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Legislative Amendment of Citizen Initiatives:

Where the "Will of the Voter" Meets the "Consent of the Elector"

by Derek P. Langhauser

INTRODUCTION

Maine continues to experience relatively frequent use of citizens' initiatives.[1] These initiatives have legislated issues attracting broad attention such as school funding, recreational marijuana, minimum wage, transmission lines, ranked-choice voting, and Medicaid expansion, to name just a few.

This frequent activity sparks several questions. Are such initiatives perceived necessary because elected representatives are not being responsive enough? Should the threshold for gathering signatures be raised to make the process more difficult to initiate? Should the people be able to initiate laws in areas that are both complex and implicate the legislature's express core powers, such as taxation, spending, education, and general welfare? Should the legislature send out more competing measures?

Yet other questions recur when the legislature amends what the people have passed. Does the legislature's amendment or repeal of such measures not long after the people approve them inappropriately trespass upon the will of the voters? How much deference, if any, has or should the legislature accord initiatives? In the future, if initiatives that propose substantive movement on important or otherwise populist issues succeed, the demand on the legislature to revisit those initiatives may increase, so, too, may these questions of whether the legislature can and should respond and, if yes, how far the responses should go.

Recognition of possible legislative amendment or repeal may be disquieting to those who support initiatives, believe strongly in the merits of direct democracy, and support passionately the carefully chosen text of their specific measure. All advocates in the political process work hard for their wins and none appreciates having their wins meaningfully altered, effectively diluted, or worse yet, outright repealed. But advocates and those citizens who are asked to sign a petition, give money, or vote at the polls should recall that, as a matter of fundamental Maine constitutional law, citizen-initiated and -approved legislation is like any other statute and is therefore subject to amendment or repeal at any time.

The purpose of this article is to discuss these issues by explaining the legislature's authority to amend or repeal citizen initiatives, how and why the Maine Constitution specifically provides for that authority, and how and why that approach is conceptually consistent with numerous other provisions and principles of our Constitution. This article further suggests the types of issues that, regardless of the subject matter in question, the legislature should consider in determining whether, and if so how and when, to change a directly democratic act of the people. Such considerations when earnestly applied can serve to balance the legislature's representational duty to mind the popular will as well as its leadership responsibility to steward the state with the additional exercise of the legislature's own lawmaking power.

LEGISLATURE-AMENDED INITIATED LAWS

Maine is one of 23 states that authorize the people to initiate new, amended, or repealed statutes. By comparison, 12 of those states provide for direct initiatives (proposals that qualify go directly on the ballot); nine, like Maine, provide for indirect initiatives (proposals are submitted to the legislature, which has an opportunity to act on the proposed legislation, and the initiative question goes on the ballot if the legislature rejects it, submits a different proposal, or takes no action); and two provide for both direct and indirect initiatives.[2]

Maine's history of permitting initiatives is more than 100 years old. The initiative provision of the Maine Constitution was enacted in 1909 and first used in 1911.[3] Thereafter, and for the first six decades, only seven initiatives received a popular vote. It was not until 1970 that initiatives began to appear on ballots more frequently.[4]

The Maine Supreme Judicial Court and the Maine attorney general[5] have both recognized that the legislature has the power to repeal or amend an initiated or referred law and that the legislature may do so either expressly or by implication. All told, from 1909 to the date of this publication, there have been 78 initiatives.[6] Seven were approved by the legislature and consequently never went to referenda. That is the rare path. Although

legislative review and disapproval of initiatives is a constitutional prerequisite to a popular vote, such disapproval is not a reflection of the chambers' views on the merits. The legislature typically votes to send initiatives to the people not as any statement on the merits but simply so that citizens may have their say.

That leaves 71 that went to referenda (nine of those with competing measures), and 36 failed and 35 were approved. Of the 35 that were approved, 29 were amended at least once by the legislature. Of those 29, 21 were amended either at the next session of the same term or the next legislative term, and eight were amended or repealed years later. So, over the full history of the provision, the Maine Legislature has amended or repealed popularly approved initiatives about 83 percent of the time.

Depending on one's perspective, many of these changes may be regarded as technical in nature. As such, they did not attract attention or debate. Others though have been more substantive, such as the amendment in 2005 immediately after voters approved an initiated change to the state's funding formula for general purpose aid to K–12 education.[7] This was done expressly to temper the popular will with an acknowledgment of fiscal reality.

THE SHARED POWER OF LAWMAKING: THE PEOPLE AND LEGISLATURE

The Maine Constitution delegates lawmaking powers to the people and the legislature alike. Under the Constitution, the people are the sovereign source of the state. They have the express rights to "give instructions to their representatives," and to request by "petition or remonstrance redress of their wrongs and grievances." They also have an "unalienable and indefeasible right to institute government, and to alter, reform, or totally change the [government] when their safety and happiness require it." They "reserve to themselves power to propose laws and to enact or reject the same at the polls independent of the Legislature" (i.e., initiative), and also "reserve power at their own option to approve or reject at the polls any Act, bill, resolve or resolution passed by the joint action of both branches of the Legislature" (i.e., referendum).[8]

The people's lawmaking powers are in addition to, and not in replacement of, the lawmaking powers of the legislature. The legislature may use its own powers to propose, enact, and override vetoes of legislation at their own will, even if it is on the same subject as that addressed by the people.[9] For its part, the legislature is not bound by a previous legislature's determinations and cannot bind a successor legislature[10] because each legislature retains plenary lawmaking authority during its biennial term.

THE LEGISLATURE'S CORE LAWMAKING POWERS

In addition to these core legislative operating principles, the Maine Constitution speaks expressly to four core powers of the legislature. Increasingly, citizen initiatives address subjects within the scope of these powers.

The first category is the police power. Under the broad police power, the governor may propose and pass any law that the governor "may deem expedient," and the legislature may propose any law deemed "reasonable…for the defense and benefit of People…[and] not repugnant to the Constitution(s)." This broad police power is the legislature's core duty and responsibility and therefore cannot be bargained or granted away.[11]

Next are the taxation powers. Because taxation fundamentally burdens the citizens, the Constitution provides that no tax may "be imposed without the consent of the people or of their representatives in the Legislature." Because taxes are also the essential source of government revenues, the Constitution also expressly states that the legislature "shall never, in any manner, suspend or surrender the power of taxation."[12] This means that the legislature is not, and cannot be, required to defer to a citizens' initiative involving taxes because such requirement would constitute a suspension or surrender of that power.

Third is the education power. The Constitution expressly provides that the legislature is "authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools." The legislature also has the power to "provide that taxes, which it may authorize a School Administrative District or a community school district to levy, may be assessed on real, personal and intangible property in accordance with any cost-sharing formula which it may authorize." The Constitution expressly provides these powers to the legislature because it recognizes that a "general diffusion of the advantages of education…[is] essential to the preservation of the rights and liberties of the people." The Constitution entrusts these powers to the Legislature in order to "promote this important object."[13]

Finally, there is the spending power. The Constitution expressly provides that "no money shall be drawn without an appropriation or allocation authorized by law." Although the people may use an initiative for revenue legislation, when an initiative proposes to raise or spend significant amounts of money, such initiative implicates more substantially

the Legislature's responsibilities to enact a balanced biennial budget. The biennial budget is at the core of a legislature's work; it is the measure that most comprehensively provides for the "defense and benefit of the People" under the police power clause and directly advances the "public peace, health and safety" under the emergency enactment clause.[14]

PARALLEL, RECIPROCAL, AND DYNAMIC LAWMAKING POWERS

The legislature and people share the same power: the power to enact. And what they each have the power to enact is also the same: a statute, a form of law that is always capable of amendment by subsequent action of the people, the legislature, or both. The powers of the legislature and people to enact are parallel; neither is superior to the other or absolute. Consistent with the Constitution's broader scheme of separation of powers and its core mediating tension of checks and balances, the legislature and people each have the power to change the acts of the other.

The relationship between these parallel powers is, by design of the Constitution, reciprocal and dynamic: reciprocal because voters can change a law enacted by the legislature, and the legislature can change a law approved by the voters; and dynamic because such changes can occur whenever, and however often, either the people or the legislature has the will and the votes to do so.

The Constitution intentionally does not confer greater legal status to an initiated enactor over a legislated enactor. To do so would grant supremacy to direct democracy over the principles of representative democracy that define the Maine Constitution. Such supremacy could ultimately hold the state captive to the initiative process, and the text and design of our Constitution make clear that the Framers understood and rejected that approach. Instead, the Constitution gives voters the right to govern directly but only as checked by possible subsequent legislative action. If citizens object to that change, they can elect other representatives or initiate other legislation. That dynamic will inevitably cause tension between the people and their representatives, but that is exactly how checks and balances work within the shared lawmaking powers of an engaged citizenry and a conscientious legislature.

In short, an initiative is but one step in the dynamic process of lawmaking: a process that never ends, that moves from session to session in a continuous government elected to act in biennial periods of time,[15] that encourages and tolerates ongoing debates, and accepts disparate and even conflicting outcomes at different times along the way.

QUALITATIVE DIFFERENCES BETWEEN INITIATIVE AND LEGISLATIVE PROCESSES

The Constitution sets forth only broad procedures by which an initiative and legislation are enacted. The initiative process is defined by articulating a succinct question, getting a certain number of supportive signatures, giving the legislature the opportunity to accept or reject the measure either outright or by a competing measure),[16] and then holding statewide election. As a practical matter, the legislature has rarely enacted the initiative as is (only 7 times in 78 opportunities), rarely proposed its own competing measures (only 9 times in 78 opportunities), and instead, typically votes against the measure as is. Citizens are principally advised of the measure through the advocacy of proponents and opponents.

By contrast, the legislative process of policy formulation occurs within a much more structured framework. This process begins with drafting assisted by expert staff. It then requires an initial review by a subject-focused committee. After committee hearings, work sessions, and debate, amendments are typically devised. Unanimous or divided reports then go to the floors of both Houses where further debate, floor amendments, and conference committees work to achieve the bicameral concurrence required by the Constitution. The measure then goes to the governor who may, among other choices, line-item veto the measure or permit the legislature to recall it beforehand;[17] either way, giving the measure even more opportunity for refinement.

This process of legislative enactment—whatever else its flaws—generates more objective fact finding, clearer issue identification, and broader attention to unintended consequences than populist advocacy. As a result, this process, again whatever its own shortcomings, typically admits fewer threats of issue isolation and issue distortion by special interests.

RECOGNITION OF—AND CONSTRAINTS TO—THE WILL OF THE PEOPLE

As noted in the introduction, one important question is whether the legislature's amendment or repeal of such measures not long after the people approve them inappropriately trespasses upon the will of the voters. Under the Maine Constitution, the will of the people is recognized in six primary ways: granting consent to first establish the Maine Constitution; approving subsequent amendments to the Maine Constitution; voting for the governor, senators, and representatives; proposing and voting on citizens' initiatives; voting

on policy referenda; and voting on bond referenda.[18]

By forming and maintaining the Constitution, the people consented to its limitations on their own acts of direct democracy. By voting on referenda, citizens get their say on legislation but only within the broader context of the Constitution, which grants the legislature a plenary police power to enact laws, a power that includes the authority to amend or repeal an initiated law. And by electing representatives, citizens delegate broad authority to their representatives to think for themselves and act on the people's behalf. Indeed, a vote for office authorizes the representative to vote for or against a myriad of bills, nominees, resolutions, orders, or sentiments during their elected term. The only stated limit on the representatives' judgment is their commitment to their oaths of office to faithfully discharge their duties and support the state and federal constitutions.[19]

The people's consent to a constitutional scheme of government also means that their acts of direct democracy are subject to the doctrine of checks and balances. This doctrine distributes power among the three branches of government[20] and the people's interaction with those branches. This distribution includes a significant number of limitations on the people. As already discussed, the legislature retains plenary power to change an initiated law, and the governor can join the effort by recommending measures the governor deems expedient.[21] But there are many more ways—indeed, at least 20—in which our Constitution, with the people's consent, restrains the people.

For example, the people cannot initiate a constitutional amendment, bond issue, a measure that is not legislative in character, a measure that de facto amends the United States Constitution or a measure that suspends rather than repeals a law, and cannot enforce an approved measure found to violate the Constitution. The people cannot recall a governor, senator, or representative, and cannot convene the legislature into session. The Constitution does not permit the legislature to surrender to the people its police or taxation powers. Supermajority two-thirds votes are required for a variety of actions, even when a simple majority can be argued to be more reflective of the people's will. These votes include, for example, actions related to emergency measures, impeachment, veto overrides, confirmation procedures, and removing a disabled governor. They also include certain matters regarding bond issues, mining, state mandates, and state parks.[22]

Similarly, the House and Senate are authorized to disqualify, punish, and expel a member elected by the people. The legislature controls the power of impeachment, and the legislature and Maine Supreme Court chief justice decide gubernatorial disability. And, of course, the courts can render and enforce decisions even if they are politically unpopular. Finally, and perhaps most dramatically, the people have even consented to the legislature acting outside the Constitution's rights and limitations when the severe needs for "continuity of government" so require.[23]

LEGISLATIVE CONSIDERATIONS ON CHANGING AN INITIATED LAW

If initiatives proliferate in Maine, particularly on issues viewed as divisive, legislators will increasingly be invited to consider subsequent changes. Legislators may be more or less inclined to do so depending upon the subject matter or issues of principle, policy, passion, or politics. Some legislators may believe that initiatives as express acts of direct democracy are entitled to strict deference *ab initio.* Others may so passionately object to the policy that they eschew any such notion of deference. Yet others will occupy positions in between.

So, a two-part threshold question is what, if any, higher scrutiny or deference should be applied to an approved initiative, and how is that standard defined and determined to be met? Again, as the Constitution does not require a supermajority, such as two-thirds, vote to change an approved initiative, that is not the standard.

A practical approach to addressing this question would be to identify the types of issues, regardless of the subject matter, that should be considered in determining whether straight deference is outweighed in any instance. Such considerations might include, for example, the following:

- **Circumstances**—How long ago was the measure approved? To what degree have the circumstances foreseen for regulation changed?
- **Role**—To what degree does the measure interfere with a core responsibility typically reposed to the legislature, such as public safety, spending, taxation, or education? Does the measure involve a subject matter with the type of reaching and complex consequences that benefit from the legislature's deliberative process?
- **Compliance**—To what degree does the measure present on its face or as applied material legal questions? Does the measure lack clarity? Is it under- or over-inclusive? Does it otherwise present compliance confusion?

- **Conflicts**—To what degree does the measure materially conflict with other Maine laws? Was the measure crafted from existing Maine law? Or is it a template imported from other state(s) with different demographics and regulatory schemes?
- **Scope**—To what degree is the measure one of broad vs limited application or scope? To what degree would a change be as broad or as narrow?
- **Passage**—What percentage of electors voted on the measure? By what percentage did it pass? To what degree does the measure reflect the will of certain parts of the state more so than other parts? To what degree are there legitimate concerns with the accuracy or completeness of the information presented to the people?

Thoughtful persons can identify additional or alternative considerations. The point here is that when the legislature considers addressing the merits of an approved initiative, conscientious lawmaking should be applied regardless of whether the legislature ends up standing upon deference or crafting a response deemed better suited to the perceived needs of the day. Either way, as noted in the introduction, legislators will have tended to both their representational duty to show respect for the popular will and their leadership responsibility to possibly better steward the interests of the state.

CONCLUSION

The right of the people to initiate and enact legislation is an important component of their sovereignty. While that right is express, it is exercised within the Constitution's distribution of express and implied delegated powers between the people and the three branches of government. It is the doctrine of checks and balances that distributes power between those four sovereign actors and both authorizes and obligates the legislature to judge and moderate the direct democratic acts of the people. This is the way that our Constitution, which decidedly created a representative democracy, checks, balances, and integrates the people's important acts of direct democracy.

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NOTES

1 "The initiative has become an increasingly widespread device for addressing a variety of societal concerns, such as land use regulations, environmental policy, and public health issues." Marshall Tinkle, *The Maine State Constitution, A Reference Guide* (Westport, CT: Greenwood Press, 1992), 91. This article addresses only initiatives pursuant to Me. Const. art. IV, pt. 3, § 18; it does not analyze referenda (laws initiated and passed by the legislature and then subject to people's approval or veto) pursuant to Me. Const. art. IV, pt. 3, § 17.

2 National Council of State Legislatures (NCSL) at https://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx. For more detailed information on the various states' different approaches, see https://www.ncsl.org/research/elections-and-campaigns/initiative-and-referendum-processes.aspx#/.

3 Interestingly enough, the legislature promptly amended the first popularly approved measure. P.L. 1913, ch. 221 amended by P.L. 1915, ch. 47, § 2.

4 Tinkle, 1992.

5 Opinion of the Justices, 673 A.2d 693, 695 (Me. 1996) citing, among others *Manigault v. Springs,* 199 U.S. 473, 487 (1905). Op. Me. Att'y Gen. No. 05-4 at 2005 WL 4542877 (Me. A.G.); Op. Me. Att'y Gen. (April 26, 1976) at 1976 Me. AG. Lexis 126.

6 The figures in this section are based upon research conducted with Cleaves Law Library and the Law and Legislative Reference Library. The exact tabulation of "subsequent amendments" is challenging because a law can be amended directly by express act and indirectly by changes to related laws. This article counted only the direct amendments that the libraries identified.

7 I.B. 2003, ch. 2 amended by P.L. 2005, ch. 2. Changes to that formula are both complicated and consequential as GPA accounts for about two-thirds of all state spending in a fiscal year.

8 The rights discussed in this paragraph are (in order discussed) set forth in Me. Const. art. I, § 15; art. I, § 2; art. IV, pt. 1, § 1, and pt. 3, § 18; and art. IV, pt. 1, § 1, and pt. 3, § 17. Furthermore, the legislature cannot interfere with the submission of initiated measures to the people either by action or by inaction and cannot enact amendments to a law during the period in which a competing measure is pending before the voters (*Ferris ex rel. Dorsky v. Gross,* 143 Me. 227, 232 [1948]; Op. Me. Att'y Gen. No. 97-1 at 1997 WL 664660 [1997]; Tinker [1992]).

9 Me. Const. art. IV, pt. 3, § 1, and §§ 2 and 2-A. The governor also has the related powers to introduce and veto legislation, but the governor does not have the power to enact (Me. Const. art. V, pt. 1, § 9 and Me. Const. art. IV, pt. 3, §§ 2 and 2-A).

10 See, for example, *Jones v. Maine State Highway Commission,* 238 A.2d 226, 230 (1968), citing *Baxter et al. v. Waterville Sewerage District et al.,* 79 A.2d 585, 588 (1951).

11 Broad police power is described in Me. Const. art. V, pt. 1, § 9, and art. IV, pt. 3, § 1. See also, for example, *First Nat. Bank of Boston v. Maine Turnpike Authority,* 136 A.2d 699, 708 (1957).

12 Imposing taxes is set forth in Me. Const. art. I, § 22 and art. IX, § 8, and suspending taxes in Me. Const. art. IX, § 9. The Maine Supreme Court has recognized that the power of taxation is an essential attribute of sovereignty. See, for example, *Town of Milo v. Milo Water Co.,* 131 Me. 372, 378-89 (1932).

13 Support for education is set forth in Me. Const. art. VIII, pt. 1, § 1; taxes for schools in art. IX, § 8(3); and importance of public education in art. VIII, pt. 1, § 1.

14 Sources for this paragraph are (in order of appearance) found in Me. Const. art. V, pt. 3, § 4; Opinion of Justices, 370 A.2d 654, 667-68 (Me. 1977) (revenue legislation); Me. Const. art. IV, pt. 3, § 1 (broad power to enact includes budget bills) and Me. Const. art. IX, § 14 (implying requirement that budget be balanced in order to avoid unauthorized debt); Me. Const. art. IV, pt. 3, § 1 (police power clause); and emergency measures are enacted pursuant to Me. Const. art. IV, pt. 3, § 16.

15 See Me. Const. art. IX, § 17 and art. II, § 4.

16 Me. Const. art. IV, pt. 3, § 18. As an interesting aside, the Law Court has held that emergency legislation amending a statute that an initiated measure seeks to repeal does not constitute a competing measure (*McCaffrey v. Gartley,* 377 A.2d 1367 [Me. 1977]). Likewise, the legislature may not enact amendments to a law during the period in which a competing measure is pending before the voters (Op. Me. Att'y Gen. No. 97-1).

17 Provision for this legislative process is set forth in Me. Const. art. IV, pt. 3, § 2 and 2A. Permitting the legislature to recall it beforehand is an implied power under the presentment clause in Me. Const. art. IV, pt. 3, § 2 and recognized expressly in *Mason's Manual of Legislative Procedure,* §753 (3).

18 The six primary ways in which the will of the people is recognized are (in order listed in paragraph) found in Me. Const. preamble; art. X, § 4; art. II, § 1; art. IV, pt. 3, §§ 18 and 17; and art. IX, §14.

19 Me. Const. art, IX, § 1.

20 Me. Const. art. III, §§1 and 2.

21 Note also that the legislature may also use its lawmaking powers to not fully fund a measure approved by voters.

22 These constraints are recognized in Me. Const. art. X, § 4 (constitutional amendment); art. IX, § 14; *Opinion of Justices,* 191 A.2d 357, 360 (1963) (bond issues); *Avangrid Networks, Inc. v. Secretary of State,* 2020 ME 109 (legislative character); *Opinion of the Justices,* 673 A.2d 693, 697 (Me. 1996) (citing U.S. Const. art. V); and *Opinion of Justices,* 370 A.2d 654, 669 (Me. 1977) (suspending laws). Inability to recall a governor is implied by exclusion from Me. Const. art. IV, pt. 2, § 7, art. IV, pt. 1, § 8, and art. IX, § 5. Inability to recall a senator or representative is implied by exclusion from Me. Const. art. IV, pt. 3, § 4; and inability to convene a legislative session from Me. Const. art. IV, pt. 3, § 1. See *First Nat. Bank of Boston v. Maine Turnpike Authority,* 136 A.2d at 708 for discussion of police powers, and Me. Const. art. IX, § 9 for taxation powers. Other sources from the Maine Constitution include art. IV, pt. 3, § 16 (emergency measures); art. IV, pt. 2, § 7 (impeachment); art. IV, pt. 3, § 2 (veto overrides); art. V, pt. 1, § 8, ¶ 3, and § 14 (confirmation procedures and removing a disabled governor); and art. IX, § 14 (bonds), §20 (mining), § 21 (mandates), § 23 (state parks).

23 Sources for this paragraph include (in order discussed) Me. Const. art. IV, pt. 3, §§ 3 and 4; art. IV, pt. 2, § 7; art. IV, pt. 1, § 8; and art. IX, § 5; art. V, pt. 1, §§ 14 and 15; art. VI, § 1; and art. IX, § 17.

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