

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

Last year's report focused on three needs: 1) redistricting, to reduce the power of one-party governance, 2) campaign finance reform, to reduce the outsized influence of big money, and 3) a more inclusive nominating process than the caucus/convention systems of the two major political parties. We believe that these unfinished pieces of business remain the most important to address in this year's report. Reform in each area would produce the greatest improvement in the functioning of our democratic republic.

Redistricting

As last year's report described, Utah's current legislative districts do not fairly represent Utah voters or their policy preferences. Republicans constitute 83% of the state legislature while representing about two-thirds of the state's voters.¹ The current gerrymandering of election districts has resulted in one-party monopolies across the nation's congressional and state legislative districts, inhibiting the ability to reach compromise among competing interests. It also has tended to result in more polarization of party positions, reducing the role both of moderate Republicans and moderate Democrats. **Democracy should mean that voters pick their elected representatives rather than the present system where our elected representatives pick their voters.**

David Daley, in his book *Ratf**cked: The True Story Behind the Secret Plan to Steal America's Democracy*, makes a persuasive case, based on detailed evidence, that **polarization across the country has resulted from sophisticated gerrymandering** by the political party with majority power in state elections since 2010--the Republican Party.² Utah has been no exception. Republicans with right-wing ideologies have been capturing more than their fair share of Utah's state and federal legislative districts.³

The best way to address the self-serving problem of the majority party and incumbents protecting themselves when they redistrict every ten years is to **introduce independent, nonpartisan redistricting commissions** in the states--that is, take away the process of redistricting from the political parties. Many states have confronted the need for redistricting directly. Six states currently have independent commissions with primary responsibility for drawing district lines; seven have political commissions.⁴ Five states have advisory commissions to recommend the boundaries to their state legislatures, and at least five have backup commissions made up of political officials or individuals appointed by political leaders who draw the district lines if their legislatures are unable to agree on a plan.⁵ Iowa has its own unique redistricting system.⁶ Five other states have reform efforts underway,⁷ and six more have lawsuits pending about their state's redistricting plan on racial or partisan grounds.⁸

Although achieving an independent Utah redistricting commission would be difficult, it is likely to address the problem of one-party governance more effectively than any other single reform. Under the federal constitution, no bar exists to establishing independent redistricting commissions where state law allows them. The U.S. Supreme Court upheld Arizona's commission, established by voter initiative, as constitutional under the federal election clause.⁹ The voters' exercise of the legislative function was deemed co-equal to that of the Arizona Legislature.

Utah's Constitution also allows citizens to exercise legislative power through the use of the initiative process. It states:

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 statute¹⁰

Arizona's Constitution provides for amendments to its constitution by initiative; Utah's Constitution has no such provision. Therefore, a Utah independent redistricting commission might have to be established by statute, whether by initiative or passage by the Legislature.¹¹ Although Utah statutory conditions make it difficult to obtain the required number of initiative petition signatures to get on the ballot, it is not impossible. A broad coalition of supporters, with sufficient financing and organization, could write and submit a petition in time to place it on the 2018 ballot. Without such an initiative, we believe that our democracy is threatened by a legislature that is frequently unreceptive to public needs, and one-party rule is likely to continue.

Advisory redistricting commission bills were introduced in the 2016 legislative session, but no action was taken. Even if a bill passed, UCC doubts that advice from a nonpartisan advisory commission would be followed by the Legislature if the result was to undermine the power of the party in power. The bills, however, kept the issue of redistricting alive, as did a legislative resolution--not adopted--to broaden the criteria for redistricting.

Utah's Caucus/Convention System

Utah is one of only a few states to retain the caucus/convention system; others have direct primaries by the voters. The Count My Vote compromise (see last year's UCC report) allowed signature gathering as an alternative way to get on the primary ballot for those who did not gain sufficient votes in party conventions. The Republican Party, after losing its court cases challenging the compromise bill (SB 54), announced it would not file an appeal but would try to modify the law in the upcoming legislative session. Among other changes sought, the Party said it wanted control of candidate selection when the primary election did not produce a clear majority vote for one person.¹² Turning plurality votes back to the party for candidate selection, however, would undermine the basic purpose of SB 54.

Last year, we urged sufficient years of experience before modifying SB 54. It is still early to know how SB54 will affect future elections. The *Salt Lake Tribune* and *Deseret News* continue

to support SB 54,¹³ and the *Deseret News*, in an August 2016 editorial, expressed hope that opening up the nominating process would help more women gain legislative seats.¹⁴

The Utah Republican Party conducts a closed primary election; only registered Republicans can vote. The Utah Democratic Party conducts an open primary. **Closed primaries deny representation by nonaffiliated voters** in the selection of legislative candidates. Some states have a partially open primary, allowing nonaffiliated voters (but not registered members of an opposition political party) to participate. IndependentVoting.org, a national group organized in 30 states, is fighting the disenfranchisement of independent voters, who outnumber members of both the major political parties.¹⁵ It supports "top-two" nonpartisan primaries, in which all voters can choose any candidate without regard to party. Such primary election processes are already used in Louisiana, California, and Washington State.¹⁶ South Dakota had a similar measure on the ballot this year, but it was defeated.¹⁷

Campaign Finance Reform

Real reform of campaign financing is difficult to achieve, among other reasons because of a 2010 Supreme Court decision.¹⁸ *Citizens United v. Federal Election Commission* allowed corporations and unions to spend unlimited amounts of money in support of election candidates as long as not coordinated with individual campaigns.

Overturing *Citizens United* would be a start but would not prevent large amounts of "dark money" (undisclosed donors to 501(c)(4) nonprofits)¹⁹ in elections. Tax exemption given to other "527" groups (nonprofits with unlimited funding potential in elections whose donors must be disclosed) would also survive. Big money infects campaigns up and down the line.²⁰ By and large, middle and working classes don't contribute to campaigns. (The Sanders presidential campaign was an exception.) By May 31, 2016, 37% of political donations--\$462 million--had flowed to super PACs alone.²¹ Growing public frustration with the lack of campaign finance reform has increased distrust of democracy. Without finance reform, the possibility of actual oligarchical control of this country, whether by one party or big business interests, also increases. Ordinary citizens feel like their needs count far less than the preferences of those with money to influence lawmakers on key legislation.

Enforcing the requirement that super PACs remain independent of political campaigns is difficult because the PACs have various camouflaged ways to coordinate. For instance, they can share the same consultants and advertisers, and they can sell their data to the campaign.²² Money from super PACs also can influence the minds of voters through ads, canvassing, and get-out-the-vote (GOTV) campaigns. In other words, Super PACs influence not only lawmakers but voters.²³

Action in 19 states and more than 680 local governments supports a constitutional amendment to overturn *Citizens' United*.²⁴ New York became the first state with at least one Republican state legislative chamber (the state Senate) to call for a constitutional amendment to overturn *Citizens United*.²⁵ Other states with ongoing efforts include Arkansas, Minnesota, Nebraska, and New Hampshire.²⁶

An amendment to the U.S. Constitution would be difficult to adopt, but short of that, steps could be taken to rein in spending by special interests: Federal legislation should require disclosure of dark money and campaign contributions by government contractors, and blocks on

communications between so-called "independent" groups and political campaigns.²⁷ Another option would be a revitalization of public financing of federal campaigns²⁸ and a public financing mechanism for state campaigns in Utah. For instance, South Dakota passed a ballot measure to create a \$50 tax credit that each voter can use to donate to a political candidate. South Dakota also banned campaign contributions of more than \$100 from lobbyists and state contractors and requires that independent groups disclose their top five contributors to political ads and electioneering communications within 60 days of an election.²⁹ Seattle's reform was described in last year's UCC report. In 2015, the Salt Lake City Council passed campaign contribution limits on individuals and groups--\$3500 in the aggregate for the mayor's race and \$750 for Council races.³⁰ This was a beginning.

Commendations

- **Efforts by three legislators, Chavez-Houck, Iwamoto, and Nelson, to pass legislation or rules seeking to constrain gerrymandering, although we do not believe anything short of an Independent Redistricting Commission will achieve state-level nonpartisanship**
- **Introduction of bills to limit campaign contributions** by Democratic Representative Brian King and former Republican Representative Kraig Powell
- **Contribution limits for Salt Lake City mayoral and city council races**
- **Representative Greg Hughes' efforts to require disclosure** for nonprofits who engage in electioneering, even though the bill was challenged then gutted by a settlement
- **Salt Lake County's successful advisory redistricting commission and process**

Recommendations

- **A broad coalition of good government groups should underwrite an initiative petition establishing an independent, nonpartisan redistricting commission,** with preliminary study of the most feasible approach to such a process and commission.
- **The Gardner Policy Institute at the University of Utah, or a similar research group, should study campaign financing reform options** to ascertain the best way to limit campaign contributions and encourage smaller donors to become involved in elections.
- **The Legislature should establish legal state disclosure requirements** for 501(c)(3) and 501(c)(4) nonprofits. California's new disclosure law or New York's disclosure regulations could serve as models.
- **The Republican Party should be encouraged to open its primary elections to nonaffiliated voters. Alternatively, Utah should adopt a direct primary.**
- **The Legislature should allow SB 54 to remain as presently written, allowing more experience to ascertain its impact on voters and the democratic process.**

Endnotes for Article 7 (Participatory Governance)

¹ In the nine presidential elections dating back to 1984, the percent of Republican voters has varied from a low of 43.36% in 1992 to a high of 74.50% in 1984. See [en.wikipedia.org/wiki/United-States-presidential-election,-\[add each election year\]](http://en.wikipedia.org/wiki/United-States-presidential-election,-[add_each_election_year]), accessed November 29, 2016. On average, Republican candidates for President of the U.S. captured 62.11% of the vote. In two elections, Independent candidates captured a significant percentage of the vote: 1992 (Perot) and 2016 (McMullin), so the actual percent of Republican voters in Utah is probably closer to 67-70% of the Utah electorate. In any event, Democrats are underrepresented. They should have between 25-30% of the state legislators, rather than the 16-17% they have had in recent years, due in large part to gerrymandering.

² David Daley, *Ratf**cked: The True Story Behind the Secret Plan to Steal America's Democracy* (New York: Liveright Pub.), 2016.

³ According to Hedrick Smith, former *New York Times* bureau chief and editor, gerrymandered districts have become "favorable turf for extremist candidates in the only seriously contested voting"--the primary election. See Hedrick Smith, "Can the States Save American Democracy?" *New York Times*, August 21, 2016, accessed August 23, 2016, http://www.nytimes.com/2016/08/21/opinion/can-the-states-save-american-democracy.html?_r=0.

⁴ "Redistricting Commissions: State Legislative Plans," *National Council of State Legislatures*, December 7, 2015, accessed September 28, 2016, www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx. Alaska, Arizona, California, Idaho, Montana, and Washington have independent commissions; Arkansas, Colorado, Hawaii, Missouri, New Jersey, Ohio, and Pennsylvania give the job to political commissions appointed by legislatures. For a breakout between a state's congressional redistricting and its state district procedures, see "State by State Redistricting Procedures," *Ballotpedia*, accessed September 28, 2016, https://ballotpedia.org/State-by-state_redistricting_procedures.

⁵ *The National Council of State Legislatures* lists five advisory commissions: Maine, New York, Virginia, Rhode Island, and Vermont. It lists five backup commissions: Connecticut, Illinois, Mississippi, Oklahoma, and Texas. *Ballotpedia* adds two more to the list--Maryland and Oregon.

⁶ "Redistricting Commissions." See also last year's UCC Article 7 report for more details.

⁷ South Dakota, Nebraska, Indiana, Florida, and Maryland. Republican governor John Kasich and Indiana's former Republican governor Mike Pence have both said that gerrymandering should be ended because it results in polarization and division. See "Can the States Save American Democracy?"

⁸ *Ibid.* Alabama, North Carolina, Virginia, Wisconsin, and Maryland. In November 2016, a special federal district court panel in Wisconsin ruled that Wisconsin's 2011 redistricting scheme was unconstitutionally partisan. Considered by commentators to be potentially transformative, the decision specified how courts could actually quantify (by a mathematical formula) whether gerrymandering indicated manipulative, unacceptably partisan boundaries. This case will move eventually to the U.S. Supreme Court. It deserves careful attention.

⁹ *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. ____ (2015).

¹⁰ Utah Constitution, Art. VI, Section 1.

¹¹ If an initiative sought to establish an independent redistricting commission by amending the Utah Constitution, a court ruling would be unavoidable to validate the people's right to do so. Additional arguments for the legality of such an amendment would include Article I, Section 1, of the Utah Constitution, adopted in 1896: "All political power is inherent in the people; and all free governments are founded on their authority for the equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require." Arguments against such an amendment would include Article XXIII, Section 1, also adopted in 1896: "Any amendment or amendments to this Constitution may be proposed in either house of the Legislature" (and requires a favorable vote of 2/3 of the Legislature prior to placement on the ballot at the next general election). An initiative might be written in such a way that if the Utah Supreme Court ruled that a constitutional amendment could not be initiated by the people, it could be adopted as a statute if approved by the voters.

¹² Bob Bernick at Utahpolicy.com reports that the Legislature may consider a runoff election of the top two candidates emerging from a primary election as a way to continue to honor the substantive requirements of SB 54. "GOP Leaders May Agree to Primary Run-off Election as Solution to SB 54 Plurality Issue," accessed September 27, 2016, <http://utahpolicy.com/index.php/features/today-at-utah-policy/10954-gop-leaders-may-agree-to-primary-run-off-elections-as-solution-to-sb54-plurality-issue>.

¹³ "GOP Caucus Aftermath Makes Case for SB 54," *Salt Lake Tribune*, March 29, 2016; "Utah Republicans Are Right to Allow SB54 Reforms to Go Forward," *Salt Lake Tribune*, September 4, 2016; "The Primary Election Confirms Benefits of SB 54," *Deseret News*, July 3, 2016.

¹⁴ "Utah Should Continue Its Proud History of Female Participation in Politics," *Deseret News*, August 9, 2016 (hoping SB54 will reform the caucus system and encourage more women to run for elective office).

¹⁵ See www.Independentvoting.org.

¹⁶ "States with Open Primaries for Other Elections," *Wikipedia*, accessed September 28, 2016, https://en.wikipedia.org/wiki/Open_primaries_in_the_United_States. Louisiana's, Washington's, and California's systems are frequently referred to as nonpartisan blanket primaries.

¹⁷ "South Dakota Nonpartisan Elections Constitutional Amendment V (2016), accessed November 28, 2016, [https://ballotpedia.org/South_Dakota_Nonpartisan_Elections_Constitutional_Amendment_V_\(2016\)](https://ballotpedia.org/South_Dakota_Nonpartisan_Elections_Constitutional_Amendment_V_(2016))

¹⁸ 558 U.S. 310 (2010).

¹⁹ *Public Citizen v. FEC* represents ongoing litigation against a 501(c)(4) group, Crossroads GPS (GPS). Public Citizen's complaint to the Federal Election Commission alleged that GPS was, in actuality, a political committee formed to allow big donors to hide their donations and that, therefore, it was required to report its contributions and expenditures to the FEC. The FEC dismissed the complaint after its Republican and Democratic members deadlocked at 3-3. After various procedural maneuvers by both parties to the complaint and by GPS, further proceedings are continuing in the D.C. federal district court. *Public Citizen v. FEC*, accessed October 6, 2016, <http://www.citizen.org/litigation/forms/cases/getlinkforcase.cfm?cID=853>.

²⁰ The Supreme Court's decision in *McDonnell v. United States* (no. 15-474, June 17, 2016) also concerned many commentators. The Court vacated former Virginia Governor Robert McDonnell's conviction on bribery charges and remanded the case to a lower court because the jury instructions had been erroneous. The Governor had accepted \$175,000 in gifts, loans, and other benefits from a constituent and, in return, had held meetings and events and had called other officials on behalf of that constituent. Although the Court characterized the case as at least "distasteful," with "tawdry tales," nonetheless, on the basis of the overbroad jury instructions, none of the Governor's activities could be factually determined to have been "official acts" sufficient to constitute *quid pro quo* corruption. On remand, with a narrower instruction of what constitutes an "official act," a jury must find that the Governor's activities constituted "formal exercise of government power." *Ibid.*, 26-28.

²¹ A Super PAC is an independent political action committee that can accept unlimited donations for political campaigns as long as it doesn't coordinate with actual candidates. In general, donors are disclosed. It has been difficult, however, to block Super PACs from coordinating with candidate campaigns in various indirect ways.

²² Elizabeth Drew, "How Money Runs Our Politics," *New York Review of Books*, June 4, 2015, 24.

²³ Idress Kahloon, "Does Money Matter?" *Harvard Magazine*, July-Aug. 2016, 52-54.

²⁴ Smith, "Can the States Save American Democracy?" The 17 states mentioned are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Montana, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, West Virginia, and New York. California's Proposition 59 and Washington's Initiative 735 for similar action was approved by voters this past November, bringing the number to 19.

²⁵ "New York Becomes 17th State to Call for an Amendment to Rein in Election Spending," *Public Citizen News* 36, (no.4), July/August 2016, 1. The Republican legislators supporting the amendment said "they understand that big-moneyed interests are hijacking our democracy."

²⁶ *Ibid.*

²⁷ Much information about money in politics and campaign finance reform efforts can be found at www.Democracy21.org, a nonprofit, nonpartisan organization founded by attorney/activist Fred Wertheimer. Its mission is to work "to strengthen our democracy and promote government integrity, accountability and transparency measures to accomplish its goals."

²⁸ No candidate has accepted public funds for presidential campaigns since John McCain in 2008. Barack Obama in the same campaign declined to accept public financing so he could raise more money. Candidate and outside spending on federal campaigns has grown so large that available public funding is inadequate. Congress could up the amount raised by increasing the match given to the optional taxpayer contribution checked on annual tax return forms while encouraging more Americans to contribute to public financing. See <https://thinkprogress.org/the-288-million-in-campaign-funds-that-candidates-arent-using-fa62673bbcdc#91ljnz75g>. See also www.Democracy21.org.

²⁹ "South Dakota Revision of State Campaign Finance and Lobbying Laws," accessed November 28, 2016, [https://ballotpedia.org/South_Dakota_Revision_of_State_Campaign_Finance_and_Lobbying_Laws_Initiated_Measure_22_\(2016\)](https://ballotpedia.org/South_Dakota_Revision_of_State_Campaign_Finance_and_Lobbying_Laws_Initiated_Measure_22_(2016)), accessed November 28, 2016. See also Smith, "Can the States Save American Democracy?"

³⁰ *Salt Lake City Code*, Section 2.46.050 (December 8, 2015). A candidate's own money is not included in the caps.