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## Redistricting Transparency

Rebecca Green

William & Mary Law School, [rgreen@wm.edu](mailto:rgreen@wm.edu)

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## REDISTRICTING TRANSPARENCY

REBECCA GREEN\*

### ABSTRACT

*Until recently, legislative redistricting remained a relatively obscure topic for most Americans. In the upcoming 2020 round, increased public interest in the problem of gerrymandering, combined with the rise of technologies that empower public participation, will fuel public scrutiny of state redistricting processes at levels never before experienced. Are states prepared for this oversight onslaught? Will current redistricting transparency rules frustrate or nurture growing public interest? Can states take steps in advance of 2020 to ensure meaningful and productive public participation during the redistricting process? A thoughtful approach to redistricting transparency can both improve resulting maps and stave off litigation. This Article surveys the landscape of current state redistricting transparency rules, discusses technological innovations that impact redistricting transparency, asks whether redistricting transparency is an unqualified good, and suggests a set of redistricting transparency decision points states should consider heading into the 2020 round.*

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\* Co-Director, Election Law Program, and Professor of Practice of Law, William & Mary Law School. The author would like to thank Carrie Mattingly, William & Mary Law School Class of 2017, Caiti Anderson, Class of 2018, Jakob Stalnaker, Class of 2019, Anna McMullen, Class of 2018, and Christopher Everett, Class of 2019, for their outstanding research assistance.

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## INTRODUCTION

For much of this country's history, the redistricting process—like so many other government processes—took place in proverbial (if not literal) smoke-filled rooms.<sup>1</sup> If legislative redistricting happened at all (which, for decades it did not, despite state constitutional commands),<sup>2</sup> the process included very little, if any, public oversight or input.<sup>3</sup> Practical realities prevented meaningful oversight. Few Americans were aware the process took place and lacked the rarified legal and technical expertise to understand redistricting's subtleties and evaluate legislative maps.<sup>4</sup>

In the 1950s and 1960s, public attention to inequities in redistricting, specifically malapportionment between rural and urban districts, gave rise to heightened public awareness of the issue generally.<sup>5</sup> Equipopulation concerns culminated in the Supreme Court's "one person, one vote" mandate in 1962, requiring that states redraw congressional and state legislative districts every ten years to account for changes in population.<sup>6</sup> According to public opinion polling at the time, the vast majority of members of the public (76 percent) agreed with the "one person, one vote" principle.<sup>7</sup> If the

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1. See Harlan Yu & David G. Robinson, *The New Ambiguity of "Open Government,"* 59 UCLA L. REV. DISCOURSE 178, 184 (2012) (noting that "prior to World War II [which upon its conclusion heralded open-government reforms], the key federal law controlling disclosure of government information was the archaic Housekeeping Statute of 1789, which gave '[g]overnment officials general authority to operate their agencies' and withhold records from the public." (second alteration in original) (footnote omitted) (quoting H.R. REP. NO. 89-1497, at 2-3 (1966))); cf. Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 6-12 (1991) (discussing the historical U.S. constitutional tension between transparency and needed secrecy).

2. *Baker v. Carr*, 369 U.S. 186, 191 (1962) (noting that for sixty years, between 1901 and 1961, Tennessee failed to reapportion).

3. See *infra* note 8 and accompanying text.

4. See *infra* Part I.

5. See, e.g., J. DOUGLAS SMITH, ON DEMOCRACY'S DOORSTEP: THE INSIDE STORY OF HOW THE SUPREME COURT BROUGHT "ONE PERSON, ONE VOTE" TO THE UNITED STATES 23-24 (2014) (describing heightened public awareness of malapportionment between rural and urban districts in California).

6. BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 53 (2015).

7. Joshua Fougere et al., *Partisanship, Public Opinion, and Redistricting*, 9 ELECTION L.J. 325, 325 & n.1 (2010) (noting that after the Supreme Court decided *Baker v. Carr*, 76 percent of Americans called the so-called "one person, one vote" decision "right," citing a Louis Harris & Associates survey from 1966).

public conceptually absorbed and approved of the idea of “one person, one vote,” intermittent polling thereafter established that the vagaries of the rest of the redistricting process remained largely removed from public consciousness.<sup>8</sup>

In the decades that followed *Baker v. Carr*, states dutifully completed the decennial redistrict.<sup>9</sup> But public participation and oversight of the process remained minimal.<sup>10</sup> State legislatures largely shrouded the redistricting process from public view and built in few public input mechanisms.<sup>11</sup> Cloaked processes and mounting fairness concerns later prompted reform efforts, particularly in states with direct democracy mechanisms.<sup>12</sup> In several states, reformers created independent redistricting commissions featuring a variety of transparency measures to make the process more open, participatory, and accountable.<sup>13</sup>

In the 2010 round of redistricting, many states saw an unprecedented level of public participation buoyed by a technological revolution in the way the public could engage in the process.<sup>14</sup> In the last round, any person with access to a computer, redistricting software, and basic knowledge of the line-drawing process could draw his or her own maps in several states using the same data legislative line-drawers used.<sup>15</sup>

This Article posits that these trends will be joined in 2020 by another more recent phenomenon: unprecedented levels of public interest in redistricting. Since the 2016 election and subsequent

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8. *See id.* at 325 (“Beyond the easy-to-grasp concept of ‘one person, one vote’... the public has little knowledge or opinion concerning the redistricting process.”).

9. *Id.*

10. *See id.*

11. *See infra* Part I.A.

12. *See infra* Part I.B.

13. *See infra* Part I.B.

14. *See infra* Part I.B.

15. In the 2010 round, several states hosted redistricting competitions that allowed student teams to draw alternative maps. *See* Steven F. Huefner, *Don't Just Make Redistricters More Accountable to the People, Make Them the People*, 5 DUKE J. CONST. L. & PUB. POL'Y 37, 58 (2010) (describing the Ohio Citizen Redistricting Competition); Christopher R. Nolen & Jeff Palmore, *Election Law and Government Ethics*, 46 U. RICH. L. REV. 119, 140 (2011) (describing how State Senator John Miller introduced the winning William & Mary Law School team's map from the 2011 Virginia Redistricting Competition in the state senate as one of three alternate plans); Noah Litton, Note, *The Road to Better Redistricting: Empirical Analysis and State-Based Reforms to Counter Partisan Gerrymandering*, 73 OHIO ST. L.J. 839, 874 (2012) (describing a public redistricting competition proposal); *see also infra* Part I.C.

high-profile partisan gerrymandering cases in Wisconsin, Maryland, North Carolina, and Pennsylvania, public interest in the redistricting process is expanding.<sup>16</sup> The experience of the Virginia redistricting reform organization OneVirginia2021 is illustrative. The group formed in 2013 to press for reform amid public outcry following the 2010 round (which installed incumbent-protective maps resulting in only two seats changing party hands in the subsequent election).<sup>17</sup> In the following several years, the organization's leadership struggled to gain traction. In January 2015, the group had 3500 supporters.<sup>18</sup> The fallout from the 2016 election, the Supreme Court's invalidation of Virginia's state legislative maps as unconstitutional racial gerrymanders in 2017,<sup>19</sup> and unprecedented local, state, and national attention to the issue of gerrymandering (as well as the group's own successful efforts to strike a chord), all combined to swell OneVirginia's ranks to 73,000 active members as of March 2018.<sup>20</sup> Polling in Virginia bears this trend out, showing

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16. Energy and enthusiasm for redistricting reform has increased since the last round. See, e.g., Eric Petry, *Redistricting Reform Gains Momentum in 2016*, BRENNAN CTR. FOR JUST. (Jan. 25, 2016), <https://www.brennancenter.org/print/14982> [<https://perma.cc/66Y5-5XX3>] (noting that significant efforts for redistricting reform had been launched in ten separate states, "the most in recent memory"); Bill White, *Gerrymandering Reform Gaining Grassroots Momentum*, MORNING CALL (Feb. 1, 2017, 7:37 PM), <http://www.mcall.com/opinion/white/mc-bw-gerrymandering-20170201-story.html> [<https://perma.cc/RCY3-ZTFC>] (describing huge crowds at recent redistricting events in Pennsylvania).

17. *Redistricting*, ONEVIRGINIA2021, <https://www.onevirginia2021.org/redistricting> [<https://perma.cc/72JS-VVGJ>].

18. ONEVIRGINIA2021, *VOTING'S NOT ENOUGH: DEMAND REDISTRICTING REFORM 1*, <http://networknova.domain.com/wp-content/uploads/2017/03/OneVirginia2021-Packet.pdf> [<https://perma.cc/J48H-QLLH>].

19. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 794-95 (2017). This decision came on the heels of a federal court holding Virginia's U.S. congressional maps were unconstitutional racial gerrymanders. See *Page v. Va. State Bd. of Elections*, 58 F. Supp. 3d 533 (E.D. Va. 2014), *vacated sub nom. Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015).

20. Monica Marciano, *Redistricting Reform: Gerrymandering Should Be 'Ethical Issue of the Day'*, RAPPNEWS (July 24, 2017), <http://rappnews.com/2017/07/24/redistricting-reform-gerrymandering-should-be-ethical-issue-of-the-day> [<https://perma.cc/JXM2-ZEVM>]. Although it should be taken with a grain of salt, a Google Trends analysis confirms a rise in interest in the topic generally. Google Trends does not reveal exact numbers for term searches, but it does show the percentage growth in the number of searches. Simon Rogers, *What Is Google Trends Data—and What Does It Mean?*, MEDIUM (July 1, 2016), <https://medium.com/google-news-lab/what-is-google-trends-data-and-what-does-it-mean-b48f07342ee8> [<https://perma.cc/T28A-TMRZ>]. This growth (or decline) can indicate whether people have become more or less interested in a topic over time. See *id.* Although interest in the term "redistricting" has remained largely even since 2004 (when Google started recording searches), searches for the

an increase in interest in redistricting, particularly among younger voters. According to a Christopher Newport University Wason Center for Public Policy survey, in 2015, 33 percent of Virginia voters ages eighteen to forty-four indicated familiarity with redistricting concepts.<sup>21</sup> Polling in 2017 suggests that percentage has almost doubled to 64 percent.<sup>22</sup>

As of this writing, it appears likely that public interest in the process in the 2020 round could rise to levels states have not previously experienced.

Are states prepared for a potential onslaught of interest? What measures can states take to ensure that public participation and oversight mechanisms are functioning and adequate? Are states preparing for negative consequences of increased public scrutiny? Public channels of input can distort rather than enhance the process, particularly given our current landscape of purposeful misinformation campaigns and security lapses. Furthermore, massive public interest can flood the process, making it difficult for line-drawers to deliberate effectively, let alone absorb and incorporate public will. In this environment, ensuring public satisfaction with redistricting outcomes presents an enormous challenge for 2020 line-drawers.

This Article examines whether current state redistricting transparency rules are adequate and suggests ways in which states might

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term “gerrymandering” have spiked considerably. GOOGLE TRENDS, <https://trends.google.com/trends/explore?date=today%205-y&q=gerrymandering> [https://perma.cc/N79K-SCV2]. In November 2016, the number of people searching the term “gerrymandering” reached an all-time high—much higher than any general election year on record. *See id.* As of November 2017, the total number of searches has more than doubled since November 2012, and has more than quadrupled when compared to both November 2008 and November 2004. *See id.*

21. JUDY FORD WASON CTR. FOR PUB. POLICY, CHRISTOPHER NEWPORT U., VIRGINIANS THINK McDONNELL PRISON SENTENCE FAIR; BACK GIFT BAN, REDISTRICTING REFORM, REPORTING CAMPUS RAPE TO POLICE, LOOSER MARIJUANA LAWS 8 (Jan. 27, 2015), <http://wasoncenter.cnu.edu/wp-content/uploads/2017/07/1-27-15-General-Assembly.pdf> [https://perma.cc/6QV9-XHDV].

22. The Wason Center for Public Policy conducted the survey using registered Virginia voters from February 2015, February 2016, and February 2017. JUDY FORD WASON CTR. FOR PUB. POLICY, CHRISTOPHER NEWPORT U., GILLESPIE, NORTHAM LEAD PARTY RACES FOR GOVERNOR; VOTERS BACK ACA REPEAL, POT REFORM, BATHROOM BILL 15 (Feb. 2, 2017), <http://wasoncenter.cnu.edu/wp-content/uploads/2017/07/2-2-17-General-Assembly.pdf> [https://perma.cc/Y82G-ZW4D].

improve redistricting transparency mechanisms. The Article proceeds in three Parts. Part I provides an overview of state redistricting transparency rules and innovative approaches to transparency in redistricting. Part II describes the risks inherent in transparent processes, suggesting that redistricting is particularly vulnerable to challenges transparency poses. Part III concludes with a set of decision points to help ensure that increased public interest in the redistricting process translates to meaningful public input and oversight—and public buy-in once the process is complete.

### I. STATE MODELS FOR TRANSPARENCY IN REDISTRICTING

This Part surveys current state redistricting transparency environments in three categories: transparency rules in states in which legislators draw the lines; transparency rules governing independent redistricting commissions; and finally, a sampling of experiments with redistricting transparency innovation.

#### *A. Redistricting Transparency Provisions in Noncommission States*

As of this writing, thirteen states will employ some form of independent commission to draw state legislative lines in 2020.<sup>23</sup> In seven states, independent commissions will draw lines for U.S. congressional districts.<sup>24</sup> In the remaining thirty-seven states, legislators will draw the lines of their own districts, and forty-three state legislatures will draw U.S. congressional maps.<sup>25</sup> Most state

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23. See *Redistricting Commissions: State Legislative Plans*, NAT'L CONF. ST. LEGISLATURES (Dec. 7, 2015), <http://www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx> [https://perma.cc/7TTS-TRRM].

24. See *Redistricting Commissions: Congressional Plans*, NAT'L CONF. ST. LEGISLATURES (Dec. 8, 2015), <http://www.ncsl.org/research/redistricting/redistricting-commissions-congressional-plans.aspx> [https://perma.cc/E5LQ-R25N].

25. Iowa has a unique redistricting process: nonpartisan legislative staffers at the Iowa Legislative Services agency develop maps for Iowa's legislative and U.S. congressional lines without employing political or election data (including addresses of incumbents). NAT'L CONF. ST. LEGISLATURES, *supra* note 23. The legislature then votes on the plans developed. *Id.* An Iowa statute requires that the Iowa legislative services agency make copies of bills and maps it produces available to the public. IOWA CODE § 42.2(4) (2018). Iowa statutory law also establishes that a redistricting advisory commission shall conduct at least three public hearings in different regions of the state after an initial plan is available. *Id.* § 42.6(3)(a). Further, the



redistricting transparency provisions in noncommission states are found in state statutes.<sup>26</sup>

Most state statutory approaches require some combination of public meetings, notice, and publication of draft maps. Oregon's redistricting transparency statute, for example, requires its legislature to hold ten public hearings throughout the state prior to proposing a reapportionment plan.<sup>27</sup> Following the proposal of a plan, but before adoption, the legislature must, to the extent practicable, hold five more public meetings in each congressional district or via teleconference to permit active citizen participation throughout the state.<sup>28</sup> In addition, the statute requires appropriate public notice

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commission is also responsible for submitting to the General Assembly a report summarizing the information and testimony received during the hearings. *Id.* § 42.6(3)(b).

26. Of noncommission states, only a few state constitutions mention redistricting transparency. Maine's constitution provides that its advisory commission "shall hold public hearings on any plan for apportionment prior to submitting such plan to the Legislature." ME. CONST. art. IV, pt. III, § 1-A. Maine's commission functions in an advisory role with legislators exercising the final say. See Justin Levitt, *Maine*, ALL ABOUT REDISTRICTING, <http://redistricting.lls.edu/states-ME.php> [<https://perma.cc/24PR-UZAK>]. Thanks to a 1982 Michigan Supreme Court case, Michigan's constitutional transparency requirements are dead letter law. See MICH. CONST. art. IV, § 6. Michigan's constitution contains a provision establishing that a commission on legislative apportionment be responsible for redistricting. See *id.* The Michigan constitution requires that such commission shall hold public hearings "as may be provided by law." *Id.* Michigan's constitution mandates that any final plan be published before it becomes law and delegates to its secretary of state the task of maintaining a public record of all commission proceedings and publishing and distributing each plan. *Id.* Although these constitutional provisions remain on the books, the Michigan Supreme Court invalidated the Michigan Constitution's redistricting provisions in 1982 because of inconsistencies with the equipopulation standard in *Reynolds v. Sims*. See *In re Apportionment of State Legislature—1982*, 321 N.W.2d 565, 582 (Mich. 1982) (per curiam) ("We have accordingly concluded that the apportionment provisions of art. 4, §§ 2-6, cannot be maintained. When the weighted land area/population apportionment formulae fell, all the apportionment rules fell because they are inextricably related."). Kansas's state constitutional redistricting transparency does not quite qualify as a transparency provision: it requires apportionment maps to be published, but only following passage of new maps. KAN. CONST. art. 10, § 1(a) (requiring that legislative districts be published in the Kansas register immediately following final passage). Plaintiffs challenged Kansas's lack of transparency in redistricting after the 1990 cycle. In *In re Stephan*, plaintiffs argued that "there was no opportunity for public participation in the drawing of the House districts ... [and] that the public hearings ... were not meaningful because complete census figures were not available." 836 P.2d 574, 578 (Kan. 1992) (per curiam). The court responded: "Although a greater opportunity for comment on the proposed Senate districts could have been provided the public as a matter of good government, the failure to do so under the existing circumstances is not a deficiency that invalidates this enactment on procedural grounds." *Id.* at 579.

27. OR. REV. STAT. § 188.016(1) (2017).

28. *Id.* § 188.016(2).

of each hearing be given; at least one of the preproposal hearings be held in each congressional district; and, at least one preproposal and one postproposal hearing be held in areas with the greatest population shifts since the previous reapportionment.<sup>29</sup> Finally, people in remote locations must be permitted to provide public testimony at the hearings remotely through video equipment.<sup>30</sup>

In the past, even states with statutory transparency provisions have run into trouble. Illinois provides an example. A 2011 statute mandated that the Illinois legislature provide notice and hold public hearings during its redistricting process.<sup>31</sup> Despite these requirements, vocal criticism of the state's transparency measures ensued. Critics argued that the new law provided only a facade of transparency.<sup>32</sup> As one journalist described it, "Democratic leaders in Illinois held dozens of public hearings ... [b]ut all of the meetings came before the congressional redistricting maps were released, and the Democratic majority quickly approved their own proposals with little opportunity for the public, or Republicans, to voice concerns."<sup>33</sup>

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29. *Id.*

30. *Id.* § 188.016(3)(d). New York's statute operates like Oregon's, but applies only to its redistricting commission, which suggests plans in an advisory capacity to its legislature. N.Y. LEGIS. LAW §§ 93(1), 94(1) (McKinney 2017). New York's commission must conduct at least one public hearing on proposals in cities and counties throughout the state. *Id.* § 93(1)(f). "Notice of all such hearings shall be widely published ... [within] a reasonable time before every hearing." *Id.* Further, the statute mandates that the commission publicize its draft redistricting plans and relevant data in an accessible form, meaning "in a form that allows ... their use by the public to review, analyze, and comment upon ... plans and to develop alternative redistricting plans for presentation to the commission at ... public hearings." *Id.* The commission is required to report all findings from the public hearings to the legislature. *Id.* § 93(1). The statute is silent on transparency measures governing subsequent processes the legislature undertakes to finalize the lines.

31. 10 ILL. COMP. STAT. 125/10-5 (2018). The Illinois Redistricting Transparency and Public Participation Act requires that legislative redistricting committees conduct at least four public hearings statewide to receive testimony and inform the public, and one hearing must be held in each of four distinct geographic regions of the state. *See id.* All hearings must be open to the public, and committee chairpersons must provide at least six days' notice before any hearing. *Id.*

32. *See Redistricting Reform Facade*, NORTHWEST HERALD (Dec. 12, 2010), <http://www.nwherald.com/2010/12/12/redistricting-reform-facade/atbxdap/> [<https://perma.cc/DBR6-XUUT>] ("If you represented the status quo in Illinois—Democratic Party dominance over our broke, crumbling state—and you wanted to project a façade of support for redistricting reform, what would you do? You would propose the Illinois Voting Rights Act of 2011 and the Redistricting Transparency and Public Participation Act, that's what.")

33. Nicholas Kusnetz, *Redistricting: GOP and Dems Alike Have Cloaked the Process in Secrecy*, CTR. FOR PUB. INTEGRITY (Nov. 1, 2016, 6:00 AM), <https://publicintegrity.org/2012/11/>

Illinois's experience demonstrates that having transparency measures on the books does not necessarily translate to a satisfied public.

Some state statutes employ permissive transparency rules or rules that otherwise fall short of mandating transparency. For example, an Alabama statute instructs that its committee on reapportionment *may* hold public hearings.<sup>34</sup> Likewise, a Vermont statute permits that its legislative apportionment board (which proposes maps for state legislative districts to the legislature) has the power to hold public hearings.<sup>35</sup> A North Carolina statute explicitly provides that all documents prepared for redistricting are not confidential and become public records—but only once the plan becomes law, precluding meaningful public oversight or participation while plans are being formulated.<sup>36</sup>

A slight majority of state constitutional and statutory regimes (twenty-six) are silent on the topic of redistricting transparency.<sup>37</sup> In the map below, the dark-shaded states are states that have no

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01/11670/redistricting-gop-and-dems-alike-have-cloaked-process-secrecy [https://perma.cc/5G3N-357B] (reporting, for example, that Ohio Republicans began a redistricting training for legislators by advising them to “keep it secret”).

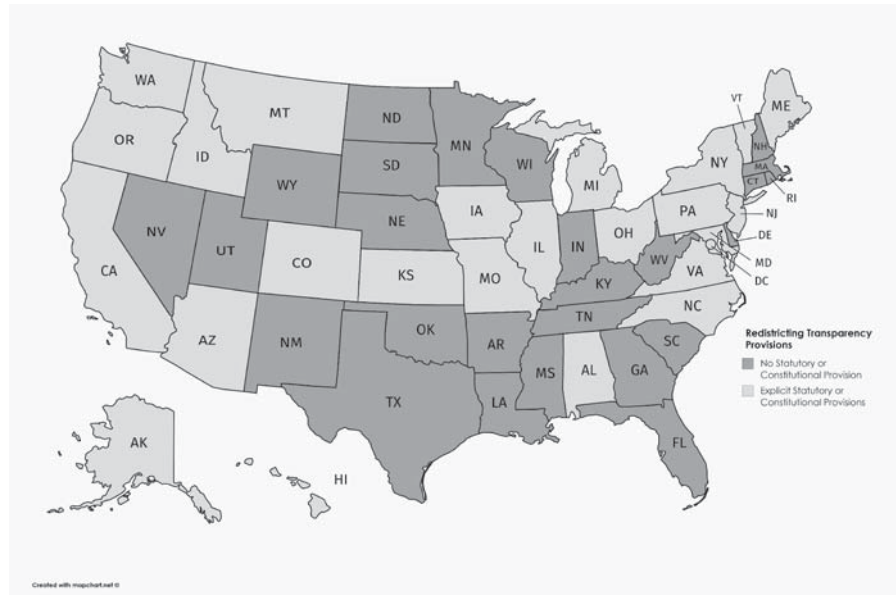
34. ALA. CODE § 29-2-52(g) (2017) (“The committee *may* meet within and without the state, hold public hearings, and otherwise have all of the powers of a legislative committee under the legislative law.” (emphasis added)).

35. VT. STAT. ANN. tit. 17, § 1908(2) (2017) (“The legislative apportionment board shall have the following powers: ... (2) To hold public hearings in any town or city for the purpose of obtaining information relevant to reapportionment of the general assembly.”). The board’s final plans for representative districts must be made available for public inspection. *Id.* § 1906a(d). Vermont statutory law does provide for notice of municipal leaders when tentative plans divide a town or city. *Id.* § 1905.

36. N.C. GEN. STAT. § 120-133(a) (2017). Courts have not helped to open the process in North Carolina. In *Dickson v. Rucho*, the North Carolina Supreme Court ruled that nothing in section 120-133 can waive the attorney-client privilege or work product doctrine in redistricting litigation. 737 S.E.2d 362, 372 (2013). For a discussion of legislative privilege, see *infra* Part I.B.

37. The following states do not explicitly address redistricting transparency in the state constitution or statutes: Arkansas, Connecticut, Delaware, Florida, Georgia, Indiana, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Rhode Island, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, and Wyoming. It should be noted that although these states lack constitutional or statutory commands specific to redistricting transparency, most state constitutions make general reference to government openness, including several states on this list. See, e.g., FLA. CONST. art. I, § 24(b); GA. CONST. art. III, § IV, para. XI; NEB. CONST. art. III, § 11; NEV. CONST. art. IV, § 15; N.M. CONST. art. IV, § 12; WYO. CONST. art. III, § 14.

explicit mention of redistricting transparency in their statutes or constitutions.



The absence of transparency protections in state constitutions and statutes has, in some cases, led to a largely closed process, as notoriously, for example, in Wisconsin.<sup>38</sup> In the 2010 round, Wisconsin Republicans controlled both houses of the legislature and the governorship. Without meaningful opposition and with no rules to mandate transparency, party leaders instead excluded the public (and Democrats) from the process. Republican leaders hired a law firm and instructed legislators who wanted to discuss the plan to sign a confidentiality agreement.<sup>39</sup> Republican leaders introduced the plan on July 11, 2011, and held one public meeting two days later.<sup>40</sup> On

38. Kentucky, North Carolina, and Wisconsin received a score of 0/100 on the metric of whether the state held open meetings during the 2010 redistricting process from a Center for Public Integrity analysis of redistricting transparency; Michigan, New Hampshire, North Dakota, Ohio, and Tennessee received a score of 25/100; and Kentucky, Minnesota, New Hampshire, and Wisconsin all received a score of 0/100 on the criteria of whether public hearings were held seeking input on maps. Yue Qiu et al., *How Does Your State Rank for Integrity?*, CTR. FOR PUB. INTEGRITY (Nov. 9, 2015, 12:17 AM), <https://www.publicintegrity.org/2015/11/03/18822/how-does-your-state-rank-integrity> [<https://perma.cc/V962-CKRA>].

39. *Whitford v. Nichol*, 151 F. Supp. 3d 918, 922 (W.D. Wis. 2015).

40. *Id.*

July 19, the state senate approved the maps along a party-line vote.<sup>41</sup> The secretive approach undertaken by Wisconsin's majority party became part of the case against the maps that led a three-judge federal court to strike the maps—the country's first successful partisan gerrymandering claim.<sup>42</sup>

That a state lacks explicit statutory redistricting transparency commands does not mean that every legislature without statutory mandates has followed Wisconsin's approach. When a state's statutory scheme is silent on the question of redistricting transparency, two mechanisms can provide a measure of transparency. The first is legislative rules or practice. For example, Nevada's constitution and statutes contain no redistricting transparency protections. However, Nevada legislative rules during the 2010 round provided that any person interested in presenting alternative plans or proposed maps be provided a reasonable opportunity to do so.<sup>43</sup> In addition, Nevada legislative rules required that the state's redistricting committee video record its meetings and hold them throughout the state.<sup>44</sup> Many states published maps and held public hearings during the 2010 round via legislative rule or practice.<sup>45</sup>

Open records laws can be a second source to fill the transparency gap when a state's constitution and statutes are silent. In most noncommission states, legislative committees charged with redis-

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41. *Id.*

42. The lack of transparency in the process was not by any means the only factor that displeased the majority in *Whitford*, but the nature of Wisconsin's secretive process fueled considerably the narrative against the legislative majority's actions. *See id.* Plaintiffs successfully proved this claim in part by introducing evidence that "[t]he plan was drafted in secret and without any input from Democrats." *Id.* at 928.

43. NEV. JOINT STANDING RULES, 76th Sess., R. 13.4 (2011).

44. *Id.* R. 13.6(4).

45. For example, Florida, Georgia, Kentucky, Louisiana, Mississippi, Nebraska, Nevada, New Mexico, Oklahoma, Rhode Island, South Carolina, Texas, Utah, Virginia, and Wyoming published redistricting maps in the 2010 round. *See* Justin Levitt, *Maps and Data of the 2010 Redistricting Cycle*, ALL ABOUT REDISTRICTING, <http://redistricting.lls.edu/2010districts.php> [<https://perma.cc/Z676-8SB7>] (each redistricting map provided through "PDF" link in row corresponding to each respective state). All of those states, except for Kentucky and Oklahoma, also held public meetings. *Id.* (information about public input and public meetings provided through link to each state).

tricting appear to be subject to the state's open records<sup>46</sup> and open

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46. The following thirty-three states in which legislatures draw the lines each appear to include the legislature and legislative committees within the ambit of the state's public access statute: Arkansas, ARK. CODE ANN. § 25-19-103(7)(A) (2017); *see, e.g.*, Laman v. McCord, 432 S.W.2d 753, 755-56 (Ark. 1968); Ark. Att'y Gen. Op. No. 96-123 (Apr. 29, 1996); Ark. Att'y Gen. Op. No. 84-91 (Mar. 20, 1984); Colorado, *see* COLO. REV. STAT. § 24-72-202 (2016) (although § 24-72-202(6)(II) exempts work product prepared for elected officials); Connecticut, CONN. GEN. STAT. § 1-200(1)(A) (2017) (covering almost all political bodies and institutions within Connecticut, including the legislature and its committees); Florida, FLA. CONST. art. I, § 24(a) (stating that legislative, executive, and judicial branches all fall within the scope of "the right to inspect or copy any public record made or received in connection with the official business of any public body officer, or employee of the state, or persons acting on their behalf"); Illinois, 5 ILL. COMP. STAT. 140/2(a) (2017) (including state legislature and its committees); *but see id.* 140/7(f) (exempting working papers, preliminary drafts, and opinions under deliberative process clause); Iowa, IOWA CODE § 22.1(1) (2017) (incorporating the state legislature in definition of public body); *but see* Des Moines Register & Tribune Co. v. Dwyer, 542 N.W.2d 491, 503 (Iowa 1996) (holding senate maintains constitutionally granted power to establish its own rules, which may run counter to the Iowa Open Records Law); Kansas, KAN. STAT. ANN. § 45-217(f)(1) (2016); *but see id.* § 45-221(20) (exempting "[n]otes, preliminary drafts, [and] research data in the process of analysis" and all "recommendations or other records in which opinions are expressed or policies or actions are proposed" except "when such records are publicly cited or identified in an open meeting or in an agenda of an open meeting"); Kentucky, KY. REV. STAT. ANN. § 61.870(1) (West 2017); Louisiana, LA. STAT. ANN. § 44:1(A)(1) (2011); *but see* LA. CONST. art. III, § 8 (granting the legislature certain exemptions); Maine, ME. STAT. tit. 1, § 402(2)(A) (2017); *but see id.* § 402(2)(F), (3)(J) (exempting working papers of legislatures under deliberative process exemption); Maryland, *see* MD. CODE ANN., GEN. PROVS. § 4-101(j) (LexisNexis 2018) (including state legislature and its committees); Michigan, MICH. COMP. LAWS § 15.232(d)(ii) (2017); Mississippi, MISS. CODE ANN. § 25-61-3(a) (2017); *but see id.* § 25-61-17 ("Nothing in this chapter shall be construed as denying the Legislature the right to determine the rules of its own proceedings and to regulate public access to its records."); Missouri, MO. REV. STAT. § 610.010(4) (2016); Nebraska, NEB. REV. STAT. § 84-712.01(1) (2017); *but see id.* § 84-712.05(12) (allowing individual legislators to rely on deliberative process exemptions to exempt their personal working papers and contacts); Nevada, NEV. REV. STAT. § 239.005(5)(a)-(b) (2017); New Hampshire, N.H. REV. STAT. ANN. § 91-A:1-a(VI)(d) (2017); New Mexico, N.M. STAT. ANN. § 14-2-6(F) (West 2017); North Carolina, N.C. GEN. STAT. § 132-1(a) (2017); North Dakota, N.D. CONST. art. XI, § 6; *but see* N.D. CENT. CODE § 44-04-18.6 (2017) (exempting legislative work product); Ohio, OHIO REV. CODE ANN. § 149.011(A) (LexisNexis 2018); Pennsylvania, 65 PA. STAT. AND CONST. STAT. ANN. §§ 67.102, 67.303 (West 2017); Rhode Island, 38 R.I. GEN. LAWS § 38-2-2(1) (2017); South Carolina, S.C. CODE ANN. § 30-4-20(a) (2017); South Dakota, S.D. CODIFIED LAWS § 1-27-1.1 (2017); Tennessee, TENN. CODE ANN. § 10-7-503(a)(1)(A) (2017) (applying to "any governmental entity"); *but see id.* § 3-10-108(a) (exempting confidential documents held on the legislative computer system); Texas, TEX. GOV'T CODE ANN. § 552.003(1)(A)(i) (West 2017); *but see id.* § 552.106(a) (excluding certain categories of information pertinent to the legislature and drafts or working papers involved in the preparation of proposed legislation); Utah, UTAH CODE ANN. § 63G-2-103(11)(a)(ii) (LexisNexis 2017); Vermont, VT. STAT. ANN. tit. 1, § 317(a)(2) (2017); Virginia, VA. CODE ANN. § 2.2-3701 (2017); *but see id.* § 2.2-3705.7(2) (exempting from disclosure working papers and correspondence prepared by or for members of the General Assembly or the Division of Legislative Services);

meetings statutes.<sup>47</sup> For example, Mississippi statute defines a “public body” as including “any standing, interim or special committee of the Mississippi Legislature.”<sup>48</sup> In some states, such as Washington and Maine, redistricting statutes explicitly subject the apportionment process to the state’s open meetings laws.<sup>49</sup>

While legislative action, including redistricting, may be subject to state open records and open meetings laws, in seven states (and at the federal level), open records/meetings laws do not apply to the legislative branch.<sup>50</sup> Further, courts in some states have held that

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West Virginia, W. VA. CODE § 29B-1-2(4) (2017); Wisconsin, WIS. STAT. § 19.32(1) (2017); *but see id.* § 19.34(1) (exempting legislature from law requiring departments to post methods for filing a records request); and Wyoming, WYO. STAT. ANN. § 16-4-201(a)(v) (2017).

47. Alabama, ALA. CODE § 36-25A-2(4) (2017); Connecticut, CONN. GEN. STAT. § 1-200(1)(A); Florida, FLA. CONST. art. I, § 24(b); Kansas, KAN. STAT. ANN. § 75-4318(a) (2016); Louisiana, LA. STAT. ANN. § 42:13(3) (2017); Maine, ME. STAT. tit. 1, § 402(2)(A); Michigan, MICH. COMP. LAWS § 15.262(a); Minnesota, MINN. STAT. § 3.055(1) (2017); Mississippi, MISS. CODE ANN. § 25-41-3(a); Nevada, NEV. CONST. art. IV, § 15; New Hampshire, N.H. REV. STAT. ANN. § 91-A:1-a(VI)(d); New Mexico, N.M. CONST. art. IV, § 12; New York, N.Y. PUB. OFF. LAW § 102(3) (McKinney 2017); North Carolina, N.C. GEN. STAT. §§ 143-318.14A(a), 143-318.18 (2017); North Dakota, N.D. CENT. CODE § 44-04-17.1(13); Oregon, OR. CONST. art. IV, § 14; OR. REV. STAT. § 192.610(4) (2015); Rhode Island, 42 R.I. GEN. LAWS § 42-46-2(3) (2017); South Carolina, S.C. CODE ANN. § 30-4-20; Tennessee, *see Dorrier v. Dark*, 537 S.W.2d 888, 892 (Tenn. 1976) (holding Open Meetings Act applies to any board or commission created by the legislature); *but see* TENN. CONST. art. II, § 22; Texas, TEX. GOV’T CODE ANN. §§ 551.001(3), 551.003 (2017); Utah, UTAH CODE ANN. § 52-4-103 (LexisNexis 2017); Vermont, VT. STAT. ANN. tit. 1, §§ 310(3), 313(c); Virginia, VA. CODE ANN. § 2.2-3707.01(B); West Virginia, W. VA. CODE § 6-9A-2(7).

48. MISS. CODE ANN. § 25-41-3(a).

49. Washington’s Redistricting Act requires the state commission to abide by Title 42 of the Washington Code, which covers all public officers, public meetings, and public records. WASH. REV. CODE § 44.05.080 (2017). Maine’s statute identifies legislative committees, including the apportionment committee, as being subject to Freedom of Access requests. ME. STAT. tit. 1, § 402(1-A). In the 2010 round, Pennsylvania’s state redistricting website included a tab that allowed users to submit a request for access to committee records under the state’s Right-to-Know statute. *See Right-to-Know*, PA. REDISTRICTING, <http://www.redistricting.state.pa.us/RTKL.cfm> [<https://perma.cc/YMV6-84FF>].

50. Six states explicitly exempt legislatures from public access statutes either in the text of the statute or by court ruling: Delaware, DEL. CODE ANN. tit. 29, § 10002(h) (2017) (“Public body’ shall not include any caucus of the House of Representatives or Senate of the State.”); Georgia, *see Fathers Are Parents Too, Inc. v. Hunstein*, 415 S.E.2d 322, 322 (Ga. Ct. App. 1992) (holding that the “Legislature ha[s] historically exercised the authority to adopt its own internal operating procedures, and ha[s] subsequently adopted ... procedures ... inconsistent with the [Open Meetings] Act” (citing *Coggin v. Davey*, 211 S.E.2d 708 (1975))); Indiana, *see State ex rel. Masariu v. Marion Superior Court*, 621 N.E.2d 1097, 1098 (Ind. 1993) (citing separation of powers considerations as block to open records access); Massachusetts, *see* MASS. GEN. LAWS ch. 66, § 18 (2017); New York, *see* N.Y. PUB. OFF. LAW § 86(3) (McKinney 2017);

legislative line-drawers are not bound by open records and open meetings rules, typically citing some version of legislative privilege.<sup>51</sup> In *Pick v. Nelson*, for example, the Nebraska Supreme Court cited legislative process protections that insulate the redistricting process from notice and open hearings requirements.<sup>52</sup> In some cases, line-drawers have evaded open meetings statutes by holding one-on-one discussions or through other procedural mechanisms.<sup>53</sup>

Legislative privilege rules routinely shroud all or part of redistricting deliberations from public view. Provisions in state constitutions conferring legislative privilege largely track federal constitutional language.<sup>54</sup> Forty-three state constitutions provide a legislative privilege to varying degrees.<sup>55</sup> New York's constitution

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Oklahoma, *see* OKLA. STAT. tit. 51, § 24A.3 (2017); and Oregon, *see* OR. REV. STAT. § 195.410(5). Alabama's open records regime is unclear as to whether it applies to the legislature. The question of whether open records statutes apply to legislative records has been the subject of litigation in Nevada. When members of the press sought access to legislators' emails, the legislature passed a statute specifically exempting them from Nevada open records laws. *See* Michelle Rindels, *Nevada Legislature Excuses Itself from Public Records Law*, LAS VEGAS REV.-J. (Mar. 13, 2016, 6:18 PM), <http://www.reviewjournal.com/politics/government/nevada-legislature-excuses-itself-public-records-law> [<https://perma.cc/PFQ7-VT4Z>].

51. Often, courts will cite some version of separation of powers in their reasoning. *See, e.g., State ex rel. Masariu*, 621 N.E.2d at 1098 (ruling that the law cannot be enforced against the legislature due to separation of powers considerations); *see also State ex rel. Ozanne v. Fitzgerald*, 798 N.W.2d 436, 441 (Wis. 2011) (ruling that separation of powers principles preclude judicial review of the legislature's compliance with its own rules of procedure concerning passage of legislation, whether those rules are internal or statutory). For an example of a court so holding in the independent commission context, *see infra* note 100 and accompanying text (describing a Missouri court's finding that the commission did not qualify as a public body under the state's open records laws).

52. 528 N.W.2d 309, 316 (Neb. 1995) (“[T]he formation of representative districts is ... a legislative process [because] [t]here is no constitutional due process requirement of notice and hearing applicable to legislative matters.” (quoting *Barnett v. Boyle*, 250 N.W.2d 635, 637 (Neb. 1977))). In *Pick v. Nelson*, plaintiffs brought a due process challenge, not an open records challenge, to the closed process, but the principle upon which the court relied is the same: legislatures enjoy protections and courts do not. *See id.*

53. *See Willems v. State*, 325 P.3d 1204, 1209 (Mont. 2014) (finding that the open meeting law's “definition of ‘meeting’ does not include ‘serial one-on-one discussions’”). Note that such “evasion” is not necessarily nefarious. Indeed, as will be discussed later, deliberative space is a necessary component of the redistricting process. *See infra* note 175.

54. At the federal level, legislative privilege derives from the U.S. Constitution's Speech and Debate Clause. U.S. CONST. art. I, § 6, cl. 1 (“Senators and Representatives ... shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged ... for any Speech or Debate in either House, they shall not be questioned in any other Place.”).

55. *See* Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 224 (2003).



requires that “[f]or any speech or debate in either house of the legislature, the members shall not be questioned in any other place.”<sup>56</sup> Vermont’s constitution provides that “[t]he freedom of deliberation, speech, and debate, in the Legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.”<sup>57</sup>

Scholars have argued that legislative privilege in redistricting is needed, in part to prevent legislators being sapped of time in complying with discovery requests during a politically charged process sure to contain foes bent on casting doubt.<sup>58</sup> Others counter that legislative privilege rules should not be absolute in redistricting, suggesting that other means could be employed to prevent frivolous discovery requests.<sup>59</sup> Recent case law makes clear that, at least in some instances, courts have been willing to uphold legislative privilege in redistricting litigation. For example, in 2016, a state court reversed a contempt of court order against Virginia legislators for failing to produce redistricting documents including related emails from or to legislators.<sup>60</sup> The court described at length the expanse of the legislative privilege in Virginia, noting that it can even extend to nonlegislators “functioning in a legislative capacity on behalf and at the direction” of a legislator.<sup>61</sup>

In 2015, a federal court in Virginia found Virginia’s legislative privilege boundaries more malleable. In *Bethune-Hill v. Virginia*

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56. N.Y. CONST. art. III, § 11.

57. VT. CONST. ch. I, art. 14.

58. Huefner, *supra* note 55, at 270 (analyzing state legislative privilege protections and arguing that two reasons support a broad interpretation: “(1) providing absolute protection from the harms and burdens, both incidental and deliberate, that might otherwise result from judicial intrusions into the legislative process, and (2) freeing legislators to deliberate more candidly and creatively among themselves and their staff by granting them fuller autonomy and allowing them to preserve confidences where desired”).

59. See, e.g., Mark Tyson, Comment, *Monitored Disclosure: A Way to Avoid Legislative Supremacy in Redistricting Litigation*, 87 WASH. L. REV. 1295, 1298 (2012) (discussing the application of legislative privilege to redistricting litigation discovery specifically and arguing that courts should shy away from finding an absolute disclosure privilege in redistricting cases).

60. *Edwards v. Vesilind*, 790 S.E.2d 469, 483 (Va. 2016).

61. *Id.* at 481. Note, however, that ultimately the Virginia Supreme Court did not rule on the privileged nature of the redistricting documents, remanding the case back to the circuit court. See *id.* at 483-84.

*State Board of Elections*, plaintiffs sought production of Virginia legislative documents and emails in their case challenging legislative districts as unconstitutional racial gerrymanders.<sup>62</sup> In ruling on the discovery motion, the district court prefaced its discussion of legislative privilege by noting that “where important federal interests are at stake” (in this instance, a racial gerrymandering claim), state legislative privilege faces limitations.<sup>63</sup> Because redistricting litigation requires “judicial inquiries into legislative ... motivation,” the district court recognized “extraordinary” factors and held only qualified legislative privilege applied.<sup>64</sup>

In *League of Women Voters of Florida v. Florida House of Representatives*, the Florida Supreme Court found that although the legislative privilege generally existed, it did not shield legislative redistricting materials.<sup>65</sup> Part of the court’s reasoning can be explained by its need to evaluate legislative motive to enforce state constitutional commands. Florida’s constitution provision (established via ballot initiative in 2010) explicitly forbids partisanship in

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62. 114 F. Supp. 3d 323, 329 (E.D. Va. 2015).

63. *Id.* at 333 (quoting *United States v. Gillock*, 445 U.S. 360, 373 (1980)) (deriving the legislative privilege not from the Virginia Constitution, but from federal common law).

64. *Id.* at 337. Once it had so determined, the court held that the legislature must disclose selective documents, including: (1) documents or communications, including emails, created following the enactment of the redistricting legislation; (2) documents or communications shared with or received from anyone outside of the legislature; and (3) “internal” legislative documents or communications “reflecting strictly factual information” and those “produced by committee.” *Id.* at 343. The court allowed redactions of legislator opinions, comments, or requests. *Id.* The court further held that four legislators had waived their privilege by refusing to respond to the litigation. *Id.* The court placed the burden of determining the privileged nature of any remaining documents on the legislature, offering guidelines the legislature may use. *Id.* at 344-45. Finally, the court held that any communications between legislators and the Virginia Attorney General were not protected by attorney-client privilege because the Attorney General only provides legal advice to the executive branch. *Id.* at 347. Texas provides another example of a court that pierced legislative privilege in redistricting. After the 2010 cycle, a group of Latino plaintiffs challenged maps in Texas, alleging racial and partisan gerrymandering claims. *See* Plaintiffs’ Third Amended Complaint at 3-6, *Perez v. State*, 970 F. Supp. 2d 593 (W.D. Tex. 2013) (No. 5:11-CV-0360-OLG-JES-XR). During the discovery process, plaintiffs sought written communications between members of the U.S. Congress and Texas state legislators. *See* Order at \*1, *Perez*, 970 F. Supp. 2d (No. 11-CA-360-OLG-JES-XR). Members of Congress asserted legislative privilege as barring access. *See id.* A district court in Texas denied the assertion and required the congressmen to comply with discovery requests. *See id.* at \*3 (denying defendants’ motion to prevent disclosure of the written communications).

65. 132 So. 3d 135, 154 (Fla. 2013).

redistricting.<sup>66</sup> The Florida Supreme Court created a balancing test for the redistricting process to help courts charged with evaluating alleged violations of the partisanship prohibition.<sup>67</sup> Using this test, the court found that the documents in question were the sole means of determining the presence of political motivation in the districting process, making protection less important than compliance with the specific constitutional command.<sup>68</sup>

These cases demonstrate the difficulties of applying legislative privilege in the redistricting context. Some courts decline to pierce legislative privilege in redistricting,<sup>69</sup> others are not so moved.<sup>70</sup> As scholars have noted elsewhere, legislative privilege is increasingly at odds with the open government movement.<sup>71</sup> The spotlight on redistricting in the 2020 round may well bring these questions closer to the fore. Cases thus far suggest that in instances in which legislators seek to shield redistricting deliberations from public view, legislative privilege will only provide protection inasmuch as a competing rationale for access is surmountable. When federal and state constitutional claims require evidence of legislative motive, the veil may be particularly susceptible.

Overall, in noncommission states, redistricting transparency rules are spotty at best. Even states with comprehensive statutory schemes promoting transparency are not insulated from the critique that such provisions pay lip service to transparency while the real process unfolds behind closed doors.<sup>72</sup> State open meetings and open records laws can provide a means of public access and oversight, but

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66. FLA. CONST. art. III, § 20(a).

67. Courts must balance legislative privilege against competing and compelling interest in complying with the state constitutional prohibition on partisan political gerrymandering. See *League of Women Voters*, 132 So. 3d at 138, 147.

68. *Id.* at 154.

69. See *Edwards v. Vesilind*, 790 S.E.2d 469, 483 (Va. 2016).

70. See *supra* Part I.A.

71. Huefner, *supra* note 55, at 227 (“[N]ew issues of state legislative privilege are likely to arise as a result of the trend towards open government.”).

72. See, e.g., *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 294-95 (D. Mass. 2004) (overturning a Massachusetts redistricting plan for violating section 2 of the Voting Rights Act). One of the main issues was that the Special Joint Committee did not meet together as a body, except at the five public hearings. *Id.* at 295. Rather, the two members—the chair and another—dominated the process. *Id.* The chair did not accept views from leaders of communities of interest, despite the public hearings. *Id.*

exemptions for legislative actions and legislative privilege can cut the other way.

The next Section examines how transparency fares in states in which independent commissions draw the lines.

### *B. Transparency and Redistricting Commissions*

Thirteen states empower redistricting commissions to draw state legislative districts and, in some cases, U.S. congressional districts with varying degrees of input from elected officials, ranging from politician commissions to citizen commissions.<sup>73</sup> In theory, by taking line-drawing power away from legislators, independent redistricting commissions, almost by definition, prevent the smoke-filled-room approach to redistricting. That said, a common critique of independent commissions is that they take power from accountable members of state legislatures only to put it in the hands of unelected and unaccountable commission members.<sup>74</sup> To combat this concern, independent commissions employ a variety of mechanisms to enable public oversight and participation.<sup>75</sup> Particularly in states

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73. NAT'L CONF. ST. LEGISLATURES, *supra* note 23.

74. See Huefner, *supra* note 15, at 55 (“[O]ne of the more effective arguments against an independent redistricting commission often has been that it would render the redistricters unaccountable to the voters: once they are appointed, the public loses control over them. For instance, precisely this argument figured prominently in the campaigns to defeat the 2005 Ohio and California ballot measures.”); see also Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 690 (2006) (“[Independent commissions’] political insulation renders them decidedly unaccountable to the electorate and isolated from popular sentiment.”).

75. Some states, like Colorado, embed redistricting transparency into their commission’s constitutional framework. Colorado’s constitution charges the Redistricting Commission with keeping a public record of all proceedings of the commission and publication and distribution of copies of each redistricting plan. COLO. CONST. art. V, § 48(e). Hawaii, which has used a commission to draw state and U.S. congressional lines since 1968, is another example of a state with a detailed statutory redistricting transparency scheme. HAW. REV. STAT. § 25-2 (2017) (by statute, Hawaii’s commission must “conduct public hearings and consult with the apportionment advisory council of each basic island unit.... [I]n each basic island unit, public notice of a legislative reapportionment plan [shall be given].... At least one public hearing on the proposed ... plan shall be held in each basic island unit.... The notice shall include a statement of the substance of the proposed ... plan, and of the date, time, and place where interested persons may be heard.... All interested persons shall be ... [able] to submit data, views, or arguments, orally or in writing, for consideration by the commission.... [The commission] shall [give] public notice ... of the final ... plan [before it goes into effect].”) The Ohio independent commission’s transparency rules have yet to be tested. Ohio’s newly amended

with commissions formed more recently, transparency provisions are robust. California provides the perfect example.

California's process, which resulted from popular calls for reform culminating in a successful 2008 ballot initiative to install a commission, built its commission process around the idea of transparency.<sup>76</sup> California voters chose to compose its commission entirely of members of the public.<sup>77</sup> California's constitutional amendment requires that its Citizens Redistricting Commission "conduct an open and transparent process enabling full public consideration of and comment on the drawing of district lines."<sup>78</sup> Far from deliberating in the dark, the California Constitution mandates transparency and requires the commission to issue a report explaining the basis on which its decisions were made.<sup>79</sup>

California statutes further buttress public access and input at various stages in the process. The public must be given fourteen days' notice of meetings during which public input is to be received.<sup>80</sup> Commission's records must be posted online to ensure immediate and widespread public access.<sup>81</sup> California's commission process also includes an extensive outreach program to solicit broad public participation.<sup>82</sup> Public hearings are to take place both before and after maps are drawn.<sup>83</sup> Finally, maps are displayed for public comment to achieve the widest public access possible, and public

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constitution requires the state Redistricting Commission (which will draw maps for state legislative districts only in 2020) to release to the public a proposed general assembly district plan and then hold at least "three public hearings across the state to present the proposed plan and ... seek public input." OHIO CONST. art. XI, § 1(C). The constitution mandates that all meetings of the commission be open to the public and be broadcast electronically. *Id.* Drafters of the initiative were likely prompted to include such transparency protections because of the lack of transparency in previous rounds. In 2012, electors brought suit in the Ohio Supreme Court for a declaration that the Apportionment Board failed to comply with Ohio's Open Meetings Law. *Wilson v. Kasich*, 963 N.E.2d 1282, 1283 (Ohio 2012) (per curiam). In a very short opinion, the Ohio Supreme Court held that it lacked jurisdiction to address plaintiffs' open meetings claim. *Id.*

76. See CAL. CONST. art. XXI, § 2(b).

77. *Id.* § 2(c)(2)-(3).

78. *Id.* § 2(b)(1).

79. *Id.* § 2(h).

80. CAL. GOV'T CODE § 8253(a)(1) (West 2017).

81. *Id.* § 8253(b).

82. *Id.* § 8253(a)(7).

83. *Id.*

comment must be taken for at least fourteen days from the date of display of the first preliminary maps.<sup>84</sup>

California's Citizens Redistricting Commission won high marks for its transparency measures during the 2010 round in a League of Women Voters commissioned report called *When the People Draw the Lines* examining the 2010 commission process. The report cited a comparative study of transparency of state governing processes.<sup>85</sup> The report gave California a B- rating overall, but the state's citizen redistricting process received an A, scoring an impressive score of 100/100.<sup>86</sup> Scholars praised the commission's transparent and participatory process,<sup>87</sup> as did courts.<sup>88</sup>

Several commission states lack detailed transparency requirements for how their commissions must operate. Alaska's constitution, for example, mandates that public hearings be held on

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84. *Id.*

85. See RAPHAEL J. SONENSHEIN, LEAGUE OF WOMEN VOTERS OF CAL., *WHEN THE PEOPLE DRAW THE LINES: AN EXAMINATION OF THE CALIFORNIA CITIZENS REDISTRICTING COMMISSIONS* 2-3 (2013).

86. *Id.* at 3.

87. See, e.g., Nicholas O. Stephanopoulos, *Communities and the California Commission*, 23 STAN. L. & POL'Y REV. 281, 313-14 (2012).

88. In 2012, for example, the California Supreme Court lauded the commission's efforts to ensure transparency. In a case affirming the commission's maps, the court took pains to demonstrate the legitimacy of those maps by detailing the transparency and public input measures the commission employed. *Vandermost v. Bowen*, 269 P.3d 446, 457 (Cal. 2012) (detailing the degree to which the commission conducted a transparent process: "[The Commission] held more than 70 business meetings and 34 public hearings in 32 cities throughout the state. Generally, the Commission's hearings were scheduled in the early evening hours at school or government locations in the center of a community, making it convenient for 'average citizens' to participate. It regularly allowed public input and comment at its business meetings as well. Its educational materials were broadly distributed in English and six other languages (Spanish, Chinese, Japanese, Korean, Tagalog, and Vietnamese), and it ultimately received, in addition to oral testimony, more than 2,000 written submissions, including maps reflecting statewide, regional, or other districts. The Commission's staff received 'written comments, input and suggestions from more than 20,000 individuals and groups.' The Commission held 23 public input hearings before issuing a set of its draft maps in June of 2011. After a five-day public review period, it held 11 more public input hearings around the state to collect reactions to and comments concerning those draft maps. It held 22 business meetings in Sacramento to discuss the draft maps, at which more than 276 people appeared and commented. All of the Commission's public meetings were 'live-streamed,' captured on video, and placed on the Commission's Web site for public viewing. All of the Commission's completed documents, and those of its staff, were posted on the Commission's Web site for public viewing as well." (citations omitted)). The extent of the commission's efforts to ensure transparency and meaningful public input played heavily into the court's decision to allow the commission's map to be used in the relevant upcoming election. *See id.*

proposed plans,<sup>89</sup> but its statutes put little meat on transparency's bones.<sup>90</sup> Still, as in noncommission states lacking statutory transparency mandates, Alaska's commission nevertheless incorporated measures into its process leading the Alaska Supreme Court to praise its transparency efforts in the 2010 round.<sup>91</sup>

Montana likewise went above and beyond statutory mandates during the last round. Montana statute requires its independent commission to hold at least one public meeting at the state capitol before submitting its plan to the legislature.<sup>92</sup> In practice, Montana's commission held many public hearings in the 2010 round—over thirty between 2009 and 2013.<sup>93</sup> New Jersey also falls into this

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89. See ALASKA CONST. art. VI, §§ 3-4, 6, 8-11.

90. ALASKA STAT. § 15.10.300 (2017) discusses redistricting but does not provide additional transparency measures. Washington is another example of a commission state that outlines basic transparency protections by statute, in this case its State Redistricting Act. See WASH. REV. CODE § 44.05.080 (2017). The Act requires the commission to comply with requirements to disclose and preserve public records, hold open meetings pursuant to the Open Meetings Act, prepare and disclose minutes, and prepare and publish a report with the plan to be made available to the public at the time the plan is published. *Id.* § 44.05.080(3)-(5), (7). The report must include the percentage deviation from average district population for every district, explain the criteria used in developing the plan with justification of any deviation, and contain a map of all the districts. *Id.* § 44.05.080(7).

91. In the 1990s, Alaska's advisory commission ran into transparency trouble. In invalidating the 1990 maps, a district court cited a failure to abide by Alaska's open records and open meetings laws as part of the basis for invalidating the maps. See *Hickel v. Se. Conference*, 846 P.2d 38, 43 (Alaska 1992) (noting "the [Advisory] Board violated the Open Meetings Act, AS 44.62.310 [and] ... concluded that the Board [also] violated the Public Records Act, AS 09.25.110-140"), *modified*, 868 P.2d 919 (1994). The Alaska Supreme Court later affirmed the district court's sunshine law holdings in the case. See *Hickel v. Se. Conference*, 868 P.2d 919, 930 (Alaska 1994). This may in part explain its more recent efforts to provide transparency mechanisms in later rounds. In the 2010 round, for example, after Alaska had shifted to an independent commission, the Alaska Supreme Court praised the commission's transparency efforts: "At the outset, we commend the Board for its diligence and dedication throughout the redistricting process. The record demonstrates that the Board ... considered a great deal of input from Alaska's citizens." *In re 2011 Redistricting Cases*, 274 P.3d 466, 466 (Alaska 2012). The court nevertheless invalidated the maps as violating, *inter alia*, provisions of the federal Voting Rights Act. *Id.*

92. MONT. CODE ANN. § 5-1-108(2) (2017).

93. For a description of the open hearings held, see MONT. DISTRICTING & APPORTIONMENT COMM'N, MONT. LEGISLATURE, LEGISLATIVE REDISTRICTING PLAN AS SUBMITTED TO THE 63RD MONTANA LEGISLATURE: BASED ON THE 2010 CENSUS 11 (2013); see also *Willems v. State*, 325 P.3d 1204, 1208 (Mont. 2014) (noting that the "Commission went to great lengths during most of its existence to encourage openness and public participation"). This did not stop plaintiffs from challenging the openness of the Montana commission. Plaintiffs argued that one-on-one discussions should have been observable to the public under state open meetings laws. See *Willems*, 325 P.3d at 1208. The Montana Supreme Court held that the open meetings

category. The New Jersey Constitution requires its congressional redistricting commission to hold at least three public hearings in different parts of the state, and, if convenient, to review plans submitted by the public.<sup>94</sup> In practice, the New Jersey Commission held nine public meetings during the 2010 round, and, although there is no constitutional or statutory mandate for public meetings in the case of state legislative districts, the state legislative commission nevertheless held public hearings (in fact, more than its congressional committee).<sup>95</sup>

Going further than required in implementing transparency measures did not insulate the New Jersey Commission. A group of plaintiffs alleged that the process of creating state legislative maps shut out the general public and favored an outsized level of access to party elite.<sup>96</sup> Because New Jersey's commissions are not subject to its open meetings laws,<sup>97</sup> plaintiffs alleged commissioners were emboldened to hold a series of secret meetings behind closed doors prompting the claim that the commission had been unduly influenced by private parties.<sup>98</sup> Not persuaded, the trial court, appeals court, and the New Jersey Supreme Court all agreed to dismiss the case. The trial court noted that the state legislative commission was nowhere required to hold public meetings and credited the commission for choosing to hold more meetings than the congressional redistricting committee.<sup>99</sup> In this way, the New Jersey Commission's efforts to promote transparency (even if only an exercise in lip service, according to plaintiffs in the case challenging the process) paid off.<sup>100</sup>

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statutory definition of "meeting" does not include "serial one-on-one discussions." *Id.* at 1209.

94. N.J. CONST. art. II, § II, para. 4.

95. See *Public Meetings*, N.J. APPORTIONMENT COMMISSION, <http://www.apportionment.commission.org/schedule.asp> [<https://perma.cc/HU47-DTL4>].

96. See *Gonzalez v. State Apportionment Comm'n*, 53 A.3d 1230, 1235 (N.J. Super. Ct. App. Div. 2012).

97. N.J. STAT. ANN. § 10:4-7 (West 2017).

98. See *Gonzalez*, 53 A.3d at 1235.

99. *Id.* at 1253-54.

100. In Missouri, a court came to the opposite conclusion with respect to a judicially appointed committee empaneled when its independent commission could not agree on maps during the 2000 cycle. In *Johnson v. State*, the Supreme Court of Missouri held that its nonpartisan reapportionment commission, appointed to file a new apportionment plan after the bipartisan reapportionment commission failed to meet a deadline, was not subject to the state's sunshine law. 366 S.W.3d 11, 16 (Mo. 2012). The court concluded that the commission



The Idaho commission's transparency framework, which requires that the commission hold meetings in different portions of the state, also came under attack as "transparency in name only" during the 2000 cycle.<sup>101</sup> Plaintiffs brought a challenge asserting that the commission violated the state's transparency statute because citizens were not given an opportunity to review and discuss the plan ultimately adopted by the commission.<sup>102</sup> Although the commission complied with the literal language of its redistricting transparency statute by holding meetings throughout the state, plaintiffs alleged it failed to fulfill the spirit of the statute because at no time was the plan placed before the public for review.<sup>103</sup> Rather, it was adopted "at the last minute behind closed doors," depriving citizens of the opportunity to provide feedback on the division of a county when such division was not contemplated by the plans shared with the public.<sup>104</sup> The court granted plaintiffs' petition to enjoin the map on a separate claim; only a concurring Idaho Supreme Court justice addressed the transparency claim, concluding that the commission violated its statutory duty to "maximize the opportunity for public participation."<sup>105</sup>

In several states that established a commission approach before the digital age, transparency provisions still on the books are antiquated. For example, Pennsylvania's 1968 constitutional provision requires that its politician commission publish its state legislative district plan in at least one newspaper of general circulation in each district.<sup>106</sup> Multiple proposals to reform Pennsylvania's independent

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was a judicial entity made up of court of appeals judges and that the judges were not operating in an administrative capacity; therefore, it was exempt from the definition of "public governmental body." *Id.* at 16, 22. As a result, the court held that the commission's three closed meetings, convened without public notice or minutes taken, did not violate the sunshine law. *Id.* at 22.

101. IDAHO CONST. art. III, § 2(4); IDAHO CODE § 72-1505(4) (2017). Note, too, that Idaho's redistricting process is subject to state public access laws. IDAHO CODE § 72-1505(1).

102. *Smith v. Idaho Comm'n on Redistricting*, 38 P.3d 121, 125 (Idaho 2001) (Kidwell, J., specially concurring).

103. *Id.*

104. *Id.*

105. *Id.* at 126.

106. To constitute Pennsylvania's commission to draw state legislative districts, majority and minority leaders of the legislative houses each select one member. These four then select a fifth to chair who cannot be a public official. PA. CONST. art. II, § 17(b), (i) ("The publication shall contain a map of the Commonwealth showing the complete reapportionment of the

commission include detailed transparency provisions, most notably the proposed Redistricting Openness and Fairness Act which would provide for thirty days of public comment on preliminary plans, enable Pennsylvanians to submit plans of their own to be considered by the commission, give the public access to software and demographic data to prepare alternate plans, and require five public hearings in different regions of the state.<sup>107</sup>

In all, independent commission states receive relatively higher marks on transparency. States that established independent commissions more recently tend to have stronger, more explicit transparency mandates. Independent commission states that lack rigorous transparency requirements tend in practice to go beyond what is required. Still, as evidenced by litigation and reform proposals in several commission states, the public may well remain dissatisfied with transparency measures state commissions employ.

This discussion reveals that what a state has or does not have on the books does not necessarily dictate the degree of public satisfaction in the openness of the process. The next Section examines the extent to which the technological innovation that spurred public participation and oversight in the 2010 round holds promise in addressing public dissatisfaction with traditional transparency mechanisms.

### *C. Technological Innovation and Redistricting Transparency*

In the past few rounds, states have experimented with technological means of improving public oversight of and participation in the

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General Assembly by districts, and a map showing the reapportionment districts in the area normally served by the newspaper in which the publication is made. The publication shall also state the population of the senatorial and representative districts having the smallest and largest population and the percentage variation of such districts from the average population for senatorial and representative districts.”). Note that Pennsylvania’s Sunshine Act includes the Redistricting Commission in the bodies it governs. *See* 65 PA. CONS. STAT. § 703 (2018). Note that Pennsylvania’s Legislative Reapportionment Commission is explicitly defined by its open records statute as a legislative agency, making it subject to open records laws. *See* 65 PA. STAT. AND CONS. STAT. ANN. § 67.102 (West 2018). Hawaii is another example of a state that updated its transparency procedures to reflect the times. In 1998, Hawaii updated its statute from requiring that notices of redistricting meetings be “published in a newspaper of general circulation” to the broader requirement to give “public notice.” HAW. REV. STAT. § 25-2(a) (2017).

107. H.B. 878, 2015 Gen. Assemb., Reg. Sess. (Pa. 2015).

redistricting process, on occasion mandating its use by statute. For example, an Oregon statute requires public access to public hearings via teleconference to permit active citizen participation throughout the state.<sup>108</sup> Individuals in remote locations must be permitted to provide public testimony at the hearings through video equipment.<sup>109</sup> Other states have experimented with various approaches to enable remote access to redistricting hearings and materials through streaming, video-conferencing, and other means.<sup>110</sup> Particularly in rural states where traveling to a central location is more difficult, technology can provide a valuable bridge.

By far the biggest innovation in redistricting transparency has been the open-redistricting movement. Scholars elsewhere have described in detail the enormous impact of technological innovation in the realm of redistricting.<sup>111</sup> Michael McDonald and Micah Altman have been particularly thorough in documenting technology's promise and the challenges its use presents.<sup>112</sup> They describe how computers revolutionized redistricting starting in the 1960s.<sup>113</sup> Many thought using computers to redistrict might limit or even eliminate

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108. OR. REV. STAT. § 188.016(1)-(2) (2017).

109. *Id.* § 188.016(3)(d).

110. Arizona and Florida are examples of two states that live streamed redistricting meetings and made video archives available on the states' redistricting websites. *See, e.g., Meeting Videos*, FLORIDAREDISTRICTING, <https://mydistrictbuilder.wordpress.com/meeting-videos> [<https://perma.cc/8WQY-WK2W>] (listing Florida's archived meeting videos). Arizona streamed meetings from its website. *Stream*, ARIZ. INDEP. REDISTRICTING COMMISSION, <https://azredistricting.org/stream> [<https://perma.cc/WYF4-ZHNK>].

111. *See, e.g.*, Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 124-25 (1985); Stuart S. Nagel, *Simplified Bipartisan Computer Redistricting*, 17 STAN. L. REV. 863, 863 (1965) (describing computer program implementing redistricting algorithm); Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1352 n.110 (1987); James B. Weaver & Sidney W. Hess, *A Procedure for Nonpartisan Districting: Development of Computer Techniques*, 73 YALE L.J. 288, 301 (1963) (describing a computer program implementing redistricting algorithm based on mathematical techniques of operations research).

112. Micah Altman et al., *Pushbutton Gerrymanders? How Computing Has Changed Redistricting*, in PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING 51, 51-52 (Thomas E. Mann & Bruce E. Cain eds., 2005); Micah Altman & Michael P. McDonald, *A Half-Century of Virginia Redistricting Battles: Shifting from Rural Malapportionment to Voting Rights to Public Participation*, 47 U. RICH. L. REV. 771, 792-93 (2013) [hereinafter Altman & McDonald, *A Half-Century of Virginia Redistricting Battles*]; Micah Altman & Michael McDonald, *The Promise and Perils of Computers in Redistricting*, 5 DUKE J. CONST. L. & PUB. POL'Y 69, 70 (2010) [hereinafter Altman & McDonald, *Promise and Perils*].

113. *See* Altman & McDonald, *Promise and Perils*, *supra* note 112, at 71.

human bias in the process.<sup>114</sup> As that debate unfolded (and continues to unfold),<sup>115</sup> the role of computers in making the process more transparent began to crystallize. Starting in the 1990s, in what Altman and McDonald refer to as the “open redistricting movement,” computer scientists began developing software that, when populated with state redistricting data, enabled members of the public to try their hand at drawing maps.<sup>116</sup> Early on, states experimented with making available a public computer in a state library or state office that enabled members of the public to create district maps.<sup>117</sup> During the 2000 cycle, eighteen states maintained some form of public terminal that enabled such public participation.<sup>118</sup> As Altman and McDonald note, it was not until the 2000s that it became possible (from a cost and technological standpoint) to significantly broaden the availability of these tools.<sup>119</sup>

In 2007, Chris Swain of the USC Game Innovation Lab created “The ReDistricting Game,” an educational tool that allows users to explore basic concepts in redistricting in a hypothetical environment.<sup>120</sup> For the first time, members of the public could put themselves in the shoes of hypothetical line-drawers and gain appreciation for trade-offs required to comply with state and federal

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114. *Id.* at 72 (citing PIETRO GRILLI DI CORTONA ET AL., *EVALUATION AND OPTIMIZATION OF ELECTORAL SYSTEMS* (1999)).

115. *See, e.g.*, Bruce E. Cain et al., *A Reasonable Bias Approach to Gerrymandering: Using Automated Plan Generation to Evaluate Redistricting Proposals*, 59 WM. & MARY L. REV. 1521 (2018); Yan Y. Liu et al., *PEAR: A Massively Parallel Evolutionary Computation Approach for Political Redistricting Optimization and Analysis*, 30 SWARM & EVOLUTIONARY COMPUTATION 78, 89 (2016). *See generally* Wendy K. Tam Cho & Yan Y. Liu, *Toward a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 ELECTION L.J. 351 (2016).

116. *See* Altman & McDonald, *Promise and Perils*, *supra* note 112, at 98.

117. *Id.*

118. *Id.* at 98-99 (noting that in the case of Arizona’s public terminal, only two well-organized interest groups used the tools provided to create maps). Altman and McDonald note that these maps, along with public testimony, influenced the outcome in Arizona that round. *Id.*

119. *Id.* at 98.

120. *See About the Game*, THE REDISTRICTING GAME, <http://redistrictinggame.org/about.php> [<https://perma.cc/2D9Z-98G7>]; *see also* Altman & McDonald, *Promise and Perils*, *supra* note 112, at 99 (citing Michael Falcone, *A Gamers Guide to Redistricting*, N.Y. TIMES: THE CAUCUS (June 14, 2007), <http://thecaucus.blogs.nytimes.com/2007/06/14/a-gamers-guide-to-redistricting>). Writing in 2010, Altman and McDonald noted that the ReDistricting Game “probably has led to more people drawing (hypothetical) redistricting maps in the last three years than in the entire history of the nation.” Altman & McDonald, *Promise and Perils*, *supra* note 112, at 99.

laws—and grasp the power to manipulate lines for partisan ends. Computer scientist Dave Bradlee created a platform that takes the ReDistricting Game a step further. It allowed users to create congressional districts using real data from the 2010 census in all fifty states and Puerto Rico.<sup>121</sup>

Several states took advantage of the open-redistricting movement to host redistricting competitions. In the 2010 cycle, five states hosted various forms of competition that allowed members of the public to draw alternative maps in their state.<sup>122</sup> Virginia's experience is illustrative. The Wason Center for Public Policy at Christopher Newport University hosted a redistricting competition enabling Virginia college and law students to compete for cash prizes to draw alternative maps. The dual goals of the competition were to educate the public about the redistricting process and produce a set of alternative maps separate from those generated within Virginia's very political process.<sup>123</sup> Virginia's competition was a historical first, marking "the first time in American history that such a competition was held while a state's redistricting process was underway, and the first to generate a legal plan."<sup>124</sup> Students created a total of fifty-six plans for U.S. congressional and state legislative districts in Virginia.<sup>125</sup> As Altman and McDonald describe,

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121. Dave Bradlee, *Do Your Own Redistricting*, DAVE'S REDISTRICTING, <http://www.gardow.com/davebradlee/redistricting/launchapp.html> [<https://perma.cc/3F83-EFP7>].

122. The Ohio League of Women Voters hosted a redistricting competition in partnership with various state representatives, Dr. Richard Gunter of Ohio State University, and then-Secretary of State Jennifer Brunner using Geographic Information System (GIS) software. See *Redistricting Contest Open to All*, LEAGUE WOMEN VOTERS OHIO, <http://www.lwvohio.org/site.cfm/In-The-News/Press-Releases/Redistricting-Contest.cfm> [<https://perma.cc/2J76-HP9Q>]. The New York Student Redistricting Competition requested student-drawn maps of the New York state legislative and congressional maps using Public Mapping Project Software. See *New York Student Redistricting Competition*, 2012 N.Y. REDISTRICTING PROJECT, FORDHAM U., <http://www.redistrictny.org/student-competition> [<https://perma.cc/5PUQ-NM29>]. The Michigan Redistricting Collaborative and the Michigan Center for Election Law and Redistricting and Common Cause Minnesota also hosted a 2010 redistricting competition. See Justin Levitt, *Michigan*, ALL ABOUT REDISTRICTING, <http://redistricting.ills.edu/states-MI.php> [<https://perma.cc/TJ96-XJFU>]; Justin Levitt, *Minnesota*, ALL ABOUT REDISTRICTING, <http://redistricting.ills.edu/states-MN.php> [<https://perma.cc/6UJK-KXX8>].

123. Altman & McDonald, *A Half-Century of Virginia Redistricting Battles*, *supra* note 112, at 792-93 (citing Brian McNeill, *Va. College Students to Attempt Redistricting*, ASSOCIATED PRESS ST. & LOC. WIRE, Dec. 27, 2010).

124. *Id.* at 793.

125. Fifteen student teams (a total of 150 students) submitted thirteen congressional plans, nine Senate plans, and six House of Delegates plans that met base-level legal requirements;

the student plans “were substantively different from one another and not simply plans that seemed to have been shuffled around from one bill to another during the legislative process.”<sup>126</sup> Representatives entered several student plans as bills in the General Assembly.<sup>127</sup>

The open redistricting movement flowered in California in the 2010 cycle. Over 20,000 individuals and groups in California offered comments or maps at public meetings or through the commission’s public portal.<sup>128</sup> California’s transparency scheme requires that

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three teams submitted plans for all six possible entries. *Id.* at 800.

126. *Id.*

127. See Tyler Whitley, *Fight over Congressional Map Next for General Assembly*, RICHMOND TIMES-DISPATCH (Apr. 10, 2011), [http://www.richmond.com/news/fight-over-congressional-map-next-for-general-assembly/article\\_2dc8dfa5-8da0-5ff8-b00b-f0e0476d14d8.html](http://www.richmond.com/news/fight-over-congressional-map-next-for-general-assembly/article_2dc8dfa5-8da0-5ff8-b00b-f0e0476d14d8.html) [<https://perma.cc/7CBE-7ERQ>]; see also *Redistricting Plans*, VA. DIVISION LEGIS. SERVICES, <http://redistricting.dls.virginia.gov/2010/RedistrictingPlans.aspx> [<https://perma.cc/45QZ-8VCB>]. Describing the promise of Virginia’s competition, Altman and McDonald wrote,

Enabled by appropriate technology, students were able to create legal redistricting plans that demonstrated a much wider range of possibilities; generally were better than the legislature’s plans, as measured by formal redistricting criteria; and were much more competitive and balanced than any of the plans actually adopted.... When many eyes look at a problem, it may be that someone will discover a solution that no one has thought of before. This is particularly true with redistricting, an extremely complex mathematical problem. Harnessing the mind power of the crowd will promote a more robust discussion of options than any one entity can devise on its own.

Altman & McDonald, *A Half-Century of Virginia Redistricting Battles*, *supra* note 112, at 830-31. Note that some have expressed skepticism about redistricting competitions. See, e.g., Justin Levitt, *Weighing the Potential of Citizen Redistricting*, 44 LOY. L.A. L. REV. 513, 528-29 (2011) (noting that deciding who “wins” raises a problematic set of concerns). Levitt suggests that embedding certain features in contests would mitigate some of his concerns. He writes:

[I]f the population shares a commitment to certain representational goals, contests that encourage members of the public to submit plans fulfilling those goals in different ways provide transparent means to flesh out policy options. If proxies for measuring those goals can be found with some relative precision, then individuals can be encouraged to one-up each other en route to a range of solutions more closely approaching a Pareto-optimal decision set. And if there is a commitment to establish a pool of “winners,” rather than a single winning plan, that flexibility may adequately accommodate inevitable imperfections in the proxies or weighting process necessary for scoring contest results.

*Id.* (footnotes omitted).

128. Angelo N. Ancheta, *Redistricting Reform and the California Citizens Redistricting Commission*, 8 HARV. L. & POL’Y REV. 109, 128-29 (2014) (“Many advocacy and civil rights groups that had participated in prior redistricting cycles not only submitted statewide or regional maps, they mobilized members and constituents to attend and testify at individual hearings.”).

public mapping software and redistricting data be made available to the public.<sup>129</sup> According to observers of California's 2010 redistricting process, plans submitted by the public helped frame "discussion of what was possible, particularly submissions by the civil rights groups (due to the threat of potential litigation)."<sup>130</sup> Evaluations of public contributions to the California commission noted positive influence,<sup>131</sup> in some cases, proposed alternative maps underwent serious consideration.<sup>132</sup>

With the exception of states like California, which passed redistricting reform just as technological advances in service of redistricting started to make significant strides, most state transparency rules—if on the books at all—are limited to requiring public hearings and publishing proposed maps for public review with varying degrees of notice and public participation requirements. Many of the most recent crop of proposed transparency bills include provisions that incorporate technology.<sup>133</sup> Examples include requirements that

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129. CAL. GOV'T CODE § 8253(b) (West 2013) ("The Legislature shall take all steps necessary to ensure that a complete and accurate computerized database is available for redistricting, and that procedures are in place to provide the public ready access to redistricting data and computer software for drawing maps.").

130. Karin Mac Donald & Bruce E. Cain, *Community of Interest Methodology and Public Testimony*, 3 U.C. IRVINE L. REV. 609, 615 (2013). The authors describe other forms of public input, such as comments describing local communities of interest to inform the commission with the hope these communities would be kept together, and, later, public reactions to specific commission-proposed lines. *See id.*

131. Justin Levitt, *Democracy on the High Wire: Citizen Commission Implementation of the Voting Rights Act*, 46 U.C. DAVIS L. REV. 1041, 1082, 1093 (2013) (discussing positive impact of public testimony on Voting Rights Act compliance).

132. *Id.* at 1102-03 (describing the commission's consideration of the Mexican-American Legal Defense Fund's alternative map submission). According to the Center for Public Integrity's analysis of redistricting transparency in the 2010 round, only nine states received a 0/100 score for whether the state government accepted plans submitted by members of the public (Arkansas, Georgia, Kentucky, New Hampshire, Pennsylvania, Texas, Utah, Virginia, and Wisconsin). *See* Caitlin Ginley, *Grading the Nation: How Accountable Is Your State?*, CTR. FOR PUB. INTEGRITY (Mar. 19, 2012, 12:01 AM), <https://www.publicintegrity.org/2012/03/19/8423/grading-nation-how-accountable-your-state> [<https://perma.cc/K6KE-HJ7M>].

133. Reformers in many states have proposed bills that incorporate enhanced redistricting transparency measures: Arizona, H.R. Con. Res. 2030, 53d Leg., 1st Reg. Sess. (Ariz. 2017); Delaware, S. 270, 148th Gen. Assemb., 2d Reg. Sess. (Del. 2015); Illinois, H.R.J. Res. 0021, 100th Gen. Assemb., 1st Reg. Sess. (Ill. 2017); Indiana, H. 1014, 120th Gen. Assemb., 1st Reg. Sess. (Ind. 2017); Kansas, S. Con. Res. 1609, 86th Leg., Reg. Sess. (Kan. 2016); Maryland, H. 367, 437th Gen. Assemb. (Md. 2017); Michigan, S. 82, 99th Leg., Reg. Sess. (Mich. 2017); Nebraska, Legis. 653, 105th Leg., 1st Sess. (Neb. 2017); Legis. 216, 105th Leg., 1st Sess. (Neb. 2017); Legis. 580, 104th Leg., 2d Sess. (Neb. 2016); New Jersey, G.A. Con. Res. 93, 217th Leg.,

states make redistricting software available to the public to draw their own maps,<sup>134</sup> a proposal that would require a commission to accept and then score such plans submitted by the public,<sup>135</sup> increasingly common requirements like live-streaming public hearings,<sup>136</sup> and the creation of public access and input portals on state redistricting websites.<sup>137</sup>

Technology will play an enhanced role in redistricting transparency in 2020. What remains to be seen is how effective individual states will be in harnessing its potential and limiting its harm.

## II. THE PERILS OF TRANSPARENCY IN REDISTRICTING

After surveying the contours of state redistricting rules and the promise of technology in enhancing public oversight of and participation in the process, the following question must be asked: Is redistricting transparency an unqualified good? As states think through how to structure redistricting transparency rules in the upcoming round, is more transparency always better? Does greater transparency inevitably ensure an informed citizenry, provide accountability, and build public trust in the process?

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1st Sess. (N.J. 2016); S. Con. Res. 107, 217th Leg., 1st Sess. (N.J. 2016). The U.S. Congress considered legislation that would require technological innovation in redistricting transparency. *See* Redistricting Transparency Act of 2011, H.R. 419, 112th Cong. § 2 (2011) (introduced in subsequent sessions as recently as January 27, 2017). The bill would, *inter alia*, require states to establish a website that enables members of the public to participate in initial development of plans. *Id.* § 3.

134. *See, e.g.*, Redistricting Openness and Fairness Act, H.R. 878, 2015 Gen. Assemb., Reg. Sess. (Pa. 2015).

135. *See* H.R. HJRCA0034, 94th Gen. Assemb. (Ill. 2009). The top-scored maps would then be sent to the legislature for consideration. *See id.*

136. Reform proposals in Nevada and Ohio would require videoconferencing or broadcasting of redistricting meetings/hearings. NEV. JOINT STANDING RULES, 76th Sess., at 6 (2011); OHIO CONST. art. X, § 1(C).

137. Delaware, Michigan, Nebraska, Pennsylvania, and Tennessee also have bills that would require the creation of a website containing redistricting information: Delaware, S. 270, 148th Gen. Assemb., 2d Reg. Sess. (Del. 2015); Michigan, S. 82, 99th Leg., Reg. Sess. (Mich. 2017); Nebraska, Legis. 653, 105th Leg., 1st Sess. (Neb. 2017); Legis. 216, 105th Leg., 1st Sess. (Neb. 2017); Pennsylvania, Redistricting Openness and Fairness Act, H.R. 878, 2015 Gen. Assemb., Reg. Sess. (Pa. 2015); Tennessee, TENN. CODE ANN. § 10-7-503(a)(1)(A) (2017).



### A. *The Problem of Transparency*

The ideal of transparency is deeply ingrained into the American ethos; modern Americans are trained to believe that more transparency is always better.<sup>138</sup> The rise of digital information has further fueled the promise of open government. Recent initiatives emanating from all levels of government have sought to “free” usable data in order to enhance government oversight and improve government efficiency and accountability.<sup>139</sup> Digital transparency advocates argue that allowing direct public access to unmediated government data enables citizens to make better decisions, allows private entities to use data to create improved public services, and promises to revolutionize government accountability.<sup>140</sup> The open-government movement has made great strides toward these goals.<sup>141</sup> But as the open-government movement unfolds, some wonder whether open government always delivers, arguing that in our modern information environment too much transparency (or transparency done poorly) can breed confusion, distort interests, and even thwart beneficial government action.<sup>142</sup>

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138. See BRUCE E. CAIN, *DEMOCRACY MORE OR LESS: AMERICA'S POLITICAL REFORM QUANDARY* 42 (2014) (“The philosophical and cultural commitment to open government runs deep in American culture.”). The oft-quoted Brandeis line that “[s]unlight is ... the best of disinfectants” typifies this perspective. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1914).

139. One federal example was President Obama's Open Government Initiative, announced in December 2009. See Memorandum from President Barack Obama for Heads of Exec. Dep'ts and Agencies, 74 Fed. Reg. 4685 (Jan. 26, 2009) (proclaiming the President's commitment to making government “transparent,” “participatory,” and “collaborative” as part of his Administration's effort to be transparent and open); see also WENDY R. GINSBERG, CONG. RESEARCH SERV., R41361, *THE OBAMA ADMINISTRATION'S OPEN GOVERNMENT INITIATIVE: ISSUES FOR CONGRESS* 12-26 (2011); Paul T. Jaeger & John Carlo Bertot, *Transparency and Technological Change: Ensuring Equal and Sustained Public Access to Government Information*, 27 *GOV'T INFO. Q.* 371, 373 (2010). For examples of local initiatives, see S.F., CAL., ADMIN. CODE § 22D.2 (2017); E.B. Boyd, *San Francisco Passes First Open Data Law*, *FAST COMPANY* (Nov. 8, 2010), <http://www.fastcompany.com/1701410/san-francisco-passes-first-open-data-law> [<https://perma.cc/J4EE-A6NB>]; and Sarah Kessler, *App Quest Contest Challenges Developers to Create Apps Using NYC Data*, *MASHABLE* (July 12, 2011), <http://mashable.com/2011/07/12/mta-app-contest/#iG5dZ6wz8Oqq> [<https://perma.cc/M6CL-4PB3>].

140. See John Geraci, *The Four Pillars of an Open Civic System*, *O'REILLY RADAR* (June 15, 2009), <http://radar.oreilly.com/2009/06/the-four-pillars-of-an-open-ci.html> [<https://perma.cc/ZW6C-9RXC>].

141. See *id.*

142. See, e.g., JEREMY BENTHAM, *POLITICAL TACTICS* 39 (Michael James et al. eds., 1999)

Bruce Cain has worried about these issues thoughtfully. He identifies a number of problems that transparency and public participation presents in modern deliberative democracies. A first involves intermediary distortion. Cain notes that “average citizens do not have the time or resources to monitor public officials ... themselves.”<sup>143</sup> As a consequence, intermediaries often take on the oversight role. Depending on the motivations of these intermediaries, the messages conveyed may be sensationalized or otherwise distorted.<sup>144</sup> If powerful special interests dominate discourse, transparency rules may poorly serve or even undermine their function.

Second, Cain posits that modern transparency norms might encroach on needed deliberative space. He argues that elected representatives must be able to exercise their judgment free of distorted (or outsized) outside input.<sup>145</sup> Further, Cain worries that elected officials may lack the skills or ability to sift through public inputs during an open process ensuring that input enhances rather than muddles the decision-making process.<sup>146</sup> Cain also warns that putting officials under a microscope will inevitably force them to find

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(noting instances when too much publicity in government is problematic); *see also* ARCHON FUNG ET AL., FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 177-80 (2007) (describing the real risks broad disclosure can engender and proposing principles for effective transparency policies); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 101 (1996); Joshua Cohen, *Democracy and Liberty*, in DELIBERATIVE DEMOCRACY 185, 193-94 (Jon Elster ed., 1998); Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar.-Apr. 1982, at 14, 15-16; Lawrence Lessig, *Against Transparency*, NEW REPUBLIC (Oct. 9, 2009), <https://newrepublic.com/article/70097/against-transparency> [<https://perma.cc/A98Q-E32B>]. *See generally* CAIN, *supra* note 138, at 42.

143. CAIN, *supra* note 138, at 42.

144. Some motivations include maximizing readership for the press or demonstrating impact to funders for nonprofits. *See id.* *See generally* Kay Lehman Schlozman et al., *Civic Participation and the Equality Problem*, in CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY 427 (Theda Skocpol & Morris P. Fiorina eds., 1999) (discussing civic participation in American politics for equal protection of interests).

145. *See* Bruce E. Cain, *The Transparency Paradox*, 11 AM. INTEREST 26, 28 (2015) (“If interest groups ... capture the public comment and participation opportunities, it exacerbates the problems that come with having so many veto points.”).

146. *See* Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 852 (2014) (“In the midst of the declining governing capacity of the American democratic order, we ought to focus less on ‘participation’ as the magical solution and more on the real dynamics of how to facilitate the organization of effective political power.”); *see also* JONATHAN RAUCH, CTR. FOR EFFECTIVE PUB. MGMT. BROOKINGS, POLITICAL REALISM: HOW HACKS, MACHINES, BIG MONEY, AND BACK-ROOM DEALS CAN STRENGTHEN AMERICAN DEMOCRACY 21 (2015), <https://www.brookings.edu/wp-content/uploads/2016/08/political-realism-rauch2.pdf> [<https://perma.cc/9PL9-G5NA>].

ways to conceal deliberation, entirely undermining the point and promise of transparency.<sup>147</sup>

Relatedly, Jonathan Rauch argues that progressive calls for greater transparency have “badly damaged the country’s governability.”<sup>148</sup> Rauch explains: “We live in a world of second and often third choices, and in order to govern one must make decisions and engage in practices which look bad up close and are hard to defend in public but which, nonetheless, seem to be the best alternative at the time.”<sup>149</sup>

Digital transparency can amplify transparency’s downsides. While the quantity of available government data has exploded, the quality and utility of that information has not always improved by similar leaps and bounds.<sup>150</sup> Delivering open-government data is one thing; delivering it in a format that the public can readily use and understand, is quite another. Some argue that wholesale release of poorly contextualized government data leads to confusion—or worse.<sup>151</sup>

A second series of problems relates to the impact of digital norms on public participation in deliberative democracy.<sup>152</sup> As public bodies create platforms to enable the public to access information and provide avenues for comment, message distortion and deluge can undermine their ability to produce usable and productive inputs.<sup>153</sup>

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147. Cain, *supra* note 145, at 30 (“The predictable effect of [requiring officials’ emails be preserved for possible public release] will be that [officials] will discuss serious matters in person or over the phone.”).

148. RAUCH, *supra* note 146, at 1.

149. *Id.* at 7.

150. Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL’Y REV. 79, 91 (2012); see also Mark Fenster, *The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State*, 73 U. PITT. L. REV. 443, 489 (2012).

151. See FUNG ET AL., *supra* note 142 (arguing the dissemination of highly technical information without converting it to a user-friendly format is ineffective and sometimes even counterproductive); Lessig, *supra* note 142.

152. See Alissa Ardito, *Social Media, Administrative Agencies, and the First Amendment*, 65 ADMIN. L. REV. 301, 318 (2013) (discussing avenues of speech that do not facilitate productive public discussion including: “personal attacks, profanity, ... [] aggressive behavior,” or “off topic” comments that promote irrelevant services or products). Ardito also warns of potential censorship and free speech concerns when site moderators wield a potential veto on the speech of others. See *id.* at 315.

153. Cain, *supra* note 145, at 28 (“Since the online submission enables and encourages more public input, agencies can be overwhelmed by the amount of public testimony directed

To make matters worse, the growing problem of nonhuman manipulation of public forums presents a real threat.<sup>154</sup> A growing literature seeks to address the problem of the muddled online deliberative forum, suggesting that thoughtful design choices should be employed to counter some of the problem.<sup>155</sup>

As this discussion suggests, more transparency is not always better. And transparency—particularly digitally enhanced transparency—comes with costs. These concerns are particularly acute in the area of redistricting.

### *B. The Problem of Redistricting Transparency*

In general, liberal democratic theory ascribes three goals of government transparency: an informed citizenry, accountable government officials, and enhanced public trust in government.<sup>156</sup> Redistricting transparency presents a particular set of challenges in each respect. First, redistricting has traditionally been too arcane and complex a topic for most Americans to grasp. It takes years of

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their way.”).

154. Tim Wu, *Please Prove You're Not a Robot*, N.Y. TIMES: SUNDAYREVIEW (July 15, 2017), [https://www.nytimes.com/2017/07/15/opinion/sunday/please-prove-youre-not-a-robot.html?\\_r=0](https://www.nytimes.com/2017/07/15/opinion/sunday/please-prove-youre-not-a-robot.html?_r=0) [https://perma.cc/AWZ5-LUBF].

155. See Archon Fung, *Minipublics: Deliberative Designs and Their Consequences*, in DELIBERATION, PARTICIPATION AND DEMOCRACY: CAN THE PEOPLE GOVERN? 159, 162 (Shawn W. Rosenberg ed., 2007); Warren Sack, *Discourse Architecture and Very Large-Scale Conversation*, in DIGITAL FORMATIONS: IT AND NEW ARCHITECTURES IN THE GLOBAL REALM 242, 242 (Robert Latham & Saskia Sassen eds., 2005); Scott Wright, *Design Matters: The Political Efficacy of Government-Run Discussion Boards*, in THE INTERNET AND POLITICS: CITIZENS, VOTERS AND ACTIVISTS 80, 83-84 (Sarah Oates et al. eds., 2006); see also John Morison & David R. Newman, *On-line Citizenship: Consultation and Participation in New Labour's Britain and Beyond*, 15 INT'L REV. L. COMPUTERS & TECH. 171, 185 (2001); Scott Wright & John Street, *Democracy, Deliberation and Design: The Case of Online Discussion Forums*, 9 NEW MEDIA & SOC'Y 849, 854-59 (2007). See generally GRAHAM SMITH, DEMOCRATIC INNOVATIONS: DESIGNING INSTITUTIONS FOR CITIZEN PARTICIPATION 8-29 (2009).

156. Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 888 (2006) (“By any commonsense estimation, governmental transparency, defined broadly as a governing institution’s openness to the gaze of others, is clearly among the pantheon of great political virtues.” (footnote omitted)). Two of the most commonly cited goals of government transparency in liberal democratic theory are to enable both an informed citizenry and official accountability, central ingredients of the democratic process. See, e.g., 2 JEREMY BENTHAM, *An Essay on Political Tactics*, in THE WORKS OF JEREMY BENTHAM 299, 312 (John Bowring ed., 1843); JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 89 (1862).

study to learn the intricacies of the laws and requirements governing redistricting.<sup>157</sup> In addition, there remain numerous unsettled areas resulting in continuous litigation and constant change. Core assumptions about what constitutes desirable representation models are perpetually in flux.<sup>158</sup> These complexities make it difficult for the public to meaningfully engage. A study published in 2013 on public satisfaction with redistricting outcomes suggested that people lacked enough basic knowledge about redistricting to even register approval or disapproval of outcomes<sup>159</sup>:

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157. Even people who have devoted a lifetime to the study of redistricting often find basic presumptions or predictions proven wrong after election outcomes contradict their predictions. In *Vieth v. Jubelirer*, Justice Scalia recounted what he called “[a] delicious illustration” of experts (including judges) being proven wrong about line-drawing once elections take place. See 541 U.S. 267, 287 n.8 (2004) (plurality opinion).

158. See Levitt, *supra* note 127, at 524 (“There is ample debate among scholars, activists, and practitioners about the role in redistricting of—alone and in context—the continuity of political representation, the nature of protection for minority rights, the degree of partisan competition or partisan inequity, physical proximity or accessibility, and the ability and desirability of representing homogenous or heterogeneous communities.”); see also Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1727-30 (2001) (wrestling with how to understand minority voting rights as aggregate versus individual rights). Gerken writes, “Are the preferences of rural voters and urban voters different and should [courts] recognize this fact? To what extent ought a majoritarian system recognize minority voters? How does one gauge the social meaning of an apportionment plan?” Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411, 1443 (2002).

159. Costas Panagopoulos, *Public Awareness and Attitudes About Redistricting Institutions*, 6 J. POL. & L. 45, 45, 47 tbl.1 (2013) (“Studies have demonstrated that, while there is considerable variation in what Americans know about politics, the public is generally poorly informed about the basic structures of many political institutions and processes. Citizens’ knowledge about redistricting, in particular, tends to be especially low.” (citations omitted)); see also Fougere et al., *supra* note 7, at 327, 340.

Table 1. Familiarity and satisfaction with redistricting process

	Satisfied	Dissatisfied	Don't Know
Overall	23	23	54
Age <30	19	12	69
Age >30	24	27	49
Men	24	32	44
Women	22	15	64
White	25	25	50
Black	11	18	71
Hispanic	14	19	67
Democrat	21	19	60
Republican	33	24	43
Independent	19	31	50
Commission (Actual)	22	19	59
Legislature (Actual)	23	25	52

Notes: Figures represent (mean) percentages (weighted). *Question wording:* Are you satisfied or dissatisfied with the process by which Congressional district lines are drawn in your state?

Likewise (and as a consequence), holding legislators accountable in redistricting has traditionally been difficult to achieve. Legislatures typically create maps and release versions to the public, sometimes not until late in the process.<sup>160</sup> Whether the public can meaningfully evaluate lines is questionable, particularly when it comes to voters' assessments of particular legislators' input. Steven Huefner points out that even when citizens have access to redistricting deliberations, maps, and criteria used to draw them, few are able to hold legislators fully accountable for decisions made within that process.<sup>161</sup> Huefner explains, “[C]rucial aspects of the redistricting process occur behind closed doors, leaving voters little opportunity to understand how particular redistricting choices were made and when to blame their specific legislator for complicity in a redistricting abuse.”<sup>162</sup>

Further complicating matters, when it comes to a complex task like redistricting, a shadow process very often looms behind whatever public-facing processes take place.<sup>163</sup> Following the 2010 round

160. This occurred, for example, in Wisconsin. *See supra* Part I.A.

161. Huefner, *supra* note 15, at 55.

162. *Id.*

163. *See, e.g.,* Romo v. Detzner, No. 2012-CA-412, 2014 WL 3797315, at \*20-21 (Fla. Cir. Ct. July 10, 2014) (describing the efforts of Republican political consultants and operatives during the 2011 Florida redistricting process who “made a mockery of the Legislature’s

of redistricting, critics lambasted state redistricting transparency climates, arguing that many states—even those with transparency provisions on the books—cloaked the real process in secrecy.<sup>164</sup>

The problem of public trust is often stacked against the redistricting process. As reformers routinely point out, self-dealing is baked in when legislators draw the lines,<sup>165</sup> foxes guarding the henhouse is a common refrain.<sup>166</sup> Building public trust in outcomes is therefore a huge hurdle. Even in states in which commissions draw the lines, observers have noted that public trust in their neutrality is critical and hard to achieve given the difficulty of removing partisanship entirely from the process not to mention the temptation for perceived losers to cry foul.<sup>167</sup>

In addition, the problem of data deluge is enormous in this sphere. California's experience in the 2010 round of redistricting bears this out. California's transparency measures won praise for enabling meaningful public participation and building public faith in the commission's final maps.<sup>168</sup> As described above, its citizen commission built in robust transparency and public participation mechanisms that in many ways supply a roadmap for how to open the process. But, as Commissioner Angelo Ancheta described, "the

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proclaimed transparent and open process of redistricting by [operating] ... in [a] shadow of that process, utilizing the access it gave them to the decision makers, but going to great lengths to conceal from the public their plan and their participation in it"), *aff'd*, 172 So. 3d 363 (Fla. 2015).

164. See Kusnetz, *supra* note 33.

165. DAVID DALEY, *RATF\*\*KED: THE TRUE STORY BEHIND THE SECRET PLAN TO STEAL AMERICA'S DEMOCRACY* xvii-xviii (2016) ("[P]oliticians have gerrymandered since before there was a Congress, since before gerrymandering even had a name.").

166. *But see* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 650 (2002) (arguing that factors other than partisan redistricting account for problems perceived by those who seek reform of the redistricting process).

167. Mac Donald & Cain, *supra* note 130, at 614 ("The legitimacy of [the independent redistricting commission] approach hinges on all parties buying into the belief that legal and professional norms of impartiality will ultimately prevail. In practice, the losers in judicially imposed redistricting plans often read bias into the final outcomes."); *see also* Kang, *supra* note 74, at 684 (noting that "[s]cholars have discovered that even truly independent methods of redistricting may produce quite biased results," suggesting that the public has reason for skepticism).

168. *See supra* notes 85-88 and accompanying text.

Commission became overloaded with information.”<sup>169</sup> Ancheta continued,

Although the commissioners, the Commission’s staff, and its line-drawing team created efficient processes and employed up-to-date redistricting technologies and software, no one expected that there would be testimony from over 2700 members of the public and over 20,000 written submissions, including fully developed statewide and regional maps. There were methods for streamlining the information, and the line-drawing team carefully catalogued the data. Much of the testimony was also repetitive—having been the product of mobilization efforts by various groups and offices—but it was all counted.

[T]he Commission was ill-equipped to deal with what evolved into a redistricting “big data” problem.... Sorting through the data and separating the signal from the noise became challenging because of the sheer volume of testimony, and converting imprecise and sometimes conflicting proposals into geospatial information became problematic.<sup>170</sup>

California’s experience offers a cautionary tale for what could unfold in the rest of the country as states, individuals, and private organizations make redistricting data and mapping tools widely available. As the public becomes increasingly aware of the ills of redistricting and more interested in overseeing it, state redistricting entities are likely to face increased public pressure for greater levels of public access to the process. Depending on what transparency measures are in place, line-drawers could face a California-like deluge of public input to the point it hinders rather than helps meet transparency’s core goals. As Karen Mac Donald and Bruce Cain warn,

[P]ublic testimony can easily overwhelm the redistricting process and sometimes provides conflicting interpretations. A sincere and earnest effort to determine the public’s interests in redistricting requires finding ways to process large amounts of information rapidly, examining the feasibility of competing

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169. Ancheta, *supra* note 128, at 130.

170. *Id.*



proposals, and managing public expectations about the ability to satisfy everyone's demands.<sup>171</sup>

Furthermore, managing "big data" projects is a tricky endeavor in which state employees are seldom trained. If redistricting data is not made available or is made available in unusable formats or without sufficient educational tools and context, the effort could backfire, feeding public anger and distrust of the process.

Likewise, the intermediary problem has huge potential to distort state redistricting conversations.<sup>172</sup> Certain groups are likely to be very active in redistricting advocacy.<sup>173</sup> Is it likely that those groups will inadequately represent the interests of all? Will some advocates and organizations have outsized influence? Will deeper pockets magnify some voices? Is it possible that well-organized groups will game the system or use trickery to introduce public comments and maps? The answer to each of these questions—as already demonstrated in past rounds—is a certain yes.<sup>174</sup>

An additional challenge is the problem of ensuring adequate deliberative space.<sup>175</sup> Overzealous transparency rules may force decision makers underground. As plaintiffs in Pennsylvania and Florida complained during the last round, stringent transparency requirements led line-drawers to conduct the "real" business in the backroom undermining transparency rules designed to prevent this very behavior.<sup>176</sup>

Additionally, the growing concern of data security adds another troubling twist. Is it possible that outside (or inside) forces seeking to destabilize American democracy will take advantage of transparency and public participation measures to flood input channels?

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171. Mac Donald & Cain, *supra* note 130, at 611.

172. *See id.* at 616 (citing Kevin M. Leyden, *Interest Group Testimony and Resources at Congressional Hearings*, 20 LEGIS. STUD. Q. 431, 435-37 (1995)).

173. CAIN, *supra* note 138, at 83 (noting the problem of staffing the California Citizens Redistricting Commission with attorneys that did not appear biased, Cain writes, "The greater the political consequences, the more likely that the expertise will also be partisan affiliated").

174. *See supra* notes 144-47 and accompanying text.

175. Deliberative space in redistricting is widely acknowledged as an important component of the process. *See, e.g.*, Levitt, *supra* note 131, at 1092 (noting that it is wholly appropriate for a redistricting body receiving legal advice to do so in closed session).

176. *See supra* note 163 and accompanying text.

Will state governments take sufficient care to ensure redistricting websites and data repositories are secure and that hackers or other disruptors cannot infiltrate and alter data they contain? This country—both in the public and private sectors—is just starting to come to grips with the massive vulnerabilities within the information society we have built. Attacks on our election infrastructure suggest that data security concerns will add to the complicated question of transparency in redistricting.<sup>177</sup>

And finally, one of the biggest hurdles in redistricting transparency is a philosophical one. Does transparency unquestionably benefit the line-drawing process? California experimented with a full disclosure model, going to great lengths to make the process as transparent and open to public input as possible—even going so far as populating its commission with citizens themselves.<sup>178</sup> At the other end of the spectrum is Wisconsin where legislators during the 2010 cycle took pains to shield the process from public input (and from political opponents).<sup>179</sup> But from a good government perspective, is one end of the spectrum inherently “bad” while the other “good”? Is it possible that a closed process, or one with very limited transparency mechanisms, might produce superior maps that are more representative of voters’ interests? Maybe shutting out public noise is preferable, assuming that the criteria upon which line-drawers base their decisions are impartial and apolitical.<sup>180</sup> If maps produced under a closed process are met with criticism, the ready

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177. See Nathaniel Persily, *Can Democracy Survive the Internet?*, J. DEMOCRACY, April 2017, at 70, 71-72 (describing the impact of disinformation campaigns on democratic institutions); Kaveh Waddell, *Why Elections Are Now Classified as ‘Critical Infrastructure,’* ATLANTIC (Jan. 13, 2017), <https://www.theatlantic.com/technology/archive/2017/01/why-the-government-classified-elections-as-critical-infrastructure/513122/> [https://perma.cc/EL4E-QXFL] (describing threats to U.S. election security).

178. Michael Kang’s proposal to require new redistricting plans to win statewide popular approval through direct democracy also populates this end of the spectrum. See Kang, *supra* note 74, at 700.

179. See *supra* Part I.A.

180. The problem, however, is that the goal of neutral criteria prompting line-drawers to spit out competitive maps is likely an impossible dream for the same reason experts doubt computers are unable to do so. See Kang, *supra* note 74, at 685 (“Once we have neutral, apolitical decisionmakers handling redistricting, how should they draw district lines? The answers are not obvious in any sense. Should electoral competition be paramount, as many suggest? Should partisan and group representation in the legislature be more important?”).

answer in states in which legislators draw the lines is to vote the line-drawers out of office.

The problem with this line of thinking is the process failure problem. Voters cannot easily hold legislators accountable if the process or resulting maps displease because, in many cases, unhappy voters have been districted out of the bad actor's district or subsumed in districts dominated by supporters.<sup>181</sup> Likewise, as described above, holding individual legislators accountable in the redistricting process is next to impossible; maps are the result of hundreds of thousands of decisions.<sup>182</sup> By far the biggest reason why the Wisconsin end of the spectrum is untenable is the issue of public trust. It may be that some measure of deliberative space is required to enable line-drawers to do their work. But public skepticism of redistricting is on the rise. In this environment, the black box approach is perilous if the end result is to survive public—and judicial—scrutiny.

With these concerns in mind, the next Part suggests some basic principles to help guide states through these fraught waters.

### III. REDISTRICTING TRANSPARENCY IN 2020: BEST PRACTICES

Which transparency measures have the best chance of producing an informed citizenry, accountable officials, and public trust in the process? Is it possible to design transparency rules that line-drawers and outside malefactors cannot manipulate or subvert? There are no easy answers to these questions. This Part suggests four basic principles to guide states in designing redistricting transparency rules for the upcoming round.

#### *A. Clarify*

States should work to clarify redistricting transparency rules. Well in advance of the next round (meaning now), states should

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181. *Id.* at 698 (“An elected official or political party hurts its chances of re-election if it takes an unpopular position on tax cuts. An elected official or political party that entrenches itself through redistricting, on the other hand, increases its chances of re-election regardless whether the redistricting is popular with the public.”).

182. See Huefner, *supra* note 15, at 55.

conduct an audit of transparency measures used in past rounds whether mandated by statute, legislative rule, judicial decree, or undertaken in practice. States should evaluate the effectiveness of their rules and look to the experiences of other states for ideas about what might work better. Once this audit is complete, legislators should work to clarify and formalize the transparency mechanisms built into the redistricting process. State legislatures should affirmatively clarify whether open records and open meetings laws apply to the redistricting process (and subprocesses) and the extent to which legislative privilege shields legislative activity.

Evaluating, formalizing, and clarifying transparency rules and processes can produce a number of desired effects, most importantly improving public confidence in the process. A lack of clarity or misrepresentation of the level of access afforded can breed mistrust and undermine public confidence in outcomes.<sup>183</sup> Additionally, a lack of clear rules and procedures can lead to costly litigation to establish what level of access should be (or should have been) afforded. Importantly, legislatures will have better luck building deliberative space into the process if transparency rules and procedures are clear at the outset to counter the public perception that something tricky or underhanded is taking place.

### *B. Consider Timing Carefully*

States devising redistricting transparency rules must consider their timing carefully. Line-drawers commonly delay transparency to purposely truncate the public's ability to oversee and weigh in during the process. Wisconsin's legislative tactics during the latest round are a poster child for this approach. After a secretive process, legislators published maps followed by only one public meeting and

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183. Jennifer Shkabatur, *Cities @ Crossroads: Digital Technology and Local Democracy in America*, 76 BROOK. L. REV. 1413, 1438 (2011) ("Public officials and designers of participatory platforms should be explicit about the procedures ex-ante and adhere to them ex-post. Even if the rules grant participants only the most minimal powers, a misrepresentation of the process can deepen the levels of mistrust between citizens and government and alienate potential participants from future participatory endeavors.").

a party-line vote a mere ten days later.<sup>184</sup> Another example described above is Illinois, which held public hearings before redistricting maps were released and then hastily passed them without meaningful opportunity for public comment.<sup>185</sup> And in another example, although Tennessee legislators boasted that they planned “the most open, interactive and transparent redistricting process,” legislators did not release information about the plans “until ... about a week before they adopted the proposals,” and did not release full district maps until two weeks after the legislature had approved them.<sup>186</sup> Providing notice and adequate time to evaluate should be a cornerstone of any redistricting transparency plan.<sup>187</sup>

In 2009, the League of Women Voters and the Campaign Legal Center produced “Model Legislation for Transparency in the Redistricting Process.”<sup>188</sup> The model legislation featured a variety of specific timing mandates that provide decision points states should consider, including, for example, establishing deadlines for how long before the publication of U.S. census data the state’s redistricting website should be up and functioning, when the criteria line-drawers will use will be publicized, how long before adopting final plans a set of detailed proposed plans should be circulated online and in print, and how long after public comments are received should the final plans be posted publicly online.<sup>189</sup>

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184. See Michael Buelow, *August: Redistricting Should Be More Transparent*, WIS. FREEDOM INFO. COUNCIL, [http://www.wisfoic.org/index.php?option=com\\_content&view=article&id=206:august-redistricting-should-be-more-transparent&catid=56:2011-columns&Itemid=55](http://www.wisfoic.org/index.php?option=com_content&view=article&id=206:august-redistricting-should-be-more-transparent&catid=56:2011-columns&Itemid=55) [https://perma.cc/BYS7-89PP]. North Carolina, with its storied redistricting malfeasance, is still using this tactic today. See Anne Blythe, *Here’s Your Chance to Comment on Shape of Maps to Correct NC Gerrymanders*, NEWS & OBSERVER (Aug. 3, 2017, 6:53 PM), <http://newsobserver.com/news/politics-government/state-politics/article165323017.html> [https://perma.cc/XE87-24Q4] (describing how legislative line-drawers in North Carolina are citing a tight schedule in order to limit public input).

185. See *supra* note 33 and accompanying text.

186. See Kusnetz, *supra* note 33.

187. Kentucky, New Hampshire, Ohio, and Wisconsin received a score of 0/100 on the criteria of whether schedules of redistricting meetings/hearings were available to the public in the Center for Public Integrity analysis of state redistricting transparency in the 2010 round. See Ginley, *supra* note 132.

188. See LEAGUE OF WOMEN VOTERS & CAMPAIGN LEGAL CTR., *DEVELOPING AN ACTION AGENDA FOR REDISTRICTING IN 2011*, at 20-25 (2009).

189. *Id.* The proposed Federal Redistricting Transparency Act also included specific timing deadlines. For the version introduced in 2017, see Redistricting Transparency Act of 2017, H.R. 713, 115th Cong. (2017).

States can cater timing decisions to their liking but should work to produce and publicize well in advance of the cycle a clear timeline that provides adequate notice and opportunity for meaningful public input and oversight.

### *C. Embrace Technology*

We are past the point of no return to the days when line-drawers could hide behind highly rarified technical barriers to explain away an opaque process. If states fail to create open-redistricting platforms themselves, nonprofits and other actors will provide public tools to draw alternative maps—indeed, such platforms already exist.<sup>190</sup> States that have not already done so should get out in front of the tidal wave of open redistricting. Done right, platforms that educate, inform, and enable members of the public to participate can go a long way in building public trust in the process and outcomes.<sup>191</sup>

Open redistricting presents many challenges. Relatively early on, the open-government movement produced consensus about the core features of an ideal platform. Written in 2007 and later updated, the “Ten Principles for Opening Up Government Information” provide useful guidance. They include: completeness, primacy (use of primary source data), timeliness, ease of physical and electronic access, machine readability, nondiscrimination, use of commonly owned standards, removal of licensing/attribution requirements, permanence, and elimination of usage costs.<sup>192</sup> States developing digital

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190. See Bradlee, *supra* note 121.

191. Despite the troubles Florida’s transparency regime experienced during the 2010 round, the State created a comprehensive redistricting website offering redistricting software to allow members of the public to try their hand at creating maps. The site included written video tutorials on creating and submitting plans, archives of videos and transcripts of meetings, open data and code for its district building software, and links to resources. See *Learn to Use MyDistrictBuilder*, FLA. HOUSE OF REPRESENTATIVES’ REDISTRICTING COMMITTEE & FLORIDAREDISTRICTING, <https://mydistrictbuilder.wordpress.com/learnmydistrictbuilder/> [<https://perma.cc/966W-J9Y8>].

192. A group of open government advocates developed the document in 2007, which the Sunlight Foundation later updated. See *Ten Principles for Opening up Government Information*, SUNLIGHT FOUND. (Aug. 11, 2010), <https://sunlightfoundation.com/policy/documents/ten-open-data-principles/> [<https://perma.cc/H3MP-SDC6>].

platforms for redistricting would be wise to consider each of these elements carefully.

In 2010, the Brookings Institution convened members of the academic, nonprofit, and legislative communities to determine a series of best practices for transparency in redistricting. The group focused its attention on necessary preconditions for members of the public to evaluate proposed plans and create alternative plans of their own.<sup>193</sup> Several recommendations related to ways technology should be incorporated into transparency mechanisms.<sup>194</sup> For example, the group suggested states create platforms populated with sufficient data and software tools to enable “the public [to] verify, reproduce, and evaluate ... plan[s].”<sup>195</sup> The group further suggested that such software “be publicly available, ... open-source[d],” and include “documentation sufficient for the public to replicate the results using independent software.”<sup>196</sup> The Brookings principles suggest concrete ways technology can be leveraged to improve redistricting transparency.

Also issued prior to the 2010 round, the Campaign Legal Center’s model transparency legislation makes very specific recommendations that feature technology measures prominently. The first substantive provision mandates making redistricting data available, which would require redistricting entities to establish a comprehensive website prior to the release of census data; then, within fourteen days after the release of the data, the website would have precinct-level data, census-tract-level data, interactive software enabling users to design state legislative and U.S. congressional districts, and information and tutorials.<sup>197</sup> The model legislation also imposes a duty on redistricting entities to update the site continuously.<sup>198</sup>

As the model legislation recognizes, state redistricting websites are a crucial feature of redistricting transparency that every state

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193. See Micah Altman et al., *Principles for Transparency and Public Participation in Redistricting*, BROOKINGS (June 17, 2010), <https://www.brookings.edu/opinions/principles-for-transparency-and-public-participation-in-redistricting/> [<https://perma.cc/43T6-FZJG>].

194. See *id.*

195. See *id.*

196. *Id.*

197. LEAGUE OF WOMENS VOTERS & CAMPAIGN LEGAL CTR., *supra* note 188, at 20-21.

198. *Id.* at 21.

should maintain.<sup>199</sup> Many states have already built impressive sites.<sup>200</sup> Building on the recommendations noted above, state redistricting websites should include data repositories including merged U.S. census and election data (where possible) and available state data on political boundaries; open-redistricting tools incorporating relevant data and including easy-to-use mapping software and accompanying instructions/tutorials; hearing portals that include notice of hearings, live-streamed hearings, and hearing archives; posted plans—both those created by legislative/commission line-drawers and maps submitted by members of the public; and portals for public input and comment. Critically, because of the complexity of redistricting, sites should ideally include comprehensive educational materials and links to assist members of the public in understanding legal constraints in the redistricting process, including federal and state laws, constitutional commands, and plain language overviews of relevant case law.<sup>201</sup> The more states (and other civic institutions) can educate the public about the need for trade-offs in the redistricting process, the more nuanced and productive the redistricting conversation is likely to be.<sup>202</sup>

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199. According to the Center for Public Integrity analysis of the 2010 redistricting round, only two states received a 0/100 on the criteria of whether the state made an online redistricting resource available (Maine and North Dakota received a score of 0/100). Thirty states received a score of 100/100 on this measure (Arizona, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wyoming). See Ginley, *supra* note 132.

200. For examples of strong state redistricting websites not already mentioned, see Alaska, ALASKA REDISTRICTING BOARD [<https://perma.cc/TN7L-5337>]; Arkansas, ARK. BOARD AP-PORTIONMENT, <http://www.arkansasredistricting.org> [<https://perma.cc/BJL5-4NWA>]; Colorado, *Redistricting in Colorado*, COLO., <https://www.colorado.gov/pacific/cga-redistrict> [<https://perma.cc/2BTT-PQCS>]; Montana, *Districting and Apportionment Commission Meeting Materials*, MONT. LEGISLATURE, <http://leg.mt.gov/css/Committees/Interim/2011-2012/Districting/Meeting-Documents/meetings.asp> [<https://perma.cc/RJC4-BAL3>]; and Pennsylvania, PA. REDISTRICTING, <http://www.redistricting.state.pa.us> [<https://perma.cc/M27H-DGYF>].

201. Assuming it is possible to render redistricting decisions in plain language.

202. This task should not be limited to state redistricting entities only. Schools and universities, nonprofits, and other good government organizations have an important role to play in educating the public on the basics of redistricting. Colleges and law schools can and should focus efforts on training students by offering redistricting courses to teach students the law and mechanics of the process. To this end, William & Mary Law School's Election Law Program teamed up with the College of William & Mary's Center for Geospatial Analysis to offer a course, offered in the fall semester in 2017, called "Introduction to Legislative Redistricting."



#### *D. Fear Technology*

States should carefully think through technology's downsides and establish ways to stem its negative impacts. Online portals are as easily manipulated as in-person public redistricting hearings. As we saw in Florida in the 2010 cycle, when political operatives employed stand-ins at public meetings to artificially multiply voices in favor of their desired lines, the specter of trickery is most certainly multiplied in online spaces.<sup>203</sup> Outside the redistricting context, the threat of bots disrupting democratic processes is a fearful reality.<sup>204</sup>

What are potential fixes to prevent such harms in the redistricting process? One solution would be to carefully manage inputs.<sup>205</sup> Perhaps states could establish rules for individuals and organizations that limit the number of times comments and/or alternative maps may be submitted, including penalties for violating repeat player rules. Another, more cumbersome, idea would be to require those who submit alternative maps for consideration to do so through a legislative sponsor or to secure a requisite number of signatures of residents of the state in support in exchange for a commitment from line-drawers to consider and deliberate features of submitted maps.

Finally, states should be clear-eyed about the near certainty that hackers or others might seek to destabilize the process and take affirmative steps to prevent such interference. States should develop strong security measures using encryption tools, and moderate platforms to ensure wrongdoers are expelled and/or excluded. States should consider authentication processes for those who submit maps or public comments to establish their human form, identity, and state residency. Submissions could be anonymized on the public-facing portal if desired and still include protections to limit

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The course offered an introduction to Geographic Information Systems (GIS) skills and tools designed to develop compliant maps. In the course, students learned to work with district boundary maps, census information, and other socioeconomic layers in an integrated GIS platform to understand and quantify the impacts realized when voting districts are redrawn. See *Election Law Courses at William & Mary*, WM. & MARY L. SCH., <http://law.wm.edu/academics/intellectuallife/researchcenters/electionlaw/courses/index.php> [https://perma.cc/3XFV-CPCG].

203. See *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 376-77 (Fla. 2015).

204. See Wu, *supra* note 154.

205. See Cain, *supra* note 145; Bruce E. Cain, Commentary, *Yes, American Government Is Too Open*, 29 GOVERNANCE 295, 295-97 (2016).

malfeasance. In addition, states should publicize state and federal criminal penalties for tampering with government databases to disincentivize would-be bad actors and punish wrongdoers.<sup>206</sup> Efforts to prevent transgressions must of course be carefully crafted to limit a chill on participation—a challenge that many online public platforms face.

### CONCLUSION

Members of the public and reviewing courts are skeptical when transparency measures prove hollow. To avoid negative assessments of their maps, states should ensure that transparency measures are not lip service. Those charged with designing and implementing transparency mechanisms should be able to demonstrate that public input is meaningfully gathered and considered. Clarifying transparency rules, considering timing carefully, and deploying technology thoughtfully will help in this regard. Taking pains to take transparency seriously will pay off by increasing public confidence in the process and taking an important arrow out of the quiver of those who might attack resulting maps.

Redistricting transparency is no panacea for addressing structural infirmities inherent in the line-drawing process. That said, clear and thoughtful transparency rules are necessary to address increasingly precarious public confidence in the process. Regardless of whether legislators or commissions draw the lines, getting transparency right in the 2020 round is crucial. States should approach transparency planning with a healthy dose of skepticism. Hollow

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206. See, e.g., Computer Fraud & Abuse Act of 2006, 18 U.S.C. § 1030 (2012). The CFAA and its state counterparts are typically interpreted broadly. See Orin S. Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596, 1616-17, 1624-40 (2003) (explaining how courts have expansively interpreted the concepts of "access" and "authorization" under CFAA to capture undesirable behavior). Election statutes that reference hacking or computer malfeasance address voting machines and state voter registration databases. Most state election codes incorporate broad statutes that make it illegal to tamper with voting in any way. For instance, Florida's law makes it a felony "to perpetrate or aid in the perpetration of any fraud in connection with any vote cast, to be cast, or attempted to be cast." FLA. STAT. § 104.041 (2017). There is an argument that this broad rule could apply to redistricting websites if interpreted to be "in connection" with votes cast. Because this may be a stretch, states should consider extending such protections to redistricting data and websites.

transparency policies can backfire. Courts reviewing lines will, as they have in the past, weigh transparency shortcomings against line-drawers and the maps they create. Transparency measures can backfire in other ways, too, through distortion and information deluge. These and other ills are primed to cause trouble unless thoughtfully counterbalanced. And now that data security concerns have crashed into the election world, states must think through how to keep disinformation and destabilization clear of the redistricting realm.

States should assume a redistricting oversight tsunami is coming in 2020. Tackling these problems head on is the wisest course.