

Participatory Governance

Utah Citizens' Counsel Transparent, Ethical, and Participatory Governance Committee

Article 7. All Utahns have the right to transparent and ethical governance as well as effective participation in the democratic process.

Introduction

The past two years UCC has focused on (1) the importance of a nonpartisan redistricting process following the 2020 census, (2) the continuing need for campaign finance reform, and (3) support for the Count My Vote (CMV) effort to introduce a more inclusive nominating process for Democratic and Republican candidates for office. Although all three remain UCC priorities, campaign finance reform is complex and politically elusive at the moment, and the CMV compromise with the Legislature, reached in 2014's Senate Bill (SB) 54, has succeeded in allowing some candidates to gain access to the ballot by gathering signatures rather than using the ideologically narrow caucus/convention process. Although we continue to support campaign finance reform and will follow CMV's September 2017 decision to relaunch an initiative for a direct primary,¹ the most critical and potentially transformative means of improving the functioning of democracy in Utah would be an independent redistricting commission. Such a commission has been proposed in an initiative petition filed by a newly formed group called Utahns for Responsive Government. The commission would submit nonpartisan boundary maps to the Utah Legislature when it redraws state legislative and federal congressional district boundaries following the 2020 census. This emerging possibility is the focus of this year's report.

The Need for Nonpartisan Redistricting

Redistricting occurs every ten years, shortly after the decennial U.S. Census identifies population and demographic changes in states across the country. State legislatures have traditionally held the authority to do the redistricting.² Since the early 1800s, many legislatures have redrawn election district boundaries to favor the political party in power. The term "gerrymandering" arose when Governor Elbridge Gerry of Massachusetts signed a bill that drew a partisan district said to resemble a salamander, and the "Gerry-mander" was born.³ As urban populations increasingly exceeded rural populations in the first half of the 20th century, extra voting power went to residents of more sparsely populated rural districts because districts did not have to contain equal populations. In 1964, the U.S. Supreme Court interpreted the Equal Protection Clause of the 14th Amendment to require that congressional and state legislative districts be drawn to be essentially equal in population, articulating the one person, one vote principle.⁴ Ironically, as technological advances in computer programming and data analysis grew exponentially in recent decades, state legislatures have been able to use the Court's one person, one vote requirement to justify configurations of minute census tract subdivisions that created politically partisan, equal population districts favoring incumbents and the party in power while ignoring important considerations such as neighborhood patterns and county and municipal boundaries.

Additional law suits, many arising from the civil rights movement of the 1960s, asserted that some state legislatures were drawing boundaries deliberately to reduce the voting power of

minorities in violation of the 15th Amendment and the Voting Rights Act. Further Supreme Court rulings established additional protection for minorities, primarily African Americans.⁵ These protections, however, have not stopped political gerrymandering intended to reduce the voting power of whatever political party is the minority party in a given state.

As a result of partisan redistricting across the country in 2001 and 2011, most seats in the U.S. House of Representatives are considered safe seats for incumbents and are largely uncontested.⁶ Competition in those districts now occurs at the level of primaries, where narrow interests and extreme ideological positions often dictate the turnout. The result has been increasing polarization in the House of Representatives. This is not the way democracy should function.

In Utah, the result of gerrymandering can be seen by looking at the 2011 redistricting maps. Salt Lake County was split into three congressional districts, with District 2 stretching from Salt Lake City to St. George. So-called "pizza slice" districts combined urban and rural communities with little in common economically and culturally.⁷ No Utah representative in Congress comes from Salt Lake County, although it accounts for more than 40% of the population.⁸ Democrats now have little chance to capture even one of the four Utah seats in the House of Representatives, although having close to the same number of voters as Republicans in Salt Lake County, with Independents holding the balance of power.⁹ At the state legislative level, Republicans hold 83% of the seats in the Legislature while representing only two-thirds of the state's voters.¹⁰ The redrawn maps in 2011 split Tooele in half; Holladay in thirds, Moab right down Main Street. A dozen other municipalities were also split.

A national movement to limit the redistricting power of legislatures has been growing year by year. In 18 states, commissions made up of citizens and/or elected officials now draw the maps for state legislative districts.¹¹ As of July 2017, legislation to create independent redistricting commissions was pending in fifteen other states.¹²

The Better Boundaries Initiative

Because of widespread dissatisfaction with partisan legislative redistricting, Utahns for Responsive Government launched a Better Boundaries (BB) Campaign by filing an initiative petition to establish an independent redistricting commission. If 113,143 registered voters sign the petition by April 15, 2018,¹³ the initiative will appear on the 2018 ballot.

The initiative would establish a seven-person commission. Two members each would be selected by the majority and minority leaders in the Utah Senate and Utah House. Two more, who must be unaffiliated voters, would be selected by the majority and minority leadership teams in the Legislature.¹⁴ The Governor would appoint the seventh member, who would serve as chair.

The Commission is charged with drawing from one to three district maps to submit to the Legislature, using decennial census data and specified standards for drawing nonpartisan maps. In addition to the traditional districting standards of compactness, contiguity, and equal population, the standards require minimizing the division of cities and counties and considering natural and geographic features, traditional neighborhoods, and communities of interest. The standards also prohibit the use of partisan political data (for example, addresses of incumbents and candidates, voting records, election results, party affiliation). Five of the seven commissioners must approve any map before it can be submitted to the Legislature.¹⁵

Under the initiative, the Legislature retains the final authority to redistrict. A major court challenge to provisions in the Utah Constitution would be needed for voters to give the actual redistricting power to the Commission, so the initiative establishes the Commission's role as advisory.¹⁶ If the Legislature does not select one of the recommended maps, however, it must defend its own selection, measured against the initiative's standards for nonpartisan mapping, and the Commission may critique the Legislature's map(s). A citizen who believes that the maps violate the initiative may file what is known as a private right of action, challenging the legitimacy of the map(s) in court.¹⁷ The Utah Supreme Court would ultimately decide that case.

The Potential Benefits of the Better Boundaries Initiative

1) Chief among the expected benefits is *recognition of the right of voters to choose their political representatives rather than representatives choosing their voters.*¹⁸ This right should be obvious in a democracy. Other expected benefits include:

2) *More trust in the process.* Democracy depends in large part on people trusting their representatives. This does not happen if large numbers of potential voters believe their views are ignored because legislators are choosing their voters by how they draw district boundaries.

3) *Less polarization in decision making and more accountability to the public.* In both the U.S. Congress and the Utah Legislature, polarization has increased in recent decades.¹⁹ The result has often been reduced ability to unite to solve important problems in areas such as health care and education, where polling suggests that legislators are ignoring the will of the people.

4) *More citizens who will vote.* When eligible voters do not believe that their vote matters, they too often are lulled into not voting or even not registering to vote. Utah's voter turnout as a percentage of the eligible voting-age population has been steadily declining in recent years from 66.6% in 1980 to 28.8% in 2014, the 3rd lowest in the country. Although it rebounded in the tumultuous 2016 presidential election, far too many Utah adults are not registered, and far too many registered voters do not turn out to vote.²⁰ Both groups need to have more reasons to believe that their votes will count.

5) *More competitive elections.* When districts are competitive, results from the dominant party's infighting in its primary do not automatically determine the ultimate winner. Competitive elections can increase voter turnout and produce better public understanding of the issues. Sadly, the number of contested seats has shrunk significantly since the 2011 redistricting.²¹

Most voters are likely to vote Republican for the foreseeable future, and Republicans will hold most congressional and state legislative seats. Redistricting is not designed to change that reality but to create a more democratic process in which voters actually select their representatives. If more competitive elections produce a better informed electorate and more centrists from both parties, the result may be a renewed focus on actual problem solving and compromise through effective negotiation. Ideological purity often ignores the wishes of a majority of constituents, who prefer centrism to far left or far right ideologies.²²

Redistricting Cases in Federal Court

Concurrent with efforts to form independent redistricting commissions, legal challenges are being brought in several states, arguing that deliberately partisan state maps are unconstitutional.

One such case from Wisconsin--the first to hold partisan gerrymandering unconstitutional--was heard by the U.S. Supreme Court on October 3, 2017.²³ The Court will issue its decision by June 2018. Evidence in the lower court documented that the Wisconsin Legislature deliberately "packed" (concentrated) more Democrats into fewer districts where they were already likely to win, while "cracking" (splitting) the remainder of Democratic voters among majority Republican districts so that more Republican districts would result. Whether the Supreme Court will establish national standards to determine when redistricting is partisan enough to violate the 14th and 1st Amendments to the Constitution may be the most important decision the Court will make in its 2017-2018 term.²⁴ If the Court sets new standards to reduce the impact of partisan redistricting, Utah's Independent Redistricting Commission would follow them in a manner that ensures their implementation. At the same time, if the Better Boundaries standards for nonpartisan map drawing are more specific and thorough in reducing gerrymandering and do not conflict with those set by the Court, those standards could be used to enhance nonpartisanship and transparency. If, on the other hand, the Court does not find the case suitable for judicial resolution, the Commission's ability to implement nonpartisan standards would be even more crucial for Utahns. In either case, an independent commission that increases accountability and reduces the power of behind-the-scenes partisan jockeying will improve democracy.

Potential Legislative Response to Passage of the Better Boundaries Initiative

Many legislators insist that past redistricting has been essentially nonpartisan because it created contiguous districts of virtually equal population. They also assert that the process was transparent because it allowed many forms of citizen input. These arguments ignore how sophisticated computer programs enabled manipulation of boundaries to protect incumbents and disadvantage the minority party. They also ignore the way public input was rejected in closed-caucus meetings that shut out the public when final decisions were made. Legislator protestations notwithstanding, all who followed the process know how gerrymandering was conducted.

The initiative, if enacted, will become a statute, not a constitutional amendment. Therefore, the public must remain vigilant to ensure that the Legislature does not amend the statute to reduce the authority of the Independent Redistricting Commission and the public's right to bring a court challenge to the Legislature's actions. "Eternal vigilance is the price of liberty."²⁵ "Over the long term, everyone--and the continuing vitality of democracy--will be served by a system that resounds in fairness."²⁶

Commendations

- **Utahns for Responsive Government for launching its Better Boundaries signature-gathering campaign to allow registered voters to express their views on the benefits of allowing a public vote on nonpartisan redistricting**

Recommendations

- **The public, registered voters, and the media should support the Better Boundaries signature-gathering campaign.**
- **Registered voters should vote in large numbers for the Better Boundaries redistricting initiative once it gains a place on the 2018 general election ballot.**

Endnotes for Article 7 (Participatory Governance)

¹ Because of continuing efforts to undermine the success of SB 54, CMV leaders decided to relaunch an initiative for a direct primary, which would do away entirely with the caucus/convention system. They have expressed their frustration with continuing threats from some Republican legislators to repeal the current SB 54 compromise, which allows selection of nominees both by signature gathering and caucus/convention systems. Additional efforts by Republican Party officials to undo the compromise by litigation, unsuccessful thus far, have also been a source of deep distrust for CMV supporters. CMV leaders have determined that only an initiative process which ultimately allows the public to vote on the desirability of a direct primary will put the issue to rest.

² State constitutions give the authority to redistrict to state legislatures. Twenty-four states, however, have ballot initiative provisions that can be used by citizens to propose a law or constitutional amendment for passage either by voters or their legislature. Alexis Farmer, "Citizen-Led Efforts to Reform Redistricting," September 20, 2017, *The Brennan Center for Justice*, accessed October 1, 2017, <https://www.brennancenter.org/analysis/current-citizen-efforts-reform-redistricting>.

³ See "A Citizen's Guide to Redistricting (2010 ed.)," *The Brennan Center for Justice*, accessed August 17, 2017, <https://www.brennancenter.org/sites/default/files/legacy/CGR%20Reprint%20Single%20Page.pdf>.

⁴ *Reynolds v. Sims*, 377 U.S. 533 (1964) (requiring state legislative districts to have equal populations); *Wesberry v. Sanders*, 376 U.S.1 (1964) (applying one person, one vote principle to congressional districts).

⁵ A landmark case that invoked the 15th Amendment's prohibition against abridging the right to vote "on account of race" was *Gomillion v. Lightfoot*, 364 U.S. 399 (1960). The Court allowed a challenge to a racial gerrymander that excluded nearly all black voters from the city limits of Tuskegee, Alabama. The decision held that the state could not circumvent the constitutional prohibition by redrawing municipal boundaries. Multiple challenges have been brought since then in which the Court has had to determine whether race was a dispositive factor in the way legislative or congressional districts have been drawn.

⁶ Researchers at the Brennan Center have concluded that 16 or 17 of the 24 Republican seats needed to retain control in the House of Representatives in 2020 resulted from gerrymandering. Laura Royden and Michael Li, "Extreme Maps," May 9, 2017, *Brennan Center for Justice*, accessed October 3, 2017, <https://www.brennancenter.org/publication/extreme-maps>. Using data from the 2012, 2014, and 2016 election cycles, the authors found that partisan bias in the worst gerrymandered states provided Republicans a "durable advantage" of 16-17 seats in the current Congress. These so-called "extreme maps" all came from states under single-party control. Of interest is the finding that maps drawn by independent commissions, courts, or split-party state governments had significantly less partisan bias in their maps.

Turning to Utah, 59 of 271 state legislative races have been uncontested since 2011, a sizable increase over the previous decade's number. The supermajority of Republicans in the state House of Representatives of 62-13 in 2014 was the largest since 1967 and the second largest since the Great Depression. Lee Davidson, "Utah had 3rd-lowest voter turnout among states," *Salt Lake Tribune*, December 1, 2014, accessed August 29, 2017, archive.sltrib.com/article.php?id=1873023&itype=CMSID. Currently, the supermajority is 63-12, even more lopsided, given that 1/3 of votes for House candidates go to Democrats.

⁷ For more examples of 2011 gerrymandering, see Paul Rolly, "Decades of Gerrymandering Bear Fruit: Utah's Legislature is Wacko," *Salt Lake Tribune*, April 2, 2016, A17. Rolly states that the 2001 Legislature "tried to Neuter SLC" by slicing it up (cracking) it into heavily Republican districts. Rolly quotes Republican then-Senator Bob Bennett as describing the redistricting as "one of the worst examples of gerrymandering he had seen." Rolly asserts that the Utah Legislature furthered the effort to crack the Democratic vote by carving Tooele into three state legislative districts, splitting a Democratic district in Ogden, and placing key parts of Democratic Carbon County into neighboring Republican districts.

⁸ "Quick Facts, Salt Lake County," *U.S. Census Bureau*, accessed August 29, 2017, <https://www.census.gov/quickfacts/fact/table/saltlakecountyutah,UT/PST045216>.

⁹ Bob Bernick, "Just How Liberal is Salt Lake County?" *Utah Policy.com*, accessed August 4, 2017, <http://www.utahpolicy.com/index.php/features/today-at-utah-policy/13947-analysis-just-how-liberal-is-salt-lake-county>.

¹⁰ Bryan Schott, "Analysis Shows Utah Electoral Maps Gave GOP a Three-seat Advantage in 2016," *Utah Policy.com*, accessed August 29, 2017, <http://utahpolicy.com/index.php/featurestoday-at-utah-policy/13598-analysis-shows-utah-electoral-maps-gave-gop-a-three-seat-advantage-in-2016>.

¹¹ As of December 2015, the National Conference of State Legislatures (NCSL) reported that 13 states had commissions with primary responsibility for drawing state legislative maps (AK, AZ, AR, CA, CO, HI, ID, MO, MT, NJ, OH, PA, WA). Five had advisory commissions (ME, NY, RI, VT, VA) and five had back-up commissions if a state legislature failed to agree on redistricting--a total of 23. "Congressional Redistricting: State Legislative Plans," *NCSL*, accessed August 29, 2017, [ncsl.org/research/redistricting/2009-redistricting-commissions_table.aspx](http://www.ncsl.org/research/redistricting/2009-redistricting-commissions_table.aspx). At the same time, six states had state commissions with primary responsibility for congressional redistricting (AZ, CA, HI, ID, NJ, WA); five had advisory commissions (ME, NY, OH, RI, VA), and two had back-up commissions (CT, IN)--a total of 13. "Redistricting Commission: Congressional Plans," *NCSL*, accessed August 29, 2017, <http://www.ncsl.org/research/redistricting/redistricting-commissions-congressional-plans.aspx>. NCSL notes that some commissions are more partisan than others in the way they actually operate. It also notes that Iowa uses a different, unique procedure for its redistricting. Ballotpedia provides a condensed classification as of August 2017 that does not include advisory commissions or backup commissions. "Redistricting," *Ballotpedia*, accessed August 29, 2017, <https://ballotpedia.org/Redistricting>. Consistent with NCSL, it reports that 13 states have commissions for state legislative redistricting. Six use independent commissions, and seven use politician commissions. Of the six states using commissions for congressional redistricting, four use independent commissions and two use political commissions. Ballotpedia states that legislatures retain final authority for state and congressional redistricting in 37 states, some of which have no provision for any voter initiatives. (Seven states have only one congressperson, so congressional redistricting does not happen there.)

¹² See "Redistricting Commission Bills," *NCSL*, accessed August 29, 2017, <http://www.ncsl.org/research/redistricting/redistricting-commission-bills.aspx>.

¹³ 1,131,430 Utahns voted in the 2016 presidential election. "2016 General Election Results," *Office of Utah Lieutenant Governor*, accessed June 2017, <https://elections.utah.gov/Media/Default/2016%20Election/2016%20GE%20Canvass.pdf>. For the initiative to be placed on the 2018 general election ballot, the total number of Utah registered voters who sign the petition must reach 10% of this number. The number of registered voters must also reach 10% of the number who voted in the presidential election in each of 26 of 29 of the state Senate Districts. In other words, if 100,000 votes were cast for a 2016 presidential candidate in a specific Senate District, 10,000 registered voters must sign the petition in that Senate District. See Utah Code Annotated, 20A-7-201(2)(a) (2011).

¹⁴ To be more specific, the Speaker of the House and the Senate President would each select one member. The minority leader of the House and the minority leader of the Senate would each select one member. Various exclusions apply (e.g., no elected official, no lobbyist, no party official can serve). One unaffiliated member would be appointed by the entire leadership team of the majority party in the Legislature, and one would be appointed by the entire minority leadership team. Similar exclusions apply.

¹⁵ If five members--a super majority--of the Commission cannot agree, then the Commission must submit at least two maps to the Chief Justice of the Utah Supreme Court, who will select the map or maps to be forwarded to the Legislature. *Ibid.*, 20A-19-203.

¹⁶ The Utah Constitution explicitly gives the redistricting power to Utah's elected Legislature, along with the power to initiate amendments to the Utah Constitution if 2/3 of both Houses of the Legislature vote to do so. Utah's initiative provision was placed in the state constitution a few years later but appears limited to proposing and adopting a statute, not a constitutional amendment. A court ruling would be necessary to establish the right of voters to use the initiative to amend the redistricting provision in the constitution. Such a challenge would be unlikely to be resolved prior to the 2018 election and would be expensive and its outcome uncertain. The Better Boundaries campaign decided it was more feasible to use the initiative procedure to change the redistricting process by statute than to attempt to amend the Utah Constitution to give final authority to an Independent Redistricting Commission.

¹⁷ "Utah Independent Redistricting Commission and Standards Act," 20A-19-301.

¹⁸ As one election law scholar has framed the issue: "Are we a nation where it is okay, or not okay, to manipulate a legislative map so that 'in practice,' as president Garfield put it, 'a large portion of the voting people are permanently disenfranchised'?" Edward Foley, "Symposium: Wechsler, History and Gerrymandering," *SCOTUSBLOG*, accessed August 11, 2017, <http://www.scotusblog.com/2017/08/symposium-wechsler-history-gerrymandering>.

¹⁹ "Political Polarization in the American Public," *Pew Research Center*, accessed August 30, 2017, <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/>. See also "Partisan Politics, Polarization, and Participation," *Utah Foundation*, June 18, 2012, accessed August 30, 2017, <http://www.utahfoundation.org/reports/partisan-politics-polarization-and-participation/>.

²⁰ The percentage in 2016 was still the 11th lowest in the nation. See Lee Davidson, "Utah Leaders Hailed Voter Turnout in Election. Actually, we were among the Worst in the Nation," *Salt Lake Tribune*, March 16, 2017, accessed August 30, 2017, <http://archive.sltrib.com/article.php?id=5066062&itype=CMSID>. The leaders who were hailing the turnout were comparing the turnout to the number of registered voters, not the total population of eligible voters. See also "Utah Once Again in the Bottom-tier of States for Voter Turnout," *Deseret News*, March 20, 2017, accessed August 30, 2017, <http://www.deseretnews.com/article/865675984/In-our-opinion-Utah-once-again-in-the-bottom-tier-of-states-for-voter-turnout.html>. For 2014 and 2012 turnouts, see Lee Davidson, "Utah had 3rd-lowest Voter Turnout among States," *Salt Lake Tribune*, December 1, 2014, accessed August 30, 2017, <http://archive.sltrib.com/article.php?id=1873023&itype=CMSID>; Robert Gehrke, "Mitt or Not, Utah Voter Turnout was Paltry," *Salt Lake Tribune*, November 24, 2012, accessed August 30, 2017, <http://archivesltrib.com/article.php?id=55336290&itype=CMSID>.

²¹ See Jay Evensen, "Utah's Canceled Elections are a Bad Sign," *Deseret News*, September 30, 2015, accessed August 30, 2017, <http://www.deseretnews.com/article/865637878/Utahs-canceled-elections-are-a-bad-sign.html?pg=all> (documenting increase in noncontested legislative House races and increased percentage of landslide victories).

²² "Political Polarization in the American Public."

²³ *Whitford v. Gill*, 218 F. Supp. 3d 837, 2016 WL 6837299 (W.D. Wisc. 2016), accepted by the U.S. Supreme Court in summer 2017 for hearing in October 2017 under the name *Gill v. Whitford*. See *SCOTUSBLOG*, accessed September 12, 2017, <http://www.scotusblog.com/case-files/cases/gill-v-whitford/>. More than 50 "friend of the court" briefs have been filed in support of or opposition to the lower court decision in *Whitford v. Gill*.

²⁴ This is a widely held view, shared by Supreme Court Justice Ruth Bader Ginsburg in July 2017 comments reported in the *New York Times*. Adam Liptak, "On Justice Ginsburg's Summer Docket: Blunt Talk on Big Cases," July 31, 2017, accessed August 30, 2017, <https://www.nytimes.com/2017/07/31/us/politics/ruth-bader-ginsburg.html?mcubz=3>. Liptak wrote: "Justice Ginsburg said the court's decision to hear the case was 'perhaps the most important grant so far. . . So far, the Court has held race-based gerrymandering unconstitutional but has not found a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution.'" In September 2017, a group of prominent current and former politicians, including many notable Republicans, filed "friend of the court" briefs with the U.S. Supreme Court urging it to rule that extreme gerrymandering for partisan purposes violates the U.S. Constitution. Adam Liptak, "Some of G.O.P.'s Stars Break Ranks in Urging Justices to End Gerrymandering," *New York Times*, September 7, 2017, A18.

²⁵ This quote is usually attributed to Thomas Jefferson, but the research librarian at the Jefferson Library provides a more thorough analysis of the origin of the quote. See Anna Berkes, "Eternal Vigilance," August 22, 2010, *Thomas Jefferson Foundation*, accessed August 14, 2017, <https://www.monticello.org/site/blog-and-community/posts/eternal-vigilance>.

²⁶ A statement by a Republican friend who read our report prior to publication.