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## Exercise the Power, Play by the Rules: Why Popular Exercise of Legislative Power in Maine Should be Constrained by Legislative Rules

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# EXERCISE THE POWER, PLAY BY THE RULES: WHY POPULAR EXERCISE OF LEGISLATIVE POWER IN MAINE SHOULD BE CONSTRAINED BY LEGISLATIVE RULES

*The Honorable Jeremy R. Fischer*

- I. INTRODUCTION
- II. HISTORICAL BACKGROUND AND JUDICIAL REVIEW OF MAINE'S INITIATIVE PROCESS
  - A. *Constitutional Convention and Constitutional Amendment*
  - B. *Maine Law Court Analysis of Sections 16-22*
- III. THE PROBLEM
  - A. *Balanced Budget Requirements in Maine*
  - B. *Legislative Rules*
  - C. *The Mechanics of the Initiative Process*
  - D. *Contradictory Initiatives*
- IV. THE SOLUTION
  - A. *The Mechanics*
  - B. *Statutory Approach*
  - C. *Constitutional Approach*
- V. CONCLUSION

## EXERCISE THE POWER, PLAY BY THE RULES: WHY POPULAR EXERCISE OF LEGISLATIVE POWER IN MAINE SHOULD BE CONSTRAINED BY LEGISLATIVE RULES

*The Honorable Jeremy R. Fischer\**

### I. INTRODUCTION

As a candidate for the Maine House of Representatives (House Candidate) stands patiently on the podium at a political rally, she smiles and waves to supporters as she is introduced. She then steps to the microphone and begins an impassioned recitation of her campaign platform: improving education in Maine's schools, providing health insurance to the uninsured, and adequately funding state agencies to protect the environment. She concludes with a shrewd but simple promise—"Read my lips: no new taxes!" The crowd roars.

This is what makes Americans hate politics and politicians—unrealistic and untenable campaign promises. House Candidate is hardly the first politician to make such promises, and she is unlikely to be the last. According to a nationwide poll conducted during the 2000 general election campaign, 81 percent of respondents felt that "most political candidates will say almost anything to get themselves elected."<sup>1</sup> This poll suggests that voters are skeptical of campaign promises like House Candidate's, understanding that once elected, she cannot possibly both expand popular government programs and refuse to raise the revenues necessary for their implementation.

Although voters' distaste for campaign promises is not unfounded, the true impact on government policy of such promises is greatly exaggerated. Republican democracy does not allow the promises of lone political candidates to be translated into statute by fiat. Instead, representative government requires compromise throughout a highly deliberative legislative process.<sup>2</sup> Once House Candidate is elected and becomes House Member, she will have to navigate the legislative process, including its strict

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1. THOMAS E. PATTERSON, *THE VANISHING VOTER* 53 (2002).

2. For a helpful refresher on the legislative process, visit the Maine State Law Library's overview on the subject: *Maine's Path to Legislation (How a Bill Becomes Law)*, <http://www.maine.gov/legis/lawlib/billpath.htm> (last visited Jan. 20, 2009).

procedural and financial rules,<sup>3</sup> and its intricate system of checks and balances. These realities restrain the implementation of bills that are unrealistic, unaffordable, or contradictory.

In the last century, the popular exercise of legislative power, known as direct democracy, has gained inclusion in the constitutions of twenty-four states across the country, including Maine's.<sup>4</sup> Maine's system of direct democracy utilizes the initiative process.<sup>5</sup> Through this process, Maine citizens may exercise the legislative power by gathering signatures of registered voters on a petition in favor of a proposal.<sup>6</sup> If the petition receives a sufficient number of signatures, the proposal is "initiated" and placed before the next session of the legislature.<sup>7</sup> The legislature then holds public hearings and ultimately votes on the proposal up or down, without the ability to amend.<sup>8</sup> If the proposal is enacted by the legislature and signed by the Governor, it becomes law; if it fails enactment in the legislature, citizens are presented with the question of enactment at the ballot box.<sup>9</sup>

Maine's initiative process thus gives citizens a mechanism by which to exercise the legislative power partially independent of the legislature.<sup>10</sup> Though such a mechanism certainly has distinct benefits for citizens, it is not free from problems akin to the issue of campaign promises made by candidates. Because Maine's initiative process occurs in the public, primarily outside the deliberative legislative process, it is not subject to the process's procedural or financial rules. The necessity of compromise and the checks and balances that restrain lone politicians from delivering on contradictory campaign promises is not present in Maine's initiative process. Therefore, citizens should view the promises of initiative supporters during a campaign with at least the same, if not a higher, level of scrutiny as the promises of politicians on the stump.<sup>11</sup>

In its first part, this Article examines the citizen initiative process in Maine, which was added to the Maine Constitution by referendum in 1908. It reviews the original intent of those who championed the direct initiative in Maine and then analyzes how the Maine Supreme Judicial Court has interpreted its provisions in the century since its inclusion in the Maine Constitution.

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3. For more detailed analysis of the Maine Legislature's procedural and financial rules, please see Part III.B of this Article.

4. Initiative, Referendum, and Recall, <http://www.ncsl.org/programs/legismgt/elect/initiat.htm> [hereinafter Initiative, Referendum, and Recall] (last visited Feb. 2, 2009).

5. See ME. CONST. art. IV, pt. 3, § 18.

6. Currently, the number of signatures must be at least "10% of the total vote for Governor cast in the last gubernatorial election preceding the filing of such petition." *Id.*

7. *Id.*

8. If the legislature does substantively amend the initiated bill, it triggers a "competing measure," meaning the voters are confronted with three choices when they vote on the initiative question—"Yes" to the original initiated question, "Yes" to the legislature's competing measure, or "No" to both. *Id.*

9. *Id.* at cl. 3.

10. There are two types of initiatives. The direct initiative allows citizens to gather signatures and place a question directly on the ballot. The indirect initiative allows citizens to gather signatures and send a question to the legislature, which may either enact it or send it to the ballot for voters to consider. Maine's initiative process is the indirect initiative. Initiative, Referendum, and Recall, *supra* note 4.

11. For a detailed case study of this phenomenon, see Part III.D of this Article.

In its second part, this Article argues that there is a serious flaw with the popular exercise of legislative power in Maine, namely the failure to apply legislative limitations to the direct enactment of legislation by the people. It reviews the Maine Legislature's procedural and financial rules, especially the "fiscal note" process, which allows the legislature to maintain a balanced budget as required by the Maine Constitution. It then contrasts the rigorous legislative restraints to the lack of any real restraint on the initiative process. Finally, this part highlights two recent initiative campaigns—the Maine Municipal Association initiative on increasing school funding and the Taxpayer Bill of Rights initiative on spending limits—and contrasts their mutually alluring, but contradictory goals.

In its final part, this Article argues that if the people are to responsibly exercise the legislative power, they must be required to play by the legislative rules. Therefore, this Article argues that legislation initiated by citizens should be required to comply with legislative-style financial and procedural rules, such as the legislature's "fiscal note" process, and that the policies promised in citizen initiatives should be funded within the language of the proposal. It then examines other states that impose similar limitations on the popular exercise of legislative power and debates whether Maine's Constitution requires such limitations to be added by constitutional amendment or merely by statute. This Article concludes by proposing model legislation that should be considered by the Maine Legislature.

## II. HISTORICAL BACKGROUND AND JUDICIAL REVIEW OF MAINE'S INITIATIVE PROCESS

### A. *Constitutional Convention and Constitutional Amendment*

When the framers of the Maine Constitution met in Portland in October 1819, there was no debate about allowing citizens the right to enact legislation directly through the initiative process.<sup>12</sup> Instead, over the course of four days, the delegates focused on organization of the legislative branch into two houses, apportionment of legislative electoral districts, and whether legislative pay should be set in the constitution or by statute.<sup>13</sup> In the end, the legislative power was enshrined in article IV in three parts. The third part, entitled "Legislative Power," included fifteen sections, none of which gave power to the people to enact legislation directly.<sup>14</sup>

It was not until the 1890s, during the height of the Populist Movement, that direct democracy was first considered as a necessary legislative reform in the United States.<sup>15</sup> In its 1896 platform, the People's Party demanded "a system of direct legislation, through the initiative and referendum, under proper constitutional safeguards," in order to wrench the legislative power in state capitols across the country from the grip of large business and financial interests.<sup>16</sup> Pitting the common man against the monied elite, direct democracy proponents won their first victory in 1898, when South Dakota

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12. See THE DEBATES AND JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MAINE: 1819-1820, ser. 2, at 130-227 (1894).

13. *Id.*

14. *Id.* at ser. 4, 13-34.

15. See People's Party Platform (July 24, 1896), <http://projects.vassar.edu/1896/peoplesplatform.html>.

16. *Id.*

became the first state to allow citizens the right to legislate through the initiative process.<sup>17</sup>

The idea of the citizen initiative was first proposed in Maine in 1903, but the proposal was referred to the next legislature.<sup>18</sup> In 1905, the resolve was considered and debated in both the Maine House and Senate.<sup>19</sup> Proponents argued that citizens could be trusted to vote directly on legislation because they already possessed such power on a municipal level.<sup>20</sup> Further, legislative proponents contrasted the large civic organizations that supported the amendment with the great corporate interests that opposed it.<sup>21</sup> Opponents cautioned against extending legislative power to the citizens, arguing that it was unnecessary because citizens could already get legislation introduced through their elected representatives.<sup>22</sup> The proposal won a majority vote in the House<sup>23</sup> and the Senate,<sup>24</sup> but ultimately failed because the two-thirds vote required for enactment of the constitutional amendment was not satisfied.<sup>25</sup>

After a heated election season in which both political parties supported the citizen initiative and referendum process in their partisan platforms,<sup>26</sup> the amendment passed the Maine House<sup>27</sup> and Senate<sup>28</sup> with the required two-thirds vote in 1907. It was referred to the voters for final enactment during the fall election of 1908 and subsequently approved by a vote of 53,785 to 24,543.<sup>29</sup>

The amendment added seven new sections (sections 16-22) to article IV, part 3 of the Maine Constitution, with sections 18, 19, and 22 dealing specifically with the popular exercise of legislative power by the direct initiative.<sup>30</sup> Section 18 provided that, upon written petition of at least 12,000 electors, any bill, except a constitutional

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17. Initiative, Referendum, and Recall, *supra* note 4.

18. Staff of the Maine State Law and Legislative Reference Library, Legislative History of Maine's Constitutional Provisions for the Citizen Initiative and People's Veto 1 (compiled Apr. 4, 2006) (updated Dec. 18, 2006) [hereinafter Legislative History of Maine's Constitutional Provisions] (unpublished compilation, on file with the Maine State Law and Legislature Reference Library).

19. ME. LEG. REC. H829-34, S995-84 (1905).

20. *Id.* at H829, S777 (statement of Rep. Merrill).

21. *Id.* at H830-31, S776-77.

22. *Id.* at H832-33 (March 23, 1905) (statement of Rep. Holmes). Sponsorship of bills is governed generally by Joint Rule 206. However, by tradition, members of the Maine Legislature may ask the Office of the Revisor of Statutes to designate that a bill sponsored by the member is "By Request." This tradition in the Maine Legislature is proof that citizens often approach members about sponsoring legislation and that members often sponsor such bills.

23. *Id.* at H834-35 (announcement of the vote by the Speaker).

24. *Id.* at S785 (announcement of the vote by the President).

25. *Id.* at H855 (announcement of the vote by the Speaker).

26. See 73 ME. LEG. REC. H639 (1907) (statement of Rep. Johnson).

27. *Id.* at H647 (announcement of the vote by the Speaker).

28. *Id.* at S649 (announcement of the vote by the President).

29. Legislative History of Maine's Constitutional Provisions, *supra* note 18, at 1.

30. Sections 16 and 17 provide the people with veto power over acts of the legislature, except emergency measures passed by a two-thirds vote. ME. CONST. art. IV, pt. 3, §§ 16-17. Section 21 provides for a municipal initiative process. *Id.* § 21. Section 20 provides general definitions for the other sections. *Id.* § 20.

amendment,<sup>31</sup> could be proposed directly to the Maine Legislature by the people.<sup>32</sup> If the legislature did not enact the bill without amendment before the adjourning that year, the legislation would be placed on the ballot for consideration by the people.<sup>33</sup> Section 19 provided that if the legislature did enact the initiated bill and the Governor vetoed it, the legislation would also be placed on the ballot.<sup>34</sup> Further, if the bill was enacted by popular vote, the Governor could not veto it.<sup>35</sup> Finally, section 22 empowered the legislature to enact enabling legislation “not inconsistent with the Constitution for applying the people’s veto and direct initiative.”<sup>36</sup>

Further constitutional amendments, all technical in nature, were enacted in the years following 1908, such as (1) changing the number of petition signatures required from a specific number to a percentage of votes cast during the previous gubernatorial election,<sup>37</sup> (2) changing the timing for submission of signatures,<sup>38</sup> and (3) changing the timing of referendum elections.<sup>39</sup> The only truly substantive change to the initiative process occurred in 1951, when voters approved an amendment to section 19. The amendment applied only to initiated measures that required the appropriation of state funds and it delayed the effective date of such measures until forty-five days after the next legislature convenes, unless the measure itself provided an enhanced revenue source to offset the cost.<sup>40</sup>

#### *B. Maine Law Court Analysis of Sections 16-22*

In the years since the initiative and referendum process was added to the Maine Constitution, the Maine Supreme Judicial Court, sitting as the Law Court, has taken several opportunities to clarify its purpose, scope, and mechanics.<sup>41</sup> By creating the initiative process, “the people took back to themselves part of the legislative power that in 1820 they had delegated entirely to the legislature.”<sup>42</sup> The scope of that power, the Law Court clarified, is exactly the same as that of the legislative power exercised by the legislature—the initiative “is simply a popular means of exercising the plenary legislative power.”<sup>43</sup> The subjects upon which the initiative can be exercised are broad,

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31. Under Maine’s Constitution, only the legislature, by a two-thirds vote, may convene a constitutional convention. *Id.* § 15.

32. *See id.* § 18.

33. *Id.* § 18, cl. 2.

34. *Id.* § 19.

35. *Id.*

36. *Id.* § 22.

37. Currently, the required number of such signatures is at least “10% of the total vote for Governor cast in the last gubernatorial election preceding the filing of such petition.” *Id.* § 18, cl. 2.

38. *Id.* § 18, cl. 1.

39. *See* Legislative History of Maine’s Constitutional Provisions, *supra* note 18, at 1-6.

40. L.D. 576 (95th Legis. 1951).

41. *See, e.g.,* McGee v. Sec’y of State, 2006 ME 50, ¶¶ 20-21, 896 A.2d 933, 940; League of Women Voters v. Sec’y of State, 683 A.2d 769, 771 (Me. 1996); Allen v. Quinn, 459 A.2d 1098, 1098, 1100-01 (Me. 1983); Opinion of the Justices, 370 A.2d 654, 667-69 (Me. 1977); Opinion of the Justices, 191 A.2d 357, 359-60 (Me. 1963); Farris *ex rel.* Dorsky v. Goss, 60 A.2d 908, 911 (Me. 1948).

42. *Allen*, 459 A.2d at 1098.

43. *League of Women Voters*, 683 A.2d at 771.

being limited only by other provisions of the constitution.<sup>44</sup> Therefore, legislation affecting spending or taxation is a proper subject for the initiative;<sup>45</sup> legislation about the issuance of bonds, however, is not proper because the assumption of indebtedness is reserved exclusively to the legislature under article IX, section 14.<sup>46</sup>

The Law Court has also taken the opportunity to opine more broadly about the methodology by which the initiative provisions of the constitution are to be interpreted. For instance, pursuant to section 22, the Maine Legislature is given the power to “enact laws to implement the direct initiative . . . [but] such laws . . . must be consistent with the constitutional provision[s] setting up the direct initiative.”<sup>47</sup> When such implementing statutes are evaluated for their constitutionality, the “constitutional provision[s] must be liberally construed to facilitate, rather than to handicap, the people’s exercise of their sovereign power to legislate.”<sup>48</sup> Therefore, any statute regulating the constitutional initiative process may not “directly or indirectly abridge” the absolute right of the people to legislate through the initiative process.<sup>49</sup>

### III. THE PROBLEM

#### A. *Balanced Budget Requirements in Maine*

Unlike its federal counterpart, Maine’s government must achieve a balanced budget each fiscal year.<sup>50</sup> Both by inference from constitutional provisions and more directly by statute, Maine’s Legislature and Governor must ensure that revenues and expenditures are balanced annually. The Maine Constitution prohibits the legislature from “creat[ing] any debt . . . on behalf of the State, which shall singly, or in the aggregate . . . exceed \$2,000,000, except to suppress insurrection, to repel invasion, or for the purposes of war.”<sup>51</sup> Furthermore, by statute, the Governor is required to submit a budget proposal that “show[s] the balanced relations between the total proposed expenditures and the total anticipated revenues.”<sup>52</sup> In tandem, these two provisions create the requirement of a balanced budget.<sup>53</sup>

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44. *Id.*

45. *Opinion of the Justices*, 370 A.2d at 667.

46. *Opinion of the Justices*, 191 A.2d at 214. Issuance of bonds may only occur upon a two-thirds vote of both the House and Senate and ratification by a majority of electors voting in the general or special election. *Id.*

47. *Allen*, 459 A.2d at 1100; *see also* ME. CONST. art. IV, pt. 3, § 22.

48. *Allen*, 459 A.2d at 1102.

49. *McGee*, 896 A.2d at 940; *see also Farris*, 60 A.2d at 911.

50. Although the State of Maine enacts biennial budgets during the first session of each legislature, each of the two fiscal years must be independently in balance. Thus, just because the first year of the biennium is in surplus does not technically allow the second year to operate in deficit. However, if there is an ending surplus, any amount that is not allocated automatically by statute may be carried over to the next fiscal year.

51. ME. CONST. art. IX, § 14.

52. ME. REV. STAT. ANN. tit. 5, § 1664(1)(B) (Supp. 2008-2009).

53. While the tandem of these two provisions creates an inference of a balanced budget, legislators, the Governor, the press, and the public treat the situation as if the constitution specifically requires a balanced budget. The perception is so strong that many legislators, if asked, would state that there is an absolute constitutional requirement.



*B. Legislative Rules*

In order to help maintain a balanced budget each year, the Maine Legislature developed a “fiscal note” process during the 103rd Legislature in 1966.<sup>54</sup> A fiscal note is a “brief description[] of the effect of a bill or amendment on the finances of Maine State Government.”<sup>55</sup> The notes are prepared by the Maine Legislature’s non-partisan Office of Fiscal and Program Review (OFPR) and their purpose is to provide “information to Legislators so they can better understand the fiscal impact of a bill or amendment when making decisions.”<sup>56</sup>

To understand the fiscal note process as it exists within the larger context of the legislative process, consider a hypothetical situation that might occur following House Candidate’s election to the Maine House of Representatives. House Member, pursuant to her new authority as an elected official, introduces a bill, “An Act to Increase State Funding to Local Public Schools by \$500,000,000,” to the Maine Legislature.<sup>57</sup> The technical aspects of the bill are drafted by the Office of the Revisor of Statutes<sup>58</sup> and House Member convinces other members of the legislature to sign on to her bill as co-sponsors.<sup>59</sup> The bill is then presented to the House, which refers it to the policy committee of jurisdiction<sup>60</sup>—the Maine Legislature’s Joint Standing Committee on Education and Cultural Affairs—for thorough consideration.<sup>61</sup> The Senate concurs in the action and the bill is referred.<sup>62</sup>

The Education Committee then schedules a public hearing, providing sufficient notice to interested parties that their comments on the proposal are welcome.<sup>63</sup> Weeks later, the committee holds the public hearing where members of the public testify for or against the bill.<sup>64</sup> Following the hearing, the committee begins more deliberative work on the bill in a meeting known as a work session, which, while open to the public for observation, is not open to the public for comment.<sup>65</sup> The committee debates the proposal and ultimately votes unanimously to recommend the bill “Ought to Pass” to the full legislature.<sup>66</sup> At this time, the OFPR, pursuant to Joint Rule 312, prepares a

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54. THE FISCAL NOTE PROCESS: AN OVERVIEW, pt. II (2007), <http://www.maine.gov/legis/ofpr/overview123.htm>.

55. *Id.* at pt. I.

56. *Id.* at pts. I-II.

57. In the First Regular Session, all bills that are not duplicative may be submitted. ME. JOINT RULE 202, 206 (123d Legis. 2007). During the Second Regular Session, legislators are greatly limited by the Maine Constitution to submitting “legislation of an emergency nature admitted by the Legislature.” ME. CONST. art. IV, pt. 3, § 1. Such legislation is only admitted with approval of a majority of the Legislative Council. ME. JOINT RULE 203 (123d Legis. 2007).

58. ME. JOINT RULE 201-03, 208 (123d Legis. 2007).

59. *See id.* RULE 206. Unless specifically allowed to do so by the presiding officers of the House and Senate, a bill is limited to nine co-sponsors. *Id.*

60. *Id.* RULE 308. The policy committees of the legislature are formed to “assist the Legislature in the performance of its constitutional duties.” *Id.* RULE 301.

61. *Id.* RULE 301.

62. *See id.* RULE 308.

63. *See id.* RULE 305. “Public hearings must be advertised 2 weekends in advance of the hearing date.” *Id.* Testimony given to the committee is not under oath. *Id.* RULE 307.

64. *See id.*

65. *See id.* RULE 305.

66. *See id.* RULE 310.

fiscal note for the bill in consultation with any affected state department or agency.<sup>67</sup> The fiscal note is a technical amendment to the bill that details the effects of the proposed legislation on state revenues, appropriations, and allocations.<sup>68</sup> The fiscal note is incorporated into the bill by a vote of the committee before it is “reported out,” or sent to the full legislature.<sup>69</sup>

The bill is then sent to the House of Representatives for two readings<sup>70</sup> on what is known as the “consent calendar.”<sup>71</sup> Following these readings, during which any member can object, debate, or call for a vote,<sup>72</sup> the bill is sent to the Senate for the same two readings with the same opportunity to object, debate, or vote.<sup>73</sup> The bill is then sent back to the House, where a motion is made to “engross” the bill.<sup>74</sup> Such a motion is debatable and subject to a vote, and at this time members may offer any amendments that they find necessary or desirable, so long as such amendments are relevant to the subject of the bill.<sup>75</sup> The same process then occurs in the Senate.<sup>76</sup> Finally, the bill is sent back to the House for a debate and vote on whether the bill should be enacted as law.<sup>77</sup>

The bill is then sent to the Senate for enactment, but instead of finally enacting it and sending it to the Governor for signature or veto, House Member’s bill is set aside pending enactment on the Special Appropriations Table in the Senate because it requires the appropriation of \$500 million.<sup>78</sup> There the bill lies “until the end of the Legislative session after decisions on the budget bills have been made.”<sup>79</sup> At that time, the Maine Legislature’s Appropriations Committee considers all bills lying on the Special Appropriations Table in light of remaining revenues after budget bills have

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67. *Id.* RULE 312. Joint Rule 312 states:

Every bill or resolve that affects state revenues, appropriations, or allocations . . . and that has a committee recommendation other than “Ought Not to Pass” or “Referral to Another Committee” must include a fiscal note. This statement must be incorporated in the bill before it is reported out of committee. Any amendment introduced that would affect the fiscal impact of the original bill must also include a fiscal note. The Office of Fiscal and Program Review has the sole responsibility for preparing all fiscal notes.

*Id.*

68. *Id.*

69. *Id.*

70. ME. HOUSE RULE 516 (123d Legis. 2007).

71. *Id.* RULE 519.

72. *Id.* RULE 401.

73. ME. SENATE RULE 509, 510 (123d Legis. 2007).

74. ME. HOUSE RULE 517 (123d Legis. 2007).

75. *Id.* RULE 506-07.

76. ME. SENATE RULE 511 (123d Legis. 2007).

77. ME. JOINT RULE 405 (123d Legis. 2007).

78. The Special Appropriations Table is created by a Senate order, usually on the first day of the First Regular Session. THE FISCAL NOTE PROCESS: AN OVERVIEW, *supra* note 54, at app. A-1. The Order usually reads:

Ordered, that all Bills and Resolves carrying or requiring an appropriation or involving a loss of revenue that are in order to be passed to be enacted, or finally passed, shall, at the request of a member of the Committee on Appropriations and Financial Affairs, be placed on a special calendar to be called up for consideration only by a member of the Committee.

*Id.*

79. *Id.* at pt. II.

been enacted.<sup>80</sup> If there is not sufficient revenue to fund a proposal, it is killed by the Senate.<sup>81</sup> If the House agrees with the Senate, the bill is declared dead.<sup>82</sup> If the House disagrees with the Senate, the bill is dead in “non-concurrence.”<sup>83</sup>

As the proceeding hypothetical indicates, the legislative process contains multiple procedural and financial hurdles over which any legislation affecting revenues or expenditures must leap. Throughout the fiscal note process, “[t]he Legislature has established procedures for tracking and making sure that bills that affect the General Fund . . . are coordinated with the overall budget decisions.”<sup>84</sup> Therefore, because of Maine’s balanced budget requirements detailed above, House Member’s laudable bill to increase state funding of public education will likely never become law due to a lack of resources required to fund it—the institutional rules of the legislative process are simply too rigorous.

### C. *The Mechanics of the Initiative Process*

While the original initiative provisions of the Maine Constitution spelled out the mechanics of the initiative process in great detail,<sup>85</sup> they imposed no financial limitations on the popular exercise of legislative power. The lone fiscal restraint on policies enacted by initiative was imposed by a constitutional amendment that was passed by the Maine Legislature without debate in May 1951 and ratified by voters in September 1951 by a vote of 27,746 in favor and 20,900 opposed.<sup>86</sup> The amendment to section 19 added a provision that any measure enacted through the initiative process “which entails expenditure in an amount in excess of available and unappropriated state funds shall remain inoperative until 45 days after the next convening of the legislature in regular session, unless the measure provides for raising new revenues adequate for its operation.”<sup>87</sup> However, the Law Court later clarified that any measure rendered inoperative for the period described in section 19 operates retroactively once it becomes law.<sup>88</sup> This provision of section 19, which is a limited restraint under the Law Court’s later clarification, remains the lone financial limitation on the popular exercise of the legislative power.

For the purpose of comparison, reconsider the hypothetical above about House Member’s bill, “An Act to Increase State Funding to Local Public Schools by \$500,000,000,” which failed final enactment on the legislature’s Special Appropriations Table due to lack of available funding. Instead of House Member proposing the bill, however, assume it was initiated by a group of citizens under the provisions of the Maine Constitution.

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80. *Id.*

81. *Id.*

82. ME. HOUSE RULE 503 (123d Legis. 2007).

83. THE FISCAL NOTE PROCESS: AN OVERVIEW, *supra* note 54, at pt. II; ME. JOINT RULE 402 (123d Legis. 2007).

84. THE FISCAL NOTE PROCESS: AN OVERVIEW, *supra* note 54, at pt. II.

85. See ME. CONST. art. IV, pt. 3, §§ 18-20.

86. Legislative History of Maine’s Constitutional Provisions, *supra* note 18, at 2.

87. L.D. 576 (95th Legis. 1951); Comm. Amend. A to L.D. 576, No. 409 (95th Legis. 1951).

88. Opinion of the Justices, 460 A.2d 1341, 1347 (Me. 1982).

After gathering the constitutionally-required number of signatures in favor of the proposal and having them duly authenticated by the Secretary of State, the initiated measure is sent to the legislature for consideration.<sup>89</sup> It is referred to the Education Committee as before, a public hearing is held, and the committee votes the bill “Ought to Pass” following a work session. The bill then returns to the House and Senate for the same series of votes as before.

The legislature has three choices. First, it can pass the bill as drafted by the group of citizens.<sup>90</sup> However, due to the fiscal note requirements of the legislature, the bill would be sent to the Special Appropriations Table where, as noted above, it would likely die due to lack of funding.<sup>91</sup> Because the provisions of the constitution require an initiated bill to be enacted by the legislature in the session it is presented or be sent to the people for consideration, the effect of this scenario would be to place the bill on the ballot at the next election.<sup>92</sup> Second, the legislature can reject the bill and send it directly to voters for enactment as drafted.<sup>93</sup> Finally, the legislature can amend the bill and send both the original measure and a “competing measure” to voters for their consideration.<sup>94</sup> The voters would have the option of choosing one of the measures or rejecting both.<sup>95</sup> If neither of the measures received a majority of the votes cast, the measure garnering the most votes would be re-submitted to voters during the next election.<sup>96</sup>

If the original proposal is enacted by the people under either the second or third option detailed in the preceding paragraph, the provisions of section 19 are triggered.<sup>97</sup> Therefore, because the measure entails the expenditure of funds beyond those available and unappropriated, it will remain inoperative until forty-five days after the next legislature convenes in regular session.<sup>98</sup> At that time, however, the measure will become operative and the legislature will be required to find the \$500 million necessary for the legislation’s implementation. The result is clear—the legislation can become law if the legislative power is exercised by the people, but not if it is exercised by the legislature, because the latter exercise of the legislative power is constrained by procedural and financial rules of accountability, like the fiscal note process.

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89. See ME. CONST. art. IV, pt. 3, § 18, cl. 2. The required “number of signatures shall not be less than 10% of the total vote for Governor cast in the last gubernatorial election preceding the filing of such petition.” *Id.*

90. *Id.* According to section 18, the proposed measure is to be submitted to the people for a vote “*unless enacted* without change by the Legislature at the session at which it is presented . . . .” *Id.* (emphasis added).

91. While section 18 states that such measures must be enacted “without change by the Legislature,” *id.*, informal opinions from the Maine Attorney General’s Office have consistently concluded that adding a fiscal note to an initiated bill does not constitute a substantive change. Thus, adding a fiscal note would not alone trigger the “competing measure” provisions.

92. See ME. CONST. art. IV, pt. 3, § 18, cl. 2.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* § 19.

98. *Id.*

*D. Contradictory Initiatives*

As discussed above, because Maine's initiative process occurs primarily outside the deliberative legislative process, it is not subject to the process's procedural and financial rules. The necessity of compromise and the checks and balances that restrain lone politicians from delivering on contradictory campaign promises is not present in the initiative process. For instance, the campaign platform of House Candidate, outlined in the introduction, contains contradictory ideas. On the one hand, she proposes to expand funding for popular government programs. On the other, she promises not to raise taxes, thus refusing to raise the revenue necessary to implement her program expansions. Her only other option is to reduce spending in other areas, yet she proposes no such ideas. Because of the balanced budget requirements and fiscal note process of the Maine Legislature, House Member will be restrained from implementing her proposals because they are unrealistic, unaffordable, and contradictory.

Maine's initiative process, however, which allows for popular exercise of the legislative power, is totally divorced from these legislative realities. Nothing restrains voters from proposing and enacting legislation based on fundamentally contradictory ideas that ignore and subvert the constitutional requirement of a balanced budget. Recent electoral history in Maine illustrates this point.

In 2003, the Maine Municipal Association (MMA) and other groups gathered over 100,000 signatures to place the "School Finance Act of 2003" before the Maine Legislature.<sup>99</sup> The proposal required the state to "pay 55% of the cost of public education. . . ."<sup>100</sup> The additional cost to the state was estimated at roughly \$500 million over the first biennium of implementation and it required the increased funding to take effect immediately.<sup>101</sup> However, the bill contained no funding mechanism, leaving such issues for the legislature to deal with. The legislature considered the bill and voted instead for a competing measure that spread the cost over five years because it could not figure out a way to pay the \$500 million cost immediately within the balanced budget requirements of the constitution.<sup>102</sup> Therefore, both measures were sent to voters in November 2003, with the additional option to reject both.<sup>103</sup> Because none of the three options garnered a majority of the votes cast, the initiated measure, which received the most total votes, was carried over to the June 2004 election.<sup>104</sup> At that election, the MMA's initiated proposal was enacted by voters, with 55 percent voting in favor and 45 percent opposed.<sup>105</sup>

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99. *School Finance Act of 2003: Hearing on LD 1372 before the Legislature's Joint Standing Committee on Taxation*, 121st Leg., 1st Reg. Sess. (Me. 2003) (statement of Dana K. Lee, President of "Citizens to Reduce Local Property Taxes Statewide").

100. STATE OF ME., DEP'T OF THE SEC'Y OF STATE, MAINE CITIZEN'S GUIDE TO THE REFERENDUM ELECTION (2003) [hereinafter MAINE CITIZEN'S GUIDE (2003)], <http://www.maine.gov/sos/cec/elec/2003n/intco03n.htm>.

101. Pat Colwell, *School Funding and Property Tax Relief*, BANGOR DAILY NEWS, Sept. 20, 2003, at A-11.

102. *Id.*

103. See MAINE CITIZEN'S GUIDE (2003), *supra* note 100.

104. STATE OF ME., DEP'T OF THE SEC'Y OF STATE, REFERENDUM ELECTION TABULATIONS (Nov. 4, 2003), <http://www.maine.gov/sos/cec/elec/2003n/gen03sum.htm>.

105. STATE OF ME., DEP'T OF THE SEC'Y OF STATE, REFERENDUM ELECTION TABULATIONS (June 8, 2004), <http://www.maine.gov/sos/cec/elec/2004/pri04ref.htm>.

Only two years after 55 percent of Maine voters enacted a law requiring the state to increase expenditures by \$500 million per biennium without any mechanism to pay for it, another group of citizens, led by Mary Adams, initiated a bill entitled, “An Act to Create a Taxpayer Bill of Rights” (TABOR), by gathering over 51,000 signatures.<sup>106</sup> The bill proposed to “restrain the growth in state . . . government by imposing expenditure limitations on state . . . government.”<sup>107</sup> Under this bill, state expenditures were limited to the rate of increase in population plus inflation.<sup>108</sup> According to its fiscal impact statement, the legislation would have decreased available government revenues by over \$7 million in the first year of its implementation and over \$14 million in the second year, all at a time when the Maine Legislature was grappling with a way to continue to fund the \$500 million education bill initiated only two years earlier by voters.<sup>109</sup> In the election, TABOR was narrowly defeated, with nearly half of all voters supporting its contradictory mandate.<sup>110</sup>

The MMA and TABOR initiatives, both initiated by citizens in Maine within a two-year period, clearly demonstrate the problems created by an initiative process without financial limitations. The legislature cannot increase state spending on popular programs while also cutting state taxes—both the balanced budget requirements and the fiscal note process prevent the enactment of such contradictory ideas. Through the deliberative legislative process, crafty elected officials can broker compromises to implement all, or at least some, of these priorities. For instance, by cutting spending on less essential programs or by raising certain taxes, the legislature might be able to provide increased school funding, though not likely \$500 million. Likewise, legislators might decrease expenditures to enable a tax cut. However, these strategies require more deliberation and compromise than is available through the initiative process.

By contrast, through the initiative process, voters are presented with seductive ideas in a vacuum. Voters are asked, “Do you favor more spending on schools?” or “Do you favor lower taxes?”, but they are not presented with full and honest choices. More spending on schools means less spending on other programs or a tax increase. Less taxes means less spending—possibly on schools. Yet Maine voters are not presented with such choices—the problem is clear.

#### IV. THE SOLUTION

##### A. *The Mechanics*

The solution to the problems discussed above is to apply financial limitations on the popular exercise of legislative power that are similar to those imposed on the legislature. By doing so, the initiative process will become more deliberative, the enactment of bills that are unrealistic, unaffordable, or contradictory will be restrained, and compliance with Maine’s balanced budget requirements will be strengthened.

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106. STATE OF ME., DEP’T OF THE SEC’Y OF STATE, MAINE CITIZEN’S GUIDE TO THE REFERENDUM ELECTION (2006) [hereinafter MAINE CITIZEN’S GUIDE (2006)], <http://www.maine.gov/sos/cec/elec/2006/intent06.html>; see also *McGee*, 2006 ME 50, ¶ 3, 896 A.2d at 936.

107. *McGee*, 2006 ME 50, ¶ 3, 896 A.2d at 936.

108. *Id.*

109. *Id.*

110. MAINE CITIZEN’S GUIDE (2006), *supra* note 106.

Therefore, two simple procedural modifications should be made to the initiative process. Currently, under Maine law, any citizen wishing to initiate legislation must file a written application to the Secretary of State that includes the full text of the proposed law.<sup>111</sup> The Secretary must review the application and ensure that it is in the “proper form,” as described in the statute.<sup>112</sup> If changes are necessary, the Secretary works with the Maine Legislature’s Office of the Revisor of Statutes to help the citizen make technical corrections.<sup>113</sup> Once the proposed law is in the “proper form,” the Secretary and the applicant draft the ballot question and the petition can begin its circulation for signatures.<sup>114</sup> Both of the necessary modifications have to do with what is required of a citizen prior to the Secretary’s certification that the initiative is in the “proper form.”

The first proposed modification is to require the Secretary to submit the citizen’s proposal to the legislature’s OFPR prior to petition circulation to determine if it has a fiscal impact, such as a revenue reduction or an additional appropriation beyond the cost of conducting a referendum on the proposal. If it does have such an impact, the OFPR should develop a formal fiscal note for the proposal. The citizen should be provided with this fiscal note by the Secretary and be required to submit a revised draft that includes a section identifying a funding source to offset the fiscal note. For instance, if the proposal would require additional appropriations, the citizen should be required to either designate a specific tax to increase to cover the cost or a specific de-appropriation from another government program. The citizen should be provided with technical assistance in this process by OFPR. Until the citizen submits a revised version of the proposal to the Secretary, the application should be considered to be in improper form.

Once the citizen develops a proposed law with a balanced fiscal note, a second modification is necessary. Before the petition is circulated, the ballot question should be amended to describe, in simple terms, both the fiscal impact of the proposed law and the means by which that additional cost would be addressed. Therefore, if a citizen wished to initiate the school finance bill discussed above, with an additional cost of \$500 million, the ballot question might ask, “Do you favor increasing State aid to local education by \$500,000,000 by raising the sales tax by X%?” Once the proposed law and the ballot question are in proper form, and the petition is approved by the Secretary of State, the citizen would be free to begin circulating the petition.

The last remaining question regarding the two proposed modifications is whether they can, or should, be enacted as amendments to current statute or whether such changes necessitate amendments to Maine’s Constitution.

### *B. Statutory Approach*

The provisions of the Maine Constitution allow, and in fact direct, the legislature to enact procedures to implement the initiative process.<sup>115</sup> As noted above, the Law

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111. ME. REV. STAT. ANN. tit. 21-A, § 901 (2008).

112. *Id.* § 901(3-A).

113. *Id.*

114. *Id.* § 901(4).

115. ME. CONST. art. IV, pt. 3, § 22.

Court has clarified this legislative authority through its opinions.<sup>116</sup> In its decisions, the Law Court directed that any implementing statute must be consistent with the constitution.<sup>117</sup> Furthermore, an implementing statute must “facilitate, [not] handicap, the people’s exercise of their sovereign power to legislate,”<sup>118</sup> and it must not “directly or indirectly” abridge the “absolute right” of the people “to initiate and seek to enact legislation.”<sup>119</sup>

The legislature has used this constitutional authority to enact a wide variety of statutes promulgating procedures to facilitate the initiative process.<sup>120</sup> The most important of these statutes is title 21-A, section 901 of the Maine Revised Statutes.<sup>121</sup> This section includes a long list of procedural requirements in order for a citizen to obtain and circulate an initiative petition. The two modifications described above add two additional requirements that would have to be satisfied prior to the Secretary certifying that the initiative is in “proper form.” By merely amending Maine law to include the financial limitations, the necessary changes might be accomplished. However, amending the statute to include these requirements would undoubtedly precipitate a constitutional challenge.

Opponents would likely challenge the modifications by arguing that the Maine Constitution specifically deals with initiatives that have fiscal consequences. They would further contend that the 1951 amendment already addresses the issue and thus preempts any statute on the subject. Because the Maine Constitution prohibits such legislation from becoming operative until forty-five days after the convening of the next legislative session,<sup>122</sup> they would argue that the people clearly expressed their right to enact such legislation and their desire to leave the funding problem to the next legislature. Thus, if the statute was allowed to stand, the constitutional provision allowing for such legislation would become a nullity. Therefore, because any implementing legislation for the initiative provisions must be consistent with the constitutional provisions, opponents would argue that such a statute is unconstitutional because it directly conflicts with the people’s absolute right to legislate by initiative.

Proponents of the additional statutory requirements would likely defend the law by arguing that article IV, part 3, section 18 of the Maine Constitution merely gives citizens the right to propose legislation by gathering signatures on a petition and submitting it to the Maine Legislature—the mechanics and procedures of the petition process are clearly left to implementing legislation. Therefore, they would contend that the legislature has already prescribed numerous procedural hoops through which citizens must jump prior to being allowed to lawfully circulate an initiative petition<sup>123</sup>

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116. See, e.g., *McGee v. Sec’y of State*, 2006 ME 50, ¶¶ 20-21, 896 A.2d 933, 940; *League of Women Voters v. Sec’y of State*, 683 A.2d 769, 771 (Me. 1996); *Allen v. Quinn*, 459 A.2d 1098, 1098, 1100-01 (Me. 1983); *Opinion of the Justices*, 370 A.2d 654, 667-69 (Me. 1977); *Opinion of the Justices*, 191 A.2d 357, 359-60 (Me. 1963); *Farris ex rel. Dorsky v. Goss*, 60 A.2d 908, 911 (Me. 1948).

117. See *Allen*, 459 A.2d at 1100.

118. *Id.* at 1102-03.

119. *McGee*, 2006 ME 50, ¶ 21, 896 A.2d at 940; see also *Farris*, 60 A.2d at 911.

120. See, e.g., ME. REV. STAT. ANN. tit. 21-A, § 901 (2008); ME. REV. STAT. ANN. tit. 21-A, § 903-A (2008).

121. *Id.* § 901 (2008).

122. ME. CONST. art. IV, pt. 3, § 19.

123. See ME. REV. STAT. ANN. tit. 21-A, § 901 (2008).



and adding a few minor financial limitations would not “handicap” or “directly or indirectly abridge” the people’s exercise of their initiative power. In fact, proponents would argue that the financial limitations would simply impose the same rules on popular exercise of the legislative power as the legislature imposes on its own exercise of the same power in furtherance of the constitution’s balanced budget requirement. Further, the statutory and constitutional provisions are not directly inconsistent because they can operate concurrently and in tandem, with each applying under certain circumstances.

Though both the opponents and proponents of the statutory approach would be able to articulate strong arguments, a recent Law Court ruling on the initiative process seems to bode ill for the statute’s constitutionality. In 2006, in *McGee v. Secretary of State*,<sup>124</sup> the Law Court reviewed section 903-A, a then-newly enacted statutory amendment that limited the circulation time for initiative petitions to one year from the date of issuance. In that case, the court found the statute directly inconsistent with section 18 of the Maine Constitution, which states that only signatures no more than one year old may be considered valid.<sup>125</sup> Despite the legislature’s good intentions in enacting the statute,<sup>126</sup> the Law Court struck down the statute as a “substantial restriction” that imposed requirements on the initiative process that were “inconsistent with the circulator’s more flexible options provided by the Constitution.”<sup>127</sup> Therefore, the basic lesson of *McGee* is that any statutory provision promulgating procedures for the initiative process must not restrict flexibility implied by the constitutional provisions.

Applying this holding to the statutory provisions proposed above, it seems reasonably clear that they suffer from the type of constitutional infirmity described in *McGee*. Under section 18 of the constitution, citizens seem to have the flexibility to enact laws that do not include sufficient funding for their implementation. Under the statutory amendments to section 901 proposed here, such flexibility is removed through the procedures required to make the initiative application in “proper form” for the Secretary of State. Given these potential constitutional infirmities, proponents of financial limitations on the initiative process should consider making these changes by constitutional amendment.

### C. Constitutional Approach

By adding the financial limitations described above by a constitutional amendment to either sections 18, 19, or both, proponents would avoid the pitfalls of possible constitutional infirmity of the provisions. However, unlike amending a statute, the process of amending the Maine Constitution is rigorous.<sup>128</sup> Instead of enactment by a simple majority of each body of the legislature and signature by the Governor, a

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124. 2006 ME 50, 896 A.2d 933.

125. *Id.* ¶ 34, 896 A.2d at 943; *see* ME. CONST. art. IV, pt. 3, § 18, cl. 2.

126. *McGee*, 2006 ME 50, ¶ 39, 896 A.2d at 944.

127. *Id.* ¶ 33, 896 A.2d at 943.

128. Maine’s Constitution may only be amended if the process is begun by the legislature with two-thirds votes in each chamber. ME. CONST. art. X, § 4. Thus, the constitution cannot be amended via the initiative process. However, Maine’s Constitution is amended with infinitely greater regularity than the Federal Constitution.

constitutional amendment requires a supermajority vote in each body for the amendment to be proposed and a simple majority of voters to ratify it at the polls.<sup>129</sup> Therefore, although the statutory approach must confront the possibility of a constitutional challenge, the constitutional approach must confront the possibility that a supermajority of the legislature might not vote in support of the amendment, or the voters might reject it at the polls.

Although the constitutional approach must overcome the significant challenges detailed above, it does benefit from a simple advantage. Although no other state in the United States imposes financial limitations of the type proposed here by statute, several states do so in their constitutions.<sup>130</sup> For instance, in Arizona, the constitution requires that any initiative measure that “proposes a mandatory expenditure of state revenues . . . must also provide for an increased source of revenues sufficient to cover the entire immediate and future costs of the proposal.”<sup>131</sup> In Mississippi, the sponsor of an initiative must “identify in the text of the initiative the amount and source of revenue required to implement the initiative.”<sup>132</sup> In Missouri, the initiative may “not be used for the appropriation of money other than of new revenues created and provided” in the initiative question.<sup>133</sup> Finally, in Nevada, the initiative process may not be used to appropriate money “unless such statute or amendment also imposes a sufficient tax.”<sup>134</sup>

If the proponents of the financial limitations wish to amend the Maine Constitution, they would be wise to model their amendment on one of the several amendments referenced above. The amendment that most closely mirrors the goals of this Article comes from Mississippi. Mississippi’s amendment clearly states that it is the sponsor’s duty to identify the “amount and source of revenue required to implement the initiative” in the text of the question to be considered by voters.<sup>135</sup> Further, to avoid any ambiguity, the constitutional provision identifies what types of sources are available. First, the sponsor may raise revenue through taxes or fees, but it is the sponsor’s responsibility to be specific regarding the source of the revenue. Second, if the sponsor wishes to fund the initiative by reducing government spending in some other area, “the sponsor shall identify in the text of the initiative the program or programs whose funding must be reduced or eliminated to implement the initiative.”<sup>136</sup> Therefore, citizens in Mississippi who sponsor initiatives are given clear guidance and direction about both their rights in the initiative process (they are allowed to propose laws that increase expenditures or lower revenues) and also their responsibilities (they are required to fund the expenses of such legislation through specific revenue increases or spending reductions to current programs).

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129. *Id.*

130. National Conference of State Legislatures, *Restrictions on the Dedication of Revenue via the Initiative: Selected States’ Constitutional Provisions* (April 2007) (on file with author).

131. ARIZ. CONST. art. 9, § 23.

132. MISS. CONST. art. 15, § 273, cl. 4.

133. MO. CONST. art. III, § 51.

134. NEV. CONST. art. 19, § 6.

135. MISS. CONST. art. 15, § 273.

136. *Id.*

## V. CONCLUSION

In *League of Women Voters v. Secretary of State*, the Law Court clearly stated that the “exercise of the initiative power by the people is simply a popular means of exercising the plenary legislative power.”<sup>137</sup> When the legislature exercises its legislative power, it does so through a deliberative process filled with checks, balances, and compromise. Most importantly, the legislature has imposed procedural and financial limitations on its ability to enact laws having fiscal consequences in order to help it maintain a balanced budget each year, as required by the Maine Constitution.

While the initiative process allows Maine citizens a mechanism by which they can exercise this legislative power partially independent of the legislature, the process’s lack of procedural and financial limitations creates situations where initiatives have the potential to enact contradictory ideas without directly confronting the immense financial consequences of such action, as evidenced by the MMA and TABOR initiatives in 2004 and 2006 respectively.

This clear deficiency in the initiative process cries out for a solution, whether it is statutory or constitutional in nature. Popular exercise of legislative power should be subject to the same sorts of procedural and financial rules imposed on the legislative exercise of legislative power; citizens exercising such power should have the same duties and responsibilities as legislators. By imposing financial limitations on the initiative power, the right of the people to exercise legislative power is not restricted or limited. Rather, a simple and equitable result is reached: if citizens wish to exercise the legislative power, they should play by the legislative rules. By imposing these rules, the initiative process will become more deliberative, the enactment of bills that are unrealistic, unaffordable, or contradictory will be restrained, and compliance with Maine’s balanced budget requirement will be strengthened.

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137. 683 A.2d 769, 771 (Me. 1996).