

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 UCC focused exclusively on the value of a nonpartisan redistricting process, recommending public support of the ballot initiative entitled Better Boundaries. The initiative gathered the necessary signatures to be on the November 2018 ballot as Proposition 4. We are updating last year's report to emphasize the importance of this initiative. In addition, we followed the controversy and litigation efforts of the Count My Vote initiative, which the Utah Lieutenant Governor's Office determined to be ineligible for the 2018 ballot because of the number of signature rescissions that came in after the deadline for signature gathering. Finally, this year we are introducing the concept of the National Popular Vote, a movement to allow the popular vote in presidential elections to determine the actual outcome in the Electoral College. All three of these movements reflect dissatisfaction by significant segments of the population with legislative governance and the current state of political parties. For democracy to flourish as expected, government needs to perform in such a way as to gain widespread respect for its role in creating healthy communities and honoring public needs and interests. We hope these three movements will push government in the right direction.

Better Boundaries Initiative: Proposition 4

Gerrymandering, whereby state legislatures draw partisan boundaries for state and federal elections, has become increasingly problematic. Multiple states and court decisions have ruled that the process must become more nonpartisan so that legislators are not, in effect, selecting their voters. Instead, voters must be given a fair chance to select their legislators. Ohio, Pennsylvania, Wisconsin, Maryland, and North Carolina are among the most recent states to initiate legal challenges to their redistricting processes.¹ Michigan, Missouri, and Colorado have ballot initiatives this November to establish independent redistricting processes, and in May Ohio passed a measure curbing gerrymandering.²

Better Boundaries (BB) would like Utah to become another of the states that reduces the effect of gerrymandering for federal and state legislatures. Its initiative would establish a seven-person commission made up of Republican, Democratic, and unaffiliated voters who have not held elective office or been lobbyists or party activists in the recent past. In the ballot initiative, this independent redistricting commission is charged with drawing one to three maps to submit to the Legislature for its approval. The Commission is given strict standards or criteria for map drawing, standards that minimize dividing cities and counties and that prohibit use of partisan political data. Five of the seven commissioners must approve any map submitted to the Legislature. If this super majority cannot be achieved, then the Chief Justice of the Utah Supreme Court will intervene to determine which map(s) will be submitted. If the Legislature does not approve one of the submitted maps, it can draw its own map but must follow the standards established in the initiative. The Commission may critique the legislative map publicly, and private citizens may challenge the map in court.³

Review of Potential Benefits of Proposition 4

Passing the initiative is expected to produce multiple benefits, including:

- 1) Honoring the right of voters to choose their political leaders and not vice versa.
- 2) Building more trust in the fairness of the election process.
- 3) Producing less polarization in decision making and more accountability. (Current polarization has resulted in reduced ability in the U.S. Congress and the state legislature for members of political parties to come together to solve pressing problems and to respect the will of the people.)
- 4) Increasing the number of citizens who will register and vote because their vote will actually matter.
- 5) Producing more competitive elections so that, in what should be swing districts, the party in power does not automatically win because of the way it drew boundaries to split the votes of the party not in power.

Redistricting to reduce gerrymandering is not designed to change the reality of which party has the support of the majority of a state's registered voters but is designed to more accurately reflect the proportional power of the minority party in any given state.

Impact of U.S. Supreme Court Decisions

The U.S. Supreme Court had two gerrymandering cases before it in 2018, one from Wisconsin and one from Maryland. In June 18, 2018 rulings, the Court declined to decide the two challenges to gerrymandering, ruling that the plaintiffs in the Wisconsin case did not have standing (did not allege sufficiently particularized injury) to sue. The Court sent the case back to lower courts to allow four of the plaintiffs to try to provide evidence of their direct injuries.⁴ In the Maryland case, the Court issued an unsigned opinion rejecting plaintiffs' request for a preliminary injunction and remanding the case to the lower court.⁵ The impact of these decisions leaves the issue of partisan gerrymandering unresolved by the highest court in the land. A decision on the merits must await future cases.

Supporters and Opponents of Proposition 4

Currently, the only stated opponents of the initiative are legislators, who have disliked the ability of ordinary citizens to initiate a law that the Legislature itself has declined to pass. In Utah, the initiative process is extremely difficult and, when undertaken, has reflected the fact that members of the public believe that the state legislature is ignoring what is in the best interests of the state. It takes enormous commitment and resources to succeed in getting an initiative on the ballot and then to build understanding among registered voters so that the initiative has a chance of passing. The Governor has given support to the initiative, although his support has been characterized as "lukewarm." Multiple good government groups and members of *both* major political parties support the initiative. Endorsers can be found at www.betterboundaries.org.

Count My Vote Initiative

The 2018 Count My Vote (CMV) initiative allowed political party candidates to appear on their party's primary election ballot by one of two methods: 1) nomination by the party at its nominating convention or 2) gathering signatures from 1% of registered party members in the pertinent jurisdiction. Passage of the 2018 CMV initiative was intended to solidify prior legislative support for the dual options enacted in 2014 (Senate Bill 54)--a compromise that had resulted in withdrawal of the 2013 CMV initiative for a direct primary.⁶ The 2018 initiative also introduced improvements over SB 54 by reducing from 2% to 1% the number of signatures of party members required for a candidate to qualify for the ballot. It also established a party primary runoff election if the leading candidate received no more than 35% of the primary vote.⁷ Both these additions solved problems that had arisen under SB 54 provisions.

CMV 2018 backers were motivated to reintroduce an initiative by the continuing efforts of most members of the Republican Party leadership to negate SB 54, both in court and legislatively. CMV asserted that the caucus/convention process was unfair to most party members and was producing ideologically narrow candidates while ignoring the will of most party voters.⁸ CMV initially met the state's requirements for inclusion on the November 2018 ballot.⁹ Opponents (organized as Keep My Vote), however, mounted a 30-day signature rescission effort *after* the final date for submitting the petition signatures, an effort that succeeded.

CMV backers filed a legal challenge in state court, arguing that the statutory rescission provision violated the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. Opponents had convinced fewer than 600 registered voters to remove their signatures from three of the 26 required Senate Districts after backers could no longer gather signatures. This number was less than half of one percent (0.04%) of the 131,000 valid signers, which CMV argued gave opponents, in effect, a veto power to keep the initiative from being decided by the state's voters. In short, CMV argued that the constitutional right of the people to initiate legislation had been unduly burdened.¹⁰

The CMV complaint also stated that bulk filing of the vast majority of rescission requests by CMV opponents was illegal, asserting that the plain language of the statute required voters to submit their signature removal requests personally to a county clerk.¹¹ In late August 2018, the Utah Supreme Court ruled against CMV (postponing the issuance of a written opinion explaining its reasoning), so the initiative will not appear on the ballot. This means that the ball is now back in legislative hands for resolution of the appropriate process for political party nominations.

National Popular Vote Interstate Compact Movement

Dissatisfied with national elections that have allowed a candidate to become President when another candidate has received more popular votes (e.g., Al Gore in 2000, and earlier elections), a movement sprang up in 2006 to change the way Electoral College votes are counted. An interstate compact entitled the National Popular Vote (NPV), if enacted by enough states, would guarantee the Presidency to the candidate who receives the most popular votes in all 50 states and the District of Columbia. Under the Compact, if the nation's voters give a majority to any one candidate, each state belonging to the Compact would require that all its state's electors cast their votes for that candidate.¹²

This approach to a change in the Electoral College process would not require the onerous task of amending the U.S. Constitution. The Constitution leaves it to states to decide how to allocate their electoral votes. States with close votes in winner-take-all states, in effect, negate the effect of all minority votes that count in the popular vote tally but not in the Electoral College.

Supporters argue that the Compact would create a fairer election process because states that cast all their Electoral College votes for the winner of the national popular vote would assure that candidates would feel compelled to campaign in all 50 states rather than concentrating on swing states with the most electoral votes. In other words, each state, regardless of size and political power, would count.

The National Popular Vote Interstate Compact has already been enacted into law by 11 states and D.C., which together comprise 172 electoral votes. Those states are: CA, CT, HI, IL, MA, MD, NJ, NY, RI, VT, and WA (3 small states and D.C., 4 medium-size states, and 4 large states).¹³ Two hundred seventy electoral votes are needed to constitute a majority of the Electoral College. Other states currently considering the Compact include AR, AZ, CO, DE, GA, ME, MI, MO, NC, NM, NV, OK, and OR.¹⁴ Bills to adopt the Compact were introduced by Republican members of the Utah Legislature in 2007, 2011, and 2012 but were not seriously considered.¹⁵ Republican Representative Jeremy Peterson introduced it again in the 2018 session, and it was heard in the Government Operations Committee¹⁶ but was not forwarded to the House because not enough groundwork had been laid to assure its passage, according to those in the know.¹⁷

Commendations

- **The Better Boundaries organization for its successful** campaign to get its initiative petition on the November 2018 ballot
- **The Count My Vote backers for filing suit** to challenge the allegedly illegal rescission procedures
- **State Representative Jeremy Peterson for introducing National Popular Vote legislation** in the 2018 Utah legislative session

Recommendations

- **Utah voters should pass the Better Boundaries (Proposition #4) initiative** and by a sizable majority to better shield the initiative from subsequent legislative tampering.
- **The Utah Legislature should not revise Proposition #4 if it passes.** Substantive revisions prior to giving the independent redistricting commission a chance to work would be disrespectful of the Utah Constitution's initiative provision and the will of the majority of the voting public.
- **The Utah Legislature should ensure that signature gathering remains an option for securing a place on the primary ballot** of Utah's political parties and should amend SB 54 to reflect improvements to that law introduced in the 2018 CMV initiative.
- **The Utah Legislature should support the National Popular Vote movement.** It is timely to again consider legislation to become part of the NPV Compact.

Endnotes for Article 7 (Participatory Governance)

¹ "The State of Redistricting Litigation (August 2018 Edition)," *Brennan Center for Justice*, accessed August 15, 2018, <https://www.brennancenter.org/blog/state-redistricting-litigation>.

² Michael Wines, "Drive Against Gerrymandering Finds New Life in Ballot Initiatives," *N.Y. Times*, July 23, 2018, accessed August 15, 2018, <https://www.nytimes.com/2018/07/23/us/gerrymandering-states.html>. See also Editorial: "The Supreme Court isn't Stopping Gerrymandering so Citizens are Trying to," *Washington Post*, August 3, 2018, accessed October 6, 2018, https://www.pennlive.com/opinion/2018/08/the_supreme_court_isnt_stoppin.html (Michigan ballot initiative).

³ The full initiative can be found at www.betterboundaries.org.

⁴ Gill v. Whitford, 585 U. S. ____ (2018). Slip opinion at https://www.supremecourt.gov/opinions/17pdf/16-1161_dc8f.pdf.

⁵ Benisek v. Lamone, 585 U. S. ____ (2018). Slip opinion at https://www.supremecourt.gov/opinions/17pdf/17-333_b97c.pdf.

⁶ The 2013 initiative had provided for a direct primary, negating the party's role in nominating candidates for public office.

⁷ See "Public Hearing Presentation" on the Count My Vote website, accessed August 15, 2018, www.countmyvote.org. Senate Bill 54, enacted in 2014, requires a higher percentage of registered voters to sign a nominating petition and does not have provisions for a primary run-off in case no candidate receives a majority of the votes. SB 54, accessed August 15, 2018, <https://le.utah.gov/~2014/bills/static/SB0054.html>.

⁸ The most prominent example was when popular U.S. Senator Robert Bennett was eliminated as the party's senatorial candidate at the 2010 party convention. Current U.S. House Representative John Curtis was also eliminated as the Republican Party's candidate at the 2016 special convention to replace Jason Chaffetz, who had resigned, but Curtis was able to gather enough signatures under SB 54 to run in the Republican primary, where he won handily.

⁹ CMV gathered about 19,000 more valid signatures than the required 113,143 statewide as well as signatures equal to 10% of the last presidential vote in 26 of Utah's 29 Senate districts.

¹⁰ Benjamin Wood, "Count My Vote asks Utah Supreme Court to put direct primary initiative on the ballot," *S.L. Tribune*, June 16, 2018, accessed August 15, 2018, <https://www.sltrib.com/news/politics/2018/06/15/count-my-vote-asks-utah-supreme-court-to-put-direct-primary-initiative-on-the-ballot/>.

¹¹ Bryan Schott, *Utah Policy*, June 16, 2018, accessed August 15, 2018, <https://utahpolicy.com/index.php/features/today-at-utah-policy/16963-count-my-vote-appeals-to-the-supreme-court-claiming-utah-s-sign>.

¹² "Agreement Among the States to Elect the President by National Popular Vote: One Page Explanation," *National Popular Vote*, accessed August 15, 2018, <https://www.nationalpopularvote.com/written-explanation>.

¹³ Christopher Ingraham, "A National Popular Vote Just Got One Step Closer to Reality," *Washington Post*, accessed September 11, 2018, https://www.washingtonpost.com/news/wonk/wp/2018/05/08/a-national-popular-vote-just-got-one-step-closer-to-reality/?utm_term=.1ba16a47c5a.

¹⁴ *National Popular Vote*, accessed August 28, 2018, <https://nationalpopularvote.com>.

¹⁵ In 2007, Representative Neil Hansen introduced the Compact (HB 346). In 2010, he introduced it again (HB 297). In 2011, Senator Steve Urquhart introduced it (SB 252). In 2012 Senator Howard Stephenson introduced it in the Senate (SB 63), and Representative Kraig Powell introduced it in the House (HB 509). Over the past decade, many other well-known Utah Republicans have endorsed National Popular Vote, including former Utah Senators Jake Garn and Bob Bennett, and Utah Republican Party leader Stan Lockhart. Even President Donald Trump has endorsed it informally, "National Popular Vote, Utah," *National Popular Vote*, accessed June 12, 2018, <https://www.nationalpopularvote.com/state/ut>.

¹⁶ HB 193, accessed August 10, 2018, <https://le.utah.gov/~2018/bills/static/HB0193.html>; see also <https://www.nationalpopularvoteutah.com>.

¹⁷ *Ibid.*, accessed August 10, 2018, <https://www.nationalpopularvoteutah.com>.