

**OFFICE OF POLICY AND LEGAL ANALYSIS**

**Date:** March 3, 2021  
**To:** Veterans and Legal Affairs Committee  
**From:** Janet Stocco, Legislative Analyst

**LD 202 RESOLUTION, Proposing and Amendment to the Constitution of Maine To Implement Ranked-choice Voting (Senator Miramant)**

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**SUMMARY**

This resolution proposes to amend various provisions of the Constitution of Maine to require candidates for the offices of Governor, State Senator and State Representative to be elected by a majority vote rather than a plurality vote, as is required currently. The resolution replaces the phrases “plurality of [all / the / all of the] votes” with the phrases “majority of [all / the / all of the] votes” in the four provisions of the Maine Constitution that describe which candidate has been elected to the following offices:

Constitutional Provision	Office	Proposed Constitutional Amendment
Art. IV, pt. 1, § 5	State Representative	“elected by a <del>plurality</del> <u>majority</u> of all votes returned”
Art. IV, pt. 2, § 4	State Senate	“elected by a <del>plurality</del> <u>majority</u> of the votes in each senatorial district”
Art. IV, pt. 2, § 5	State Senate	“elected by a <del>plurality</del> <u>majority</u> of votes” and “elect by a <del>plurality</del> <u>majority</u> of votes”
Art. V, pt. 1, § 3	Governor	“choice by <del>plurality</del> <u>majority</u> of all of the votes returned”

**ADDITIONAL INFORMATION**

- **Constitutional Amendment Procedure.** Under Article X, § 4 of the Constitution of Maine:
- The Legislature may, by a 2/3 vote in each chamber in favor of a Constitutional Resolution, propose an amendment to the Constitution of Maine;
  - The Constitutional Resolution is then submitted to the voters for ratification by majority vote in an election held the following November.

The Governor does not have the opportunity to sign or to veto the Constitutional Resolution; thus, the Constitutional Resolution may not include amendments to the Maine Revised Statutes.

- **Current law: ranked-choice voting (RCV).**
- **Covered Elections:** Pursuant to [21-A M.R.S. § 1\(27-C\)](#), the following elections are conducted using RCV in the State if there are 3 or more candidates qualified to appear on the ballot for an

office **or** if there are at least 2 candidates qualified to appear on the ballot for an office and at least one declared write-in candidate for that office:

- A. Primary elections for the offices of United States Senator, United States Representative to Congress, Governor, State Senator and State Representative;
- B. General and special elections for the offices of United States Senator and United States Representative to Congress;
- D. General elections for presidential electors; and
- E. Primary elections for the office of President of the United States.

- **RCV procedures.** The procedures through which a candidate is declared the winner in an election determined by RCV are set forth [21-A M.R.S. § 723-A](#) and the [rules adopted](#) by the Office of the Secretary of State. These procedures are also summarized in the memorandum attached to the Secretary of State’s [testimony](#) and on the Secretary of State’s [website](#).
- **RCV and the “plurality” requirements of the Maine Constitution.** In November 2016, *An Act To Establish Ranked Choice Voting*, a citizen-initiated bill, was approved by the voters. [I.B. 2017, ch. 3](#). Under this Act, RCV would have applied to all elections—primary, general and special elections—for U.S. Senator, U.S. Representative to Congress, Governor, State Senator and State Representative. In response, the Maine Senate sought an advisory opinion from the Justices of the Maine Supreme Judicial Court under [Art. 6, § 3](#) of the Constitution of Maine on several questions, including whether “the method of ranked-choice voting established by the Act in elections for Representative, Senator and Governor violate the provisions of the Constitution of Maine”—*i.e.*, the constitutional provisions quoted in the chart above— “which declare that the person elected shall be the candidate who receives a plurality of all of the votes counted and declared by city and town officials as recorded on lists returned to the Secretary of State”?

The Justices unanimously answered this question in the affirmative: in any general election for State Representative, State Senator or Governor in which there are more than 2 candidates, the Justices opined, the Act “is in direct contradiction to the plurality requirements of the Maine Constitution” because it “would not declare the plurality candidate the winner of the election, but would require continued tabulation until a majority is achieved or all votes are exhausted.” [Opinion of the Justices, 2017 ME 100, ¶65](#). Although this opinion was “advisory only, and [did] not provide binding precedent,” in 2018 the Maine Supreme Judicial Court, sitting as the Law Court, specifically adopted both the conclusion and the reasoning of the Justices’ 2017 advisory opinion “in full.” [Maine Senate v. Secretary of State, 2018 ME 52, ¶4 n.12](#). The Court also observed that its decision did not apply to primary elections for these State offices, as primary elections “are governed entirely by statute and find no source in the Maine Constitution itself.” *Id.* ¶5 n.5.

An outline of the legislative history of RCV, history of elections determined by RCV in Maine, as well as a brief chronological summary of the court challenges to RCV in Maine, is attached.

## AMENDMENT PROPOSED AT PUBLIC HEARING

- **Proposed Amendment - League of Women Voters of Maine:** The League proposed amending LD 202 to match a provision included in [LD 1477](#) from the 129th Legislature that, instead of simply replacing “plurality” with “majority” in the constitutional provisions regarding elections for State

Representatives, State Senators and the Governor, would have created the following new provision within Article IV, pt. 3 (Legislative Power):

**Section 24. Elections by plurality or majority.** The Legislature, or the people acting pursuant to Section 18, shall predetermine by law whether the electors choose the Governor, Senators and Representatives by a plurality or majority of the votes.

*Analyst Note:* In the First Regular Session of the 129th Legislature, a majority (8-5) of the VLA Committee voted in favor of an [amended version of LD 1477](#) that would have replaced the language quoted above with the following:

**Section 24. Method for tabulating votes for Representatives, Senators and Governor.** The Legislature, or the people acting pursuant to Section 18, shall, by proper enactment, predetermine the methods for sorting and counting votes cast for Representatives, Senators and Governor and the method for determining who has been elected to these offices.

This amended version of the constitutional resolution failed final passage in the House during the First Regular Session, was placed on the Special Appropriations Table in the Senate and ultimately died there when the Legislature adjourned *sine die* at the end of the Second Regular Session.

## TECHNICAL ISSUES

- **“Majority” Requirement and RCV.** If LD 202 is ratified, it will amend the Constitution of Maine to provide that the general election candidate for State Representative, State Senator or Governor who receives a “majority of the votes” or a “majority of all [of the] votes returned” is elected to the office. As noted by the League of Women Voters of Maine, this language does not require the use of RCV to identify a “majority” winner in these elections. Instead, the use of a runoff election to identify a “majority” candidate would also be consistent with this language.

An argument also could be made that the use of current RCV counting procedures may not always end with the winning candidate having received a “majority of the votes” or a “majority of all votes returned.” As has occurred in at least one Maine election to date, under [21-A M.R.S.A. §723-A](#), a candidate can be declared the winner by having the *most votes counted in the final round* of RCV even though the number of votes counted for that candidate in the final round is not a *majority of all votes originally cast* in the election. In a footnote to their 2017 advisory opinion, the Justices of the Maine Supreme Judicial Court described just such an RCV candidate as “win[ning] by a plurality of votes.” *Opinion of the Justices*, 2017 ME 100, ¶65 n. 38. The Justices’ use of “plurality” in this description suggests the Court may not consider this winning RCV candidate as having received a “majority” of the votes.

If the Committee is concerned that the RCV counting procedures do not always comply with LD 202’s proposed constitutional language, it may want to consider amending LD 202 in a manner similar to the [committee amendment to LD 1477](#) in the 129th Legislature—*i.e.*, to require the Legislature or the people through a direct initiative to determine the method for counting and sorting the votes and declaring the winner of elections for Representatives, Senators and Governor. Although the amendment to LD 1477 did not require that the election procedure established by the Legislature or by direct initiative result in a “majority” winner rather than a “plurality” winner, the committee may of course add this restriction if it feels that restriction would be appropriate.

- **Requirements that local officials count and declare the votes:** Under the [rules governing RCV elections](#), if no candidate receives a majority of the first-choice votes cast, the ballots and tabulating machine memory devices are transported from the affected municipalities by private courier to an RCV counting facility in the Augusta area, where staff from the Office of the Secretary of State conduct the subsequent rounds of the RCV counting process. An argument could be made that this procedure does not comport with the following provisions of the Maine Constitution, which require local officials to “sort, count and declare” the votes cast:

Provision of Constitution	Office	Relevant constitutional text (available <a href="#">here</a> )
Art. IV, pt. 1, § 5	State Representative	“the election officials of the various towns and cities shall ... receive the votes of all the qualified electors, sort, count and declare them in open meeting; and a list of the persons voted for shall be formed, with the number of votes for each person against that person's name.”
Art. IV, pt. 2, § 3	State Senate	“The meetings within this State for the election of Senators shall be notified, held and regulated and the votes received, sorted, counted, declared and recorded, in the same manner as those for Representatives.”
Art. V, pt. 1, § 3	Governor	“The meetings for election of Governor shall be notified, held and regulated and votes shall be received, sorted, counted and declared and recorded, in the same manner as those for Senators and Representatives.”

Although they were asked this question in 2017, the Justices of the Maine Supreme Judicial Court declined to answer and have not yet decided whether RCV violates these constitutional provisions. (By analogy, however, election recounts for these offices are conducted in a central location by staff from the Office of the Secretary of State and this procedure has not been declared unconstitutional.)

If the Committee is concerned that RCV does not comply with these provisions of the Constitution of Maine, it may want to consider adopting the relevant language of [LD 1477](#) from the 129<sup>th</sup> Legislature, as amended by the [majority committee amendment](#).

- **Subsequent legislation necessary.** If LD 202 is passed by the Legislature and ratified by statewide vote, the definition of “elections determined by ranked-choice voting” in 21-A MRSA §1(27-C) should then be amended to include elections for Governor, State Representative and State Senator. This type of statutory change may not be included in LD 202, however.

## FISCAL IMPACT

Not yet determined; however, the [fiscal note to LD 1477](#) in the 129th Legislature indicated that, if the number of referendum questions approved by the Legislature resulted in a need to print and deliver to municipalities a second ballot for the November election, an \$172,00 appropriation may be required.