

Participatory Governance Committee Report

Introduction and Summary of Major Positions

Utah needs and deserves more ethical, transparent government that better honors the role of citizen participation in governance. Where is our leadership failing Utahns? Among other things, the Legislature has been significantly modifying recent citizen initiatives legalizing medical marijuana, expanding Medicaid, and establishing a redistricting process to mitigate intentionally partisan gerrymandering.¹ The Legislature lacks respect for the citizen initiative process and assumes it knows best, in spite of conflicts of interest and excessive financing from special interest groups. Along with the upcoming 2021 redistricting process, election processes assume more importance this year, and our report is a call both for informed citizen participation in our democracy and for governmental responsiveness. A summary of our top priorities is below. Explanations of the first four of our priorities are found on subsequent pages.

- **Honest stateswomen and statesmen must be appointed to the 2021 Independent Redistricting Commission.** Regardless of political affiliation, they must place the needs of our democratic republic ahead of partisan gerrymandering and honor the need for voters to elect their representatives and not for representatives to select their voters.
- **The public must perform an important role in the redistricting process,** insisting that the Commission adopt and implement the redistricting standards in the initial initiative and serving as a watchdog for the Commission's work.
- **As a national leader in vote-by-mail, Utah should continue to share its success and help other states adopt or expand it in the future and must continue to teach every registered Utah voter how to avoid making ballot mistakes.** Utah elected officials must also continue to urge Utahns to understand the extra time required to count the paper ballots used in vote-by-mail systems. They must also explain, monitor, and safeguard the anti-fraud and anti-hacking measures used in our election processes.
- **Ranked-choice voting (aka instant run-off voting) should be expanded** to more Utah municipal, nonpartisan primary elections whenever more than two candidates are on the ballot, ensuring that election results reflect the wishes of a majority and not a mere plurality of voters. The Legislature should enact stronger legislation to encourage or incentivize ranked choice voting in such elections as the next step in evaluating RCV.
- **Candidate access to the ballot by signature gathering must remain.** In case the issue re-emerges in 2021, we refer readers to our 2018 report for details about the continuing, but currently latent, Republican Party opposition to allowing potential candidates to gather signatures as a means to gain access to the primary ballot. Republican Party leaders have wanted the Party to control which Republican candidates can appear on the ballot, but the Party convention in recent years has been dominated by delegates who do not represent the views of a majority of Republicans across the state.

2021 Redistricting and the Independent Redistricting Commission

The problem of undue partisan gerrymandering has received a great deal of national attention recently. Legislatures in one-party states have redrawn congressional and state legislative district boundaries after each 10-year census in ways which ensure that the party in power has more than its fair share of representation. The terms “packing” and “cracking” are used to refer to tactics whereby legislatures divide (crack) minority-party voters among separate districts to dilute their voting power and thereby reduce their chance of winning, or concentrate (pack) minority-party voters into fewer districts, allowing them to win more easily there while reducing their ability to have a chance to win in any other districts. How to determine mathematically when these techniques intentionally rob voters of their right to have their vote counted fairly has become a focus of intense interest.²

The U.S. Supreme Court ruled in 2019 that partisan redistricting was nonjusticiable,³ meaning that it was not for the federal courts to decide but was a political problem for Congress and the individual states to resolve. Utah’s successful 2018 Better Boundaries (BB) initiative sponsored by Utahns for Responsive Government (URG) would seem to fall within the scope of the kinds of state efforts that the Supreme Court said were not prevented by its decision.⁴

The 2018 BB initiative did not attempt to change the current understanding, based on the Utah Constitution, that ultimate authority to redistrict remains with the Utah Legislature. Instead, it created a seven-person Commission to recommend nonpartisan boundaries to the Legislature. The Commission consisted of two Republicans and one unaffiliated voter selected by majority party legislative leaders, two Democrats and one unaffiliated voter selected by minority party legislative leaders, and a chairperson appointed by the Governor. The Commission was charged with drawing maps of congressional, state legislative, and school board districts, based on updated population counts from the 2020 census and using a mandated set of nonpartisan criteria for map-drawing. A choice of a maximum of three maps per district was to be submitted to the Utah Legislature for its acceptance or rejection. If the Legislature declined to use a Commission map, it was required to explain how its substitute map still met the initiative’s redistricting standards. Its explanation and decision could be challenged in court.⁵

Notwithstanding the success of the ballot initiative, the Utah Legislature objected strenuously to public interference in what it saw as its own exclusive right to redistrict. A significant effort by URG to maintain the heart of the initiative resulted in a prolonged negotiation for a so-called compromise bill enacted by the 2020 Legislature and signed by the Governor. The new, 2020 enactment (SB200)⁶ significantly waters down the initiative. Although it retains the Independent Redistricting Commission and the \$1 million for staff support, it removes constraints on the former political or lobbying activities of the Republican and Democratic commissioners. It gives the Commission the authority to define and implement whichever of the initiative’s redistricting standards it chooses to adopt. It removes the right of private citizens to legally challenge the Legislature’s ultimate redistricting maps. It does not require the Legislature to even vote on any

map submitted by the Commission. In spite of such limitations, URG supported the compromise bill rather than lose the Independent Redistricting Commission entirely. The hope was that the Commission could function to recommend better redistricting maps than the Legislature alone would draw and create public pressure to select one of the maps submitted.

Now it is up to the legislative leaders to appoint Commissioners (by February 2021) who will honor their responsibilities and up to the public to do their jobs to ensure that the Commission functions in a nonpartisan fashion and builds momentum for reduced gerrymandering.

From our perspective, chief among the measures and values needed to ensure proper functioning of the Commission are:

- 1) A visible application process that is clear, easy to use, and open to eligible comers—which ideally should be made public by January 1, 2020;
- 2) Selection of Commissioners who are perceived by the public as good citizens, with meritorious and relevant backgrounds, representing a cross section of Utah residents;
- 3) A Commission committed to working together in common cause to achieve a fair process, with a chairperson who motivates members to abandon hidden political agendas.
- 4) A high turnout of well-informed voters at the seven hearings the Commission must conduct across the state;
- 5) Adherence by the Commission to the standards set forth in the original initiative⁷:
 - preserving communities of interest;
 - following natural, geographic, or man-made features, boundaries, or barriers
 - minimizing the division of municipalities and counties across multiple districts,
 - achieving boundary agreement among the different types of districts,
 - prohibiting the purposeful and undue favoring of (a) an incumbent elected official, (b) a candidate or prospective candidate, or (c) a political party.
- 6) Public's willingness to submit their own maps for consideration;
- 7) Complete transparency of the Commission's work, including its computer software and assessment tools, so that the public understands and appreciates the challenges involved in drawing fair maps that do not deliberately favor one political party over another;
- 8) Statewide media coverage of each phase of the Commission's work;
- 9) Heavy public interest in and analysis of any maps drawn by the Legislature that substitute for the Commission's recommendations;
- 10) Public ability and willingness to hold Utah legislators accountable for their decisions.

Election Processes

Vote-by-Mail. Utah adopted vote-by-mail ballot (also widely known as mail-in voting) in 2015 and now uses it statewide. Utah is one of 5 states (UT, CO, HI, OR, and WA) to have such a statewide ballot option. Most of the remaining states have a modified version of vote-by-mail--known as no-excuse absentee voting, which allows voters to request an absentee ballot without

having to state a reason such as medical infirmity or absence from the state on election day.⁸ Various attempts were underway in a number of states to expand their mail-in system in time for the November 3rd election.

Some of the advantages of vote-by-mail are: (1) avoiding long lines and wait times on election day, thus greatly reducing health risks; (2) allowing voters more time to study the ballot and seek information on candidates and ballot questions; (3) making voting more convenient by not requiring voters to show up at a polling place; (4) increasing early voting, thus reducing the effectiveness of last-minute dirty campaigning; and (5) creating a paper trail for auditing purposes!

Vote-by-mail has been well accepted in Utah. The ballot is mailed to registered voters two to three weeks prior to election day, and about 90% of voters are now using it.⁹ They can mail their ballots (pre-paid by most Utah counties) through the U.S. Postal Service¹⁰ or drop them into special drop-boxes. This pandemic-year, each county was asked to provide more drop boxes. In-person voting remained available, but provisions for outdoor voting were to be available if a health emergency made them necessary. No known attempts to suppress voting emerged.

Allegations that vote-by-mail increases fraud are unsubstantiated. States that use vote-by-mail have documented only miniscule fraud problems, far fewer than would be needed to affect the outcome.¹¹ In Utah, an early problem of some LDS parents signing absentee ballots for their missionaries was discovered easily because the forged signature did not match the signature of the registered voter. In other words, the authentication procedure worked.¹²

A theoretical problem called “ballot harvesting” (where someone collects a group of ballots, say, from a nursing home and that person could potentially influence the voters as they complete their ballots) has also been virtually nonexistent. It is handled in Utah by an updated 2020 statute prohibiting its use except in unusual circumstances (for instance, if issues arising from disability, age, or illness prevent a few voters from mailing their own ballots).¹³

The bigger need, in the aftermath of this year’s general election, is for election officials to continue to urge patience as vote counts proceed and to extend efforts to explain procedures to authenticate mail-in ballots and minimize fraud. Going forward, they should continue to work to eliminate occasional mistakes in the printing and distribution of ballots in local jurisdictions and always insist that election outcomes be allowed to proceed under the rule of law and ensure that the public can trust that outcomes are accurate.

Ranked Choice Voting. What is ranked choice voting (RCV)? It is an election process that allows or requires voters to rank order their candidate preferences when more than two candidates are running for the same spot. Then, if no candidate acquires a majority of first place votes, more rounds of counting votes are used to produce a winner with the broadest public support. RCV is gaining interest across the country as a way to promote more democratic elections, rather than producing winners who have gathered only a plurality of support. Under

RCV, if no one is the majority winner after the first round of counting, the candidate with the fewest first place votes is eliminated, and the ballots favoring the eliminated candidate are recounted in favor of the candidate who was ranked second on those ballots. The same process of elimination continues until a candidate achieves a majority of the votes.

The current system. In recent multiple-candidate elections in Utah and across the country, the current system has allowed a candidate receiving less than a majority of votes to be elected to office. This occurs where nonpartisan municipal elections have multiple candidates and the votes are split so that no one receives a majority of the votes, forcing a run-off election. It also occurs in political party primary elections where the outcome in a voting district (like many of Utah's one-party districts) or a one-party state (like Utah) effectively determines the outcome of the general election. It has also occurred in national presidential primary and general elections. In these situations, having a mere plurality winner harms our belief in majority rule.

Potential Advantages of RCV

- 1) A plurality doesn't determine the outcome.
- 2) It can reduce partisanship and negative political advertising because candidates do not want to antagonize voters who might otherwise rank them second.
- 3) Voters can vote their conscience rather than feeling obligated to vote for the candidate with a better chance of winning.
- 4) One's vote isn't wasted if a favorite candidate drops out of the race prior to the election, because the voter's other preferences still count.
- 5) It eliminates the need for a run-off election to get a majority, saving money and time.
- 6) It has worked in political party convention elections in many states.
- 7) It may encourage a bigger voter turnout.
- 8) It allows more than two candidates to compete without fear of "splitting the vote" among like-minded individuals and letting a fringe candidate slip through.
- 9) It creates incentives for candidates to reach out to a larger audience of voters, rather than just one political base.

A couple of examples out of many illustrate problems with plurality elections. In Utah's 2020 Republican gubernatorial primary, well over 60% of the voters voted for someone other than the winner, who then became the general election winner in Utah's overwhelmingly Republican state. In the 2016 presidential election, six states gave all their electoral college votes to a candidate who received only a plurality of votes in those states. In both examples, it is not known whether a different candidate would have won using an RCV process.

Potential Disadvantages of RCV

- 1) All primaries tend to attract only a plurality of eligible voters, so RCV may not overcome that problem and not be worth the time and effort for the county clerks.

- 2) It requires educating the public to a new method of voting (e.g., explaining that voters are free not to rank any candidate deemed unacceptable) and may produce more invalidated ballots or staff time to determine voter intent.
- 3) Transition to RCV can take money and time: Among possible costs: replacing outdated equipment, training staff to use new software, and redesigning the ballot.
- 4) The ballot may be cumbersome and require extra pages, depending on ballot design;
- 5) Some prefer runoff elections for the top 2 candidates as a better expression of the public will.
- 6) It may not produce a different outcome from the current method (i.e., the plurality winner would end up being the RCV winner)
- 7) It may produce more litigation on the part of losing candidates, as it has in Maine.

Who's Using RCV? Ten states now use RCV for some local elections (CA, UT, CO, NM, MN, VA, MA, TN, MD). Five states used it in the 2020 Democratic presidential primaries (WY, KS, AK, MT, and HI). Maine uses RCV in federal elections and state-wide primary elections. Six states use it for military and overseas voters (IL, SC, LA, MI, AL, AK, presumably because there isn't time for an overseas run-off election). Utah, Virginia, and Indiana have used it in political party conventions. A growing number of cities are using it, among them Santa Fe and Las Cruces NM; Cambridge, MA; Oakland and San Francisco, Minneapolis and St. Paul; with NYC starting in 2021.¹⁴ In the 2020 election, Massachusetts rejected an RCV proposal for state and federal legislative elections (presidential elections were not part of the proposal). An RCV proposal in Alaska that was part of a bigger reform package on the 2020 ballot appeared headed for defeat as of November 8th.¹⁵ Many lawsuits have tried but failed to overturn Maine's federal RCV elections, but new attempts keep arising.¹⁶

The Utah Experience. Utah legislation (2018) allows local governments to adopt RCV in its Municipal Alternative Voting Methods Pilot Program.¹⁷ Two Utah County towns, Vineyard and Payson, chose to do so for their 2019 city council elections. Over eighty percent of surveyed respondents found it very or somewhat easy to use and wanted it used again. Three-fourths of the candidates also supported the process; the rest expressed no opinion. A 2020 legislative resolution (HCR8) passed, encouraging other municipalities to adopt RCV to avoid the need for a runoff election.¹⁸ (In effect, the primary becomes an instant run-off election, i.e., the final election.) Interest in mandating its use in nonpartisan municipal elections is building.¹⁹

Utah's limited experience with RCV means that the public may not yet be ready to support it.²⁰ Like vote-by-mail, which took several years for statewide support, more experience at local levels may be where to expand. If the results produce more majority winners and can be scaled up to be economically and logistically feasible, then RCV could be expanded to larger cities or statewide elections. We like the purposes of RCV but support more RCV experience before adopting it in place of the current system.

Endnotes for Participatory Governance Report

¹ 2018's successful ballot Proposition 2, legalizing medical marijuana, was substantially altered by the Legislature, as was Proposition 3's successful Medicaid expansion and Proposition 4's successful establishment of an Independent Redistricting Commission. Opposing such legislative alterations, Representative Angela Romero introduced a bill (HB112) in the 2020 legislative session that would have required voter approval of any legislative bill that amended the substance of an initiative approved by the voters. The bill did not receive a hearing.

² For information about one of the more promising algorithms for determining intentional gerrymandering, known as Markov Chain Monte Carlo, see the amicus brief of mathematicians submitted in the Supreme Court case of *Rucho v. Common Cause*, accessed August 8, 2020, https://www.supremecourt.gov/DocketPDF/18/18-422/91446/20190308181814592_18-422%2018-726%20Amicus%20BOM%20Mathematicians.pdf.

³ *Rucho et al. v. Common Cause et al.*, 139 S. Ct. 1484 (2019).

⁴ *Ibid.* The Court said that a number of states were addressing the issue of excessively partisan gerrymandering through state constitutional amendments and legislation that placed power to draw electoral districts in the hands of independent redistricting commissions. It said that nothing in its decision prevented those efforts.

⁵ The original initiative petition is found at <https://elections.utah.gov/Media/Default/2018%20Election/Initiatives/Better%20Boundaries%20Application.pdf>.

⁶ SB200 is found at <https://le.utah.gov/~2020/bills/static/SB0200.html>.

⁷ The Legislature introduced an additional standard: i.e., preserve "cores" of former districts. "Cores" are not defined, but some think it means preservations of core constituents in former districts.

⁸ Eric Cortellessa, "Voting in the Time of Coronavirus," *Washington Monthly*, April/May/June 2020.

⁹ Lee Davidson, "Hackers, COVID-19 and foreign disinformation create challenges for Utah elections this year," *Salt Lake Tribune*, May 12, 2020, accessed August 4, 2020, <https://www.sltrib.com/news/politics/2020/05/11/hackers-covid-foreign/>.

¹⁰ In counties that do not pay the return postage, the Post Office will return ballots lacking postage to the correct county anyway.

¹¹ Oregon, for example, has "sent out more than 100 million mail-in ballots since 2000, and documented only about a dozen cases of proven fraud. That's 0.00001% of the votes cast." See Wendy Weiser, "To Protect Democracy, Expand Vote By Mail," *Brennan Center for Justice*, June 30, 2020, accessed August 8, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/protect-democracy-expand-vote-mail>. Washington state secretary of state stated on NPR, August 1, 2020, that out of 3.2 million ballots cast in the 2018 election, there were only 142 cases of voter fraud, <https://www.npr.org/2020/08/01/898184573/how-washington-state-s-mail-in-elections-play-out>. For a full exposition on the virtual absence of fraud, see Ben Ginsberg, "Republicans have insufficient evidence to call elections 'rigged' and 'fraudulent,'" *Washington Post*, September 8, 2020, accessed September 8, 2020, <https://www.washingtonpost.com/opinions/2020/09/08/republicans-have-insufficient-evidence-call-elections-rigged-fraudulent/>. Ginsberg is an election law attorney, a Republican, and was the 2013 co-chair of the bipartisan Presidential Commission on Election Administration.

¹² Lee Davidson, "While President Trump and national GOP sound alarm on voting by mail, red Utah embraces it," *Salt Lake Tribune*, August 4, 2020, <https://www.sltrib.com/news/politics/2020/08/01/while-president-trump/>.

¹³ SB6009 (2020), UCA 20A-3a-501. Other exceptions are if the person delivering the ballot lives in the same house as the voter or is an authorized election worker. The USPS is critical for rural Utah residents. According to the Rural Utah Project, in some communities, "not mailing your ballot means your best chance of voting is a two hour drive away. Unlike many metropolitan areas around the country, Garfield

County, Utah, does not provide ballot drop off locations for voters. If not for USPS, voters are left without a paddle. . . .” Email to D. Huefner from info@ruralutah.org, August 25, 2020.

¹⁴ These data come from [FairVote.org](https://www.fairvote.org), a national advocacy group particularly promoting RCV in the 2024 presidential primaries. See also Bill Theobald, “Ranked Elections rejected in Massachusetts, in Doubt in Alaska.” *The Fulcrum*, November 4, 2020, accessed November 6, 2020, <https://thefulcrum.us/ranked-choice-voting-massachusetts-2648622323>. The *Fulcrum* article reported that in the 2020 election, RCV was approved for municipal elections in 2 cities in California, 2 in Minnesota, and 1 in Colorado.

¹⁵ “Ranked Elections rejected in Massachusetts, in Doubt in Alaska.” The Alaska proposal was more complicated and included 3 topics: RCV for some state and federal elections; open top-4 primaries; and campaign finance disclosure reforms. For more detail about the proposals, see [https://ballotpedia.org/Massachusetts_Question_2,_Ranked-Choice_Voting_Initiative_\(2020\)](https://ballotpedia.org/Massachusetts_Question_2,_Ranked-Choice_Voting_Initiative_(2020)) and [https://ballotpedia.org/Alaska_Ballot_Measure_2,_Top-Four_Ranked-Choice_Voting_and_Campaign_Finance_Laws_Initiative_\(2020\)](https://ballotpedia.org/Alaska_Ballot_Measure_2,_Top-Four_Ranked-Choice_Voting_and_Campaign_Finance_Laws_Initiative_(2020)).

¹⁶ Maine has had a series of court cases challenging RCV in both state and federal court. A federal district court has twice upheld Maine’s law from constitutional challenges by the loser of a 2018 congressional race. Maine’s Supreme Judicial Court has also ruled against proponents who wanted to overturn RCV. This past October, it denied a request by the Maine Republican Party for a stay of the court’s earlier denial of a proposed referendum on the November ballot asking voters to overturn Maine’s 2019 RCV extension to presidential elections. The Court denied the request because voting by absentee ballot was already underway and, in addition, it again affirmed the determination of the Maine Secretary of State that the referendum had failed to obtain enough eligible signatures for placement on the ballot. Scott Thistle, “Maine’s high court denies request to put ranked choice decision on hold,” October 2, 2020, accessed October 26, 2020, <https://www.pressherald.com/2020/10/01/maines-high-court-asked-to-put-hold-on-ranked-choice-voting-decision/>. The Maine Republican Party appealed the decision to the U.S. Supreme Court, but the last-minute appeal was rejected by Justice Breyer, acting for the Court. David Sharp, “Supreme Court turns away Maine GOP appeal on ranked choice voting,” October 7, 2020, accessed October 26, 2020, <https://wgme.com/news/local/supreme-court-turns-away-maine-gop-appeal-on-ranked-choice-voting>.

¹⁷ HB35 (2018), <https://le.utah.gov/~2018/bills/static/HB0035.html>.

¹⁸ The data in this paragraph come from information included in HCR8 (2020), accessed August 2020, <https://le.utah.gov/~2020/bills/static/HCR008.html>.

¹⁹ Utah Senators Curt Bramble and Mike Winder have expressed interest in a mandate for all primary elections. Lee Davidson, “Two lawmakers seek switch to ‘ranked-choice voting,’” *Salt Lake Tribune*, July 8, 2020, accessed August 4, 2020, <https://www.sltrib.com/news/politics/2020/07/08/two-utah-lawmakers-seek/>.

²⁰ Polling of prospective Republican voters in the 2020 gubernatorial primary suggested this is the case. Lee Davidson, “Poll: Utah GOP primary voters are wary of ‘ranked choice voting,’” *Salt Lake Tribune*, June 15, 2020, accessed August 4, 2020, <https://www.sltrib.com/news/politics/2020/06/15/poll-utah-gop-primary/>.