



A PATH FORWARD

**Addressing the Issues from
League of Women Voters of Utah et al v Utah State Legislature et al
And Utah's Amendment D**

An Open Letter

Utah now finds itself in an interesting predicament with the Utah Supreme Court's recent decision in *League of Women Voters of Utah et al v Utah State Legislature et al* ("LWVU v Utah") (discussed further below). The timing of this decision is juxtaposed with other issues that have produced some fairly serious consternation among many Utah citizens (such as the changing of the State flag, SB 54's impact on primary election results, the Olympic bid, NHL hockey, etc.).

I am well aware of the serious nature of the issues presented to our Republic and constitutional form of government that are now present as a result of *LWVU v Utah*. I fully believe that a constitutional amendment is necessary to address the consequences that will flow from this case. However, I also believe that, absent a return to the constitutional principles that made us a nation, we should not vote for the proposed Amendment D as it does not properly return us to the principles that made us a nation.

I write this letter as a concerned citizen, an independent candidate for the office of Attorney General, and as an attorney with experience in constitutional matters. My sincere hope is that we can all set aside our political differences and simply work to restore things to that which is right, that which made our country what it is.

With that in mind, I will give a background of what I see of the issues, and I will follow that up with a path forward that can resolve a number of the more critical issues. This letter is longer, as it is necessary to write in detail about a number of the items to fully communicate the information necessary to understand them.

Background of *LWVU v Utah*

In 2018, Utah had three or so ballot initiatives make it through the difficult process of obtaining enough signatures to be placed on the ballot to be voted on. A ballot initiative is a proposed law that is voted on directly by the people and that circumvents the legislative process. Utahns approved the three ballot initiatives, thus legalizing medical marijuana, expanding Medicaid, and creating an independent commission for drawing new legislative districts after the census took place in 2020.

As time went on, the legislature changed each of these ballot initiatives. From my perspective, none of the ballot initiatives in 2018 were a shining example of good legislative drafting, and each contained issues that should have been addressed or

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corrected. However, one major weakness and flaw (among others) in the ballot initiative process is that there is no debate or review from opposing sides to produce a better initiative. It is simply what it is when first proposed, and legislation is rarely a good, finished product in its first public appearance.

With some of the changes that were made to these initiatives by the legislature, Utah respected the core intent of the initiative. Medical marijuana, for example, remained legal even though the legislature met in special session to address some issues with the bill.

With the independent commission for redistricting though, the Utah Legislature changed the core intent of the initiative and removed any binding power of the independent commission. The legislature reclaimed their power to create any legislative districts that they wanted, and they rendered the independent commission to a similar status as the English royalty—that of a simple place holder with no real power.

When it came time to draw new lines based on the 2020 census, the Utah Legislature ignored the districts drawn by the independent commission and made their own. With the intent of the ballot initiative rendered null and void, a few groups sued arguing that their constitutional rights under the Utah Constitution were trampled upon.

The Utah Constitution has two relevant provisions in it. One in Article VI §1 states that the legislative power of the State is vested in the legislature **and** the people. This means that Utah citizens have a constitutional right to ballot initiatives and referendum to overturn laws passed by the legislature. The other provision in Article 1 §2 states that the people of Utah have the right to “alter or reform their government as the public welfare may require.”

Thus, the question raised in the case was whether the Utah Legislature could change a ballot initiative that removed power from the legislature. If the Utah Legislature could change any ballot initiative and completely erase its impact and intent, then how do the people of Utah have any right to “alter or reform their government”?

There were many arguments presented on both sides of this question. Ultimately, the Utah Supreme Court, in a unanimous decision, ruled that the Utah Legislature could not change the substance of a ballot initiative that “altered or reformed” the government, except in very limited circumstances.¹ Since the independent commission on redistricting

¹ “[W]hen Utahns exercise their right to reform the government through an initiative, this limits the Legislature’s authority to amend or repeal the initiative. This does not mean that the Legislature cannot amend a government-reform initiative at all. Rather, legislative changes that facilitate or support the reform, or at least do not impair the reform enacted by the people, would not implicate the people’s rights under the Alter or Reform Clause. Legislative changes that do impair the reforms enacted by the people could also survive a constitutional challenge, if the Legislature shows that they were narrowly tailored to advance a compelling government interest.” *LWVU v Utah*, ¶11 (emphasis added). From a legal perspective, only a handful of situations have been found to be “narrowly tailored to advance a compelling

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was intended to remove a power from the Utah Legislature (that of being able to draw legislative districts based on political parties and political preferences), the Utah Legislature could not simply take the power back. Doing so would, according to the Utah Supreme Court, violate the constitutional right of Utah citizens to alter or reform their government.

Implications of *LWVU v Utah*

I think it would be fair to say that the Utah Supreme Court's decision in *LWVU v Utah* blindsided the Utah Legislature, as the legislature had always maintained the right to amend initiatives. Whether expected or not though, some of the pros and cons that follow from the decision include the following:

Pros

- The people of Utah can pass a ballot initiative to change the government, and the change cannot be vetoed (in most situations) by the government.
- The rights of the people of Utah were strongly supported by the Utah Supreme Court.
- The government will now need to listen more to the people. If it doesn't, the people can change whatever it is that the government refuses to address (if related to the form of government).

Cons

- Ballot initiatives, whether good or bad, pass in most situations. Ballotpedia claims that from 1995 through 2016, 86.96% of measures on the ballot (which likely include more than ballot initiatives alone) had been approved by the voters.² This means that laws that may seriously undermine our government and State could pass without any real check or balance on it.
- The ballot initiative process does not include the robust debate and improvement process that other bills go through. This eliminates voices and input and allows for the majority to oppress others, one of the things the founders worked hard to balance.
- The people are not obligated to balance a budget or be concerned about the other implications of a law they pass, so ballot initiatives can often be shortsighted and create a variety of unintended consequences. Laws, of course, can do this too, but there is a much easier process to address and deal with unintended consequences.

Ultimately, this decision fundamentally changes our form of government. America was built as a Republic, one where we elect officials who have the responsibility to represent

government interest", and so this standard means that in most situations, the Utah Legislature cannot change the core of what the people passed in a ballot initiative.

² https://ballotpedia.org/Utah_2018_ballot_measures

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the citizens in their districts. They review laws, balance budgets, listen to issues and other viewpoints, and put their proposed bills into a process that allows for changes, amendments, and improvements. However, with the decision in *LWVU v Utah*, the form of government is shifting more towards a democracy.

While I believe that there are many elected officials who are good and try to be good, I also do not believe that all elected officials fall into this category. However, I trust that the system will ultimately produce a good result when the proper checks and balances are in place, even if there are some bad actors along the way. Over the years though, the system of checks and balances has been breaking down, which is leading to results that are further from what is right or good. I also believe that moving us closer to a democracy will propel us further down a path where the decisions are even more removed from that which is right or good.

For example, consider if the following were ballot initiatives:

- Eliminating the government's power to impose taxes;
- Eliminating the government's power to charge for higher education;
- Requiring the government to provide housing for all; or
- Placing full personal liability on all government officials for any harm that comes to anyone as a result of the official's actions, inactions or statements.

To a voting group that is not responsible to balance a budget or to find people willing to be involved in government without some form of protection against liability, or to a voting group that is not widely educated in how government works or functions, these ballot initiatives have the potential of passing and radically altering so much in Utah, with no check or balance in place currently (due to the Supreme Court's decision in *LWVU v Utah*) to address the serious issues that may follow their passage.

No power in the government should exist free or independent of a healthy check and balance on it. The genius of America was in its system of checks and balances, not in having the people vote in a popularity contest about the new set of benefits they now want from their government.

Accordingly, from my perspective, *LWVU v Utah* presents a serious threat to our republic form of government and our system of checks and balances. Just as the government should not be able to do whatever it wants whenever it wants, so too the people need to be checked in the laws they pass. As it stands, there is simply not a good mechanism in place for a proper check and balance on ballot initiatives or on citizens who vote through the popularity contest or majority-rule process associated with the initiatives.

While I support an amendment to address proper checks and balances, I do not feel it is possible to consider this issue in isolation as does Amendment D. If the legislature wants

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power back from the people in the form of a constitutional amendment, it has to have the approval of the people (as constitutional amendments have to be ratified in Utah by the voters). For me to support an amendment, it will need to ensure that the people, if they give up some of this power, have the ability to also check and balance the government through the intended means of elections. **Checks and balances first, power second.**

Here is my view of the various societal issues at play right now that will present a roadblock to the passage of an amendment that does not properly restore the system of checks and balances.

Issues in the Hearts of Various Utahns

The following is not an exhaustive list, but it provides some insights into how an attempt at a constitutional amendment may fail if it does not address more issues than the issue raised in the *LWVU v Utah* case alone:

#1 Long Period of One-Party Rule in Utah

In Utah, one party has dominated the scene for a very long time. This leads those outside of the party or more mainstream politics or religion to feel that their voices do not matter or are not heard. The fact that they now have a virtually legislative-veto-proof power will be of no small consequence to them, and I would guess that they would work aggressively to keep this power and not give it away. While an amendment could still pass with those in the ruling party voting for it, the party is fractured currently and the issues below highlight things that may prevent those in the party from unifying on the issue of a constitutional amendment.

#2 SB 54 (Signature Path to Candidacy)

The frustration and discontent within the Republican Party is growing over the impacts of SB 54. There is a growing chorus of people that want to see SB 54 done away with and repealed, and this is no longer a small group. 45% or so of voters in the Republican Primary for Governor voted for the Convention path candidate. That 45% voting block may want SB 54 repealed so much that they may initiate their own ballot initiative to do so. If they repeal SB 54 through a ballot initiative (or utilize a form of law that effectively nullifies it), then, based on *LWVU v Utah*, the Utah Legislature likely cannot change this in the future. Now that that power is in their hands, I do not see a good way to convince this group to simply give the power back to the government. They are frustrated with all of their requests not being heard. Without that vote in support, and the vote in support of the groups in #1 above, an amendment is likely to fail.

Whether intentional or not, many delegates at the Republican Convention felt belittled or degraded when the SB 54 candidate for Governor virtually taunted them. Many others did not love this either, and, while the SB 54 candidates that won presumably obtained

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enough votes to win their race, it was not a majority decision for all of them, and the numbers were changing fairly rapidly in the weeks leading up to the primary in support of convention candidates. Given another month or so to campaign, the results may have been entirely different than they were.

#3 The Utah State Flag Process

Many citizens felt lied to about the State Flag process. They wanted to be able to vote on the new flag selection, and that vote was taken from them and the legislature and Governor simply moved forward without that vote. I do not know the reasons for that decision, but asking that group (which may overlap a fair amount with the group in #2 above) to simply give the power back too is a significant ask, especially since their requests related to submitting the flag to a vote of the people was denied and the referendum process was overly complicated. While improving the referendum process would be helpful here (and it is an item I discuss more below), I doubt that that improvement alone would fully sway their vote.

#4 The Olympics and NHL Hockey

There are many Utahns super excited about the Olympics and NHL Hockey. Yet, there are many who are concerned about where government is headed. Utah appears to be embracing the desire to look and feel glamorous, and the deals between billionaires and the Utah government are not going unnoticed. Sales tax increases that go directly to a billionaire? Potential changes to Abravanel Hall? Huge changes to the face of downtown? Moving the prison to make prime real estate available?

While these issues have not yet bubbled over into something conclusive, they percolate in people's minds, and there is a level of discomfort with it all. To put it bluntly, there is a growing distrust of government, and the fact that Utah committed nearly a billion dollars to a billionaire for hockey, Major League Baseball, or whatever other form of entertainment comes up next produces serious concerns for many. Not everyone wants the Olympics, not everyone wants NHL Hockey, and not everyone wants to be the ones paying for these through their taxes. We should not pretend that these incursions into the realm of wealth and glamour have not had their impact on the average Utahn that views government through a lens of principle and appropriate checks and balances.

#5 Significant Property Tax Increases

Citizens are supposed to have the right to conduct a referendum on laws, including tax increases. Yet, the Utah Legislature did not provide a path for referendum on property tax increases of a school district.³ School districts in Utah are significantly increasing

³ See the Utah Supreme Court decision in *Lord et al v Jordan School District* (2022).

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property taxes, and the lack of a check and balance is not lost on Utahns. Tax increases are a significant concern for many, and many feel powerless to change any of these.

#6 Concerns Over Election Transparency and Accountability

For good or for bad, there has been a significantly heightened awareness of the potential for election issues in the last few years. Election transparency and accountability are significant issues for many voters. This year has had its fair share of election issues, from late post marks due to Utah mail routed through Nevada to potential criminal misconduct of an influential signature gathering company to a lack of laws that allow for inspection and transparency on election and voting concerns.

Elections are supposed to be the main way that citizens check and balance their government officials. If they cannot be assured of a valid election, there will be no trust and no desire to give the government more power. If the government wants to ask for its legislative power back through a constitutional amendment, it needs to give the people basic and fundamental ways to assure that all votes are being properly processed and counted, free from interference, fraud, or other forms of manipulation.

#7 Conflicts of Interest of Government Officials

From the ethical issues at the U.S. Supreme Court to the issues that seem to continue to plague the Utah Attorney General's Office, Utahns are aware of a lack of proper accountability over various conflicts that exist. They are also painfully aware that government officials do not love to impose their own systems of ethics or checks and balances.

One major source of concern with conflicts is that the elections are overseen by the office of the Lieutenant Governor. This is a highly partisan position. Further, our current Lieutenant Governor sits on a finance committee for an attorney general candidate, helping to raise funds for this candidate. How that is even remotely fair or right is unknown to most who know about this issue. Yet, even when I directly requested that the Lieutenant Governor step down from this role, I received no response from the Lieutenant Governor's office. While I am also a candidate for Attorney General, this issue was brought to my attention by other voters who were deeply concerned with the conflicts and fairness aspects at issue.

Further, the partisan nature of this office and the concerns it brings are compounded by the lack of transparency and accountability into potential election issues. Judges will not overturn an election that has occurred, leaving it to government officials to do what is right and create ways to address issues that arise in the election process. However, Utah does not have a good system to address issues that arise, and it does not have a good system to address ethical issues and conflicts that exist, thus leaving people to feel that their only option is to pass something outside of the realm of government officials as

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government officials are not taking the lead on addressing many of these issues and concerns.

Our Governor's office refuses even to release the conflict of interest statements from his cabinet members, statements that exist for the benefit of the public.⁴

So, just trust our government? No. Checks and balances first, power second. Always.

Results of these Issues

To me, these issues combine to make the proposed Amendment D untenable. To put it another way, the combined actions of the Utah Government (at the state, county, city, and school board levels) that have deviated from good principles of sound government are weakening the trust of the people. If the people do not trust their elected officials, they will not be inclined to give power back now that it resides with the people.

In other words, the people are in possession of a significant amount of power right now. To get it restored to a proper balance in our Republic, we need to address the various issues that have thrown it off and address the items that have weakened or hurt the foundation that our country was built upon. We have to restore the checks and balances as part of any correction of power.

A Path Forward

In my opinion, the path forward is to put some level of politics aside and simply return to a good foundation of checks and balances that respects the role of each group involved. We have to trust in the power of the principles to create a system that works moving forward, rather than trying to simply achieve one partisan result or another. What this looks like to me, in principle (with details to follow the main principles) is:

1. Giving the legislature the ability to be the main source of law, and the ability to check and balance bad law;
2. Providing the people with a way to pass laws that the government refuses to address or to overturn bad laws passed by the legislature;
3. Removing elections from the purview of the Lieutenant Governor's office and creating a new elections board with proper checks and balances, transparency, and accountability in place;
4. Restoring the power of political parties to choose their own candidates.

⁴ <https://www.ksl.com/article/51128071/state-refuses-to-release-conflict-of-interest-records-for-coxs-cabinet>

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Details

1. Giving the legislature the ability to be the main source of law, and the ability to check and balance bad law

I believe that the legislature should be able to propose amendments to all law that exists, especially if or when there are serious issues with a ballot initiative. For situations that change or alter the form of government and that are passed by the people, I believe that there does need to be some form of check and balance. This could take on a few different forms.

For example, legislative changes could be sent back to the people for approval, with the law on hold until the next election. The ballots could include an explanation from the legislature on why it is important to address or change portions of the ballot initiative that was approved by the people.

Another option would be to allow all ballot initiatives to be changed by the legislature, unless the ballot initiative was approved with 67% of the vote of the people, at which point any changes would have to be approved by the people. This would help protect the will of a supermajority, but protect against major changes and overhauls based on a simple majority.

A third option would be to give full amendment power to the legislature on ballot initiatives, but to make the referendum process be much simpler and easier for referenda on laws amending ballot initiatives that alter the form of government. In other words, if it were simpler to get a referenda on the ballot to repeal a legislative change to a ballot initiative, this would be a potential check and balance as well that helps produce an active process for addressing changes and ensuring that the will of the people is carried out. The proposed changes of an additional 20 days to the referenda process is simply not enough. The signature requirements should be eased as well.

2. Providing the people with a way to pass laws that the government refuses to address or to overturn bad laws passed by the legislature

The referendum process is currently too difficult. The legislature should not be afraid of making this process simpler and giving more time to gather signatures. Doing so will significantly help promote trust by giving the people a way to correct bad laws by exercising their veto power. The legislature should not be able to pass laws that were vetoed through the referendum process again for a set time after (perhaps five or more years).

For a strong Republic, a ballot initiative process cannot be too simple though, but it also cannot be so burdensome that it is impossible to achieve. There are a few checks that

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could be considered on ballot initiatives to help initiatives only exist for things that the government refuses to address itself:

- a. Require that the subject of an initiative first appear in the legislative session twice. Only subjects that do not make it through to become a law (twice) can move on to be a ballot initiative. This gives the legislature the ability to act first and to have law proceed through the normal channels where it is subject to revision, refinement, and debate. This can help to produce a law with better drafting, and one that has had the opportunity for debate. This will improve the quality of the ballot initiatives that are submitted for signatures.
- b. Subject a ballot initiative to the same procedures as administrative rules, at least for having a public comment period. One of the major flaws and weaknesses of ballot initiatives is that they do not go through the public comment and review period. Requiring that a proposed ballot initiative be placed for public comment, with a revision period that follows before gathering signatures will help to address and eliminate issues that arise from bad drafting and will give all Utahns a voice. If the ballot initiative process is the way to make individual Utahns have equal legislative power, they should also have to go through some form of a legislative debate or review process, and the administrative rulemaking process with public comment periods is a system we already have in place that could be used to provide this option. A public comment period also gives the government a third chance to pass legislation itself rather than leaving it to a ballot initiative. After the public comment and revision period closes, the ballot initiative could be finalized by the sponsors and sent out for signature gathering.
3. **Removing elections from the purview of the Lieutenant Governor's office and creating a new Elections Board with proper checks and balances, transparency, and accountability in place**

This option perhaps requires the most work to do, but it is one that can assist with many issues and concerns and help restore faith in our government and our systems. From my perspective, if the government wants us as people to give up some of our power of checks and balances through the ballot initiative, we need solid assurances that our vote and election system operates at the highest level of integrity possible. The idea is to spread the power out to make it so that one elected official does not have the say on all things elections. I have a proposal below, and there are certainly other ways to accomplish this, but hopefully this is some food for thought and discussion. My proposal for an election board is as follows:

Each county elects one Election Board Member to sit on the Utah Election Board. The election for the Election Board Member is overseen solely by the County Clerk's office of each county. The Utah Election Board oversees all other elections in the State (similar to the Lieutenant Governor's office currently), with the exception that no Election Board

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Member may address or work on election issues that arise in their own county.

The Utah Election Board would be tasked with:

- Overseeing the administration of elections, as the Lieutenant Governor has so far;
- Creating a system of transparency to allow auditing and verification of results by independent third parties. Much of the information can be provided publicly without revealing the identify of individual voters;
- Enforcing election laws and having mechanisms to resolve election disputes;
 - For example, we can do away with the tradition of declaring winners from an election on election night. All results can be kept private until they have all been independently reviewed. They can then be publicly released with a period set aside for challenges to any results to be lodged and addressed.
- Enforcing a code of ethics and conflict of interest policy that helps extinguish the conflicts that exist with government officials in many areas currently; and
- Remaining neutral in elections and unaffiliated from any candidate that is running for office in an election.

4. **Restoring the power of political parties to choose their own candidates**

Just as the Utah Legislature feels that the balance of power is tipped in the wrong way with the case of *LWVU v Utah*, so too do Utah citizens feel that the balance of power is tipped in the wrong way with SB 54. The parties decided their own candidates for many years, and SB 54 fundamentally interfered with important rights of association and choice. If the government wants more candidates on the ballot, it can choose to create a path for such candidates to be there, but it is not right to take the name of a political party and place it next to such candidates. This is misappropriation, pure and simple, and SB 54 needs to be repealed to fully allow for individuals and parties to exercise their own decisions related to who is labeled as the party's representative. Part of trusting elections is trusting that the rights of the people to choose their own candidates to represent them under a certain party label is also respected.

Conclusion

Ultimately, I strongly believe that to address the current concerns with ballot initiatives, a constitutional amendment must address and properly balances these concerns above. Not addressing any of the above items though will keep us on a path that may lead to serious future consequences as our checks and balances will remain off.

Sincerely,

Austin Hepworth

Believer, Citizen, Attorney, and Independent Candidate for Attorney General

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