

## 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**

Many issues fall under the rubric of transparent, ethical, and participatory government. Covering this topic for the first time in our annual reports, UCC has chosen to focus on three issues that demonstrate the closed nature of our current governmental processes: gerrymandering, which favors incumbent parties and reduces competitive elections; Utah's political party caucus/convention systems, which many think contribute to a decline in voter turnout and reduce democratic participation in Utah elections; and the lack of campaign finance reform, which promotes favoritism for moneyed special interests rather than for the broader public.

### **Gerrymandered Legislative Districts**

Every ten years, state legislatures redraw federal and state legislative boundaries in response to the decennial census. Gerrymandered (artificial and distorted) boundaries routinely accompany this redistricting and are designed to protect incumbent legislators and favor whichever political party is in power. The redrawn boundaries often divide groups with similar needs and interests and reduce the voting power of political and ethnic minorities. Over time, more and more one-party districts and states have emerged, resulting in less competitive elections. In 2011, for instance, the Utah Legislature adopted a redistricting plan that provided for a 62% Republican majority in each Utah congressional district. The Democratic majorities in Salt Lake and Summit counties were carefully neutered in the process so those votes would not affect election outcomes. Currently, more than 80% of Utah's legislative districts are single-party districts; several are Democratic, but most are Republican. This calls into question what is labelled the "representational fairness" of current redistricting processes.<sup>1</sup>

Although partisan considerations will probably always play a role in redistricting, a number of states have reduced the partisanship of legislative redistricting by the use of independent redistricting commissions, which tend to be less concerned with preserving artificial boundaries that protect incumbents and the party in power.<sup>2</sup> Arizona and California are among the best known, while Iowa has a unique system of legislative advisers to help redraw boundaries.<sup>3</sup>

Arizona survived a recent legal challenge which asserted that the state's five-member independent commission contravened the U.S. Constitution's Election Clause.<sup>4</sup> In *Arizona State Legislature v. Arizona Independent Redistricting Commission* (2015),<sup>5</sup> the U.S. Supreme Court held that the power to redistrict given in the Arizona Constitution to the "legislature" extends to Arizona voters who successfully use the initiative provision in that constitution. The Court ruled that such an initiative provision gives voters legislative power over state and congressional

redistricting that is co-extensive with that of the state legislature. The Utah Constitution has a similar provision.<sup>6</sup>

An attempt in 2010 by a group called Fair Boundaries to establish, through an initiative petition, a Utah independent redistricting commission failed to get enough signatures to get on the ballot. Since that time, the Utah Legislature has made it even more difficult for any initiative petition to succeed. By statute it has increased the number of signatures required and provided that signers may withdraw their signatures for a 30-day period after the closing date of the petition drive, thereby allowing opponents of the petition an extended period to try to persuade signers to change their minds when proponents can no longer gather additional signatures. Electronic signatures on initiative and referendum petitions have also been outlawed by statute.<sup>7</sup>

### **Political Party Caucus/Convention Systems**

Both the Republican and Democratic parties in Utah select their candidates for state and federal office in a caucus/convention system. Utah is one of the few states whose political parties do so. In recent years, party activists, particularly Republicans in control of the party machinery, have made intensive efforts to ensure that all candidates support state-party-line positions, especially on hot button issues. The result has been to eliminate candidates for whom the broader public might want to vote. For example, Senator Robert Bennett was eliminated in the 2010 Republican convention because far right, tea party delegates thought he was not conservative enough.

Party caucuses select delegates to represent their precincts at state conventions, where candidates are selected to run for state and federal office. Overwhelmingly, Utahns do not attend their respective caucuses, so the notion of grassroots participatory democracy doesn't really work. The caucus system is not well understood by the public, the rules are complex, notice of the meeting locations is often poor, and those who attend are those with the most intense party loyalties. Women, minorities, and non-Mormons are frequently underrepresented. Caucuses subvert the one-person-one-vote principle because the number of voters in neighborhood voting precincts is not equalized. Furthermore, political party leaders can skew the allocation of delegates by adding "ex officio" delegates and appointing delegates in inactive precincts. A small district can end up with twice the number of delegates as a larger district.

Because legislators respond to the delegates who select them to run for office, they often can ignore the broader public with impunity. Many pundits believe that voter turnout in Utah's general elections has declined because voters know that their votes don't really matter; they didn't have a say in selecting the candidates. In a single-party district, their votes matter even less because the outcome has already been decided.

A group entitled Count My Vote began gathering signatures in 2013 for a ballot initiative to provide an alternative to the caucus system; candidates could get on the primary ballot by obtaining a certain percentage of registered voter signatures, in other words, bypassing the caucus/convention process. The effort was meant to ensure a more open, less controlled nomination process and better public participation.

The Legislature, and the Republican Party in particular, disliked the initiative petition, but a compromise was worked out in the 2014 legislative session: The initiative sponsors agreed to suspend their signature gathering in return for enactment of a somewhat convoluted direct

primary election process. The compromise bill (SB 54) allowed a petition process in addition to or as an alternative to the party caucus/convention system. Sponsors hoped that the compromise would create a way to break the stranglehold that extremists had on the nomination process. The bill has been subject to controversy and litigation challenging its validity.<sup>8</sup> It is scheduled for its first test in the 2016 elections.

## **Campaign Finance**

Utah is one of only seven states without any limits on financial contributions to campaigns from individuals, corporations, PACs, and unions.<sup>9</sup> That is, no caps are placed on the amount of money that candidates for state office can accept from such donors. This is in contrast to races for federal office, where contribution caps are set in law and contributions from corporations directly to candidates are prohibited. In January 2015, the *Salt Lake Tribune* documented that 82% of all donations accepted by incoming Utah legislators came from special interests, such as lobbyists, corporations, business leaders, advocacy groups, and political action committees (PACs).<sup>10</sup> Only 7% came from constituents living within the district boundaries of their state senators and representatives. Even senators not running for re-election received donations. These are alarming reflections on the politics of big money. Special interests give money to candidates, especially incumbents, because they expect to receive, first and foremost, access to legislators-- a powerful factor in adopting legislation acceptable to the big donors. The donations also reward incumbents with the resources they need in their re-election campaigns.

The public is increasingly aware of the danger to democracy resulting from big money and special interests with too much influence on election outcomes and subsequent policies.<sup>11</sup> Many tie the growing problem to the Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*.<sup>12</sup> The controversial 5-4 decision ruled that corporations and unions have a first amendment right to spend unlimited amounts of money to support or oppose candidates for federal office. Although they are not permitted to give directly to the campaigns, they can give indirectly through political ads or contributions to political action committees independent (theoretically, at least) of the candidates. The decision has led to a proliferation of so-called super PACs, raising millions of dollars from billionaires, businesses, and unions. Although super PACS must disclose their donors, many newly formed nonprofits that file as "social welfare" groups under section 501(c)(4) of the federal tax code do not have to disclose their donors. These groups have been giving extravagant sums of money to support or oppose candidates. Their only limit is that their primary purpose not be political. The supposed standard, largely unenforced, is that the organization's political spending not reach 50% of its income in a given year. Huge increases in overall campaign expenditures for congressional and presidential elections have resulted from super PACs and "social welfare" nonprofits. The role of PACS has even spread to local elections. For instance, in the 2015 Salt Lake City mayoral election, an independent PAC funded largely by Reagan Outdoor Advertising spent more than \$140,000 for billboards in support of candidates opposing the incumbent Salt Lake City mayor.<sup>13</sup>

Groups have formed to try to amend the U.S. Constitution to overturn the *Citizens United* decision. Such an undertaking faces serious political and procedural difficulties and would not stop unlimited independent spending by billionaires. Many pundits believe that other alternatives would be preferable, such as various forms of public financing, free equal TV time for candidates, better informed voters, and across-the-board campaign limits for all contributors.<sup>14</sup> Thirteen states now offer a few kinds of public campaign funding. For example, Arizona,

Connecticut, and Maine offer subsidies to candidates who agree to limit their spending and their private fund raising. Florida and Hawaii will match small contributions up to a certain amount. New York City also has a matching-contribution law.<sup>15</sup> Seattle voters recently passed a taxpayer-funded voucher system to try to reduce reliance on wealthy donors. Seattle government will give each of its registered voters four \$25 vouchers that can be contributed to municipal candidate(s) for mayor, city council, or city attorney. Candidates who choose to participate in this system must agree to strict limits on spending and on private donations. The hope is to increase the involvement and number of contributors by 10-15%. Money for the vouchers will come from a modest \$3 million increase annually in property taxes. When the money runs out, so do the vouchers: in other words, it's first come, first served.<sup>16</sup> All these forms of public financing deserve careful watching and further study. Utah has shown no interest in public financing, although the day may yet come when Utah will need to confront this directly.<sup>17</sup>

### Commendations

- **SB 54**, passed by the 2014 Legislature, which allowed the Count My Vote compromise to go forward
- The attempt to pass **campaign spending limitations** in recent legislative sessions by Representatives Brian King (Democrat) and Kraig Powell (Republican)

### Recommendations

- We urge the **creation of an Independent Redistricting Commission**, either by statute or by initiative petition.<sup>18</sup> If the latter, we urge creation of a broad coalition with the necessary funds, organizing strategies, and volunteers to mount an initiative in time for placement on the 2018 ballot.
- The Legislature should **allow SB 54 sufficient years of implementation to properly evaluate its impact prior to making more than technical, clarifying modifications to the legislation.**
- The Legislature should **require “social welfare” nonprofits** (so-called 501(c)(4) organizations) **to disclose their electioneering expenditures** above a certain amount, as well as donors who give more than a minimum amount to electioneering activities.<sup>19</sup>
- **The Legislature should adopt campaign contribution limits, using as a framework the recommendations of the 2009 Governor’s Commission on Strengthening Democracy.**
- We urge an **independent, nonpartisan examination of campaign finance reform alternatives**, including various kinds of public financing of political campaigns.<sup>20</sup>

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## Notes

<sup>1</sup> At least three states—Florida, North Carolina, and Virginia, currently are subject to ongoing court cases challenging the fairness of their most recent redistricting plans. None of these states has an independent redistricting commission.

<sup>2</sup> Thirteen states have redistricting commissions with exclusive authority to redistrict. Iowa is a fourteenth state with a special form of redistricting authority. Two more states have advisory commissions and seven have backup commissions if legislative redistricting fails. See "Redistricting Commission," *Wikipedia*, accessed October 17, 2015, [https://en.wikipedia.org/wiki/Redistricting\\_commission](https://en.wikipedia.org/wiki/Redistricting_commission).

Ohio has now joined the above states. In the November 2015 election, 71% of Ohio voters supported an amendment to the state constitution that prohibits partisan gerrymandering and creates a bipartisan redistricting commission for state legislative districts. Katrina vanden Heuvel, "Democracy beats Oligarchy," *The Washington Post*, November 10, 2015, accessed November 11, 2015, [https://www.washingtonpost.com/opinions/democracy-beats-oligarchy/2015/11/10/6dbff3c4-8701-11e5-be39-0034bb576eee\\_story.html](https://www.washingtonpost.com/opinions/democracy-beats-oligarchy/2015/11/10/6dbff3c4-8701-11e5-be39-0034bb576eee_story.html). Jim Siegel, "Voters approve issue to reform Ohio's redistricting process," *The Columbus Dispatch*, November 4, 2015, accessed November 15, 2015, <http://www.dispatch.com/content/stories/public/2015/election/ohio-state-issue-1-redistricting.html>. The reform had bipartisan support.

<sup>3</sup> Arizona's redistricting mechanism, adopted by popular initiative in 2000, created a five-member independent redistricting commission. From a slate of 25 candidates nominated by a judicial commission, the majority leaders of the Arizona House and Senate appoint two members. The minority leaders also appoint two members, and these four choose an independent, unaffiliated chairperson. Arizona Constitution, Article 4, pt. 2, § 1.

California has a 14-person redistricting commission, adopted by California voters in 2008 and 2010 initiatives, with power to redistrict state and federal legislative districts. The selection process is more complicated than Arizona's. The state legislature winnows candidates from a prior screening process conducted by the state auditor to a minimum of 12 Republicans, 12 Democrats, and 12 from neither party, with the state auditor then randomly selecting 3 from each major party and 2 others. These eight then select the final six from candidates remaining in the pool. California Constitution, Article XXI and "Legal Handbook for the Citizens Redistricting Commission," accessed November 16, 2015, [http://wedrawthelines.ca.gov/downloads/legal\\_guide.pdf](http://wedrawthelines.ca.gov/downloads/legal_guide.pdf)

Iowa gives its nonpartisan Legislative Services Agency (LSA), a professional staff of the Legislature, the responsibility to prepare proposed maps of the state and federal legislative districts after each census. The Legislature itself then must approve or disapprove the maps. If they are disapproved, the LSA revises the maps and resubmits them. A third disapproval of revised maps allows the legislature to *modify* the maps. Since adoption of this process in 1990, the Iowa Legislature has never rejected all three sets of maps. Iowa Constitution Article III, § 37, and Article III, § 34, § 35, § 36 & § 38.

<sup>4</sup> "The Times, Places and Manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations." Art. I, sec. 4, cl. 1.

<sup>5</sup> Supreme Court of the United States (Slip Opinion), accessed October 24, 2015, [http://www.supremecourt.gov/opinions/14pdf/13-1314\\_kjfl.pdf](http://www.supremecourt.gov/opinions/14pdf/13-1314_kjfl.pdf).

<sup>6</sup> Art. VI, sec 1. "(1) The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2).

(2) (a) (i): The legal voters of the State of Utah, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (A) initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority of those voting on the legislation, as provided by statute" . . .

<sup>7</sup> Senate Bill 65 (2011), UCA 20A-1-306 and 20A-7-101(17). A subsequent study by the Lieutenant Governor's Office found that the LG's Office could manage a process for validating electronic signatures on ballot propositions. It is possible that legislation to allow such e-signatures could emerge within the next few years.

<sup>8</sup> In litigation challenging SB 54, federal district court judge David Nuffer ruled recently that political parties cannot be forced to open their primary elections to those who are unaffiliated voters. In the same decision, the judge also upheld the right of candidates to have their names on the primary ballot by gathering the requisite number of signatures. Robert Gehrke, "Judge strikes down Utah law requiring parties to open primaries," *Salt Lake Tribune*, November 3, 2015, accessed November 15, 2015, <http://www.sltrib.com/home/3134238-155/judge-strikes-down-utah-law-requiring>. The judge subsequently clarified that his ruling does not affect the open primaries held by the

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Democratic Party or the ability of Democratic candidates to gather signatures from unaffiliated voters. Robert Gehrke, "Utah Dems will be able to include unaffiliated voters in June primaries," *Salt Lake Tribune*, November 27, 2015, B1. Apparently, signers on a Republican petition, however, must be registered Republicans. The Republican Party chair and the Lieutenant Governor's Office disagree over other implications of the ruling. Some are urging the Legislature to clarify SB 54. It seems likely that another court case will be necessary unless the Legislature deals with remaining ambiguities.

<sup>9</sup> "State Limits on Contributions to Candidates, 2015-2016 Election Cycle," National Council of State Legislators, accessed October 17, 2015,

<http://www.ncsl.org/Portals/1/documents/legismgt/elect/ContributionLimitstoCandidates2015-2016.pdf>. In a report released in November 2015, the Center for Public Integrity gave Utah an overall grade of D- on 13 measures of public transparency and accountability. This placed Utah in the middle of the State pack at 25<sup>th</sup>. The top grades, earned by three states, were in the C range, nothing to brag about. Utah earned an F in the area of political financing. Center for Public Integrity, accessed November 16, 2015, <http://www.publicintegrity.org/2015/11/09/18693/only-three-states-score-higher-d-state-integrity-investigation-11-flunk>.

<sup>10</sup> Lee Davidson, "Special interests give \$8 of every \$10 in donations," *Salt Lake Tribune*, January 4, 2015, A1, A5.

<sup>11</sup> Bryan Schott, "Poll: Big Majority of Utahns Want Campaign Finance Reform," September 14, 2015, posted on *utahpolicy.com*. (The Dan Jones poll revealed that close to 70% of Utahns want more restrictive campaign finance laws.) The problem was highlighted by the saga of former Attorney General John Swallow's unregulated and unchecked campaign contributions from donors who allegedly received legal favors.

<sup>12</sup> 558 U.S. 310 (2010).

<sup>13</sup> Katie McKellar, "Pricey mayoral race prompts Salt Lake City Council to consider campaign finance reform," *Deseret News*, November 10, 2015, accessed November 11, 2015,

<http://www.deseretnews.com/article/865641187/Pricey-mayoral-race-prompts-Salt-Lake-City-Council-to-consider-campaign-finance-reform.html?pg=all>.

<sup>14</sup> See, e.g., Lawrence Lessig, "The Only Realistic Way to Fix Campaign Finance," *The New York Times*, July 21, 2015, A27; Zephyr Teachout, "Legalized Bribery," *The New York Times*, January 26, 2015, A21.

<sup>15</sup> Lessig, *ibid*.

<sup>16</sup> Russell Berman, "Seattle's Experiment With Campaign Funding," *The Atlantic*, November 10, 2015, accessed November 15, 2015, <http://www.theatlantic.com/politics/archive/2015/11/seattle-experiments-with-campaign-funding/415026/>. See also Bob Young, "'Democracy vouchers' win in Seattle: first in country," *Seattle Times*, November 3, 2015, accessed November 15, 2015, <http://www.seattletimes.com/seattle-news/politics/democracy-vouchers/>.

<sup>17</sup> The Salt Lake City Council is currently reviewing options for campaign contribution limits. Christopher Smart, "SLC Council takes up campaign finance reform," *Salt Lake Tribune*, November 10, 2015, B1.

<sup>18</sup> A 2015 poll conducted by Dan Jones and Associates found that 65% of Utahns favor removing the authority of the Legislature to redraw lines for Utah's four congressional districts and allowing an independent commission to do the job. Even a majority of Utahns (58%) who describe themselves as "somewhat conservative" preferred the independent commission. See Bryan Schott, "Most Utahns Want Redistricting Done by Independent Commission," posted on *Utah Policy.com*, July 29, 2015.

<sup>19</sup> Cf. UCA 20A-11-701 and 20A-11-702 (HB 43 (2013)), which require corporations to annually disclose political campaign and political issue contributions of \$750 or more (in each category) and list names of donors and their contributions separately, but only if the donor seeks, gives, or knows that their annual gifts of \$50 or more will be used for electioneering purposes. It is being challenged in court by nonprofit corporations who do not wish to disclose their donors. This statute does not cover 501(c)(4) groups unless they are incorporated.

An example of what is happening elsewhere is the 2013 regulation in New York state that requires nonprofit social welfare (501(c)(4)) groups to report election-related expenditures that support or oppose candidates and ballot initiatives or that refer to candidates in so-called issue ads within certain time periods before an election. When a group spends more than \$10,000 on such communications with respect to New York state or local elections, it must both itemize these expenditures and also disclose individual donors who gave \$1000 or more. If a social welfare group creates a segregated bank account and spends for New York election-related communications only from that account, it need disclose only the donors and donations to that account. In announcing the new rules, the New York Attorney General Eric Schneiderman stated: "When people spend money to try to influence our elections, the public needs to know where that money is coming from, and how it is being spent. Nonprofits should not be used to subvert that basic principle. . . . Simply put, transparency reduces the likelihood of corruption." "A.G.

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Schneiderman Adopts New Disclosure Requirements For Nonprofits That Engage in Electioneering," accessed October 6, 2015, <http://www.ag.ny.gov/press-release/ag-schneiderman-adopts-new-disclosure-requirements-nonprofits-engage-electioneering>.

<sup>20</sup> For a summary of various options currently in use or under consideration, see Brent Ferguson, "State Options for Reform," *Brennan Center*, November 2, 2015, accessed November 8, 2015, <https://www.brennancenter.org/publication/state-options-reform>.