

Process Failure and Transparency Reform in Local Redistricting

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Forthcoming, Election Law Journal, Issue 11, Vol. 4 (2012)

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Abstract

Redistricting reform during this cycle has pushed for greater transparency, more public participation, the removal of redistricting from the hands of legislatures, and the design of more legitimate institutions and decision procedures. Reform efforts are generally focused on statewide and congressional redistricting, but mostly ignore thousands of local redistrictings across the country. Local redistricting often takes place under the radar, varies between jurisdictions, is subject to different institutional arrangements and political dynamics, and is more vulnerable to process failure. This article advances a policy proposal to reform local redistricting that weds aspects of several contemporary governance approaches – including so-called “New Institutionalism” and “Third-Generation Transparency” methods. It argues that states should establish centralized statewide redistricting clearinghouses for local redistricting (RDCs). The proposal envisions adapting new technologies to address process failures, but leaving existing local institutional arrangements in place.

Process Failure and Transparency Reform in Local Redistricting

By Michael Halberstam*

INTRODUCTION

In the current redistricting cycle, public debate has focused as much on the legitimacy of the redistricting process as on the substantive outcomes themselves.¹ Against the background of high unemployment, significant regulatory failures, and legislative gridlock, the public seems less tolerant of legislators insulating themselves from voters by drawing safe districts for themselves.² Reform efforts across the country have pushed for greater transparency, more public participation, the removal of redistricting from

* Associate Professor of Law, SUNY Law School, University at Buffalo. I am indebted to Gerald Benjamin, Patrick Fitzgerald, Karin Mac Donald, and Jeffrey Wice for their considerable contributions to helping me think through this project. Micah Altman has provided valuable feedback to me. My thanks to the Baldy Center for Law and Social Policy, at S.U.N.Y. Buffalo, for funding and hosting a conference on current developments in redistricting, and to the conference participants, Hugh Brady, Joshua Dyck, Jim Gardner, Keesha Gaskins, Jim Greiner, Gerry Hebert, Ellen Katz, Lynn Mather, Laughlin McDonald, Costas Panagopoulos, Rick Su, Michael McDonald, Dan Tokaji, Franita Tolson, and Tamara Wright, for their comments.

¹In the 1980s and 1990s, racial vote dilution and the implementation of the Voting Rights Act were arguably the most salient issues. *See, e.g.*, CHANDLER DAVIDSON & BERNARD GROFMANN (EDS.), *QUIET REVOLUTION IN THE SOUTH* (1994). In the post-2000 redistricting, partisanship and competitive districts received greater attention again. *See, e.g.*, THOMAS MANN & BRUCE CAIN (EDS.), *PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING* (2006). In contrast, in the run-up to the post-2010 redistricting cycle, an umbrella organization *Americans for Redistricting Reform* (comprised of advocacy organizations such as the Brennan Center for Justice, Campaign Legal Center, Committee for Economic Development, Common Cause, Council for Excellence in Government, Fair Vote, League of Women Voters, Reform Institute, Republican Main Street Partnership, U.S. PIRG, and supported by other civil rights organizations) described its mission to reform redistricting as one of “ensur[ing] transparency of the process and provid[ing] a more meaningful opportunity for effective public participation.” www.americansforredistrictingreform.org, (last visited Dec. 1, 2011). Examples of the present focus on process are too numerous to list.

² Polls show that voters support the removal of legislatures from the redistricting process and redistricting by independent commissions. *See, e.g.*, Support For Independent Redistricting Inches Up, Quinnipiac University New York State Poll Finds, *available at* <http://www.quinnipiac.edu/institutes-and-centers/polling-institute/new-york-state/release-detail?ReleaseID=1685>; *see also* *New Poll Shows Public Strongly Favors Independent Commission on Redistricting*, MASS INC. (Jan. 11, 2011), <http://www.massinc.org/Press-Room/MassINC-News/New-poll-shows-public-strongly-favors-independent-commission-on-redistricting.aspx> (for a similar poll from Massachusetts; *see* John Morris et al., *Representation and Redistricting*, TEXAS POLITICS, http://texaspolitics.laits.utexas.edu/11_6_0.html (for similar poll data from Texas).

the hands of legislatures, and the design of more legitimate redistricting institutions and decision procedures.³

Reform efforts, however, are generally focused on statewide and congressional redistricting.

Meanwhile, there are thousands of local jurisdictions across the country, that are constitutionally required to revise their election districts with each decennial census. While some local redistrictings draw local attention – mostly those in larger counties and cities – many occur without public participation or input. Those that do draw attention in the local press are not thereby rendered open or transparent, even if the press takes a critical stance. Moreover, local redistrictings are mostly opaque to outsiders, including state election officials, a state’s local government services department, and state and national public interest and civil rights organizations. A state will typically not know whether a local jurisdiction that is constitutionally required to redistrict has, in fact, redistricted. In many states, including California, which has become a model of redistricting reform, the state does not collect data on local redistricting. New York State, which has received very low grades for its redistricting practices,⁴ does nothing to support local redistricting efforts, does not collect any information about local redistricting, and consists of such a “crazy quilt” of local jurisdictions⁵ that redistricting practices are effectively an “unsurveillable political thicket.”

Local redistricting has not received much attention in the academic literature either. Whereas the legal and political science literature on state legislative and congressional redistricting is exhaustive,⁶ scholarly attention to local redistricting – other than on the subject of racial vote dilution – is very limited.⁷ As Bruce Cain and David Hopkins have observed, the “narrow focus on congressional and state legislative district creation ignores the vast

³ See *infra* notes 34 - 38 and accompanying text.

⁴ Dana Rubinstein, *Cuomo Says Most Redistricting Critics Are ‘Self-Interested or Hypocritical’*. CAPITAL (Mar. 20, 2012 1:27 PM), <http://www.capitalnewyork.com/article/politics/2012/03/5515322/cuomo-says-most-redistricting-critics-are-self-interested-or-hypocr> (citing report issued by the Center for Public Integrity, Global Integrity, and Public Radio International, awarding NYS an “F” for redistricting practices).

⁵ See e.g., New York State Comptroller, *Outdated Municipal Structures - 18th Century Designations for 21st Century Communities*, available at <http://www.osc.state.ny.us/localgov/pubs/research/munistructures.pdf>. The Brennan Center at NYU failed to receive responses to a survey of redistricting information that queried local election commissioners.

⁶ See Theodore S. Arrington, *Redistricting in the U.S.: A Review of Scholarship and Plan for Future Research*, 8 THE FORUM 1 (2010).

⁷ See *infra* notes 82-85 and accompanying text.

majority of redistricting activity, which unfolds in the more numerous city, county, and special district arenas.”⁸

Even as the vast majority of redistricting activity takes place at the local level – and local government has an ever greater impact on the lives of the average citizen (from the delivery of social services, to public safety, education, infrastructure, and the aesthetics of public spaces) – little, if anything, is being done to reform local redistricting. At the same time, there is reason to believe that local redistricting is more seriously flawed than redistricting procedures at the statewide level. Local redistricting is subject to varying state and local laws. The participants themselves are often unaware of even the basic laws governing the process. At the local level, technical requirements and data are not well understood or applied to the drawing of maps. The political and institutional dynamics are more precarious, and self-dealing by insiders is not disciplined by non-governmental actors or inhibited by other procedural safeguards. This raises serious concerns about the legality and democratic legitimacy of local legislatures and governing bodies.

This article advances a policy proposal to reform local redistricting that weds aspects of several contemporary governance approaches – including “New Institutionalism” and “Third-Generation Transparency” methods. Drawing in part on my own experience with local redistricting in New York State, I argue that states should establish *centralized statewide redistricting clearinghouses for local redistricting (RDCs)*. RDCs would replace the current decentralized procurement of redistricting data and process information, such as it is, with an independent, centralized database and public information portal at the statewide level. These databases would collect, standardize, maintain, and publicize (1) all necessary redistricting data; (2) up-to-date information about the current redistricting process (including schedules for public hearings, meetings, submission deadlines, dates of final decision); and (3) specifically applicable federal, state, and local laws governing substantive redistricting requirements and the redistricting process. RDCs could also provide additional public communication and redistricting services that are becoming available due to the development of new open-source software and technology.⁹

The architecture of such RDCs, as set forth in some detail in Part VI, reflects a careful dissection of the concrete information requirements of the

⁸ Bruce E. Cain & David A. Hopkins, *Mapmaking at the Grassroots: The Legal and Political Issues of Local Redistricting*, 1 ELECT. L. J. 515 (2002).

⁹ Micah Altman & Michael McDonald, *The Promise and Perils of Computers in Redistricting*, 5 DUKE J. CONST. L. & PUB. POL’Y 69 (2010) (describing “the use of computing infrastructure to increase public participation.”) The open-source, web-based DistrictBuilder redistricting software developed by Altman and McDonald, with the help of Azavea software, has implemented a “regionalization” feature to DistrictBuilder that goes in the direction of having one centralized database that local jurisdictions can tap into.

different governmental and nongovernmental actors at each stage of the redistricting process, and of the institutional and political dynamics of the local process.¹⁰ The proposed reform could alter incentives at the local level without impinging on local autonomy, by “nudging” local officials to participate in data and process transparency efforts, which in turn, would set higher standards and engage local jurisdictions with a range of governmental and non-governmental actors that currently have little access to local redistricting in jurisdictions not covered by the special provisions of the Voting Rights Act.¹¹

The argument of the article proceeds, as follows. Part **Error! Reference source not found.** challenges the common inference that redistricting reform is futile or unnecessary, because redistricting is “political all the way down.” Part II offers several reasons for the intense focus on *process reform* during the run-up to this redistricting cycle. Part III analyses what transparency in redistricting means, and how the concept has developed. It then introduces a new distinction between “data transparency” and “process transparency” in redistricting. Part IV examines how the political dynamics in local redistricting differ from those in statewide redistricting and argues that local redistricting is particularly vulnerable to political process failures. Part V describes local redistricting in New York State and contrasts its opacity with the transparency achieved in local jurisdictions required to submit their redistricting plans to the Justice Department for preclearance pursuant to the Voting Rights Act. Part VI discusses how third-generation transparency methods can be applied in the redistricting context by establishing redistricting clearinghouses. Part VII concludes by briefly reviewing why we should care about local redistricting and what difference RDCs would make.

I. FROM SUBSTANTIVE TO PROCEDURAL FAIRNESS

Given our current constitutional commitments, the redistricting problem does not have a simple solution, no matter what combination of standard substantive criteria are chosen to constrain the line-drawers.¹² Substantive redistricting criteria are incomplete, and there is insufficient agreement on what fair representation means to specify such criteria sufficiently to prevent line-drawers from gerrymandering election districts,

¹⁰ A technology assessment is outside the scope of this paper, but is currently being developed by New Amsterdam Ideas, with the support of ReInvent Albany, and the Baldy Center for Law and Social Policy.

¹¹ Altman & McDonald, *supra* note 9, at 77 (“public access [facilitated by computing] has a widely unrecognized potential to change the process of deliberation over districts by opening the door to wide public and interest group participation.”)

¹² See generally Grant Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213 (2003) (reviewing arguments and literature).

or unfairly protecting incumbents *ex ante*.¹³ Redistricting decisions, in other words, are inherently political. But what does this mean for redistricting reform?

A. *Politics All the Way Down?*

Justice Scalia's version of the apocryphal ancient Hindu response to the unmoved mover problem is as amusing as any: "An Eastern guru affirms that the earth is supported on the back of a tiger. When asked what supports the tiger, he says it stands upon an elephant; and when asked what supports the elephant he says it is a giant turtle. When asked, finally, what supports the giant turtle, he is briefly taken aback, but quickly replies 'Ah, after that it is turtles all the way down.'"¹⁴

Similarly, the classic, oft-repeated response to call for redistricting reform is that the process is political all the way down. Redistricting is inherently political, so the argument goes, because it involves competition and bargaining between interest groups about the allocation of political power.¹⁵ Moreover, redistricting requires tradeoffs between different political values and conceptions of representation equally consistent with the United States Constitution.¹⁶ But what political tradeoffs should be made and what theory of representation should prevail are contested political questions.¹⁷ Therefore it is most appropriate for redistricting to be carried out by the political branches, as is still the norm in most jurisdictions.¹⁸ Elected officials, after all, can be held accountable by voters for their decisions and disciplined at the ballot box. Proponents of this view recognize that some involvement by the judiciary may be necessary to constrain egregious abuses, but believe that redistricting by judges should be a last resort, because it requires judges to make political decisions.¹⁹

The politics-all-the-way-down view also rejects the common reform proposal of removing redistricting from the hands of legislatures and

¹³ See generally, Jeanne Frommer, *An Exercise in Line-Drawing: Deriving and Measuring Fairness in Redistricting*, 93 *Georgetown L. J.* 1547 (2005) (reviewing competing theories and their contrary outcomes).

¹⁴ *Rapanos v. United States*, 547 U.S. 715, 754 (2006).

¹⁵ For a succinct statement of this position, see Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?* 33 *U.C.L.A. L. REV.* 1, 4-5 (1985); see also Michael Kang, *De-Rigging Elections: Direct Democracy And The Future Of Redistricting Reform*, 84 *WASH. U. L. REV.* 667, 697-699 (2006) (describing argument that redistricting is "one of the objects of the political struggle, not one of its ground rules," but arguing against legislative redistricting).

¹⁶ James A. Gardner, *How to Do Things with Districts: Redistricting and the Construction of Politics*, *ELECTION L. J.* (This Issue).

¹⁷ Kang, *supra* note 29, at 686 ("Redistricting is an inherently political question that ultimately requires political answers.").

¹⁸ Lowenstein & Steinberg, *supra* note 29.

¹⁹ *Id.*

assigning the task to independent commissions. Redistricting by commission, so the argument goes, will not result in neutral outcomes. Commissions cannot avoid political tradeoffs, nor can they ever be truly “independent” given the high stakes attached to the outcome.²⁰ Commission members are not exempt from political pressures. But, unlike legislators, commissioners cannot be held accountable by voters for their political choices.²¹ And even where commissioners were carefully selected for independence, as was the case with California’s CRC,²² there have, nonetheless, been allegations that the commission’s consultants and staff were somehow politically manipulating the process.²³ Politics and self-interest, on this view, cannot be excluded from redistricting. Redistricting by administrators or even judges should accordingly be disfavored.²⁴ Recognizing the potential for incumbent protection plans and partisan gerrymanders, proponents of legislative redistricting have thus described legislative redistricting as perhaps the worst system, but still better than its alternatives.²⁵ In the following, I briefly analyze this conclusion and consider whether the conditions under which legislative redistricting can be defended currently prevail.

B. Procedural Fairness and Conflicts of Interest

The politics-all-the-way-down argument fairly describes the fundamentally political nature of redistricting.²⁶ But it fails to appreciate some fundamental problems with legislative redistricting that warrant attention to the redistricting process.

First, for voters to be able to hold legislators accountable for redistricting decisions, the voting public must be properly informed about the decisions made. If redistricting decisions are made behind closed doors, the timing of the process is manipulated to rush deals through the legislature without allowing for public comment, the entire process remains opaque,

²⁰ *Id.* at 36.

²¹ Kang, *supra* note 29, at 668.

²² Bruce Cain, *Redistricting Commissions: A Better Political Buffer?* 121 *YALE L.J.* 1808, 1824 (2012) (“It is hard to imagine a more complete effort to squeeze every ounce of incumbent and legislative influence out of redistricting than the CRC design.”)

²³ Lisa Vorderbrueggen, *Democrats Manipulated California Redistricting Commission; ProPublica Investigation Reveals Process Was Biased*, *TIMES-STANDARD*, Dec. 29, 2011.

²⁴ Lowenstein & Steinberg, *supra* note 29, at 36.

²⁵ Nathaniel Persily, *Reply: In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 *HARV. L. REV.* 649, 680-81 (2002).

²⁶ See Heather K. Gerken, *The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics*, 6 *ELECT. L. J.* 184 (2007); Kang, *supra* note 29.

tradeoffs are never discussed in public, the underlying data are not made public, and no substantive explanations are offered for the plan that is ultimately adopted, then voters will lack the necessary information to hold legislators accountable for their redistricting decisions. At a minimum the process must be rendered transparent.

Second, legislative redistricting is objectionable because it gives rise to a basic conflict of interest.²⁷ Legislators who draw the lines have an interest in securing their reelection. The politics-all-the-way-down view sidesteps this issue, because it ignores a fundamental ambiguity of the term “political.” It fails to distinguish between political decisions and purely self-interested decisions.²⁸ By conflating the two, proponents of legislative redistricting brush aside the profound fairness concerns that usually attend conflict of interest transactions in other contexts. In corporate law, for example, conflict of interest transactions by directors are under an “interested-director cloud,” absent procedural safeguards.²⁹ Such conflict of interest transactions do not receive the deference that is ordinarily accorded to a director’s business judgments, if they are challenged in court. Not only must directors fully disclose such conflicts of interest, but they also bear the burden of showing either that the conflict of interest transaction was arrived at by fair process or that it is substantively fair.³⁰ Fairness is demonstrated by establishing procedural fairness (e.g. by informed shareholder ratification) or substantive fairness. In redistricting, a legislature’s decisions typically stand regardless of procedural or substantive fairness.³¹ Only legal violations can be challenged successfully.

Finally, it is not evident that legislators should be the line-drawers merely because redistricting involves political choices. After all, citizens are entitled to make political choices that affect the entire community, as are other elected officials.³² It seems odd to prefer decision makers with a direct conflict of interest to decision makers who have very little, if anything at all, to gain personally from their redistricting choices. Moreover, there is

²⁷ See, e.g., D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 1757 (2012) (arguing that elected officials are subject to an inherent conflict of interest when it comes to redistricting).

²⁸ See, e.g., Thomas E. Mann, *Redistricting Reform: What is Desirable? Possible?*, in PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING (2006), *supra* note 1, at 94 (rejecting “realpolitik” perspective of American politics and recalling the progressive attack on “self-dealing of politicians”).

²⁹ *Fliegler v. Lawrence*, 361 A.D. 218 (Del. 1976).

³⁰ *Maciano v. Nakash*, 535 A.2d 400 (Del. 1987).

³¹ Unless vetoed by the executive, which provides some procedural check if the statehouse and the legislature are split between parties. But the veto can be overridden. Gary Rayno, *Senate Overrides Veto; House Redistricting Now Law*, UNION LEADER, (Mar. 29, 2012),

<http://www.unionleader.com/article/20120329/NEWS06/703299940/0/SPORTS12>.

³² Kang accordingly makes the argument for direct democratic approval by the general electorate for passage of any statewide redistricting plan. *Supra* note 29, at 668-69.

evidence to suggest that citizens do not make worse redistricting choices than legislators.³³

For these reasons, reformers have advocated – and many states and local jurisdictions are adopting – measures that foster greater transparency, public participation, and independence in redistricting. Nearly every state now has a website that provides some sort of redistricting information – even as comparisons show dramatic differences in the quality of such websites.³⁴ Reform efforts across the country have pushed for greater transparency in redistricting,³⁵ more public participation,³⁶ the removal of redistricting from the hands of legislatures,³⁷ and the design of more legitimate redistricting institutions and decision procedures.³⁸

³³ Cain, *supra* note 20, at 1812.

³⁴ For links, see Justin Levitt’s *All About Redistricting*’s website, <http://redistricting.ils.edu/resources.php>.

³⁵ See, e.g., Bruce E. Cain & Karin Mac Donald, *Transparency and Redistricting, a Supplemental Report to Competition and Redistricting in California: Lessons for Reform*, available at http://swdb.berkeley.edu/resources/redistricting_research/Transparency_&_.pdf; See also the American Enterprise Institute-Brookings Institute’s joint statement of *Principles of Transparency and Public Participation in Redistricting*, available at <http://www.electionreformproject.org/>. The Campaign Legal Center has drafted model transparency legislation in redistricting, available at <http://www.campaignlegalcenter.org/attachments/LEGISLATION/2058.pdf>. California’s public mapping of its state legislative and congressional districts by a constitutionally mandated Citizens Redistricting Commission This is where you should introduce the acronym since this is the first mention of the CRC. is by far the most sophisticated and advanced initiative of its kind. The CRC relied heavily on the data collected and publicized by California’s Statewide Database, available at <http://swdb.berkeley.edu/>.

³⁶ The Sloan-funded Public Mapping Project, led by Michael McDonald and Micah Altman, for example, has created a free open-source, web-based redistricting tool called *DistrictBuilder* to enable broad public participation in line-drawing. The Public Mapping Project has promoted redistricting competitions using *District Builder* in numerous states across the country. Other groups, like Common Cause NY have mounted significant campaigns for public participation, available at <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQlwG&b=4848833>.

³⁷ See Cain, *supra* note 37; Heather Gerken, *The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics*, 6 ELECT. L. J. 184 (2007).

³⁸ Since 2005, at least 29 states have considered ballot initiatives or legislation regarding redistricting. At least eight commission states have attempted to alter the structure of their commissions. Between 2005 and 2009 alone, 18 states whose legislatures do the redistricting have tried to create independent redistricting commissions or to expand the duties of existing state commissions (used for other purposes) to include the task of redistricting. Public Affairs Research Council of Louisiana, *Redistricting 2010: Reforming the Process of Distributing Political Power* (February 2009), available at <http://www.parlouisiana.com/s3web/1002087/docs/redistricting2010.pdf>. Oregon, Utah, and California passed redistricting ballot initiatives in 2008. California’s successful referenda in 2008 and 2010, placed State Legislative (Prop 11), and congressional

II. THE FOCUS ON PROCESS

In recent years, we have seen increased attention to potential reform of the redistricting process. This is partly explained by the dramatic advances in GIS technology, computer hardware and software, and internet-based access to public information that have created unprecedented opportunities for the public to obtain redistricting information from various sources and participate in the line-drawing process itself.³⁹ In the past, only a small number of experts nationwide had both access to the specialized and expensive software required to produce professional redistricting plans and the knowledge to use them. Computer-aided redistricting requires the integration and manipulation of large amounts of data from different sources. The task is complex and requires significant computing power. Since the last redistricting cycle, hardware and commercial software has improved, is available from different vendors, can readily be run on any laptop, and has come down substantially in cost.⁴⁰

Furthermore, nonprofits have created highly sophisticated redistricting software that allows individuals to draw their own districts or maps online without much prior knowledge. The Sloan Foundation, for example, has funded the Public Mapping Project's construction of "DistrictBuilder," a free, open source software redistricting application designed to give the public transparent, accessible, and easy-to-use on-line mapping tools.⁴¹ The Public Mapping Project has used DistrictBuilder to

redistricting (Prop 20) into the hands of an independent Citizens Redistricting Commission (CRC). The developments in California received national public attention. The CRC's public mapping process has been viewed as the gold standard by advocates for transparency, independence, and legitimacy in redistricting. *See, e.g.,* Justin Levitt, *Redistricting in California*, available at <http://redistricting.ils.edu/states-CA.php>. In New York, there was a considerable push for an independent commission, which failed. Thomas Kaplan, *Albany Redrawing Political map With Old Lines of Thought*, N.Y. TIMES, March 12, 2012. In addition to these efforts at the state level, numerous measures were introduced in the Congress that would, if accepted, have made substantial changes to redistricting, including measures requiring redistricting by independent commission.

³⁹ Mark J. Salling, *Public Participation Geographic Information Systems for Redistricting: A Case Study in Ohio*, 23 URISA JOURNAL 33, 33 (2011); Robert Goodspeed, *From Public Records to Open Government: Access to Massachusetts Municipal Geographic Data*, 23 URISA JOURNAL 21 (2011) ("The Internet is making sharing, combining, and analyzing geographic data easier and more commonplace. The development of standard formats and application programming interfaces (APIS's) mean data from multiple sources can be combined and presented in new ways by applications, Web sites, and map mashups."); Altman & McDonald, *supra* note 9 (tracing the use of GIS in redistricting over the last several decades); Joseph Ferreira, *Comment on Drummond and French: GIS evolution: Are we messed up by mashups?* 74 J. AM. PLANNING ASS'N 177 (2008).

⁴⁰ Micah Altman, Karin Mac Donald & Michael McDonald, *Pushbutton Gerrymanders? How computing Has Changed Redistricting*, in PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING 51- 66 (2005).

⁴¹ *See* <http://www.publicmapping.org/News> (last visited Apr. 28, 2012).

promote greater public participation by holding redistricting competitions in numerous states and cities.⁴²

A handful of states have tried taking the process out of the hands of legislatures and placing responsibility for redistricting with independent commissions. As in the early 1960s, current frustration with legislative gridlock at the state level created momentum for fundamental change that would render legislators more accountable. In California, concerns with legislative redistricting led to initiatives creating a Citizens Redistricting Commission (CRC).⁴³ California's CRC has received national attention as a model for reform. Whereas many states have advisory, backup, or political commissions, there are only a few states, where redistricting commissions have been truly independent. California's CRC is unique in the way it structures its process for selecting commissioners to be nonpartisan and independent from legislative influence.⁴⁴

In New York's latest redistricting, the Governor initially promised to veto maps that were not drawn independently.⁴⁵ The Governor, in response to widespread calls for an independent process, ultimately signed the same kind of bipartisan gerrymander of the state legislature that has been institutionalized for decades, giving Democrats the majority in the State Assembly and Republicans the majority in the State Senate.⁴⁶ However, the Governor did insist on a bill that calls for the creation of a commission – though not an independent one – prior to the next redistricting cycle.⁴⁷

Other developments arguably contributed to maintaining a public focus on redistricting reform between cycles. Tom Delay's highly controversial mid-decade redistricting of Texas, and the resulting litigation (and ultimate criminal conviction of Delay on related campaign finance charges), kept the issue of gerrymandering alive mid-decade, when it would otherwise have faded from public attention.⁴⁸ Delay's aggressive political

⁴² *Id.*

⁴³ State of California Citizens Redistricting Commission, *Final Report on 2011 Redistricting 2* (Jun. 15, 2012), available at <http://wedrawthelines.ca.gov/>

⁴⁴ Cain, *supra* note 37, at 1824 (“It is hard to imagine a more complete effort to squeeze every ounce of incumbent and legislative influence out of redistricting than the CRC design.”)

⁴⁵ Liz Benjamin, *Senate GOP Hopes to Pass Redistricting Plan by March 1*, STATE OF POLITICS BLOG (Feb 14, 2012), <http://www.capitaltonight.com/2012/02/senate-gop-hopes-to-pass-redistricting-plan-by-march-1/>.

⁴⁶ NY Senate Bill No. 6696, NY Assembly Bill 9525, Mar. 11, 2012, available at <http://s3.documentcloud.org/documents/324709/n-y-state-redistricting-legislation.pdf>.

⁴⁷ Cuomo to Sign Redistricting Lines, *New York Daily News*, March 15, 2012; Thomas Kaplan, *Albany Redrawing Political Map With Old Lines of Thought*, N.Y. TIMES, Mar. 12, 2012.

⁴⁸ *League of United Latin American Citizens v. Perry*, 584 U.S. 399 (2006) (describing Republican gerrymander of Texas's congressional delegation in 2003); Justin Levitt & Michael P. McDonald, *Taking the “Re” Out of Redistricting: State Constitutional*

gerrymander of Texas, which the Supreme Court declined to rein in,⁴⁹ set the tone for the increasing hyper-partisanship of Republicans in the Congress. Democrats and public interest groups were left with no doubt that Republicans would take no prisoners in the next redistricting round, and that they could not look to the lower courts to constrain partisan excesses.⁵⁰

The use of technology to improve government at all levels, and in particular the Web's ability to make real-time data accessible to anyone, has become a key focus of government reorganization. Moving beyond the establishment of entirely new IT infrastructures at all levels of government, knowledge management and information governance have become the hottest topics in good governance reform and among democracy and open government advocates.⁵¹ A full theoretical engagement with this literature is beyond the scope of this paper, but the policy proposal that is put forward in Part VII takes shape during a period of revolutionary transformation of government enabled by technological advances.⁵² Redistricting reform presents a rich field for this kind of marriage between technological innovation, government reform, and democratic participation.

Provisions on Redistricting Timing, 95 GEO. L.J. 1247, 1248 (2007) (noting that “[T]he action was highly contentious, and, thanks in part to a salacious side story of legislators twice fleeing the state to deny the governing majority a quorum, drew mainstream media coverage . . . ”); *see generally*, STEVE BICKERSTAFF, *LINES IN THE SAND: CONGRESSIONAL REDISTRICTING IN TEXAS AND THE DOWNFALL OF TOM DELAY* (2007).

⁴⁹ *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006).

⁵⁰ *See, e.g.*, Ronald A. Klain, *Success Changes Nothing: The 2006 Election Results and the Undiminished Need for a Progressive Response to Political Gerrymandering*, 1 HARV. L. & POL’Y REV. 75 (2007).

⁵¹ *See, e.g.*, ALAN R. SHARK, *SEVEN TRENDS THAT WILL TRANSFORM LOCAL GOVERNMENT THROUGH TECHNOLOGY* (2012); SHARK, *WEB 2.0 CIVIC MEDIA IN ACTION - EMERGING TRENDS & PRACTICES* (2011); JARED DUVAL, *NEXT GENERATION DEMOCRACY: WHAT THE OPEN-SOURCE REVOLUTION MEANS FOR POWER, POLITICS, AND CHANGE* (2010); DANIEL LATHROP & LAUREL RUMA (EDS.), *OPEN GOVERNMENT: COLLABORATION, TRANSPARENCY, AND PARTICIPATION IN PRACTICE* (2010) (collecting essays by “leading visionaries and practitioners both inside and outside government,” about how government can leverage web accessibility to real-time data to improve government operations, intergovernmental communication, and expert and citizens participation.).

⁵² Don Tapscott, *Foreword: Government 2.0: Rethinking Government and Democracy for the Digital Age*, in *STATE OF THE UNION: GOVERNMENT 2.0 AND ONWARDS* (2009); ARCHON FUNG, MARY GRAHAM, & DAVID WEIL, *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* 152-54 (2007) (describing “third generation” systems of collaborative policy-making); WILLIAM D. EGGERS, *GOVERNMENT 2.0: USING TECHNOLOGY TO IMPROVE EDUCATION, CUT RED TAPE, REDUCE GRIDLOCK, AND ENHANCE DEMOCRACY* (2005).

III. TRANSPARENCY AND PUBLIC PARTICIPATION

The foregoing discussion identified three types of process reforms: transparency, public participation, and independence.⁵³ This section focuses on transparency, explaining two different types of transparency and their importance in the redistricting process.

Transparency is often conceived of too broadly in public advocacy⁵⁴ and in the academic literature,⁵⁵ by failing to distinguish between it and public participation reforms. Conversely, transparency is also often conceived too narrowly in terms of specific sunshine legislation, such as open meeting laws and freedom of information statutes.⁵⁶ Transparency in redistricting is both less and more demanding. It is therefore helpful to maintain a precise distinction between transparency and public participation, especially in light of further distinctions between the different types of transparency in redistricting that I wish to introduce.

Contemporary democratic theorists have generally become more modest about the prospects of, and opportunities for, greater public participation.⁵⁷ Relatively arcane and technical redistricting decisions – in spite of all the advances in technology – arguably represent a prime example of the limits of public participation.⁵⁸ Calls for greater public participation and transparency in redistricting may thus meet with considerable skepticism.⁵⁹ These doubts notwithstanding, the movement to deliver GIS tools to the electorate and public interest groups via the Internet has been

⁵³ I recognize these distinctions may be less helpful for purposes of public advocacy.

⁵⁴ See, e.g., Americans for Redistricting Reform, *available at* <http://americansforredistrictingreform.org/> (describing its mission “to ensure transparency of the process and to provide a more meaningful opportunity for public participation”).

⁵⁵ See, e.g., Bruce E. Cain & Karin Mac Donald, *Transparency and Redistricting, a Supplemental Report to Competition and Redistricting in California: Lessons for Reform*, *available at*

http://swdb.berkeley.edu/resources/redistricting_research/Transparency_&_.pdf (describing public participation in line-drawing as a “transparency component”).

⁵⁶ Bruce E. Cain, *Reform Studies: Political Science on the Firing Line*, 40 POL. SCI. & POL. 635, 636 (2007).

⁵⁷ IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 35 (2003).

⁵⁸ JUSTIN LEVITT, *A CITIZEN'S GUIDE TO REDISTRICTING* (2010) *available at* http://www.brennancenter.org/content/resource/a_citizens_guide_to_redistricting_2010_edition/ (last visited May 30, 2012).

⁵⁹ Whether such skepticism is warranted depends on how public participation is understood. In the redistricting context a range of (1) actors, (2) actions, and (3) institutional contexts might count as “public participation.” So, for example, public participation could mean, (1) participation by individuals or by sophisticated public interest groups, (2) participation in public debate or actual line-drawing, and (3) participation in hearings, or on redistricting commissions. Moreover, public participation may be more feasible in local, as opposed to statewide, redistricting.

gaining momentum.⁶⁰ The transparency proposal put forward in Part VI does not aim at broad public participation, but assumes that public interest-, and civil rights groups would play their part, as they have done in enforcing the Voting Rights Act.⁶¹

Transparency need not be aimed at public participation. It serves concrete goals, including monitoring, accountability of public officials, and reinforcing norms, which do not require public participation in line-drawing. Monitoring of local redistricting by other government actors, such as the Justice Department and state agencies depends upon transparency, regardless of greater public participation. Currently, there is little or no centralized data available on local redistricting for entire states, which makes it very hard for state and federal agencies to monitor local redistricting.⁶² Transparency may also lead to greater democratic legitimacy in the redistricting process without greater public participation.⁶³ Finally, transparency establishes the conditions for independent commissions, which cannot operate without redistricting databases. In sum, transparency reforms do not depend on broad public participation in redistricting.

At the same time, transparency in redistricting requires more of government than making preexisting information available through FOIA requests or granting access to and regulating public meetings, as contemplated by open meeting laws.⁶⁴ Whereas the “sunshine” metaphor aptly describes the relative passivity of government in complying with freedom of information and open meeting laws – drawing back the curtains and submitting to the public gaze – much more is required to open the process to intergovernmental and interest group monitoring.⁶⁵ To render the redistricting process transparent requires specific measures at different times and junctures in the process based on an understanding of the institutional and background conditions that affect it. In the following, I

⁶⁰ Salling, *supra* note 39.

⁶¹ Chandler Davidson & Bernard Grofmann, *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990* 390 (1994).

⁶² Survey of 50 states conducted by the author, with Iriny Faltas and Andrew Dean at S.U.N.Y. Buffalo Law School (January - March 2012).

⁶³ But it may also lead to increased political conflict. John O’Looney, *Fractured Decision Making: Sunshine Laws and the Colliding Roles of Media and Government*, *NATIONAL CIVIL REVIEW*, 43 (Winter/Spring 1992) (“While sunshine laws may only marginally affect the discussion of routine public policy making, when particularly controversial or sensitive issues are placed on the agenda the ‘sunshine’ of publicity will tend to highlight and intensify the controversy.”)

⁶⁴ *See, e.g.*, California’s “Sunshine Amendment,” Proposition 59.[1] adding Article I, Section 3(b) to the California Constitution, which reads in part: “The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.”

⁶⁵ Michael McDonald & Micah Altman, *Pulling Back the Curtain on Redistricting*, *WASH. POST*, Jul. 9, 2010.

distinguish between “data transparency” and “process transparency,” and describe each in turn.

A. Data Transparency

The use of geographic information systems (GIS) has become central to the redistricting process.⁶⁶ GIS redistricting tools are used to create databases and draw boundaries, create redistricting plans, assess alternative plans, and evaluate the impact of redistricting.⁶⁷ GIS files map statistical measures by tagging them to a geography. Line-drawers begin by using Census files (TIGER files), which provide digitized maps and some political and jurisdictional boundary lines (congressional, county, town, township, and municipality). In addition, the Census Bureau produces a dataset, which provides the population, voting age population, and race/ethnic group for each polygon in the TIGER files.⁶⁸ Line-drawers then add additional data and boundary lines to the files, such as state legislative districts, voter registration data, and election returns.

When customized for redistricting, using so-called “special decision support systems,” GIS tools allow users “the ability to build a set of districts through an easy-to-operate graphic interface, while seeing the resulting statistical measures of the redistricting objectives.”⁶⁹ Thus, a user can adjust district boundaries one at a time as the machine spits out the resulting statistical measures of each adjustment dynamically.⁷⁰ While GIS systems and their dramatic decrease in cost and increase in speed afford line-drawers powerful tools for redistricting, it is important to recall that the software does not do the redistricting, humans do.⁷¹

One of the main challenges of redistricting, which is perhaps highlighted by the use of GIS tools is the procurement, integration and analysis of data from different sources that use different units of measurement and incompatible file formats.⁷² Redistricting requires the collection, verification, analysis, disaggregation and re-aggregation of different datasets from different sources, including census data and other demographic data from the federal government from different surveys during different time periods, geographic data on precinct lines from local election officials, tabular data on election returns from state or local officials,

⁶⁶ See generally Micah Altman, et al., *supra* note 40; Salling, *supra* note 39; Arrington, *supra* note 6, at 3-5.

⁶⁷ Salling, *supra* note 39.

⁶⁸ Public Law 94-171, codified at 13 U.S.C. §141(c) (2012).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Altman et al., *supra* note 40.

⁷² *Id.* at 55-57.

and geographic information on preexisting election districts from state or local officials.⁷³ This data must not only be generated, but also made available in useable formats, and it must be maintained over time in a manner that will allow for comparisons.⁷⁴

In many states and most local jurisdictions, redistricting data are not generated or maintained by election officials. Legislative task forces, government affairs committees, or other committees are often charged with overseeing the process, especially in local redistricting. This all too often means that the underlying data and the various bills and compromises that have been negotiated are lost as soon as the redistricting map is approved.

While final redistricting maps are described in a bill or law, such descriptions typically lack the data and metadata necessary to replicate the maps, rendering them of limited use. It takes even seasoned election officials and their staff days of painstaking analysis to transform such maps into usable data.⁷⁵ Such bills often lack any explanation or justification. Maps are typically drawn by outside experts. These experts use software that manipulates and integrates data from different files and sources as described. Only the final map is submitted as a bill. While underlying data files are increasingly made public in statewide redistricting, the computational procedures by which the data files are manipulated, and results are generated (the metadata), are typically not part of the public record. Data files that are made public are not always compatible with the different types of commercial redistricting software. Commercial software, moreover, is not open source, so it cannot be determined how the data was manipulated, verified, or disaggregated, even if the data is plugged back into the software.

In order to address these “data transparency” problems, experts from the American Enterprise Institute and the Brookings Institute (AEI-Brookings) have jointly proposed a set of “Transparency Principles for Redistricting” that call for the creation of data files, metadata and open

⁷³ See, e.g., Kenneth F. McCue, *Creating California’s Official Redistricting Database* (August 2011), available at <http://swdb.berkeley.edu/d10/Creating%20CA%20Official%20Redistricting%20Database.pdf>; see also Altman et al., *Pushbutton Gerrymanders*, *supra* note 40, at 55-57.

⁷⁴ While “the PL 94-171 population data do not contain political data or other data that might describe the population in more detail, such as educational attainment or socioeconomic status . . . most redistricting entities, whether a political party, a state legislature, or a redistricting commission, ‘enhance’ population data by merging it with political data such as election or voter registration information.” Altman, et al., *Pushbutton Gerrymanders*, *supra* note 40, at 56. In addition, the process requires an understanding of the particular election system adopted by the jurisdiction, is driven by knowledge of political divisions, and often takes the residence of incumbents (and challengers) into account – leaving aside the general and jurisdiction-specific legal constraints that have to be mastered.

⁷⁵ Interview with Nassau County Democratic Election Commissioner and his staff (Apr. 27, 2012).

source software. Such transparency goes far beyond passively affording access to preexisting information via freedom of information requests, requiring that:

- Redistricting plans be available in non-proprietary formats;
- Redistricting plans be available in a format allowing them to be easily read and analyzed with commonly-used geographic information software;
- The criteria used as a basis for creating plans and individual districts be clearly documented;
- All data necessary to create legal redistricting plans and define community boundaries be made publicly available, under a license allowing reuse of these data for non-commercial purposes;
- All data be accompanied by clear documentation stating the original source, the chain of ownership (provenance), and all modifications made to it;
- Software used to automatically create or improve redistricting plans either be open-source or provide documentation sufficient for the public to replicate the results using independent software;
- Software used to generate reports that analyze redistricting plans be accompanied by documentation of data, methods, and procedures sufficient for the reports to be verified by the public;
- Software necessary to replicate the creation or analysis of redistricting plans and community boundaries produced by the service be publicly available .⁷⁶

The AEI-Brookings Principles of Transparency for Redistricting describe important active steps required to render redistricting and redistricting data transparent. They focus on “data and software transparency.”

⁷⁶ Micah Altman, Thomas E. Mann, and Michael P. McDonald *Principles for Transparency and Public Participation in Redistricting* (2010), available at <http://www.brookings.edu/research/opinions/2010/06/17-redistricting-statement>.

I am aware of only one redistricting database that satisfies most of these transparency requirements: California's Statewide Database (SWDB).⁷⁷ Financed by the State of California, but run as an independent database hosted by UC Berkeley, the SWDB is exemplary in the quality of the data it provides and the access that it gives to the public.⁷⁸ The SWDB makes redistricting, and other political and demographic information available to the public free of charge. It provides the same information to the public that it provides to the State Legislature, generates data in multiple formats for use with different kinds of software, and includes substantial metadata on its website that describe how the data were generated, where they were sourced, how they were verified, and so forth. The SWDB conducts ongoing data collection and processing and makes data sets for each election between redistricting available to the public free of charge. Critically, it does so as soon as the data are processed and on a continual basis. The staff also provides assistance in using the data to state and local governments, political parties, politicians, candidates running for office, interest groups, scholars, and the general public. It makes its offices and equipment available for public use and provides training on how to work with the data. It monitors the development of Geographical Information Systems for redistricting, has copies of the most common packages available in its offices, and is able to provide assistance on how to use them.⁷⁹

B. *Process Transparency*

It is important to distinguish "process transparency" from "data transparency" in the redistricting context. Process transparency will be used here to describe access to information about the actual process of redistricting performed by the line-drawers, including the procedural safeguards that are either legally required or administratively prescribed to assure a rational and fair process. Conceptually, "procedural fairness" in redistricting can be likened to the "procedural fairness" of board decision making in the merger context or director conflict of interest transactions in corporate law.⁸⁰ Both in corporate law and in redistricting, the fairness of

⁷⁷ Karin Mac Donald, the Director of the SWDB, participated in the development of the AEI-Brookings Transparency Principles as an "attending board member."

⁷⁸ See California Statewide Database, *available at* <http://swdb.berkeley.edu/>.

⁷⁹ Interview with Karin Mac Donald, and her staff (June 18, 2012). The SWDB was originally an agency of the California State Legislature (much like New York's LATFOR) charged with providing data services for redistricting to lawmakers in Sacramento. In the 1990s, California recognized the need for an independent agency and created the SWDB by transferring the mandate to provide redistricting data to the Institute for Governmental Studies at Berkeley, then headed by Bruce Cain. Cain and Mac Donald are among the pioneers of independence, transparency, and public participation in redistricting.

⁸⁰ See, e.g., *Smith v. Van Gorkom*, 488 A.2d 858, 881 (Del. 1985); *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 174 (Del. Ch. 2005). Directors' decisions will be

the procedure is an important indicator of substantive fairness. In the redistricting context, this means that the structure and timeline of the decision process, the information considered, alternatives explored in good faith, individuals and experts consulted during the process should all be available to public scrutiny.

To use the California example, the SWDB, while providing data transparency, does not oversee the redistricting process, nor does it perform the redistricting itself. The California State Legislature performed redistricting until the voters adopted Propositions 11 and 20 in 2008 and 2010, respectively, which amended California's Constitution to require state legislative and congressional redistricting by an independent Citizens Redistricting Commission (CRC).⁸¹ Article 21 of the California Constitution requires the commissioners of the CRC to "(1) conduct an open and transparent process enabling full public consideration of and comment on the drawing of district lines; (2) draw district lines according to the redistricting criteria specified in this article; and (3) conduct themselves with integrity and fairness." The processes of redistricting and selecting the CRC commissioners who will draw the lines are subject to procedural safeguards, including transparency rules separate from those for generating and making accessible the redistricting data.

Procedural transparency is achieved in part by applying California's open meeting laws to the selection of commissioners, as well as to the line-drawing process itself. Meetings, hearings, and line-drawing sessions are all open to the public. Video recordings and transcripts of meetings, public comments and submissions are all posted online and made publicly available on the CRC's website. The website itself also includes some mapping tools (as recommended by the AEI-Brookings principles of transparency) to allow the public to manipulate the data and submit proposed districts for consideration by the CRC and by the general public. It is worth noting that public participation was an important goal of the CRC's process transparency efforts.

respected by courts unless the directors are interested or lack independence, do not act in good faith, act in a manner that cannot be attributed to a rational business purpose, or reach their decision by a grossly negligent process that includes the failure to consider all material facts reasonably available.

⁸¹ See *supra* note 40. Proposition 11 was placed on the ballot in 2008 as The Voters FIRST Act, Proposition 20 followed in 2010, amending Calif. Const. Art. 21 to create a "Citizens Redistricting Commission" every 10 years which shall "(1) conduct an open and transparent process enabling full public consideration of and comment on the drawing of district lines; (2) draw district lines according to the redistricting criteria specified in this article; and (3) conduct themselves with integrity and fairness The selection process is designed to produce a commission that is independent from legislative influence and reasonably representative of this State's diversity."

Indeed, the success of the CRC depended on the work of California's SWDB, which provided the data that the CRC relied on to draw the election districts for the California State Legislature and California's congressional delegation. Whereas the CRC can be constituted every 10 years, the collection, generation, verification, maintenance, and production of data is an ongoing process for the SWDB to which resources must be allocated. Without the data, the work of the CRC would be severely compromised.

Whether a commission or a legislature perform the redistricting, both data and process transparency are necessary components of a fair and legitimate redistricting process. Insisting on redistricting by independent commission risks an all or nothing approach. If transparency is not valued unless it substantially increases public participation, meaningful and achievable transparency reforms may be ignored, and transparency regimes that are currently in place may be scrapped without recognizing the consequences.

IV. THE SPECIAL DYNAMICS OF LOCAL REDISTRICTING

In applying one-person/one-vote, the courts have distinguished between congressional redistricting and state redistricting, but they "have treated cities, counties, and special districts as comparable to state legislatures in applying the same equipopulation standard to both."⁸² To the extent that local redistricting has received systematic attention, the emphasis has been on minority vote dilution and racial segregation.⁸³ This section discusses the distinctive features of local redistricting that warrant special attention, drawing in part on my own experience with and observations of local redistricting in New York State.

The distinctive political dynamics of local redistricting are rarely considered in the academic literature. Bruce Cain and David Hopkins began to address this gap in the literature in an article written a decade ago, based on the authors' experiences in New York and California.⁸⁴ Ten years later,

⁸² Cain & Hopkins, *supra* note 8, at 515. Thus population deviations of less than 10 percent between districts within the same plan require no justification for either state legislative or local remaps, whereas the Supreme Court has articulated a zero tolerance principle for deviations between congressional districts.

⁸³ Scholars have addressed the dynamics of local redistricting in the minority vote dilution context, but without much attention to the differences between local and statewide redistricting. *See, e.g.* LAUGHLIN McDONALD, *A VOTING RIGHTS ODYSSEY* (2003); Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1458 (1991); CHANDLER DAVIDSON & BERNARD GROFMAN (EDS.), *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990* (1994).

⁸⁴ Cain & Hopkins, *supra* note 8, at 516. ("So little has been written about local redistricting processes and politics that [one] can only hope to open the dialogue rather than offer anything definitive.")

this article remains one of the few sustained examinations of the special dynamics and procedural issues of local redistricting.⁸⁵

Cain and Hopkins identify four important differences between state and local legislatures that “may be significant” for local redistricting:⁸⁶

1. Local actors are generally much less experienced and sophisticated, and have a poor sense of the institutional and legal requirements of redistricting;⁸⁷
2. Local charters often add further redistricting criteria that may shape the line-drawing process in specific ways;⁸⁸
3. Local redistricting is often nonpartisan, making bi-partisan or partisan lock-ups less likely;⁸⁹ and
4. Local governments are subject to special decision procedures, such as relatively strict open meeting laws, that enable public participation.⁹⁰

Cain and Hopkins find that the line-drawing process at the local level is no less political or intensely fought, but that political cleavages are less likely to be partisan.⁹¹ Local elections, they note, are nonpartisan in many states, and even where they are partisan (as in New York State), the two major parties do not exercise the same kind of control over redistricting at the local level and frequently have to contend with other minor parties. While racial vote dilution remains a “real possibility” under conditions of non-partisanship, political lock-ups, such as the bi-partisan or partisan gerrymanders countenanced by the Supreme Court in *Davis v. Bandemer*⁹²

⁸⁵ *Id.* at 515 n. 1 (“there is a paucity of literature which treats local redistricting as a process distinct from that conducted at the state level.”); Arrington, *supra* note 6, at 2 (noting the scant literature on local redistricting). For examples, see Richard Briffault, *Who Rules at Home? One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339 (1993), and James A. Gardner, *Foreword: Representation Without Party: Lessons From State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L. J. 881 (2005), although Gardner’s main focus is on state legislative redistricting.

⁸⁶ Cain, *supra* note 12, at 515.

⁸⁷ Here again, covered jurisdictions appear to be the exception.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ In California and many other states, local election contests are non-partisan. But even where political parties do play a role, third party candidates and neighborhood groups are much more vocal in the political process, thus multiplying political cleavages.

⁹² 478 U.S. 109 (1986).

and *Vieth v. Jubelirer*,⁹³ are unlikely.⁹⁴ The “more fluid” factionalism at the local level, they argue, makes it hard to push through political gerrymanders.

According to Cain and Hopkins, neighborhood groups have much greater influence on redistricting at the local level, as do racial, ethnic, and gender/sexuality oriented groups such as MALDEF, PRLDEF, the NAACP, the Asian-Pacific Legal Defense Fund, and gay and transgender advocates. They describe these groups as “key actors in local redistricting.”⁹⁵

Different decision procedures at the local level also significantly contribute to the fluidity of local redistricting in their view. Relatively strict open meeting laws “permit many outside groups and individuals to submit their own plans.”⁹⁶ While public participation is thus enhanced, the disproportionate attention that certain vocal groups are able to gain in the open local process can turn local redistricting into a “chaotic free-for-all,” that ends up giving these groups greater consideration than they should receive based on their numbers.⁹⁷ The potential for such groups to disrupt commission proceedings and influence outcomes is amplified by the relative lack of experience and uncertainty about the laws and details of redistricting on the part of citizen-volunteers who frequently sit on local redistricting advisory commissions and may easily be cowed by such groups’ demands in public hearings.

In assessing Cain and Hopkins’ propositions, this article relies on my own experience with, and research on, local redistricting.

Working with a student,⁹⁸ and relying on the technical assistance of staff at the ACLU’s national Voting Rights Project, I submitted and advocated for the adoption of an independent, nonpartisan redistricting plan for Erie County, New York, during the 2011 redistricting cycle.⁹⁹ While I here rely, in part, on my experience with Erie County’s (intensely political, highly partisan, largely closed-door, and ultimately failed) redistricting process for valuable insights, it is important to recognize its limitations. From comparing my experience in Erie County with those of election law attorneys, political scientists, and redistricting experts elsewhere, it is clear that local redistricting practices vary between jurisdictions, especially between jurisdictions with much larger or much smaller populations.

⁹³ 541 U.S. 267 (2004).

⁹⁴ Cain & Hopkins, *supra* note 8, at 516, 522.

⁹⁵ *Id.* at 520.

⁹⁶ *Id.* at 516.

⁹⁷ *See id.* at 516-18.

⁹⁸ Patrick Fitzgerald, J.D. 2011, now an associate with Phillips Lytle LLC, was extremely knowledgeable about local politics and partisan cleavages.

⁹⁹ For details and coverage in Erie County, see http://law.buffalo.edu/News_And_Events/default.asp?firstlevel=1&filename=redistrictingProposal.

I have conducted further research, on redistricting transparency in particular, in other local jurisdictions in New York State, but also in states across the country. This research included conversations with experts, and attorneys with considerable experience in local redistricting, and conversations with state and local officials, including county election commissioners, state and local GIS experts, and state local government services administrators.

My own experience and research are consistent with Cain and Hopkins' first and second propositions above. Local redistricting indeed seems much more vulnerable to uncertainty and confusion about the substantive and procedural requirements of redistricting. Counties, cities, towns, and villages have few resources to devote to the process. Many local jurisdictions cannot afford outside consultants.¹⁰⁰ Because redistricting occurs only every ten years, there is little institutional memory of the rules that govern the process.¹⁰¹ For the most part, members of citizens' advisory commissions, journalists, and the legislators themselves have an inadequate understanding of the governing laws. As the laws differ between jurisdictions and between different levels of government, even participants are often confused about their application.

I am more skeptical, however, with regard to the third and fourth propositions. In particular, I am not as sanguine as Cain and Hopkins about transparency, public participation, and political pluralism in local (relative to statewide) redistricting.¹⁰² Cain and Hopkins draw an overly optimistic picture of local redistricting with regard to the fluidity of the process, the structural safeguards against political lock-ups, and the efficacy of state sunshine laws. Thus, to the extent that Cain and Hopkins suggest leaving well enough alone at the local level, their recommendations bear reexamination.¹⁰³

While partisan gerrymanders may be less of a concern at the local level, because partisan unity in redistricting may be harder to enforce, lock-ups in the form of purely self-interested "incumbent protection" plans that defeat even vocal communities of interest are a real possibility.¹⁰⁴ It is precisely the increased opportunity for self-dealing at the local level that is intensely political – but not, or not solely, along party lines – that makes the

¹⁰⁰ In New York State, most jurisdictions rely on in house personnel, if they have them, or volunteers. Interview with Jeffrey M. Wice, Of Counsel, Sandler, Reiff, Young & Lamb, P.C. (April 2012).

¹⁰¹ Arrington, *supra* note 6, at 4.

¹⁰² See also Cain & Mac Donald, *supra* note 35 (emphasizing the relatively greater transparency of local redistricting in California under the Brown Act, which did not at the time apply to redistricting by California's legislature in Sacramento).

¹⁰³ Cain, *supra* note 12, at 516.

¹⁰⁴ In New York, redistricting is not just intensely political, but can also be highly partisan at the local level. See *infra* note 108.

lack of transparency and effective public participation in local redistricting particularly objectionable.¹⁰⁵

Thus, while Cain and Hopkins recognize that “politicking” is as intense at the local level as it is at the statewide level, they do not appreciate the greater opportunities that local legislators have in striking deals across party lines to pursue their personal interests in retaining their government paychecks and getting reelected. The low absolute number of seats on local legislative bodies – often under a dozen seats for counties and cities, compared to an average of almost 150 legislators in state legislatures (between 30 and 50 seats for the average state senate; and over 100 for the average statehouse) – makes coordination among factions much easier at the local level. The fact that local legislatures are not split between two houses does so as well.

At the state level, party leaders dominate redistricting, and the rank and file must fall into step. If the individual New York Assemblyperson does not play ball, she can be sacrificed to the wolves by the party leadership. Partisan redistricting does not necessarily protect all incumbents or lead to uncompetitive districts.¹⁰⁶ In the effort to hold onto statehouse majorities and valuable leadership posts, parties will make their districts as competitive as they have to.¹⁰⁷ This means that self-interested redistricting at the statewide level is much more likely to be controlled by an identifiable party leadership and inflected by partisan goals that are salient to voters.

The structure of local legislative bodies makes for different dynamics in this regard. At the local level, party control of a legislature is not the same kind of prize that it is at the statewide level. Political cleavages often occur within the party, diminishing the party leadership’s authority over redistricting.¹⁰⁸ And legislative leadership does not always depend on which party controls the legislature.

In Erie County, for example, the Republican County Executive effectively picked the chairperson of the county legislature, an inner-city

¹⁰⁵ The distinction between incumbency protection and purely self-interested redistricting is not recognized in the law; nor has it been a focus in the literature. *But see* Arrington, *supra* note 6, at 2 and Rave, *supra* note 27.

¹⁰⁶ Nathaniel Persily, *The Place of Competition in American Election Law*, in *THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS* 171-74 (Michael P. McDonald & John Samples eds., 2000).

¹⁰⁷ *See* Jeanne Cummings, *Redistricting: Home to Roost*, WALL ST. J., Nov. 10, 2006 (“[The GOP’s] strategy of recrafting district boundaries may have backfired, contributing to the defeats of several lawmakers and the party’s fall from power Republican leaders may have overreached and created so many Republican-leaning districts that they spread their core supporters too thinly.”). For an example of a Democratic gerrymander that also failed, but for other reasons, *see* *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

¹⁰⁸ Conversation with former Erie County Legislator, Gregory Olma (Sept. 13, 2012). Olma describes intense infighting between different factions during the redistricting process.

African-American Democrat politically, resulting in a “reform coalition” of Democrats and Republicans which produced an initial “coalition plan.” That plan pitted non-coalition members against one another, and protected the coalition’s seats. The plan was neither partisan nor fair: it did not appear to be guided by any consistent redistricting principles other than the reelection of members of the “reform coalition” and ran roughshod over almost all of the suggestions voiced during hearings and proposals submitted by independent groups.¹⁰⁹

This example shows that a number of variables may affect the political dynamics of local redistricting more than they affect statewide redistricting and with much greater variation between local jurisdictions than one might expect. The structural incentives may be different at the statewide and local levels, but the incentives for self-dealing are no less pronounced at the local level.

In addition to the political dynamics arising out of the institutional differences between state and local legislatures already discussed, there are further implications of size. As already noted, size clearly matters, including the absolute size of the legislative body, the population size of the districts, and the relative size of the “natural” communities of interest that might be implicated in the process.¹¹⁰ Size shapes the opportunities for coordination among different factions during the redistricting process. Size also affects the types of communities of interest that may become relevant during the redistricting process, and whether or not they are heard or accommodated.

Neighborhood groups outside of the very large cities are unlikely to have much voice in congressional districting because of their relatively insignificant size. Ashbury Heights in San Francisco, the “old town” of Napa, or Buffalo’s Elmwood Village, are simply too small to matter to the process other than at the margins. The influence of neighborhoods in the makeup of their election districts increases with their relative size. But groups that are too small to elect a representative for a district may have little influence on the redistricting process, no matter how vocal they are.

In Erie County, for example, Buffalo’s Puerto Rican community on the Westside was extremely vocal in the redistricting process – and arguably

¹⁰⁹ Matthew Spina, *County Redistricting Plan Criticized*, BUFFALO NEWS, May 10, 2011; Spina, *Lawmakers See New Redistricting Plan*, BUFFALO NEWS, May 26, 2011. The plan was sold to the public based on its purported virtue of having a less than 2 percent deviation between districts. The plan did have that distinction (because no one else thought to hold the deviation so low), but this feature was entirely irrelevant to the goal of the line-drawers and vitiated many other legitimate considerations, including keeping towns and villages together where possible and recognizing other communities of interest.

¹¹⁰ Heather Barbour, *Size Matters in Remapping State Legislative Boundaries*, S.F. CHRON., Jul. 10, 2005.

influential in upending a closed-doors agreement. Hispanics represented only four percent of the population in all of Erie County, not enough to form a majority in any of the County's eleven districts. Nevertheless, a Westside Hispanic community group created the kind of chaotic interference that Cain and Hopkins describe, leading the police to clear the room at a public hearing of the County's redistricting advisory commission. The incident was perhaps the key factor in the collapse of the described "non-partisan gerrymander" of the County. The product of this collapse was an even worse Democratic partisan gerrymander, which was subsequently vetoed by the County Executive and rejected by a federal district court, which then drew up a map from whole cloth.¹¹¹

This dramatic turn of events in Erie County supports Cain and Hopkins' description of the relative fluidity of the local process. But it does not accord with the notion that partisan or bi-partisan gerrymanders are less of a concern, that vocal neighborhood groups and interest groups can influence the process to their advantage, or that the process is transparent or allows for meaningful public participation.

The Erie County Advisory Commission process held a number of hearings and allowed for public submission of maps during a roughly three-month period, but no serious submissions were made to the Commission before the last day of the submission period. Once submissions were made, and it became evident that there would be strong opposition, the commission Chair cancelled some of the scheduled additional hearings and moved to adopt (as the advisory commission's recommendation to the legislature) a bi-partisan gerrymander that had been drafted behind closed doors by a group of republican legislators. The advisory commission process thus effectively operated to delegitimize competing public submissions – including a submission drawn up with the aide of experts at the ACLU's national Voting Rights Project. Thus, the Commission functioned to essentially neutralize all citizen submissions and to give the bi-partisan gerrymander that had been submitted by legislators themselves, as a public submission, the stamp of independent citizen approval before it was even introduced as a bill. Instead of opening up a conversation about the lines, the commission process shut down opposition.

Cain and Hopkins's observations seem to be influenced in part by their experience with the larger, more sophisticated cities in California and New York. They note the ability of civil rights and public interest groups to influence the process in San Francisco, for example, but in local redistricting

¹¹¹ See *Mohr v. Erie County Legislature*, 2011 WL 3421326 (W.D.N.Y. 2011). The Court cited the first map's "failure to respect municipal boundaries and unnecessar[y] divi[sion of] smaller communities," and the second map's "creati[on] of a "mega-district" that encompasses 45 percent of the county's landmass, and separati[on] towns that share school districts and services," *Id.* at 7, but did not provide a cogent reason for ignoring both maps and all submissions in crafting its own plan.

in New York State such groups appear to be less strongly represented.¹¹² In Erie County and Buffalo redistricting, there was no participation by the NAACP, ACLU, Hispanic or Asian-American civil rights groups, or public advocacy groups like Common Cause that have played a significant role in statewide redistricting.¹¹³ In contrast, when LATFOR held hearings in Buffalo on the State Legislative and congressional maps, the local and regional NAACP branches were vocal, as were some of the statewide groups like Common Cause.¹¹⁴ The only nationally recognized group that was present consistently at the statewide and local levels was the League of Women Voters. As this example demonstrates, local redistricting sometimes occurs under the radar, – and not out in public in front of the full gamut of civil society associations as Cain and Hopkins suggest.¹¹⁵

V. REVISITING TRANSPARENCY IN LOCAL REDISTRICTING

In this Part, I briefly consider what implications some of the special problems and dynamics of local redistricting have for redistricting

¹¹² The NAACP filed a law suit in Albany County, the seat of the state legislature, *Pope v. Albany County*, Civ. No. 11-3439 (2d Cir., May 29, 2012), and Latino Justice and other groups became involved in Nassau County, one of the largest and diverse counties in the state, http://latinojustice.org/briefing_room/press_releases/LatinoJustice_PRLDEF_Lambastes_Irresponsible_Use_Of_Redistricting_in_Nassau_County/.

¹¹³ The local NAACP arguably had political reasons not to get involved once the various plans were in. See Matthew Spina, *NAACP Takes Neutral Stand on Redistricting Plan*, BUFFALO NEWS, June 16, 2011. But that doesn't explain its absence throughout the entire process. Neither the local NAACP, nor the local ACLU were tuned into the redistricting issues when they were called for assistance; the Brennan Center, a major player at the national level with close ties to the Governor, had no information on local redistricting; the New York City-based NYCLU decided not to get involved. The ACLU's national Voting Rights Project, located in Atlanta, GA, was finally brought in, but would not have been a participant at all, had it not been for connections with Law School faculty.

¹¹⁴ Transcript, New York State Legislative Task Force On Demographic Research And Reapportionment, Public Hearing, Congressional And State Legislative Redistricting, Thursday, February 16, 2012, available at <http://www.latfor.state.ny.us/hearings/docs/20120216trans.pdf>.

¹¹⁵ While the local ACLU and NAACP, and other groups, such as the Hispanic community on Buffalo's Westside, were clearly generally aware of the local redistricting, they apparently did not have the resources or expertise to focus on the County process, given the numerous town, city, county, state legislative, and congressional redistrictings taking place roughly in the same period, with different, but overlapping timelines, different procedures, rules, and implications. At the county level, community leaders were appointed to an advisory commission for the county legislature, but the members of the commission were not properly trained and did not produce a plan, or discuss, or assess any plans. This contrasts sharply with the practices in covered jurisdictions, where local groups must be brought into the process under the DOJ guidelines. See *infra* notes 147-149 and accompanying text.

transparency at the local levels. I also consider what we can learn from the Justice Department's preclearance guidelines. Then, I turn to some of the opportunities for reform that present themselves by focusing on local redistricting before redistricting at higher levels.

A. *The Lack of Data, Information, and Oversight*

One of the biggest differences between local and statewide redistricting is the lack of outside monitoring and/or participation in local redistricting and the difficulty of obtaining information on local redistricting laws, data, and procedures. Redistricting criteria and procedures vary from state to state and jurisdiction to jurisdiction. States differ in their local government structures and their constitutional and statutory redistricting requirements. Within states, local jurisdictions that redistrict are often governed by different redistricting regimes.¹¹⁶ There is no reliable national survey of local government structures and election systems. Even at the state level, basic local government information is often not readily available.

Based on a survey conducted by SUNY Buffalo Law School, there is currently no state that has a comprehensive centralized database for local redistricting data or redistricting procedures.¹¹⁷ What some have called the "hyperdecentralization" of U.S. elections has made election administration data hard to come by in general.¹¹⁸ Redistricting data is even more difficult to obtain because, as already noted, it is generated and maintained, if at all, by different governmental actors (e.g. the city council, city clerk, county election commission, and statewide voter registration database for a given city).

The fact that local legislative bodies and commissions are subject to open meeting laws does not thereby render the process open or transparent. Strong open meeting laws, without more, can simply drive the actual decision making process underground.¹¹⁹ Moreover, open meeting laws are often simply ignored or misunderstood.¹²⁰ No court will throw out a redistricting plan simply because open meeting laws were flaunted.

¹¹⁶ See Cain & Hopkins, *supra* note 8, at 526-30.

¹¹⁷ Tennessee comes closest to systematically providing local redistricting maps and other data. See <http://www.capitol.tn.gov/house/committees/redistricting.html>. J.D. students Andrew Dean and Iriny Faltas conducted the survey with me.

¹¹⁸ Heather Gerken, *How Does Your State Rank on the Democracy Index*, LEGAL TIMES, Jan. 1, 2007.

¹¹⁹ The substantial discussions, negotiations, fretting, shifting of alliances reported to us by insiders in Erie County contrasted with the almost complete silence of most legislators on any of the substantive issues of the proposals presented. And the public hearing process seemed to proceed in a parallel universe to the actual redistricting process that occurred in private.

¹²⁰ See, e.g., Editorial, *Meetings Must Be Open*, BUFFALO NEWS, Mar. 22, 2011 (describing how school boards routinely violate the state's open meeting laws – showing

Freedom of information requests will in most cases allow individuals to obtain redistricting data eventually, if they are made directly to the appropriate officials at the local level who have the data. However, this is not as easy as it sounds for all the reasons already mentioned: the data is not all in one place, historical data is not always maintained, formats differ, and unless the requesting party is GIS proficient and speaks to a GIS expert at the local level, it is hard to communicate, easy for administrators and officials to play games, and it is unlikely that one will obtain the information desired in a timely matter. Of course, timing is everything in redistricting. Moreover, laws, practices, and institutional contexts are important. Obtaining redistricting data at the local level in New York State is complicated in ways that may or may not apply in other states. In New York, at least some county election commissioners like to sell data. It is, therefore, sometimes difficult to sort out what is obtainable by freedom of information request and what must be purchased. Additionally, in New York State the County Election Commission is split between two elected County Commissioners, one from each party. The office thus has much more of a partisan edge than, for example, that of a County Superintendent of Elections in Florida, who acts much more like an executive of an administrative agency. Perhaps because the two parties have access to all the relevant data that is on file with the county election commissioners, the election commissioners apparently do not feel as compelled to oblige outsiders. On the other hand, insiders who know whom to ask can readily get data without a freedom of information request and without paying a fee.

As described above, it is hard enough for local officials to find their own data at present. Experience from California and New York suggest that once the redistricting process is over a lot of data is lost. Local jurisdictions apparently have a hard enough time holding onto their own local precinct line changes, never mind historic demographic and other redistricting information. However, historic information is important for drawing maps in the current cycle and for measuring compliance with the Voting Rights Act.¹²¹

complete ignorance of their most fundamental prescriptions); Mary B. Pasciak, *Process to Select Schools Chief Criticized: Private Deliberations Violate Law, Expert Says*, BUFFALO NEWS, June 2, 2012. Tactics to shut out the public include adjourning a public meeting simply to “reopen” the meeting 10 minutes later to take a vote. See, e.g., Minutes of the Erie County Redistricting Advisory Commission, available at <http://www2.erie.gov/legislature/index.php?q=advisory-committee-reapportionment-minutes#minutes7>.

¹²¹ Historic information is not only of importance for measuring retrogression under Section 5, but also for assessing racial polarization under Section 2. Analysis of racially polarized voting normally relies on data from the last three election cycles, and thus depends on information from prior elections.

In New York State, most counties and cities, but only some towns and villages redistrict.¹²² Laws and timelines for local redistricting vary.¹²³ Counties are subject either to the County Code or their own charter provisions with respect to redistricting.¹²⁴ Charter counties are free to prescribe redistricting procedures by statute, such as creating and defining the role of an advisory commission. The County Legislature may adopt additional *ad hoc* administrative procedures, such as timelines, hearing dates, and the number of hearings by resolution. Cities, towns and villages are subject to special redistricting criteria under the Municipal Home Rule Law, in addition to whatever other charter provisions and local administrative procedures they might adopt.¹²⁵ New York certainly stands out among states for its “crazy quilt” of local governments, even among eastern seaboard states that generally have a more complicated local government structure.¹²⁶ But variation in redistricting laws and practices in local government are shared by most states.

In New York State, local redistricting does not receive even minimal support or monitoring from the State. Despite its mandate to “administ[er] and enforce[] . . . all laws relating to elections in New York State,”¹²⁷ the New York State Board of Elections (SBE) does not monitor local redistricting in any way; nor does it obtain local redistricting information.¹²⁸ The SBE does not know how many local jurisdictions redistrict, does not obtain copies of

¹²² See Gerald Benjamin *At-Large Elections in N.Y.S. Cities, Towns, Villages, and School Districts and the Challenge of Growing Population Diversity*, 5 ALBANY GOV'T. L. REV. 733, 735-45 (2012).

¹²³ Erie County finalized its map in June of 2011, whereas Broome County has still not redistricted as of July 2012.

¹²⁴ The Municipal Home Rule Law sets forth its own distinct redistricting criteria and priorities. N.Y. MUN. HOME RULE LAW Art. 2, §10 (McKinney's 2012). (Hereinafter “MHRL”). While there is persuasive evidence that Counties that do not set forth particular redistricting criteria in their charters are not subject to the MHRL's redistricting criteria, Counties appear to be confused about the rule (see e.g., Broome County's posting, available at [http://www.gobroomecounty.com/files/legis/Ad%20Hoc%20Committees/Redistricting%20Committee%202011/Standards%20for%20redistricting\(1\).pdf](http://www.gobroomecounty.com/files/legis/Ad%20Hoc%20Committees/Redistricting%20Committee%202011/Standards%20for%20redistricting(1).pdf)), and at least one Court has side-stepped the issue by integrating the additional statutory criteria that apply specifically to municipalities. *Mohr v. Erie County*, Civ. No. 559S, (W.D.N.Y., Decision and Order, Aug. 4, 2011) (plan imposed by the court respects municipal boundaries “to the greatest extent possible”).

¹²⁵ MHRL Art. 2, §10 (McKinney's 2011).

¹²⁶ New York State Comptroller, *Outdated Municipal Structures - 18th Century Designations for 21st Century Communities*, available at <http://www.osc.state.ny.us/localgov/pubs/research/munistructures.pdf>.

¹²⁷ <http://www.elections.ny.gov/AboutSBOE.html>.

¹²⁸ Arguably, redistricting information is included in the statewide voter registration database for federal and statewide elections, because the voter registration record assigns voters to election districts. While important, this information is limited, must be extracted, and does not include demographic information.

redistricting maps for any county, city, town, or village in the State, and does not even know whether a local jurisdiction has, in fact, redistricted.¹²⁹

The same is true of all the other state agencies. The New York State Department's Office of Local Government Services has no information on redistricting and offers local governments no support in this area. New York State's Geographic Information Systems Clearinghouse – the most likely repository for redistricting maps and data files – does not collect such information, nor could it, if it were inclined to do so.¹³⁰ Finally, the New York Legislative Task Force On Redistricting (LATFOR) – a taxpayer funded arm of the State Legislature charged with providing data and expertise for redistricting – plays no role in local government redistricting, even as it involves the same expertise and some of the same datasets.¹³¹ LATFOR focuses exclusively on state legislative and congressional redistricting.¹³²

Standard datasets are also frequently difficult to obtain at the county level, because local jurisdictions have not collected, compiled or stored such information. Even if the data is available at the local level, it is not always easy to obtain information on the redistricting process, on hearings, submission deadlines, proposed maps, or even the population data underlying the pre-existing plan. Counties do not give out shape files without a special state FOIA request;¹³³ they will often charge for maps and other election data that they collect. Even in Erie County, which is regarded as one of the more transparent and responsive jurisdictions, our team from the SUNY Buffalo Law School met with some initial resistance to obtaining such data, when we asked for it during the period that the redistricting advisory commission was accepting public submissions and it was clear that our purpose was to use the data to create an independent redistricting plan.¹³⁴

As a result, outsiders, including the DOJ, state agencies, state and national civil rights organizations and interest groups like the NAACP, and the ACLU – which have been crucial to protecting voting rights in the South – do not have the information or data about local redistricting needed to

¹²⁹ Interviews with NYS officials at Local Government Services, the GIS Clearinghouse, the State Board of Elections, and local officials (July 1, 2011 – Oct. 1, 2011).

¹³⁰ Available at <http://gis.ny.gov/>.

¹³¹ N.Y. LEG. LAW § 83-m (McKinney 2012).

¹³² Moreover, LATFOR's mission is to serve the legislature, not the general public. It has been widely criticized as a political commission that serves the Democratic and Republican parties, perpetuating the bi-partisan gerrymander that awards Democrats control of the NYS Assembly and Republicans control of the NYS Senate.

¹³³ "Shapefiles" are special file formats for storing geometric location and associated attribute information that can be used in geographic information systems software. A "shapefile" is actually a set of several files that must be used together.

¹³⁴ At that point, the Commissioners knew who we were, because we had testified at a prior hearing of the redistricting advisory commission and were approached by one of the commissioners after our testimony.

monitor, participate in, or litigate local redistricting issues in a timely fashion. This lack of information, combined with a local government culture that is particularly resistant to transparency, makes local redistricting in New York a truly unsurveillable thicket.

Ironically, Tennessee, which became an object lesson in the drive for one-person/one-vote in the early 1960s,¹³⁵ has a centralized state-run database for county redistricting data and offers independent third-party expert redistricting support to localities.¹³⁶ But no state currently appears to have a central source for local redistricting information. Even Tennessee does not gather or post redistricting data for municipalities.

In the absence of such information for non-covered jurisdictions, we depend on local jurisdictions to make their processes transparent. Local government officials are becoming increasingly aware of redistricting transparency requirements and are seeking advice from outside consultants. But given the lack of resources, the redistricting timeline, and the pressures and constraints already discussed above, such efforts are limited and often ineffective in all but the largest and most sophisticated jurisdictions.¹³⁷

B. The Preclearance Precedent

The example of New York suggests that counties, cities, towns, and villages (and certainly special purpose districts and school districts) may not have the resources, or the expertise, to comply with the AEI-Brookings principles on their own. Even if states or civic organizations engage in extensive public awareness and education drives to make local officials aware of these data transparency principles, their adoption and operationalization at the local level may not be feasible, efficient, or worth the trouble to local officials. If that is so, centralizing and standardizing some of these operations at the state level may be the sensible thing to do.

One prominent exception to the almost complete lack of transparency of local redistricting to outsiders is the information available from the United States Department of Justice as a result of the special requirements that the Voting Rights Act of 1965 has imposed on covered jurisdictions. For decades, the VRA has required that most local jurisdictions in the South (as well as other parts of the country, including many localities in California and some in New York City) submit detailed information to the Justice Department before implementing a redistricting plan.¹³⁸ Information on thousands of local

¹³⁵ *Baker v. Carr*, 369 U.S. 186 (1962).

¹³⁶ Interview with Doug Botary, CTAS Finance Budget Consultant, County Technical Assistance Service, Tennessee (Feb. 10, 2012).

¹³⁷ For example, New York City, L.A., San Francisco, San Diego, Tucson, Phoenix, and other relatively large local jurisdictions have promoted transparency and public participation in redistricting.

¹³⁸ 42 U.S.C. § 1973c (2012).

redistrictings is available from the DOJ's Voting Section, which maintains a historical database of past submissions. More importantly, the Voting Section makes information about proposed, but not yet implemented, redistricting plans available, and encourages adversely affected groups and outside organizations, including national civil rights organizations, to weigh in on proposed redistricting plans.

Although the connection does not appear to have been made in the literature,¹³⁹ the information available through the U.S. Justice Department's Voting Section goes a long way towards satisfying the data and process transparency discussed in Part III.¹⁴⁰ Section 5 of the VRA provides that jurisdictions covered by the special provisions of the VRA¹⁴¹ must submit all changes to election laws, standards, practices, or procedures directly to the U.S. Attorney General for approval before such changes can be enforced.¹⁴² Section 5 imposes an automatic sixty-day stay on the enforcement of any state and local election law in jurisdictions covered by the Act, during which time it grants the DOJ the authority to veto the new law or procedure unless and until the submitting jurisdiction has satisfied its burden of proving that the law or procedure will have neither a discriminatory purpose nor a discriminatory effect.¹⁴³ A key aspect of Section 5 was the transparency it brought to state and local election laws and administration in the predominately Southern jurisdictions originally targeted by the VRA.¹⁴⁴

The content requirements for redistricting submissions from these local jurisdictions are set forth in detail in the regulations governing the preclearance process.¹⁴⁵ Federal regulations specify supplemental disclosures for redistricting submissions.¹⁴⁶ The regulations distinguish

¹³⁹ See, e.g., Cain & Mac Donald, *supra* note 35; and Cain & Hopkins, *supra* note 8.

¹⁴⁰ *Supra* notes 53- 81 and accompanying text.

¹⁴¹ See 28 C.F.R. PT. 51, APP. (2012) (covered jurisdictions include Alabama, Alaska, Arizona, California (select counties), Florida (select counties), Georgia, Louisiana, Michigan (select counties), Mississippi, New Hampshire (select counties), New York (select counties), North Carolina (select counties), South Carolina, South Dakota (select counties), Texas, and Virginia.)

¹⁴² 42 U.S.C. § 1973c (2012).

¹⁴³ 28 C.F.R. § 51.54 (2012).

¹⁴⁴ See generally, Michael Halberstam, *The Myth of 'Conquered Provinces': Probing the Extent of the Voting Rights Act's Intrusion on State and Local Autonomy*, 62 HASTINGS L. J. 923, 971-974 (2011).

¹⁴⁵ 28 C.F.R. § 51.28 (2012).

¹⁴⁶ Recall that jurisdictions covered by the special provisions of the VRA, are required to submit all changes in voting qualifications, laws, procedures, and administration to the U.S. Attorney General for approval before those changes can be enforced. The Attorney General has 60 days to object before the changes go into effect. An objection serves as an effective injunction that that can only be reviewed by the D.D.C. I have argued elsewhere that the preclearance regime has served primarily as a disclosure and monitoring regime. Halberstam, *supra* note 144 at 928, 948-58; see also *infra* notes 151-156 and accompanying text.

between disclosure of data that inform the substantive redistricting decisions,¹⁴⁷ and disclosure of process information.¹⁴⁸

Process information to be submitted to the DOJ before a jurisdiction can enforce a redistricting plan, includes “evidence of public notice, of the opportunity for the public to be heard, and of the opportunity for interested parties to participate in the decision to adopt the proposed change and an account of the extent to which such participation, especially by minority group members, in fact took place.”¹⁴⁹ Suggested documents and information include:

[C]opies of newspaper articles discussing the proposed change [c]opies of public notices invit[at]ions for public comment or participation in hearings . . . statements regarding where such public notices appeared (e.g., newspaper, radio, or television, posted in public buildings, sent to identified individuals or groups). Examples of materials demonstrating public notice or participation include . . . minutes or accounts of public hearings . . . statements, speeches, and other public communications . . . copies of comments from the general public . . . excerpts from legislative journals containing discussions of a submitted enhancement, or other materials revealing its legislative purpose.¹⁵⁰

Under the guidelines, the affected communities and local interest groups are to be informed of the proposed redistricting changes, hearings, meetings, and opportunities to be heard on the matter, and are to be included in the process. In addition, they are to be informed of the availability of the complete submission, which sets forth a legitimate justification for the proposed changes. In other words, covered jurisdictions cannot simply wait to the last minute, rush a redistricting map through the legislative process without an opportunity for public comment, and offer no justification for the actual redistricting decisions, as is common practice elsewhere.

There is another important consequence of the thousands of submissions received, analyzed, and archived by the DOJ: It gives *national* interest groups and the national government access to this information. The DOJ began to build a centralized database for redistricting data and process information by thousands of local jurisdictions.¹⁵¹ This allowed civil rights organizations to gain access to proposed redistricting changes through

¹⁴⁷ 28 C.F.R. § 51.28 (a) - (d) (2012).

¹⁴⁸ 28 C.F.R. § 51.28 (f) - (h) (2012).

¹⁴⁹ 28 C.F.R. § 51.28(f) (2012).

¹⁵⁰ 28 C.F.R. § 51.28(f) (2012).

¹⁵¹ 28 C.F.R. § 51.20 (2012); Halberstam, *supra* note 144, at 957.

individual FOIA requests. It also allowed those organizations to put their local representatives on a list of interested groups and individuals specifically maintained by the DOJ to automatically receive such information and be contacted for comment.¹⁵²

Considering the original regulations were written in the early 1970s, the publicity requirements were impressive.¹⁵³ Local jurisdictions have had to include “[c]opies of public notices that announce the submission to the Attorney General, inform the public that a complete duplicate copy of the submission is available for public inspection (e.g., at the county courthouse) and invite comments for the consideration of the Attorney General and statements regarding where such public notices appeared.”¹⁵⁴ Some of the more elaborate process requirements now constitutionalized by California’s Citizens Redistricting Commission were thus already operationalized by the DOJ’s Civil Rights Division. They go a long way towards establishing the kind of transparency in redistricting that reformers are seeking for statewide redistricting around the country and cut right through the unsurveillable thicket of local redistricting that is still pervasive in states, like New York, that are not covered by the special provisions of the Voting Rights Act.¹⁵⁵ The disclosure regime transformed incentives, changed the dynamic of intergovernmental relations, and opened up the local political process to monitoring and participation by a range of interested nongovernmental actors.¹⁵⁶

As the successful precedent of Voting Rights Act preclearance suggests, reporting to a central database (if not a central authority), and standardizing such reporting, is feasible and can lead to dramatic improvements in the process.

VI. ESTABLISHING STATEWIDE REDISTRICTING CLEARINGHOUSES FOR LOCAL REDISTRICTING

In this Part, I advance a specific policy proposal that weds elements from several contemporary governance approaches already touched upon.

¹⁵² 28 C.F.R. § 51.28(h) (2012).

¹⁵³ These provisions of the guidelines have not changed much over the years, but some additional data format and maintenance requirements were added.

¹⁵⁴ 28 C.F.R. § 51.28 (g)(1) (2012). *See also* 28 C.F.R. § 51.28 (g)(2) (2012) (“Information demonstrating that the submitting authority, where a submission contains magnetic media, made the magnetic media available to be copied or, if so requested, made a hard copy of the data contained on the magnetic media available to be copied.”)

¹⁵⁵ New York City is covered by Section 5, but the rest of New York is not.

¹⁵⁶ HOWARD BALL ET AL., *COMPROMISED COMPLIANCE: IMPLEMENTATION OF THE 1965 VOTING RIGHTS ACT 1965* (1982); Halberstam, *supra* note 144, at 955-56.

A. *Governance Theories*

New governance approaches have emphasized the fact that democratic governance is not achieved by government alone, but by interactions and competition between a range of governmental and non-governmental actors, that operate in complex institutional networks with overlapping authorities and rely on one another to satisfy their informational requirements. In the voting rights area in particular this observation should be uncontroversial. But as we have seen, interested governmental and non-governmental actors currently have little access to local redistricting in non-covered jurisdictions, because of information asymmetries, misaligned incentives, and a lack of incremental innovation – a circumstance that is, of course, particularly troubling in a context rife with conflicts. This needs to be remedied.

New institutionalism in election law has focused on the dearth of information and data in election administration caused by the “hyperdecentralization” of U.S. election systems.¹⁵⁷ Proponents of this New Institutionalism have proposed to introduce tools of measurement, benchmarking, and ranking common in large business organizations into the field of election administration – just as others have advocated the introduction of such methods into the management of other multi-form or decentralized governmental agencies that deliver public services, such as welfare benefits.¹⁵⁸ The proposal here advanced applies some of these methods to redistricting by creating a virtual central “organization” of decentralized local redistricting actors.¹⁵⁹

¹⁵⁷ Heather Gerken, *Getting From Here to There in Election Reform: A Trio of Ideas*, SSRN Working Paper (2010), available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=101581#reg.

¹⁵⁸ See HEATHER GERKEN, *THE DEMOCRACY INDEX* 38 (2010). (“[P]artisanship and localism generate political tides that run against election reform. If we want to get from ‘here to there,’ we need a solution that will redirect those ties. Ranking states and localities based on performance can do just that.”). Ranking, however, has significant downsides, in a context where one is heavily dependent on cooperation by local officials that one has few resources to compel.

¹⁵⁹ In the election context, theory has followed practice here, in that the heavily negotiated Help America Vote Act of 2002 (HAVA) does exactly that, by creating major funded and unfunded mandates for local election administration. One example is HAVA’s requirement that all states maintain a statewide, computerized voter registration database that meets both federal and state requirements. While Heather Gerken has highlighted opportunities offered by new technologies to reform redistricting, Gerken and other election administration reformers – including the Pew Center for State and Local Democracy – have stopped just short of conceptualizing what this would mean concretely for redistricting, because redistricting does not fall within the province of election administration. It lives at the boundary between election administration, legislation, and politics. Moreover, Gerken’s focus is again on statewide redistricting. Gerken, *supra* note 20. It is fair to say, however, that Gerken’s idea of nationalizing coverage under section 5 via “opt-in” envisions a functional equivalent at the federal level (and in much more general terms) to the type of solution that is here proposed at the statewide level.

Finally, third-generation transparency methods, which deploy advanced interactive web-based technologies to promote governance, offer powerful opportunities for addressing process failures by providing the stakeholders with access to information. “Targeted transparency,” moreover, is “fundamentally different” from the general right-to-know laws dating from the 1960s that are typically viewed as a “cornerstone of democratic governance” and “required general openness in federal, state, and local government in order to hold officials accountable for their actions.”¹⁶⁰ By providing stakeholders with specific targeted information in a user-centered format that they can put to immediate use, such transparency can “create a chain reaction of new incentives.”¹⁶¹ Our discussion of redistricting transparency generally, and of transparency in local redistricting, more specifically, clearly outlines what such targeted transparency should look like in the redistricting context.

B. Practical Proposal

Building on existing models, most notably the California SWDB, I recommend that states pursue the establishment of independent statewide redistricting clearinghouses for local redistricting data and information. These Redistricting Clearinghouses (RDCs) would collect, store, and disseminate information, data, and metadata on local representation and redistricting for all counties, cities, towns, villages, and special use districts in a state. They would be specially designed to promote both data transparency and process transparency. RDCs would be customized to fit within existing institutional frameworks in a state. Their purpose would be to bridge current information and communication gaps between federal, state, and local government actors, and between local government actors and public interest groups, civil rights and civil society groups. This approach has the potential dramatically to transform the redistricting process for entire classes of sub-state jurisdictions. It is likely to prove more effective than the alternative routes of trying to pursue reform in each local jurisdiction separately or through blanket state legislation, which is likely to be politically controversial and may be problematic under state constitutions.¹⁶²

The RDCs I recommend would have three major components. First, RDCs would promote what I have called *data transparency* for local redistricting, much like California’s SWDB has done for statewide and

Gerken, *supra* note 157. It would be interesting to compare and contrast these two proposals.

¹⁶⁰ *Id.*

¹⁶¹ FUNG, et al., *supra* note 52, at x.

¹⁶² It should be noted that referenda are also often more readily available at the local level, even where state constitutions are not as supportive of direct democracy at the statewide level.

congressional redistricting. RDCs would collect and host redistricting data, but would do so for dozens of local jurisdictions and local election contests in any given state.¹⁶³ Local jurisdictions across the state would report their redistricting data and results to the RDC in standardized formats. In turn, the RDC would serve as a basic resource to local jurisdictions for generating and using redistricting data, as well as collecting, storing and maintaining such data between redistrictings. By centralizing such functions, local jurisdictions could get the benefit of technologies they can ill afford, and that make sense only on a larger scale. The independence of the database from local elected officials would go a long way towards establishing credibility for redistricting at the local level.¹⁶⁴ The local data would automatically become available via the internet, not only to local officials and constituents, but also to all the outside public and private actors who monitor and enable public participation in local redistricting.

Second, RDCs would promote *process transparency* by offering a public communications platform and website for local jurisdictions to inform participants and other stakeholders about the timeline, process, and substantive developments of their redistricting process in standardized formats.¹⁶⁵ This “module” of the proposed RDCs would provide information about the redistricting timeline, contact information, information about where and how to make public submissions, deadlines, and other information to allow stakeholders a meaningful opportunity to participate in, or monitor the local redistricting process. This process information would include real-time information about actual dates of public hearings, commission meetings, committee meetings, or meetings by the legislature; minutes and podcasts of such meetings; maps submitted by the public; and any other substantive input by legislators, political parties, interest groups, or the public, as soon as it occurs.

While some local jurisdictions already try to publicize such process data, many do not presently have any logical place do so.¹⁶⁶ They create hard

¹⁶³ The SWDB currently hosts local data, but does not systematically collect data for substate level redistricting and local elections.

¹⁶⁴ Like the California database, such RDCs should be independently run in a research-oriented environment, whose principals are vulnerable to academic peer-review. While value judgments are inevitable in the drawing of redistricting plans, the processing, maintenance, disaggregation and aggregation of raw redistricting data are subject to statistical methods and scientific principles.

¹⁶⁵ As discussed in Part III, California’s SWDB is not tasked with collecting or providing the kind of process information that is part of a redistricting submission to the DOJ by covered jurisdictions or was generated by the activities of the California Citizens Redistricting Commission.

¹⁶⁶ See, e.g., the redistricting webpages of New York State’s Albany County Legislature, available at <http://www.albanycounty.com/legislature/redistricting.asp?id=2974>, and Erie County Legislature, available at <http://www2.erie.gov/legislature/index.php?q=advisory-committee-reapportionment>.

to find *ad hoc* websites and often disclose important process and public participation information either not at all, or very poorly. As noted above, a County Election Commission in New York State, for example, does not possess this process information, because it does not manage or control the redistricting process. The data are generated by redistricting advisory committees, local legislatures, or city councils and their committees, during the six to nine month process of redistricting. While redistricting maps (and shapefiles) for existing districts should be available from a County Election Commissioner in New York State, such process information is variously available from the legislature itself, a county or city clerk's office, sometimes from a county or city attorney. It is not entirely exaggerated to conclude that by the time non-initiates have figured out where to obtain the different types of redistricting information, the local redistricting is over.¹⁶⁷

Providing a standardized web-based platform for all jurisdictions to publicize the details of their redistricting process renders the process transparent to insiders and locals. It also gives outsiders access, and with that access the ability to monitor, participate, and compare practices across the state. Administrative practices and procedures, moreover, could be compared and indexed; best practices could be identified and highlighted, and jurisdictions could be ranked as recommended by proponents of a Democracy Index in the election administration field.¹⁶⁸

Third, RDCs would host other information critical to educating participants and assessing the legitimacy of the particular local process. This information could include federal, state and local laws as well as administrative procedures that govern the process (from the appointment of members of an advisory commission to the approval of a plan by a county executive). For each local jurisdiction, the RDC would provide a standardized, web-accessible description of the laws and other rules governing the redistricting process in that jurisdiction in user-centered formats. Much of the information would be generally applicable and could be conveyed in uploaded video presentations and slide shows, which reformers in this cycle have already made available.¹⁶⁹ At the local level, this type of information is typically generated by county or city attorneys with no

Increasingly, local jurisdictions are putting up such websites, but often after the fact. And this information is likely to be taken down soon after it is posted.

¹⁶⁷ Even at the statewide level, it took LATFOR, the current NYS redistricting database that is housed in the state legislature, months to get started, and weeks to get some of the hearing information online. Some of the information only appeared after redistricting plan was passed. This is because LATFOR is not independent, and its primary mission is to serve the legislators.

¹⁶⁸ See GERKEN, *supra* note 158. Ranking, however, has significant downsides, especially in a context where one is heavily dependent on cooperation by local officials that one has few, if any resources to compel.

¹⁶⁹ *Supra* note 34.

expertise either in the substance or the presentation of such information. They either produce the information *ad hoc*, or pull an old file from ten years ago. The information is put into the form of an internal memo that is not generally made public, may be incomplete or inaccurate, and is more likely to confuse participants in the process than educate them.

In sum, for each local jurisdiction, RDCs would collect, standardize, maintain, and publicize: (1) all necessary redistricting data (including historical information relating to prior redistricting rounds); (2) up-to-date information about the current redistricting process (including schedules for public hearings, meetings, submission deadlines, dates of final decision, and approval of redistricting plans; public testimony, meeting minutes, all proposals for line-drawing, any lawsuits filed in connection with the redistricting); (3) specifically applicable (a) federal, state, and local laws on substantive redistricting requirements, and (b) state and local laws governing the redistricting process itself.

RDC's would thus provide centralized databases for redistricting information similar to the redistricting information that has now been available for local jurisdictions covered under Section 5 of the Voting Rights Act for over three decades. But the federalism issues that plague the Voting Rights Act preclearance would not arise with regard to state-mandated disclosure of local redistricting information, because state legislatures have direct authority over local government. Moreover, regulating disclosure of redistricting information to a centralized database would not compromise municipal home rule. So long as reforms were focused on data and processing transparency, and local jurisdictions were free to determine how to structure other aspects of the process – such as commissions, timelines, or procedures, for example – municipal home rule would not be implicated. Indeed, states already impose similar legislation in the form of state freedom of information rules and sunshine laws.

But the functions and capabilities of these clearinghouses would differ significantly from the mere collection of submissions in first-generation databases by the DOJ. The DOJ's databases have had very rudimentary search capabilities, essentially only permitting the retrieval of a particular file for a particular jurisdiction. RDCs would be publicly accessible via the Internet. They would serve as a basic resource for local governments, legislatures, and redistricting commissions concerning the laws governing redistricting in their local jurisdiction, provide open source tools for carrying out such redistricting, maintain critical historical data, and standardize the collection, publication, and storage of current data in electronic formats that could be readily shared and analyzed. RDCs would provide a cost-free platform for local jurisdictions to share information about their redistricting process (such as public hearing dates and locations, submission deadlines, meeting minutes, advisory committee proposals, and subcommittee hearing information) with the public in real time. RDCs could, furthermore, take

advantage of Web 2.0 capabilities and integrate videos, podcasts, and applications, like DistrictBuilder, and social media.

Reforming local redistricting may, on the whole, be more viable politically than reforming state legislative or congressional redistricting. Process reforms to *statewide* redistricting – such as the creation of an independent redistricting database for state legislative and congressional redistricting – must either pass through the state legislature or enacted through an initiative. The legislative route involves the unlikely prospect of convincing state legislators to change cede power and control. The initiative route, despite its success in California and a few other states, presents difficult financial and practical challenges.¹⁷⁰

In contrast, state legislatures would arguably only be tweaking existing sunshine laws if they required the disclosure of redistricting data and information by local jurisdictions. Many states, including New York and California, have open meeting laws that already apply in the redistricting context. Amending these represents incremental change, that merely keeps up with current trends in the use of technology and “civic media” to connect government with the public at all levels of government.¹⁷¹

Moreover, disclosure requirements would not necessarily have to apply to the state legislature. It should be much easier to advocate for such an incremental improvement in local government transparency in the state legislature, than to ask local legislatures or state legislatures to bind themselves. As the history of California’s sunshine laws suggests, state legislatures seem (for obvious reasons) more willing to impose transparency requirements on local legislatures, than on themselves.¹⁷²

The greater difficulty is how to secure compliance with a VRA-style state disclosure mandate for local redistricting information. While a disclosure mandate seems relatively uncontroversial, it is far from clear what the penalty should be for failing to disclose such information, how it should be enforced, and who would be charged with monitoring the failures to disclose. Short of draconian consequences for reporting failures, compliance would ultimately have to depend in large part on the willingness of local jurisdictions to share their data.¹⁷³

¹⁷⁰ Levitt, *supra* note 60.

¹⁷¹ ALAN R. SHARK & SUSAN CABLE, *WEB 2.0: CIVIC MEDIA IN ACTION – EMERGING TRENDS & PRACTICES* (2011).

¹⁷² California’s Brown Act imposes an open meeting regime on local legislatures, but Sacramento is exempt from similar requirements. Cain and Mac Donald, *supra* note 3.

¹⁷³ This is the experience of the SWDB with regard to local precinct information and election returns that it collects from local jurisdictions for statewide redistricting. Interview with Karin Mac Donald, Director, California Statewide Database (June 18, 2012).

But if local jurisdictions benefitted from voluntary reporting, mandatory disclosure rules may not be necessary. While a careful public policy analysis is beyond the scope of this paper, there are many reasons to believe that local governments could be encouraged to participate voluntarily. Institutions and institutional rules shape behavior. An RDC would set a statewide standard for the sophisticated, and in important respects independent, management of the redistricting process – while leaving the decision to local legislatures and their constituencies. Proper use of an RDC during redistricting would go a long way towards ensuring procedural fairness. This might matter in a legal challenge to the resulting map. If, in addition, the state assumes the costs, local jurisdictions avoid expenditures, and there are valuable secondary uses for the data beneficial for state government, politicians, and election officials,¹⁷⁴ the “RDC process” may become the default.¹⁷⁵ “Transparency policies are likely to be effective when the new information they generate can be easily embedded into the routines of information users and when information disclosers, in turn, embed users’ changed choices in their decision making in ways that advance public aims.”¹⁷⁶ It is thus critical that RDCs be built from the ground up as a service to local government officials. Based on the experience of the staff at California’s SWDB, considerable resources would have to be spent on training local officials.

VII. CONCLUSION

This article has argued for introducing a particular kind of transparency reform into local redistricting. The proposal envisions adapting new technologies to address process failures, but leaving existing local institutional arrangements in place. Statewide databases, which we have called Redistricting Clearinghouses (RDCs), would deploy third-generation targeted transparency methods to make both redistricting data and process information available publicly via the Internet in user-friendly formats before, during, and after the redistricting process – including information on representational structures for every local jurisdiction. Currently, even the most sophisticated redistricting databases still take the form of passive websites that provide mostly raw data for redistricting for only a few jurisdictions or remaps. They generally do not provide process

¹⁷⁴ In states like New York, an RDC data collection could include information on local governance structures, charters, laws, and political processes. The value of such a database could go far beyond redistricting, and help lay the groundwork for future local government reform.

¹⁷⁵ “A [transparency] policy has effects when the information it produces enters the calculus of users, and they consequently change their actions. Further effects may follow when information disclosers notice and respond to user actions. A system is *effective*, however, only when discloser responses significantly advance policy aims.” FUNG, *supra* note 52, at 54 (2007).

¹⁷⁶ *Id.* at 173-74.

information, or do so in very limited, unsystematic fashion, and frequently after the fact. Information is not standardized across jurisdictions, thus offering outsiders only a hodge-podge of difficult to access, unverifiable, material, at different times and places, that cannot serve as a basis for comparison, systematic monitoring, assessing, or taking action – certainly not within the time constraints imposed by the redistricting process. In contrast, RDCs would standardize, and systematize timely disclosure of data and process information in a centralized database across the whole range of jurisdictions within a state, targeting different types of information specifically (and differentially) at the whole range of interested governmental and non-governmental actors with a stake in the process.

This proposal faces several challenges.

First, it can be argued that the stakes are simply too low. Arguably, not much is at stake in local legislative elections. Political Scientists tell us that voter turnout is very low, there are few competitive legislative seats, voters know little about the candidates, competition for control of local legislatures is unusual, and where local elections are partisan there is little evidence that parties or candidates offer different policy choices or platforms.¹⁷⁷ So why devote precious resources to the problem, when there are so many competing demands on taxpayer dollars?

My response is that these observations do not establish which way the causation runs or what we should do about it. If local legislative elections are uncompetitive and generate very low turnout, is that because they are unimportant, or because something is wrong with local electoral structures and laws that makes them so?¹⁷⁸ Should we abandon or improve the local democratic process? The movement for continued downsizing of legislatures across New York State – even as the population and its diversity increases – suggests that voters value local representation less and less.¹⁷⁹ But the decision not to invest in the local democratic process is a choice with consequences, not a foregone conclusion.¹⁸⁰

¹⁷⁷ See David Schleicher, *Why Is There No Partisan Competition in City Council Elections? The Role of Election Law*, 23 J. LAW & POLITICS 419, 420 (2008) (citing KAREN KAUFMAN, *THE URBAN VOTER: GROUP VOTING & MAYORAL VOTING BEHAVIOR IN AMERICAN CITIES* (2004)).

¹⁷⁸ Schleicher, *supra* note 177, for example, argues that “unitary party rules” render local races noncompetitive and undercut public debate and voter choice between alternative policies in medium-sized and larger cities, thus contributing to the limited interest and low-salience of local legislative elections.

¹⁷⁹ Rick Hampson, “*Political Downsizing*” *Is Latest Weapon For Voters*, USA TODAY (Nov. 13, 2009, 11/12/2009 1:17 AM), http://usatoday30.usatoday.com/NEWS/usaedition/2009-11-12-1Adownsize12_CV_U.htm.

¹⁸⁰ Elmendorf and Schleicher argue that the “low information” electorate has “surprisingly-far-reaching implications for redistricting.” Christopher S. Elmendorf &

But does that mean local redistricting reform is a good investment, relative to other investments in election administration at the state and local levels we could make? That, of course, depends on the circumstances. How serious is the problem? And how much will it cost?

This article has argued that redistricting at the local level is particularly vulnerable to indefensible process failures that undermine the legitimacy of local legislative bodies. Moreover, complying with federal law increasingly demands that redistricting is based on the right data. The need for historical data – usually the last three election cycles – to conduct “racially polarized voting” analyses for purposes of measuring minority vote dilution, renders the once-a-decade construction of datasets at the local level problematic. This issue becomes more important as local populations grow more diverse. Continuous data collection by a standing centralized database would address this problem and help avoid litigation.¹⁸¹

As for cost, money is already being spent on redistricting by local jurisdictions individually on building GIS capabilities and datasets, setting up websites, buying redistricting software, and the consultants who do all this – admittedly only once a decade. At the same time, states are already spending substantial funds annually on databases for statewide redistricting. Given the overlap in data on local election precincts for statewide and local redistricting, it makes sense to combine these efforts and create a more sophisticated, centralized database that, given new technologies, can do much more for less.

Particularly in New York State, where the statewide redistricting database is run as an arm of the legislature, has an annual budget of over \$1.8 million in 2012-2013,¹⁸² can provide little, if any, support to localities, has met with considerable criticism, and is due for an overhaul, a move to an independent RDC of the sort described would make sense.¹⁸³

But will RDCs make a difference? How will they change the local process? The argument I have made is that free redistricting services, which localities could only take advantage of by participating in standardizing their information and producing it to a database, would engage local officials in

David Schleicher, *Districting for a Low-Information Electorate*, 121 YALE L.J. 1846, 1883, 1855 (2012).

¹⁸¹ A recent article by Gerald Benjamin, raises the issue that local jurisdictions in New York State may increasingly become vulnerable to legal challenges under the Voting Rights Act, because of the significant demographic changes across the state, in particular, the rapid growth of Hispanic populations in suburban and ex-urban cities, towns, villages, and school districts. See Benjamin, *supra* note 122, at 734. Benjamin suggests that the number of localities that have district-based elections may increase significantly, unless they shift to cumulative voting.

¹⁸² The budget includes other expenses, but hearings were completed and maps were issued by March of 2012. See <http://www.latfor.state.ny.us/hearings/>.

¹⁸³ Rick Karlin, *Work Over \$1.9 Million Budget Survives*, TIMES UNION (Apr. 3, 2012), <http://www.timesunion.com/local/article/Work-over-1-9M-budget-survives-3457174.php>.

data and process transparency practices and routines, and, in turn, set higher standards. Transparency can change the incentives of the participants, if it provides stakeholders with specific targeted information that they can translate into concrete actions. Not only local officials, but a range of governmental and non-governmental actors that currently have little access to local redistricting in jurisdictions not covered by the special provisions of the Voting Rights Act could engage local officials in the process, and citizens groups at the local level would have a far easier time participating.¹⁸⁴ The proposal relies on the understanding that democratic governance is not achieved by government alone, but by interactions and competition between a range of governmental and non-governmental actors. This is true, in particular, of democratic governance of the democratic process. The implementation of the Voting Rights Act bears this out.¹⁸⁵ As I have argued, preclearance also provides a concrete example of how disclosure requirements for local redistricting have successfully altered incentives and brought about change in covered jurisdictions. The creation of RDCs has the potential to do the same thing nationwide, improving both the process for, and the outcomes of, redistricting.

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¹⁸⁴ Altman & McDonald, *supra* note 9, at 77 (“public access [facilitated by computing] has a widely unrecognized potential to change the process of deliberation over districts by opening the door to wide public and interest group participation.”)

¹⁸⁵ *Supra notes* 144-152 and accompanying text.