropriation, only for these purposes. In addition to the taxes on income otherwise authorized under this Article, there shall be an additional tax of 4 percent on that portion of annual taxable income in excess of $1,000,000 (one million dollars) reported on any return related to those taxes. To ensure that this additional tax continues to apply only to the commonwealth's highest income residents, this $1,000,000 (one million dollar) income level shall be adjusted annually to reflect any increases in the cost of living by the same method used for federal income tax brackets. This paragraph shall apply to all tax years beginning on or after January 1, 2019.

Anderson, 99 N.E.3d at 313.

8. *Id.*; *see* MASS. CONST. amend. art. XVIII, pt. IV, § 2 (requiring signatures from "not less than twenty-five thousand qualified voters" before an initiative amendment may be placed before the legislature).

9. *Anderson*, 99 N.E.3d at 313; *see* MASS. CONST. amend. art. XVIII, pt. IV, §§ 4, 5 ("[A]n initiative amendment receiving the affirmative votes of not less than one-fourth of all the members elected, shall be referred to the next general court," at which point if the initiative petition again receives at least one-fourth of votes from members of both houses, the petition is submitted "to the people at the next state election").

10. *Anderson*, 99 N.E.3d at 313; *see* MASS. GEN. LAWS ANN. ch. 214, § 1 (West 2018) (granting the SJC original jurisdiction to hear cases and matters of equity).

11. *Anderson*, 99 N.E.3d at 313.

12. *Id.* at 313–14. Plaintiffs argued (1) that the petition contains "three very different subject matters," violating the related or mutually dependent subjects requirement of article 48, (2) that specifically appropriating tax revenues violates article 48, and (3) that a petition to amend the constitution would wrest the legislature's taxing authority. *Id.* at 314.

13. *Id.* at 312.

14. *Id.* at 326.

15. *Id.* at 317–19.

sufficiently related to be certified regardless of whether the subjects are mutually dependent.[16]

III. HISTORY OF THE AREA

The constitutional amendment at issue in *Anderson*, article 48, was adopted at the Constitutional Convention of 1917–18 ("Constitutional Convention").[17] It established, among other things, a process for Massachusetts voters to put certain legislation, including constitutional amendments, directly before the electorate.[18] This Part will explore the history of article 48's adoption at the Constitutional Convention and the SJC's jurisprudence interpreting and applying article 48's requirement that initiative petitions "contain[] only subjects . . . which are related or which are mutually dependent."[19]

A. The Constitutional Convention of 1917–18

Starting in 1912, political pressure mounted for a new constitutional convention to consider whether Massachusetts should amend its constitution to implement some form of direct democracy.[20] The legislature acquiesced and placed the question of whether to hold a constitutional convention on the ballot in November of 1916.[21] The people answered yes.[22] The Constitutional Convention was a long one, with debates raging for 116 days over a two year period.[23] At the heart of these debates was whether Massachusetts should be the twentieth state to adopt a direct democratic process to amend its constitution by way of initiative and referendum.[24] Though it seemed clear that an initiative

16. *Id.* at 319.
17. *Id.* at 315.
18. *Id.* at 314.
19. *Id.* at 317.
20. *See* LAWRENCE FRIEDMAN & LYNNEA THODY, THE MASSACHUSETTS STATE CONSTITUTION 22 (G. Alan Tarr ed., 2011) (discussing the mounting political pressure, mostly from the Progressive Party, calling for a constitutional convention to address the issue of "whether the Commonwealth should embrace some form of direct democracy through the adoption of the initiative and referendum").
21. On April 3, 1916, the Legislature passed Chapter 98 of the General Acts of 1916 and described it as "[a]n Act to ascertain and carry out the Will of The People relative to the Calling and Holding of a Constitutional Convention." ACTS AND RESOLVES PASSED BY THE GENERAL COURT OF MASSACHUSETTS 523 (1917).
22. FRIEDMAN & THODY, *supra* note 20, at 22.
23. *Id.* The Constitutional Convention was also complicated by United States involvement in World War I. *Id.*
24. *Id.*

and referendum process would be adopted,[25] the delegates debated the proper limits on direct democratic power. Some delegates argued for few, if any, restrictions on the process, while others were concerned that making the constitution too easy to amend would render it more like a statute—subject to the impetuous will of a temporary majority.[26] The Constitutional Convention ultimately decided that certain constitutional amendments would be beyond the reach of the initiative and referendum power,[27] but this was not the only limit placed on the process.

Aside from the excluded subjects, two primary concerns motivated the Constitutional Convention to adopt further limiting language in article 48: (1) the possibility of voter confusion and (2) the potential for "log-rolling."[28] To address these concerns, the Constitutional Convention adopted an amendment mandating that a proposed law "shall not contain unrelated subjects."[29] This language was then reformulated by the Committee on Form and Phraseology before another approval, without further debate, in its current iteration—requiring initiative petitions to "contain[] only subjects . . . which are related or which are mutually dependent."[30] Thus, article 48 strikes a balance on two levels. First, the divergent interests between direct and representative democracy are reconciled by allowing the people to enact *certain* legislative changes regardless of representative opposition.[31] Second, the interests of petitioners and the voting public at large are balanced by limiting

25. *Id.* at 23.

26. *Id.* In addition to the tyranny of the majority concern, interestingly, dissenters were also concerned with the opposite—that well-funded special interest groups would commandeer the process. Delegates were also concerned that voters may be tasked with deciding issues they may not understand, exacerbated by a process devoid of adequate debate. *See* 2 DEBATES IN THE MASSACHUSETTS CONSTITUTIONAL CONVENTION 1917–1918, at 6–7, 11–12, 15 (1918).

27. For example, constitutional amendments pertaining to the judiciary, religious institutions, specific appropriations of money, or propositions inconsistent with certain individual rights in the constitution cannot be amended by the initiative and referendum process. MASS. CONST. art. XVIII, pt. II, § 2.

28. Anderson v. Attorney Gen., 99 N.E.3d 309, 314–15 (Mass. 2018). The SJC described "[l]ogrolling" in a footnote as the "practice of including several propositions in one measure or proposed constitutional amendment so that the . . . voters will pass all of them, even though these propositions might not have passed if they had been submitted separately." *Id.* at 315 n.5.

29. *Id.* at 316 (quoting 2 DEBATES IN THE MASSACHUSETTS CONSTITUTIONAL CONVENTION 1917–1918, *supra* note 26, at 12, 537, 567, 701–02).

30. *Id.* at 315; MASS. CONST. art. XVIII, pt. IV, § 3.

31. *Anderson*, 99 N.E.3d at 314 ("The State Constitutional Convention of 1917–1918 sought a balance between competing impulses toward direct versus representative democracy.") (citations omitted).

petitions to prevent both voter confusion and "log-rolling," combining unpopular propositions with popular ones on a single petition.[32]

B. Relatedness Requirement Jurisprudence

The majority and dissent in *Anderson* both relied heavily on the history of the SJC's application of article 48's requirement that initiative petitions "contain[] only subjects . . . which are related or which are mutually dependent[]" to justify their divergent interpretations.[33] In cases where initiative petitions were challenged as not "contain[ing] only subjects . . . which [were] related or . . . mutually dependent," the SJC focused its analysis almost exclusively on determining whether the initiatives' subjects were related.[34] Further, prior to the decision in *Anderson*, the SJC only held an initiative petition's subjects insufficiently related to meet article 48's requirement three times.[35] Significantly, too, the most recent of those decisions was the only one in which the SJC engaged in any form of mutual dependence analysis.[36] This begs the question that the majority and dissent answer differently: What does this historical focus on relatedness indicate about the role of mutual dependence in the analysis?[37] Let's dive in.

The SJC was first tasked with determining whether an initiative petition satisfied article 48's requirement that it "contain[] only subjects . . . which are related or which are mutually dependent[]" in 1941.[38] The Massachusetts Legislature adopted an order seeking the SJC's answer to five submitted questions related to an initiative petition to amend a ban on providing information about contraceptives by carving out an exception in three circumstances: (1) married couples treated by

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32. *Id.* at 314–16, 315 n.5.

33. *See infra* Part IV.A, C.

34. MASS. CONST. art. XVIII, pt. IV, § 3; *see infra* text accompanying note 48.

35. *See* Gray v. Attorney Gen., 52 N.E.3d 1065, 1073–74 (Mass. 2016) (finding that the subjects of the initiative petition at issue were not sufficiently related—or mutually dependent—and therefore should not have been certified by the Attorney General to be placed on the ballot); Carney v. Attorney Gen., 850 N.E.2d 521, 528–32 (Mass. 2006); Op. of the Justices to the House of Representatives, 664 N.E.2d 792, 797–98 (Mass. 1996).

36. *Gray*, 52 N.E.3d at 1073–74.

37. Part V argues that the majority was incorrect when it found the SJC's historic focus on relatedness indicated that mutual dependence was not a separate path to certification. *See infra* Part V. Rather, the dissent presented convincing evidence that this historical focus was a product of the SJC not having to engage in mutual dependence analysis, since the relatedness requirement was satisfied in most prior cases—and the SJC engaged in mutual dependence analysis at least once when relatedness was not satisfied. *Id.*

38. Op. of the Justices, 34 N.E.2d 431, 434 (Mass. 1941); *see* Anderson v. Attorney Gen., 99 N.E.3d 309, 316 (Mass. 2018) ("We were first called upon to construe the 'related subjects requirement' in 1941 . . . .").

physicians, (2) courses taught in medical schools, and (3) information published in medical treatises or journals.[39] The third question submitted to the SJC asked if the "proposed law contain[ed] subjects which are neither related nor mutually dependent, in violation of any provision of [article 48]?"[40] The SJC answered no.[41] The SJC's analysis focused on the relatedness of the three subjects previously mentioned and found each "germane to the general subject of prevention of pregnancy or conception, to such an extent, at least, that they cannot rightly be said to be unrelated."[42] Having determined the subjects to be sufficiently related, the SJC never addressed whether they might also be mutually dependent.[43]

The SJC came to the same conclusion when it next encountered the issue—forty years later. In *Massachusetts Teachers Association v. Secretary of the Commonwealth*,[44] the SJC held that an initiative petition seeking to place limits on a variety of taxes and fees levied by state and municipal authorities was properly certified since every subject in the petition "related directly or indirectly to the limitation of taxes."[45] Again, no mutual dependence analysis was offered.[46] But the SJC did drop a footnote: "The Attorney General does not argue that any two or more of the subjects covered by [the initiative petition] are 'mutually dependent.' We need not pause to consider whether any subjects which are mutually dependent could ever be said not also to be related."[47] The SJC thereby abstained from engaging in any analysis unnecessary to deciding the issue before it—an approach Part IV argues the SJC should have taken in *Anderson*.

Most opinions the SJC authored on the subject between *Massachusetts Teachers Association* and its most recent decisions in 2016 followed a similar pattern. The SJC analyzed the initiative petition at issue to determine if its subjects were sufficiently related to satisfy article 48's requirement. And each time the initiative petition's subjects were

39. *Op. of the Justices*, 34 N.E.2d at 432.
40. *Id.* at 434.
41. *Id.*
42. *Id.*
43. *Id.*
44. 424 N.E.2d 469 (Mass. 1981).
45. *Id.* at 474, 477.
46. *Id.* at 477 n.8.
47. *Id.* at 476 n.8.

sufficiently related, the SJC abstained from any mutual dependence discussion.[48] That brings us to *Gray v. Attorney General*.[49]

In *Gray*, the SJC heard a challenge to an initiative petition that sought to introduce a new public school curriculum and new assessment standards meant to "increas[e] transparency in the standardized testing process."[50] After discussing the two prior cases where the SJC had held that initiatives failed the relatedness requirement of article 48, the court in *Gray*, perhaps surprisingly, first inquired whether the subjects of the initiative were mutually dependent.[51] The SJC held that the subjects were not mutually dependent because the curriculum that the diagnostic tests were based upon did not affect the Commissioner's obligation to release the previous year's test items prior to the start of the school year.[52] Therefore, the Commissioner's obligation and the curriculum content could exist independently, and were not mutually dependent.[53]

IV. THE COURT'S REASONING

A. *The Majority Opinion*

The majority opinion began with a lengthy review of what it dubs the "[r]elated subjects requirement" in article 48.[54] The SJC first turned to the legislative history of article 48 to examine the issues that lead to its

48. *See* Dunn v. Attorney Gen., 54 N.E.3d 1, 7 (Mass. 2016) (abstaining from mutual dependence analysis and instead finding that the initiative petition's subjects "share a common purpose and are related in the accomplishment of that purpose," satisfying the relatedness inquiry); Abdow v. Attorney Gen., 11 N.E.3d 574, 592–93 (Mass. 2014) (analyzing the initiative petition's subjects for relatedness, but not mutual dependence, and finding the subjects were "operationally related with a common purpose and . . . a unified statement of public policy"); Albano v. Attorney Gen., 769 N.E.2d 1242, 1247 (Mass. 2002) (finding that the subjects of the initiative petition at issue were sufficiently "relate[d] to the common purpose of restricting the benefits and incidents of marriage to opposite-sex couples" and abstaining from any mutual dependence analysis); Mazzone v. Attorney Gen., 736 N.E.2d 358, 370 (Mass. 2000) (analyzing the subjects of an initiative petition for relatedness, but not mutual dependence, and finding that "the provisions of the petition before us are related to a single, common purpose"). *But see* Op. of the Justices to the House of Representatives, 664 N.E.2d 792, 797 (Mass. 1996) (finding that the subjects in the initiative petition were not sufficiently related and therefore answering "yes" to the Legislature's question of "whether the initiative violates the . . . requirement that all subjects of an initiative be related or mutually dependent" without engaging in any mutual dependence analysis).

49. 52 N.E.3d 1065 (Mass. 2016).

50. *Id.* at 1066, 1073.

51. *Id.* at 1073.

52. *Id.*

53. *Id.*

54. Anderson v. Attorney Gen., 99 N.E.3d 309, 314–18 (Mass. 2018).

adoption and how it was understood by the drafters at the Constitutional Convention.[55]

Next, the SJC reviewed its prior decisions interpreting article 48's "related or . . . mutually dependent" language.[56] A few axioms emerged. First, to be related, the subjects in an initiative petition must express a "unified statement of public policy that the voters can accept or reject as a whole."[57] In other words, the subjects must be germane to a single common purpose.[58] Further, this common purpose cannot be "so broad as to render the 'related subjects' limitation meaningless."[59] Instead, there must be an operational relatedness between a petition's substantive parts.[60]

But then, things got interesting. After focusing exclusively on decisions dealing with what appears to be the relatedness prong of the "related or . . . mutually dependent" language in article 48, the SJC addressed its mutually dependent discussion in *Gray v. Attorney General*.[61] The SJC seemed to read the mutually dependent analysis in *Gray* as *dicta* by noting that the analysis had taken place under the "[r]elatedness" subheading, which also contained a lengthy discussion of "the core of the related subjects requirement," the common purpose analysis.[62] The SJC concluded that the "or which are mutually dependent" language "does not lessen the limitation that an initiative petition . . . must contain a single common purpose and express a unified public policy. Nor does it impose a separate requirement that may be satisfied even if the subjects of a petition are not related."[63] In other words, there is no mutually dependent prong. Rather, subjects in an

55. *Id.* at 315–16.

56. *Id.* at 316–18.

57. *Id.* at 318 (citations omitted). The SJC has also expressed the same idea with slightly different formulations. *See Gray*, 52 N.E.3d at 1070 ("To clear the relatedness hurdle, the initiative petition must express an operational relatedness among its substantive parts that would permit a reasonable voter to affirm or reject the entire petition as a unified statement of public policy.") (citations omitted); Carney v. Attorney Gen., 850 N.E.2d 521, 528 (Mass. 2006) (finding the relatedness inquiry to turn on whether "the similarities of an initiative's provisions dominate what each segment provides separately so that the petition is sufficiently coherent to be voted 'yes' or 'no' by the voters").

58. *Anderson*, 99 N.E.3d at 316–17; *see Gray*, 52 N.E.3d at 1072–73.

59. *Anderson*, 99 N.E.3d at 317 (citations omitted).

60. *Id.* at 317–18.

61. *Id.* In *Gray*, the SJC found that the proposed basis for the diagnostic testing on the petition at issue was "clearly not 'mutually dependent'" on the Commissioner's proposed obligations for releasing test scores from the previous year. *Gray*, 52 N.E.3d at 1073. Instead, "the commissioner's obligation will exist independently of the specific curriculum content on which the tests are based." *Id.*

62. *Anderson*, 99 N.E.3d at 318.

63. *Id.*

initiative petition must always be sufficiently related—regardless of their mutual dependence. To justify this finding, the SJC again dove into the legislative history of article 48.[64]

Initially, the SJC introduced two familiar judicial canons to guide its inquiry. First, the SJC noted that "[a] constitutional amendment should be 'interpreted in the light of the conditions under which it . . . was framed, the ends which it was designed to accomplish, the benefits which it was expected to confer and the evils which it was hoped to remedy.'"[65] And second, an amendment's "words are to be given their natural and obvious sense according to common and approved usage at the time of its adoption."[66] Next, the majority looked to dictionaries to ascertain the common usage of "mutual" and "dependent."[67] Then, the SJC turned its attention to the use of "or" in article 48.[68] The SJC acknowledged that "or" is frequently used as a disjunctive, however, it declined to read it as disjunctive here.[69] Instead, it introduced another canon of statutory construction: that "or" may not be disjunctive if "the context and the main purpose of all the words demand otherwise."[70] The SJC seemingly relied on the definitions it found for "mutual" and "dependent" as being similar to "related" to conclude that "the context and the main purpose of all the words demand[s]" that "or" be read as "introduc[ing] a synonym or 'definitional equivalent.'"[71] The majority also emphasized parts of the legislative history to further justify its interpretation. First, the SJC gave great weight to the initial language adopted by the delegates after a lengthy debate about how to prevent misuse of the initiative process—

64. *Id.* at 318–20.

65. *Id.* at 318.

66. *Id.*

67. The majority found "mutual" to mean "having the same relation each toward the other" or "of or pertaining to each of two or more; held in common; shared." *Id.* (citing BLACK'S LAW DICTIONARY 1178 (10th ed. 2014)). "Dependent" was held to mean "[s]omeone who relies on another for support; one not able to exist or sustain oneself without the power or aid of someone else" or "a relationship between two . . . things whereby one is sustained by the other or relies on the other for support or necessities." *Id.* (citations omitted). Both the concurrence and the dissent concluded that the meaning of "mutually dependent" in article 48 was rooted in the doctrine of severability. *Id.* at 326–27 (Lenk, J., concurring); *id.* at 329 (Budd, J., dissenting). This split, and its repercussions, are discussed *infra* Part V.

68. *Id.* at 318–19.

69. *Id.* at 318–20.

70. *Id.* (citations omitted).

71. *Id.*; *see* United States v. Harris, 838 F.3d 98, 105 (2d Cir. 2016) (citing Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979)) ("In any event, even when striving to ensure separate meanings, the disjunctive canon does not apply absolutely, particularly where 'the context dictates otherwise.'").

that initiative petitions "shall not contain unrelated subjects."[72] Next, the SJC found that the insertion of the current language, "which are related or which are mutually dependent," after the adopted amendment was referred back to the Committee on Form and Phraseology did not materially alter the amendment because the delegates at the Constitutional Convention described the changes as "unimportant" and the new language was adopted "without further debate."[73] The SJC thus concluded that reading the added language "as eliminating the requirement of relatedness would be to vitiate the purpose of protecting the voters from misuse of the petitioning process for which it was enacted."[74]

One might expect at this point, having determined that mutual dependence is not a path to certification, that the SJC would focus its analysis on the relatedness of the initiative petition's subjects.[75] But instead, as in *Gray*, the SJC here analyzed the subjects of the initiative petition's three provisions[76] and held that they "[were] not mutually dependent" because a taxing provision and provisions allocating funds for public education and transportation could each "exist independently."[77] This begs the question addressed in Part V of this Comment: Did the SJC need to interpret the "or which are mutually dependent" language as superfluous when the initiative petition at issue could not survive mutually dependent analysis?

Finally, the SJC addressed what it spilled much ink to clarify as the main issue—whether the subjects of the initiative petition's three provisions were sufficiently related for the Attorney General to properly certify the petition in accord with article 48's relatedness mandate. The SJC held they were not.[78] The SJC did not articulate a bright-line rule to analyze whether an initiative satisfies the related subjects

72. *Anderson*, 99 N.E.3d. at 319. The SJC also seemed to find it persuasive that the delegates at the Constitutional Convention had referred to it as the "unrelated matters" provision. *Id.* (citing 2 DEBATES IN THE MASSACHUSETTS CONSTITUTIONAL CONVENTION 1917–1918, at 960).

73. *Id.* at 319–20.

74. *Id.* at 320.

75. The fact that neither party advanced any mutual dependence arguments also bolsters this expectation. *Id.* ("The parties understandably do not raise any arguments specifically concerning whether the provisions of the petition are mutually dependent.").

76. The three provisions in the initiative petition were: (1) a graduated tax on annual individual income over $1 million, (2) an earmarking of the resulting funds for public education, and (3) another earmarking of funds for "repair and maintenance of roads, bridges and public transpiration." *Id.* at 320–21.

77. *Id.*

78. *Id.* at 323–24.

requirement.[79] Instead, it weighed the interest of voters seeking to use popular initiatives to put matters directly before the electorate against the concerns of confusing or misleading other voters or forcing them to cast a single vote on dissimilar subjects.[80] Thus, the SJC was presented with a characterization problem. It could not construe relatedness so narrowly as to effectively prevent voters from placing initiatives with more than one subject on the ballot, nor could it construe relatedness so broadly as to allow subjects only tangentially related to be placed before the people.[81] As with the SJC's prior decisions on relatedness, the SJC's holding here rested on how narrowly the Attorney General could characterize the relatedness between the petition's subjects.[82] Since the Attorney General could only articulate the relatedness of the subjects broadly as "socially beneficial and for the common good," the SJC held it was improperly certified.[83]

B. The Concurrence

Justice Lenk authored a concurring opinion for the following reasons. First, she, like the dissent, believed article 48's requirement that petitions contain "only subjects . . . which are related or which are mutually dependent" is a disjunctive test.[84] Second, she agreed with the dissent's view that the meaning of mutually dependent at the time of the Constitutional Convention was rooted in the doctrine of severability of statutory provisions.[85] However, Justice Lenk agreed with the majority's relatedness analysis and disagreed with the dissent's view that the initiative petition here contained subjects which were mutually dependent.[86] As such, she agreed with the result reached by the majority that the initiative petition was improperly certified.[87]

Justice Lenk explained the applicability of severability analysis to the SJC inquiring "whether the subjects of [the petition] can 'stand independently' and, if not, whether they must instead 'stand or fall together.'"[88] Further, according to the concurrence, the SJC was not constrained by the structure of the petition.[89] Instead, article 48

79. *Id.* at 322.
80. *Id.*
81. *Id.* at 322–23.
82. *Id.* at 323.
83. *Id.* at 322, 324.
84. *Id.* at 326 (Lenk, J., concurring).
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 327.
89. *Id.*

discusses subjects, not provisions, so the subjects of the petition at issue in *Anderson* could be characterized as a taxing measure and two separate spending measures.[90] The concurrence then concluded that "[a] tax on millionaires, dedicated to funding education, could 'stand independently' as its own petition, with an internal mutual dependence."[91]

C. The Dissent

Justice Budd authored a dissenting opinion in which Chief Justice Gants joined.[92] The dissent criticized the following aspects of the majority's opinion: (1) interpreting the "or which are mutually dependent" language in article 48 as superfluous,[93] (2) ignoring that the meaning of mutually dependent was understood at the time of article 48's ratification as rooted in the severability doctrine,[94] and (3) improperly determining that the subjects in the initiative petition before the SJC were not mutually dependent.[95]

The dissent criticized the majority's interpretation of the language, "or which are mutually dependent," as superfluous in article 48 on two grounds. One, the majority improperly downplayed the role the Committee on Form and Phraseology played in textualizing the delegate's intent at the Constitutional Convention,[96] and two, the majority conflated the relatedness and mutual dependence prongs by misinterpreting prior cases.[97]

While the majority emphasized the original adopted language—"shall not contain unrelated subjects"—and characterized the Committee on Form and Phraseology's reformulation as "unimportant,"[98] the dissent described the Committee's role differently. First, the dissent pointed out that the Chair of the Committee characterized the changes as "made purely and simply to carry out what the Committee believed to be the wishes of the Convention."[99] Next, the dissent noted that, rather than add superfluous language, the Committee had actually cut the text of the amendment by fifteen percent.[100] Finally, the dissent emphasized how closely the Committee worked with important delegates, including the

90. *Id.*
91. *Id.*
92. *Id.* at 328 (Budd, J., dissenting).
93. *Id.*
94. *Id.* at 328–30.
95. *Id.* at 328, 331–35.
96. *Id.* at 334–35.
97. *Id.* at 331–32.
98. *Id.* at 316, 320 (majority opinion).
99. *Id.* at 335 (Budd, J., dissenting).
100. *Id.*

sponsor of the initiative and referendum and the advisor to the Constitutional Convention.[101] In fact, according to the advisor to the Constitutional Convention, the Committee's goal was to carefully draft the amendment to reduce the amount of litigation surrounding it.[102] Consistent with that goal, the Committee was to draw on its legal training and draft "concise and exact language," while omitting "clauses which add nothing to the amendment except superfluous words."[103]

The dissent also disagreed with the majority's interpretation that the SJC's prior case law supports reading the "or which are mutually dependent" language as superfluous.[104] The dominant focus on relatedness analysis in the SJC's jurisprudence, according to the dissent, does not support the majority's conclusion that mutual dependence is superfluous.[105] Rather, the SJC's focus on relatedness was a product of necessity. In other words, the SJC was forced to concentrate its analysis on relatedness because the provisions in prior cases were clearly severable and therefore not mutually dependent.[106]

While the majority looked to dictionaries to discern the common usage of both "mutual" and "dependent," the dissent, like the concurrence, argued that the meaning of "mutually dependent" was rooted in the doctrine of severability.[107] But the dissent described the doctrine differently from the concurrence. Instead of asking whether the subjects could "stand independently" or must "stand or fall together," the dissent characterized mutually dependent subjects as "those that, if separated from one another, would no longer convey the meaning or purpose of the proposition."[108] Based on this characterization, the dissent argued that the subjects in the initiative petition could not be separated "without changing the meaning of the petition."[109]

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101. *Id.*

102. *Id.* Lawrence B. Evans was the advisor to the Constitutional Convention and described the role of the Committee as reducing "the amount of litigation which is due entirely to the careless drafting of constitutions or statutes." Lawrence B. Evans, *The Massachusetts Constitutional Convention*, 11 L. LIBR. J. 51, 56 (1918).

103. *Anderson*, 99 N.E.3d at 335 (Budd, J., dissenting) (citing Evans, *supra* note 103, at 56).

104. *Id.* at 336.

105. *Id.*

106. *Id.*

107. The doctrine of severability instructs courts, when finding a statutory provision unconstitutional, to consider whether the unconstitutional portion may be severed from the statute so the rest of the statute may survive. *Id.* at 329.

108. *Id.* at 330.

109. *Id.* at 332.

V. ANALYSIS AND IMPLICATIONS

A. *Soundness of the Court's Analysis*

The majority in *Anderson* correctly held the initiative petition should not have been certified but for the wrong reasons. First, it issued an unnecessarily broad opinion by interpreting the "or which are mutually dependent" language in article 48 as introducing a definitional equivalent to "related"—not a separate path to certification. Further, the majority's justifications for this interpretation are unconvincing. Instead, the SJC should have come to the same conclusion, that the initiative petition should not have been certified, without interpreting the mutually dependent prong as superfluous. The initiative petition's subjects were neither related *nor* mutually dependent. Finally, the most likely impact of this decision, that the constitutional flat-tax rate cannot be amended with an attached spending provision, should have been achieved differently.

1. The SJC Issued an Unnecessarily Broad Opinion by Reading the Mutually Dependent Language as Superfluous

Judge Harold Leventhal famously observed that resorting to legislative history in support of one's statutory interpretation is similar to "looking over a crowd and picking out your friends."[110] The various opinions authored in *Anderson* highlight this problem; everyone seemed to have a friend at the party. In other words, both the majority and dissent could point to aspects of legislative history to support their divergent interpretations of the "or which are mutually dependent" language.[111] Determining whose friends are more important is difficult. On the one hand, as the majority indicated, the original version of the amendment stated that initiative petitions "shall not contain unrelated subjects," and the final language was approved without further debate after it was reformulated in the Committee.[112] On the other hand, as the dissent observed, the role of the Committee was to make language less susceptible to continuous litigation, and the advisor to the Constitutional Convention commented that the Committee did not add unnecessary words.[113]

110. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).
111. *See supra* Part IV.
112. *See supra* notes 72–74 and accompanying text.
113. *See supra* notes 102–03 and accompanying text.

Similarly, interpreting state constitutions presents particular challenges.[114] Typically, when language is unambiguous, judges interpreting state constitutional amendments adhere to the plain meaning of the words written.[115] This would have been a better approach for the majority for a few reasons. First, one of the main justifications for interpreting language contrary to its typical use, in this case the use of "or" as disjunctive, is to avoid an "absurd result."[116] But here, the result would have been the same if the majority interpreted "or" to be disjunctive because the subjects in the initiative petition were neither related nor mutually dependent. Next, the legislative history is far from conclusive. Both the dissent and the majority could point to friends in the crowd in support of their respective interpretations. Similarly, the majority's interpretation of the SJC's jurisprudence to support its conclusion is questionable. The dissent presented valid arguments that the historical focus on whether initiative petition subjects were related was a product of necessity, as the subjects in the petitions at issue here were clearly not mutually dependent.

2. The SJC's Decision Makes It Unlikely that Article 44's Flat-Tax Can Be Amended, but the SJC Could Have Achieved This Result Without Interpreting the Constitution

Though the majority indicated that the initiative petition would fail mutual dependence analysis, since it contained multiple spending provisions that could "exist independently," the majority still decided to interpret mutual dependence out of article 48. The majority in *Anderson* was clearly concerned with the history of initiative petition attempts to amend article 44's flat-tax requirement. Specifically, the five previous attempts were all voted down, and the majority seemed to view the attachment of a suggested spending provision as an attempt at logrolling. In other words, the unpopular proposition of amending the flat-tax rate was combined with what may be popular suggested spending provisions: public education and transportation. Therefore, the most practical effect of the majority's decision to interpret the "or which are mutually dependent" language as superfluous is likely that it prevents any one spending provision from attaching to an initiative petition also seeking to amend the flat-tax requirement. But article 48 already specifically

114. *See* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 313–14 (2009).

115. *Id.* at 315–16.

116. William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 97 (1994) (describing this canon of textual interpretation in a federal context).

excludes an initiative petition from "mak[ing] specific appropriation[s] of money from the treasury to the commonwealth."[117] Further, the only reason that suggested spending provisions are allowed to be presented in an initiative petition is because the SJC has held that including language in these petitions that qualifies the appropriation as being "subject to" the Legislature's determination is not prohibited by article 48.[118] Therefore, the SJC here could have revisited this line of cases by addressing the second argument presented by the challengers—that this petition violated the specific appropriation prohibition of article 48—instead of interpreting language in a constitutional amendment as superfluous.

VI. CONCLUSION

In sum, the majority in *Anderson* engaged in unnecessary constitutional interpretation based on inconclusive legislative history and past judicial decisions. Instead, the SJC should have either: (1) analyzed the initiative petition at issue under the disjunctive "or" test to conclude it was not properly certified or (2) reevaluated its prior jurisprudence to effectively prevent initiative petitions from making "specific appropriation[s] of money from the treasury to the commonwealth."[119] In reality though, mutual dependence arguments are rarely, if ever, presented in lieu of relatedness arguments for certifying initiative petitions, so the effect of the SJC's constitutional interpretation here is probably limited.

117. MASS. CONST. art. XLVIII, pt. II, § 2.
118. *See* Anderson v. Attorney Gen., 99 N.E.3d 309, 324 n.9 (Mass. 2018) (citations omitted).
119. MASS. CONST. art. XLVIII, pt. II, § 2.