REDISTRICTING TRANSPARENCY & LITIGATION

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ABSTRACT

Legislative redistricting following the 2010 Census kicked up a deluge of litigation. It did not abate. In several states, redistricting litigation extended throughout the decade, costing taxpayers millions. Factors leading plaintiffs to challenge legislative lines are multifaceted; the reasons redistricting litigation flares (and persists) are complex. One underexamined question is the extent to which process fairness in redistricting impacted redistricting litigation after the 2010 Census. At

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least in theory, a transparent redistricting process should produce fairer maps less likely to be challenged in court. But fights over maps result from myriad sources—the raw quest for political power, the availability of legal remedies, and other dynamics that process fairness may be powerless against. Still, a review of litigation spanning the last decade reveals that the degree of process transparency did matter in revealing ways, often figuring prominently in judicial assessments of maps. Examining the nexus between transparency and redistricting litigation after the 2010 round provides important insights for line drawers hoping to avoid (or at least improve their chances in) court.

INTRODUCTION

Every ten years following the release of the U.S. Census,[1] states are required to redraw state and federal legislative districts to account for population changes.[2] State legislatures have traditionally taken up the task of drawing legislative lines, despite the obvious conflict of interest.[3] In a growing number of states, independent or semi-independent redistricting commissions draw legislative maps.[4] Regardless of who draws the lines, state redistricting processes feature varying degrees of transparency.[5] In the 2010 round, some line drawers kept the process secret until just before unveiling their maps.[6] Wisconsin, a poster child for secretive redistricting in the 2020 round, only allowed members of the majority party to access deliberations and drafts—and required those who

1. U.S. CONST. art. 1, § 2, cl. 3 (requiring that an apportionment of representatives of the states must be carried out every ten years). State constitutions bear similar mandates for districting state legislative seats. *See Redistricting Criteria*, NAT'L CONF. STATE LEGISLATURES (Apr. 23, 2019), https://www.ncsl.org/research/redistricting/redistricting-criteria.aspx. The pandemic delayed the 2020 Census, altering state redistricting schedules. *See 2020 Census Delays and the Impact on Redistricting*, NAT'L CONF. STATE LEGISLATURES (Mar. 15, 2021), https://www.ncsl.org/research/redistricting/2020-census-delays-and-the-impact-on-redistricting-637261879.aspx.

2. *See* Baker v. Carr, 369 U.S. 186, 226–27 (1962) (holding that courts may enter the political thicket and require legislatures to redistrict).

3. *Who Draws the Lines?*, ALL ABOUT REDISTRICTING, LOYOLA L. SCH., https://redistricting.lls.edu/redistricting-101/who-draws-the-lines/ (last visited May 10, 2021).

4. In the 2010 round, Alaska, Arizona, California, Colorado, Idaho, Montana, and Washington used independent redistricting commissions with ultimate authority in the hands of commissioners to approve districts. *Independent and Advisory Redistricting Commissions*, COMMON CAUSE, https://www.commoncause.org/independent-redistricting-commissions/ (last visited May 10, 2021).

5. *See* Rebecca Green, *Redistricting Transparency*, 59 WM. & MARY L. REV. 1787, 1793–17 (2018) (describing transparency provisions in state redistricting processes).

6. *See id.* at 1797–98.

took part to sign confidentiality agreements.[7] In other states, particularly but not exclusively those with independent redistricting commissions, procedural rules required high levels of transparency including full public access to meetings, documents, and data.[8]

It has become routine in many states for plaintiffs to challenge district lines in court.[9] Redistricting lawsuits take many forms. Some arise before lines are finalized, seeking public access to the process or challenging some aspect of the approach.[10] Once lines are adopted, partisan or racial gerrymandering claims may ensue.[11] The Voting Rights Act (VRA) also gives rise to challenges.[12] Or, plaintiffs might argue that the lines violate the "one person one vote" requirement that districts have equal population.[13] Sometimes plaintiffs argue the lines violate a state

7. Patrick Marley, Daniel Bice & Jason Stein, *Lawmakers Were Made to Pledge Secrecy over Redistricting*, MILWAUKEE J. SENTINEL (Feb. 6, 2012), http://archive.jsonline.com/news/statepolitics/lawmakers-were-made-to-pledge-secrecy-over-redistricting-9643ep0-138826854.html/.

8. *See* Green, *supra* note 5, at 1805–11 (detailing transparency provisions in states with independent commissions); *see also Creation of Redistricting Commissions*, NAT'L CONF. STATE LEGISLATURES (Jan. 5, 2021), https://www.ncsl.org/research/redistricting/creation-of-redistricting-commissions.aspx.

9. Richard L. Hasen, *What to Expect When You're Electing: Federal Courts and the Political Thicket in 2012*, 59 FED. LAW. 34, 34 (2012) (describing how election litigation since *Bush v. Gore* in 2000 doubled from "94 cases nationally before 2000 to about 237 cases per year afterward" and noting that the total includes "dozens of redistricting controversies."); *see also* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 646 (2002) (noting that a "huge amount of the redistricting in the United States already finds its way into the courts"). Importantly, not all redistricting plaintiffs have the same goals. *See* Lisa Marshall Manheim, *Redistricting Litigation and the Delegation of Democratic Design*, 93 BOSTON U.L. REV. 563, 571–72 (2013) (critiquing the plaintiffs' motives in redistricting litigation). In the case of partisans seeking to overturn maps, the impetus may be a raw bid to recapture political power. *See id.* at 572. In the case of nonprofit groups pursuing litigation, the goal might be tied bolstering democratic institutions and/or to interests of funders. *See id.*

10. *See infra* Part II.

11. *See generally, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (holding partisan gerrymandering claims nonjusticiable). Still, the plaintiffs may bring partisan gerrymandering claims if state constitutional language supports such action. *See id.* at 2507. Racial gerrymandering claims are litigated under the Equal Protection Clause of the U.S. Constitution emanating from U.S. Supreme Court precedent commonly referred to as the *Shaw* line of cases and their progeny. Shaw v. Reno, 509 U.S. 630, 649 (1993); *see generally* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA*, 59 WM. & MARY L. REV. 1559 (2018) (describing the *Shaw* line of cases and their progeny with emphasis on the intersection of racial gerrymandering and Voting Rights Act (VRA) section 2 claims).

12. Charles & Fuentes-Rohwer, *supra* note 11, at 1571 (describing trends in VRA section 2 litigation).

13. *See generally* Reynolds v. Sims, 377 U.S. 533 (1964) (establishing "one person one vote" equipopulation requirement). Even today, equipopulation questions remain surprisingly unsettled. *See* Evenwel v. Abbott, 136 S. Ct. 1120, 1123, 1132–33 (2016) (holding that states may base legislative districting on total population figures for purposes of ensuring equal numbers of people in district).

constitutional or statutory provision.[14] Far from a settled area of law, redistricting lawsuits have proliferated since the 1960s when the Supreme Court first entered the political thicket.[15] The decade following the 2010 Census was no exception.[16]

In 2012, the Center for Public Integrity (CPI) released a report measuring the level of transparency in each state's redistricting process and assigning each state a grade of "A" through "F".[17] The CPI assessed this transparency grade based on a variety of inputs, including whether the line drawing body held public meetings; whether those public hearings actively solicited public input on proposed maps; whether schedules of public meeting and/or hearings were available to the public; whether the line drawing body accepted redistricting plans submitted by the public; and whether the line drawing body made a redistricting website or online resource of redistricting information publicly available.[18]

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14. *See, e.g.*, Vesilind v. Virginia State Bd. of Elections, 295 Va. 427, 432 (2018) (unsuccessfully challenging several Virginia legislative districts on the grounds that they violated the Virginia state constitution's compactness mandate).

15. Baker v. Carr, 369 U.S. 186, 187–88 (1962). Scholars commonly note the plentiful nature of redistricting litigation. *See, e.g.*, Hasen, *supra* note 9, at 34; *see also, e.g.*, Issacharoff, *supra* note 9, at 646. For an interesting take on litigation's problematic impact on the redistricting process, see Manheim, *supra* note 9, at 571 (critiquing the lack of transparency about redistricting litigants' motives).

16. *See infra* App. C. Various reporting has tried to quantify the cost of redistricting litigation. *E.g.*, Dave Ress, *Redistricting Legal Battle Cost to Taxpayers: $4 Million and Rising*, DAILY PRESS (Jul. 13, 2018), https://www.dailypress.com/government/local/dp-nws-redistricting-bill-20180713-story.html. In 2018, Virginia House Speaker Kirk Cox released a statement on the eve of Virginia maps' second visit to the U.S. Supreme Court that redistricting litigation had cost Virginia taxpayers $4,067,098.03. *Id.* The Milwaukee Journal Sentinel reported in 2019 that redistricting litigation had cost that state nearly $3.5 million since the legislature drew its lines in 2011. Patrick Marley, *Redistricting Legal Fight on Track to Cost Wisconsin Taxpayers $3.5 Million*, MILWAUKEE J. SENTINEL (Jan. 22, 2019), https://www.jsonline.com/story/news/politics/2019/01/22/wisconsin-gerrymandering-legal-fight-track-cost-3-5-million/2645940002/.

17. *See* Caitlin Ginley, *Grading the Nation: How Accountable Is Your State?*, CTR. FOR PUB. INTEGRITY (Mar. 19, 2012), https:/publicintegrity.org/state-politics/grading-the-nation-how-accountable-is-your-state/; *see also, e.g.*, Maureen West, *Arizona Gets D+ Grade in 2012 State Integrity Investigation*, CTR. FOR PUB. INTEGRITY (Mar. 19, 2012), https://publicintegrity.org/politics/state-politics/arizona-gets-d-grade-in-2012-state-integrity-investigation/ (the CPI report card for Arizona's transparency integrity).

18. As explored *infra*, these factors do not elicit a perfect assessment of the level of transparency a process offered. Some states received an "A" grade when subsequent litigation revealed that transparency measures like open meetings and solicitation of public input were in fact empty gestures serving as a front for backroom dealing. Florida's process, discussed *infra* pp. 2027–30, provides evidence of this phenomenon. The CPI's approach is imperfect but serves as a rough proxy to measure a baseline comparative level of process transparency. *See infra* App. A.

Using a state's CPI grade as a conversation starter, what role did transparency play in fueling or quelling lawsuits challenging the lines? Did states that received high CPI grades see less redistricting litigation? Looking at court opinions issued over the decade, to what extent did the level of transparency in a state's redistricting process affect courts' assessment of the legality of the lines and/or the outcome of lawsuits filed? Were courts more inclined to bless maps that emerged from a transparent process? State CPI redistricting transparency grades and court opinions provide vehicles to assess these questions. Resulting ruminations may be useful to those considering whether and how to incorporate transparency measures.

Part I starts with preliminaries, first assessing transparency as a value in redistricting, its boundaries, its connection to process fairness, and its dark side. It then establishes that state CPI transparency grades were unreliable predictors of litigation volume in the past decade. While some states with highly secretive processes did face onerous litigation, others received excellent CPI grades and also experienced multiple and lengthy court battles. Positing a few reasons why CPI scores seem to bear little relation to litigation volume helps set the stage.

Parts II through V turn to examining the impact of redistricting transparency on litigation from four different angles: First, did redistricting processes that were transparent in name only insulate states from litigation? Looking at Florida's experience as an example, the answer appears to be no—in that instance, faux-transparency fueled litigation. Second, did meaningful redistricting reform with robust transparency provisions reduce redistricting litigation? Apparently not. In two states with significant reform in place for the first time in the 2010 round, litigation blossomed.[19] Third, do courts care about transparency? Most assuredly so. Court opinions throughout the decade routinely discussed the degree of transparency state processes featured (or did not).[20] When legal standards required courts to evaluate the intent of line drawers, courts drew adverse inferences against shrouded redistricting processes.[21] And fourth, is the Supreme Court's 2019 ruling that partisan gerrymandering claims are nonjusticiable likely to significantly reduce litigation volume in states with opaque processes that produce unfair maps in the coming decade? The discussion below cautions otherwise.

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19. *See infra* App. C.

20. *E.g.*, Vandermost v. Bowen, 269 P.3d 446, 455 (Cal. 2012).

21. *See, e.g.*, Benisek v. Lamone, 266 F. Supp. 3d 799, 809 (D. Md. 2017), *aff'd*, 138 S. Ct. 1942 (2018).

I. PRELIMINARIES

Examining the relationship between process transparency and redistricting litigation engages a complex set of dynamics. This section discusses the contours of transparency in redistricting and the inconclusive relationship between CPI grade and litigation states experienced.

A. Transparency in Redistricting

This paper uses states' CPI transparency grades as an organizing tool, but it is worth stepping back to clarify the role of transparency in the redistricting process, what exactly that term refers to, and what discussing it in relation to litigation volume does and does not accomplish.

Redistricting transparency is complex, featuring many different possible components. Most state statutes that affirmatively address redistricting transparency (roughly half did in the 2010 round) do so by mandating some combination of public meetings, publication of draft maps, and advance public notice of both.[22] These provisions are intended to allow the public a chance to see "what their government is up to."[23] But state redistricting transparency measures are often more than one-way information flows. Some redistricting transparency statutes and state practice in the 2010 round also enabled public engagement in the process, namely avenues for public comment and participation in line drawing.[24] Public engagement has long been a core feature of reform efforts that seek not only to give citizens a seat access to the line drawing process, but also ways for members of the public to submit comments and their own maps.[25]

Two of the CPI's factors reflect this "two way street" view of redistricting transparency. CPI's transparency metric included whether or not the line drawing body actively solicited public input on proposed maps and whether the line drawing body accepted maps from the public.[26] CPI's decision to include public engagement reflects what many good

22. Green, *supra* note 5, at 1794.

23. Borrowing a phrase often used to describe the purpose of the federal government's signature transparency law, the Freedom of Information Act: "The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to." U.S. Dep't of Just. v. Reps. Comm. for Freedom of Press, 489 U.S. 749, 772–73 (1989) (citing EPA v. Mink, 410 U.S. 73, 80 (1973)).

24. Green, *supra* note 5, at 1795 (providing examples of state redistricting statutes that require avenues of public comment).

25. *Id*. at 1806 (describing transparency provisions and public participation measures built into state redistricting commission processes).

26. *See infra* App. B.

government advocates understand: government transparency requires not just making information available to the public, but also creating avenues for the public to engage in government decision making.[27] Thus, in important ways, what CPI measured was more than one-way transparency—it attempted also to measure the degree to which the process was responsive to and accommodating of public input. The descriptor of "transparency" used here adopts this broader understanding. It assumes that a robustly transparent redistricting process in the 2010 round featured access to line drawers' meetings, maps, and data and also enabled members of the public to meaningfully engage in the process through public comment and submitting maps of their own.[28]

A second clarification involves the relationship between transparency and fairness. Part of the premise of this discussion is that process transparency in redistricting makes the process more fair.[29] Yet,

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27. Soon after taking office, President Obama issued a memorandum to the heads of federal government agencies. The memo emphasized the importance of making federal documents and data publicly available (what we think of as transparency), but also stressed the need for civic participation in government processes—the idea that transparency does not go far enough on its own, that it should enable public participation in government decision making. This impulse is likely to inform the CPI's inclusion of public participation in its transparency metric. *See* Press Release, Barack Obama, President, White House, Memorandum on Transparency and Open Government (Jan. 21, 2009), https://obamawhitehouse.archives.gov/the-press-office/2015/11/16/memorandum-transparency-and-open-government ("Government should be participatory. Public engagement enhances the Government's effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information. Executive departments and agencies should also solicit public input on how we can increase and improve opportunities for public participation in Government.").

28. Not all scholars are keen on participatory democratic decision making, noting important downsides. *See e.g.*, Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 852 (2014) ("In the midst of the declining governing capacity of the American democratic order, we ought to focus less on 'participation' as the magical solution and more on the real dynamics of how to facilitate the organization of effective political power."); JONATHAN RAUCH, CTR. FOR EFFECTIVE PUB. MGMT. BROOKINGS, POLITICAL, POLITICAL REALISM: HOW HACKS, MACHINES, BIG MONEY, AND BACK-ROOM DEALS CAN STRENGTHEN AMERICAN DEMOCRACY 21, 6 (2015) (praising the art of the backroom deal, lamenting the demise of the "political machine") ("Practically every political reformer in the country—and for that matter practically every schoolchild—will tell you that machines are rotten, that careers are slimy, and that what politics needs is more popular participation, more attention to issues, more transparency, more disinterest more fresh faces. The one-sided conversation has contributed to one-sided policies and outcomes, in turn contributing to [a predictable result]: governing is harder.").

29. Of the states that had independent redistricting commissions in the 2010 round, not all sported high CPI grades: Alaska (F), Arizona (A), California (A), Colorado (C-), Idaho (A), Montana (A), and Washington (A). *See infra* App. C. According to CPI researchers, Alaska's redistricting transparency fell short because "regular citizens had a difficult time knowing the

anyone who has followed redistricting knows, a transparent process is not necessarily a fair process. A legislative line drawing process may check all the boxes indicating a transparent process took place: it may hold public meetings, it may publish preliminary maps well in advance of finalizing them, and it may accept public comments and alternative maps. As a result, the CPI grade might be high.[30] But these features do not necessarily mean the goals of transparency are served. The real horse trading may still have taken place in the back room. Until recently, members of the public lacked the access to data and tools to hold legislators accountable.[31] Line drawers could make a show of transparency without actually walking the walk.[32] As the discussion below explores, sometimes litigants and courts could see through the ruse; in an unknowable number of instances, they could not.

Finally, even when redistricting transparency is genuine and reflects process fairness more generally, transparency has a dark side.[33] Public

details enough to meaningfully participate. Steve Aufrecht, a retired University of Alaska Anchorage professor who closely tracked the redistricting process and published the results on his blog and in the Anchorage Daily News noted that 'they had lots of meetings, but in most cases, it was impossible for the public to know in advance the context of what they were doing or specifically what they were doing. Except for the groups that were putting alternate proposals in. They had an incredible number of meetings all over the place, but with little notice and almost no prior information. They were good for saying we had all these meetings, but not for real exchange. A lot of the meetings were down time waiting for people to show up.'" 2012 CPI Data (on file with author). As for Colorado, according to Bob Loevy, a retired political science professor and Republican appointed to Colorado's Commission by the Chief Justice of the Colorado Supreme Court, the commission amounted to no more than a "'marionette show' in which the outside mapping experts served as puppeteers." Lois Beckett, *Colorado Redistricting Had Inside Help*, PROPUBLICA (Feb. 9, 2012, 9:00 PM), https://www.propublica.org/article/kumbaya-to-confrontation-colorado-redistricting-started-with-best-intention. Instead of Colorado commission staff drawing the maps, ProPublica described the process this way: "Republicans and Democrats on the commission were working off-hours with teams of outside consultants who were crafting competing partisan maps. The consultants were not on the payroll of the commission—or even of the political parties. Instead, at least some of their salaries were paid by nonprofit groups who had no legal obligation to disclose who their funders were or how they spent their money." *Id.*

30. For a list of the factors feeding CPI's grade, *see infra* App. A. The CPI released its redistricting transparency grades in 2012. A shortcoming of the CPI grades for present purposes is that they do not capture the degree of transparency in redistricting that occurred after the initial round—whether court ordered or politically motivated. *See* discussion *infra* at Part IV (discussing, for example, Perez v. Abbott, 253 F. Supp. 3d 864, 961 (W.D. Tex. 2017) involving the Texas legislature's decision to use revised lines once the U.S. Supreme Court lifted preclearance requirements following *Shelby County v. Holder*.).

31. *See infra* App. A.

32. Florida's experience in the 2010 round is a good example of this. Florida's process received a CPI transparency grade of A and yet litigation subsequently uncovered that partisan shenanigans infected the process behind the scenes. *See* discussion *infra* Part II.

33. *See* Green, *supra* note 5, at 1818–21 (discussing the downsides of transparency).

comment mechanisms display this problem.[34] As Bruce Cain convincingly argues, "[t]he idea that disinterested citizens will come forward in great numbers and channel [line drawers] in the direction of some pure public interest is naïve."[35] "Public input" is very often the product of monied interests and organized interest groups that may distort rather than reflect the true public will.[36] Transparency measures can undoubtedly be manipulated (and are).[37] Related to these distortive effects, transparency in the redistricting realm may benefit only the most sophisticated among us unless the data and information transparency mechanisms reveal is meaningfully contextualized and the public is provided resources and tools to digest it. In redistricting, this can be a tall order—the process involves complex laws, sophisticated data, and mapping tools that although they are becoming far more user-friendly, are still out of reach for too many would-be participants.[38]

Despite these caveats, process transparency is an important guidepost. As most reformers, line drawers, and courts recognize, transparency—despite being an imperfect tool—provides the greatest hope for fairness in the line drawing process members of the public have.

B. Litigation Volume

One reason we might expect a state with a transparent redistricting process to experience less litigation is intuitive. Line drawers interested in self-dealing or otherwise manipulating lines to satisfy ulterior motives might predictably attempt to obfuscate the process.[39] That secretive process is likely to yield maps that are unfair (otherwise, why duck and cover?) Unfair maps would logically render opponents more likely to

34. *See generally* Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808 (2012) (evaluating the efficacy of independent citizen commissions (ICC) in redistricting).

35. *Id.* at 1841. Cain also points another caution: "Greater transparency and openness to public input might have the ironic effect of heightening the expectations and disappointment of those who do not get what they want from the reformed redistricting process." *Id.* at 1842.

36. *See* Lawrence Lessig, *Against Transparency*, NEW REPUBLIC (Oct. 9, 2009), https://newrepublic.com/article/70097/against-transparency (arguing that government transparency has significant downsides); *see also generally* Edward H. Stiglitz & Aviv Caspi, *Observability and Reasoned Discourse: Evidence from the U.S. Senate* (Cornell Legal Studies, Research Paper, No. 20-42, 2020), https://ssrn.com/abstract=3627564 (describing how transparency can distort reasoned discourse).

37. Some of these shortcomings are documented in Green, *supra* note 5, at 1817–21.

38. *Id.* at 1831–33 (discussing some of the ways technology can help the public engage more meaningfully in the redistricting process). Note that public mapping interfaces are becoming increasingly user-friendly. *See also infra* note 253 (discussing more recent development of tools to assist members of the public in engaging the redistricting process).

39. *See* Green, *supra* note 5, at 1789 ("[T]he redistricting process . . . took place in the proverbial . . . smoke-filled room.").

litigate.[40] But the assumption that a more transparent process might lead to less litigation has lots of holes, starting with the reality that transparency may fuel litigation by exposing issues that otherwise would not have seen the light of day! Maybe greater transparency lowers barriers to disputing maps. The relationship between transparency and litigation volume is far from straightforward. Examining the relationship between CPI grade and litigation volume bears this out.[41]

A few low-transparency-grade states did experience quite a lot of litigation. Maryland (CPI grade of D-), North Carolina (F), Texas (F), Virginia (C), and Wisconsin (F) all saw redistricting court battles throughout the decade.[42] Redistricting litigation raged in those states in large part because of highly partisan processes in which a majority party dominated the process (and excluded the minority party almost entirely).[43]

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40. Sometimes discovery enables litigants to pull back the veil and see what happened, though for reasons discussed below, legislative privilege may thwart such attempts. *See id*. at 1800–04 (discussing legislative privilege and redistricting).

41. The present discussion does not attempt a qualitative accounting of redistricting litigation volume in each state. Such an effort could be pursued from a number of different angles. For example, litigation volumes might be assessed by the total number of months a state spent defending its lines and/or the amount of money states spent defending their maps. *See supra* note **Error! Bookmark not defined.** (discussing news reports of the cost of defending maps in a few states). Such efforts to quantify litigation volume would be thorny in a number of respects, not the least of which is apples to oranges comparisons. For example, different redistricting authority in different states complicates the comparison, as does including both federal and state claims which offer litigants varying degrees of redress from state to state and which, during the 2010 round, still featured VRA §5 coverage of only some states and jurisdictions. Acknowledging these difficulties, the present effort relies on a qualitative assessment each state's redistricting litigation over the past decade. *See infra* App. C.

42. *See infra* App. C.

43. *See, e.g.*, Jenna Portnoy, *Hogan on High Court Ruling: 'Gerrymandering Is Wrong, and Both Parties Are Guilty'*, WASH. POST (June 27, 2019, 1:39 PM), https://www.washingtonpost.com/local/md-politics/heres-what-the-supreme-court-ruling-on-gerrymandering-means-for-maryland/2019/06/27/755f6dcc-92b9-11e9-b570-6416efdc0803_story.html; Billy Corriher, *North Carolina Elections Show the Persistence of Partisan Gerrymandering*, FACING S. (Nov. 18, 2020), https://www.facingsouth.org/2020/11/north-carolina-election-results-show-persistence-partisan-gerrymandering; John C. Moritz, *How Texas Became 'Ground-Zero' for Gerrymandering, Voter Suppression*, CALLER TIMES (Feb. 27, 2020, 8:00 AM), https://www.caller.com/story/news/politics/elections/2020/02/27/texas-republicans-democrats-gerrymandering-legislative-districts-voter-suppression/4545917002/. Virginia's process was an outlier within this group in this respect. While the Republican Party held a majority in Virginia's General Assembly in the 2010 round, the maps were widely considered bipartisan and incumbent-protective—a bipartisan gerrymander in which legislators of both parties protected their seats. *See* Thomas E. Mann & Norman J. Ornstein, *The Rigged Redistricting Process*, BROOKINGS (Mar. 18, 2011), https://www.brookings.edu/opinions/the-rigged-redistricting-process/ (describing Virginia's process as "a classic bipartisan incumbent gerrymander").

In some states that received low CPI grades, litigation barely surfaced, for example in Indiana, New Hampshire, North Dakota, Oklahoma, and Utah. Each of these states received a grade of F and each state endured very little if any litigation.[44] One factor that may have contributed is their size and relative homogeneity. As noted above, two major triggers for redistricting litigation are racial gerrymandering and VRA claims.[45] None of these five "F" states had minority populations large enough to sustain a majority minority district in 2010, nor were these states covered jurisdictions under section 5 of the VRA.[46] These factors likely contributed to lower litigation volumes in these states.[47]

Then again, many states with large minority populations avoided lengthy litigation.[48] Mississippi, with a minority population in 2010 of forty-one percent, received the stellar CPI grade of A and experienced relatively few redistricting lawsuits.[49] South Carolina, with a minority population of thirty-four percent in 2010 and a CPI grade of B-, avoided rampant litigation too (at least compared to its neighbor to the north).[50]

A key driver of redistricting litigation volume is, of course, politics. Political culture, retributive impulses, reform agendas, and levels of political (mis)trust all play a role in fueling litigation.

In the last round, controversial partisan powerplays colored much of the decade's intrigue. One prime example is REDMAP. Republicans targeted certain states for line drawing power grabs in an effort dubbed

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44. *See infra* App. C. Alaska, Wyoming, Montana, North Dakota, South Dakota, Vermont, and Delaware have only one U.S. congressional district. Generally, these states did see less litigation. *Id.*

45. *See, e.g.*, Nicholas O. Stephanopoulos, *Spatial Diversity*, 125 HARV. L. REV. 1903, 1929, 1933 (2012) (dissecting the impact of race and geography as it relates to redistricting litigation).

46. Before *Shelby County* did away with the VRA coverage formula in 201. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013).

47. Another possibility should be noted. Perhaps a greater volume of litigation might have occurred in states with low CPI grades, but a lack of transparency stymied it. Shrouding evidence from public view is a time-honored strategy for shielding legislative action from oversight. Maybe in these states this strategy proved successful.

48. For purposes of VRA section 2 litigation, the size, compactness, and political cohesion of minority voters determines whether or not a claim will be successful. *See* Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986) (setting out preconditions for successful VRA section 2 claims).

49. *See Population of Mississippi: Census 2010 and 2000 Interactive Map, Demographics, Statistics, Quick Facts*, CENSUS VIEWER, http://censusviewer.com/state/MS (last visited May 10, 2021); *see also infra* App. C.

50. *See Population of South Carolina: Census 2010 and 2000 Interactive Map, Demographics, Statistics, Quick Facts*, CENSUS VIEWER, http://censusviewer.com/state/SC (last visited May 10, 2021); *see also infra* App. C.

the Redistricting Majority Project, or "REDMAP."[51] At the top of the list of target states were those with narrow Democratic majorities in state legislatures: Pennsylvania, Ohio, Michigan, North Carolina, and Wisconsin.[52] Focusing on winning legislative races in those states prior to line drawing gave Republicans control of the process.[53] After pouring resources into winning legislative majorities in those states, Republicans drew lines with the goal of maintaining those majorities.[54] Elections held after line drawing in these and other targeted states, as planned, often featured Republicans with fewer votes statewide nevertheless capturing a majority of U.S. congressional and/or state legislative seats.[55] Many of these states received poor CPI grades as partisans sought to cover their tracks.[56]

Of the five high-priority REDMAP states, three experienced heavy redistricting litigation (Pennsylvania, North Carolina, and Wisconsin).[57] But two did not (relatively speaking): Ohio and Michigan.[58] Why? One reason might be that Ohio and Michigan's initiative process gave reformers a better avenue to push for change than filing lawsuits.[59]

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51. For a detailed description of these efforts, *see* DAVID DALEY, RATF**KED: THE TRUE STORY BEHIND THE SECRET PLAN TO STEAL AMERICA'S DEMOCRACY xxi (2016). *See also* Tim Dickinson, *How Republicans Rig the Game*, ROLLING STONE (Nov. 11, 2013), https://www.rollingstone.com/politics-news/how-republicans-rig-the-game-111011. Republicans were explicit about their designs. *See, e.g.*, Karl Rove, *The GOP Targets State Legislatures: He Who Controls Redistricting Can Control Congress*, WALL ST. J. (Mar. 4, 2010), https://www.wsj.com/articles/SB10001424052748703862704575099670689398044.

52. DALEY, *supra* note 51, at 3.

53. *See id.* at xxi.

54. *See id.* at 2.

55. Debates raged throughout the decade over whether gerrymandering was the cause of such mismatched outcomes, some arguing the distortions had to do with geography, namely wasted votes of Democrats in crowded urban centers. *See, e.g.*, John Sides & Eric McGhee, *Redistricting Didn't Win Republicans the House*, WASH. POST (Feb. 17, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/02/17/redistricting-didnt-win-republicans-the-house/.

56. In the five states REDMAP targeted, all featured CPI grades of F (North Carolina, Pennsylvania, Ohio, Michigan and Wisconsin). *See infra* App. C. Ohio and Michigan are two states on REDMAP's target list that, comparatively speaking, did not see a high volume of litigation. *Id.*

57. *See infra* App. C (Pennsylvania, North Carolina, and Wisconsin).

58. *See infra* App. C (Ohio and Michigan).

59. Reform in both states produced significant changes to the line drawing process (after much litigation, especially in Michigan, over such reform efforts). *See* Michael Li & Kelly Percival, *The Attack on Michigan's Independent Redistricting Commission*, BRENNAN CTR. (Feb. 13, 2020), https://www.brennancenter.org/our-work/analysis-opinion/attack-michigans-independent-redistricting-commission (describing Michigan reformers fight to establish a commission and the litigation it produced). For an overview of the reform effort in Ohio, *see* FAIR DISTRICTS OHIO, http://www.fairdistrictsohio.org (last visited May 10, 2021), and Grayson Keith Sieg, Note, *A Citizen's Guide to Redistricting Reform Through Referendum*, 63 CLEV. ST. L. REV. 901, 942–43 (2015) (describing redistricting reform in

Perhaps the lever of direct democracy available in these two states but not the other three contributed to some degree to dissuading would-be plaintiffs who instead put resources towards more direct ways to fix the process. Plaintiffs in the other target REDMAP states—North Carolina, Pennsylvania, and Wisconsin—lacked direct democracy tools. Litigation over the lines in those states was the only avenue.

* * *

What to make of these preliminaries? Transparency in redistricting can be superficial, gamed and/or irrelevant to whether litigation unfolds. It is clear that drivers of redistricting litigation are complex. The following discussion stakes the claim that although not a reliable predictor of litigation volume, the degree of transparency in state redistricting processes mattered in ways that are instructive.

II. CAN FEIGNED TRANSPARENCY FUEL LITIGATION? (YES)

Line drawers engaging in faux-transparency risked bringing protracted litigation upon themselves in the 2010 round. One good example is Florida. Florida received a CPI grade of A, but the process nevertheless produced classically unfair maps.[60] When litigation rained down, discovery revealed that Florida's A grade concealed massive transparency deficiencies when it came to how line-drawing decisions were actually made.

The 2010 round represented the first time Florida redistricted under a new constitutional provision intended to stem partisan gerrymandering in the state. On November 2, 2010, sixty-three percent of Florida voters supported an amendment to the Florida state constitution prohibiting partisanship in legislative line drawing.[61] Many state redistricting reform efforts focused on wresting redistricting power from the legislature completely.[62] Floridians chose to leave the legislature in charge but

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Ohio). For details on Michigan reformers efforts, *see* VOTERS NOT POLITICIANS, https://votersnotpoliticians.com (last visited May 10, 2021) and Li & Percival, *supra* note 59.

60. *See infra* App. B; *see also* Mary Ellen Klas, *Florida Supreme Court Orders New Congressional Map with Eight Districts to Be Redrawn*, TAMPA BAY TIMES (Jul. 9, 2015), https://www.tampabay.com/news/politics/stateroundup/florida-supreme-court-orders-new-congressional-map-with-eight-districts-to/2236734/.

61. *See* FLA. CONST. art. III, §§ 20–21 ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent"); *see also* LINDA HONOLD & ADRIEN SCHLESS-MEIER, BRENNAN CTR., CASE STUDIES OF STATE REDISTRICTING CAMPAIGNS, VOLUME 3: FLORIDA: FAIRDISTRICTSFLORIDA.ORG 3 (2015).

62. *See* Green, *supra* note 5, at 1805. For instance, California voted to vest redistricting power in the independent California Citizens Redistricting Commission (CCRC) in 2010. *See* Carol Goodhue Shull & Robert Shull, *California Gets B-Grade in 2012 State Integrity Investigation*, CTR. FOR PUB. INTEGRITY (last updated Nov. 2, 2015, 5:06 PM),

required that it refrain from politicizing the process.[63] A tall order as it turned out.

When the state legislature adopted new maps on February 9, 2012, critics quickly sued, arguing that the maps defied the constitutional amendment's prohibition of politics in the process.[64] The Florida Supreme Court upheld the house districts but agreed with the challengers that the senate districts violated the amendment.[65] The legislature subsequently submitted a revised senate map for court review on March 27, 2012.[66] The Florida Supreme Court approved the revisions, and the Department of Justice precleared the maps on April 30, 2012, the same year CPI bestowed its A grade on the process.[67]

But this early jostling did not end the story, in large part because of the lopsided impacts the maps produced. After a round of elections under the new maps, outcomes featured a classic lopsided tilt. Even though Democrats outnumbered Republicans in Florida (forty-one percent vs. thirty-six percent respectively), Democrats won just ten of Florida's twenty-seven congressional seats in the first election under the new maps.[68] The state senate featured a 12-28 split, and Republicans in the house outnumbered Democrats by more than 2 to 1.[69] Plaintiffs were left with the distinct impression that something fishy had gone on in the Sunshine State's redistricting process.

Despite the transparency measures in place that earned Florida the highest mark from CPI, subsequent litigation revealed that Florida's grade was unearned. The charge that political factors had infiltrated the process to benefit Republican legislators again landed Florida's map in court.[70] Trial court judge Terry Lewis had the unenviable job of parsing

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https://publicintegrity.org/politics/state-politics/california-gets-b-grade-in-2012-state-integrity-investigation/.

63. *See* FLA. CONST. art. III, § 20 (voters passed Amendment 6 to the Florida Constitution in 2010, established additional criteria to the redistricting process including a prohibition on favoring or disfavoring any political party).

64. *Florida*, ALL ABOUT REDISTRICTING, LOYOLA L. SCH., https://redistricting.lls.edu/state/florida (last visited May 10, 2021).

65. *Id.*

66. *Id.*

67. *Id.* Florida at the time was still a covered state under VRA section 5, and thus subject to preclearance of its maps. *See About Section 5 of the Voting Rights Act*, DEP'T OF JUST., https://www.justice.gov/crt/about-section-5-voting-rights-act#:~:text=Section%205%20was%20designed%20to,applicable%20only%20to%20certain%20states (last visited May 10, 2021).

68. HONOLD & SCHLESS-MEIER, *supra* note 61, at 13.

69. *Id.*

70. *See* Romo v. Detzner, No. 2012-CA-00412, 2014 WL 3797315, at *7 (Fla. Cir. Ct. July 10, 2014).

the extent to which politicians behaved politically in drawing the maps in contravention of Florida's new state constitutional mandate.[71]

In the end, after lengthy discovery battles,[72] Judge Lewis looked beyond lip-service transparency and found a process riddled with behind-the-scenes political intrigue.[73] Two processes had in fact taken place: an open and transparent process that ticked the boxes for CPI's A grade, and a second shadow process in which political operatives worked to pass partisan maps, making what Judge Lewis described as a "mockery of the Legislature's proclaimed transparent and open process of redistricting," and "going to great lengths to conceal from the public their plan and their participation in it."[74] Judge Lewis's opinion called out the political intrigue that had manipulated transparency measures built into the process:

> In this secretive process, … political consultants would make suggestions and submit their own partisan maps to the Legislature through that public process, but conceal their actions by using proxies, third persons who would be viewed as "concerned citizens," to speak at public forums from scripts written by the consultants and to submit proposed maps in their names to the Legislature, which were drawn by the consultants.[75]

Judge Lewis ultimately struck Florida's maps as violating the state constitutional prohibition of favoring a political party in the line drawing process.[76] The Florida Supreme Court later agreed.[77]

Litigation rained down on Florida's maps from all sides. In addition to the state constitutional claim and suits brought to access information about the process,[78] plaintiffs brought claims under the VRA,[79] they levied racial gerrymandering suits,[80] and they challenged the maps on equipopulation grounds.[81] The "story behind the story" of Florida's "A"

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71. *See id.* ("There are some real problems in trying to make such a determination of legislative intent in this case.").

72. *See* discussion *infra* note 173–79.

73. *See Romo*, 2014 WL 3797315, at *11.

74. *Id.*

75. *Id.*

76. *See id.* at *3

77. League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 416 (Fla. 2015).

78. *See* League of Women Voters of Fla. v. Browning, 863 F. Supp. 2d 1155, 1157 (N.D. Fla. 2012).

79. *See* Brown v. Detzner, No. 4:15-cv-00398-MW/CAS, at 3–4 (N.D. Fla. 2016).

80. *See* Warinner v. Detzner, No. 6:13-cv-01860-ORL-JA-DAB, at 3, 6–7 (M.D. Fla. 2014); *see also* Warinner v. Detzner, No. 4:14-cv-00164-JA, at 1 (N.D. Fla. 2014).

81. Calvin v. Jefferson Cnty. Bd. of Comm'r, No. 4:15-cv-00131-MW-CAS, at 2 (N.D. Fla. 2015).

CPI grade demonstrates that faked transparency does not insulate line drawers from suit. Faked transparency can fan the flames.

III. DOES REDISTRICTING REFORM INSULATE STATES FROM LITIGATION? (NOPE)

Like Florida, Arizona also implemented citizen-led redistricting reform in the last round.[82] Successful reform of the redistricting process in Arizona took power away from the state legislature to draw the lines via a citizen commission with laudable transparency features. Those transparency measures, however, failed to stem litigation in the ensuing decade for reasons worth exploring.

In 2011, Arizona voters, through a ballot initiative, installed a commission to redistrict the state.[83] The Republican-led legislature immediately challenged the existence of the commission, specifically whether the people through the initiative process possess authority to remove the statute legislature's constitutionally-delegated power to draw the lines.[84] After the U.S. Supreme Court ruled in a 5–4 decision that the people could strip the legislature of the power to redistrict, Arizona's commission got to work.[85]

One of the signature features of the commission was its robust transparency.[86] Before drawing a single line, commissioners embarked on a "listening tour," holding twenty-three public meetings around the state.[87] Once line drawing began, the commission sought public comment at each of its livestreamed meetings, allowing members of the public to fill out a "request to speak" form and supply their input for the record.[88] The commission also made available an online portal for public

82. *See generally* COLLEEN MATHIS ET AL., ASH CTR. FOR DEMOCRATIC GOVERNANCE & INNOVATION, THE ARIZONA INDEPENDENT REDISTRICTING COMMISSION: ONE STATE'S MODEL FOR GERRYMANDERING REFORM (2019) (describing Arizona's redistricting reforms).

83. *See* Proposition 106 § 3 (Ariz. 2000), http://www.azsos.gov/election/2006/info/pubpamphlet/sun sounds/english/prop106.htm.

84. Ariz. Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 814 (2015).

85. *See id.* at 792–93.

86. The Arizona redistricting commission's transparency requirements are enshrined in its constitution, Ariz. Const. Article I, Part 2, Section 1(16) ("The independent redistricting commission shall advertise a draft map of congressional districts and a draft map of legislative districts to the public for comment, which comment shall be taken for at least thirty days."). *See also* MATHIS ET AL., *supra* note 82, at 4 (describing the Arizona commission's transparency protections, "the Arizona Independent Redistricting Commission (AIRC) went to great lengths to ensure the public had numerous opportunities and methods to engage throughout the entire process.").

87. Carson Hanson, *The Value of Democracy: Independent Redistricting Commissions as a Solution for Partisan Gerrymandering*, MEDIUM (Aug. 30, 2020), https://chanson7908.medium.com/the-value-of-democracy-6dad087b65dc.

88. *See id.*; MATHIS ET AL., *supra* note 82, at 5.

comment.[89] Once the commission produced and published its draft maps, commissioners again traveled the state, visiting thirty municipalities to gather feedback on the draft lines.[90] The public ultimately supplied more than 7,400 items of input and 224 maps.[91] It was not an empty exercise; the commission absorbed public feedback. According to the commission chair, "Commissioners considered this feedback and incorporated much of it into the final maps."[92] Finally, the Arizona commission staffed a public information officer and a video/IT expert who worked to enable the public to participate.[93]

Despite these robust transparency measures, litigation nevertheless challenged both the process and the final maps Arizona's commission produced. Transparency proved an early battleground. Arizona's Attorney General sought a court order forcing the independent commissioners to cooperate with an investigation into whether or not the commission had abided Arizona's open meeting laws.[94] Not to be outdone, this spurred Arizona Democrats to file an open records request seeking records related to the Attorney General's investigation.[95] As these scuffles played out, Arizona's Governor Jan Brewer called for the impeachment of the commission chair, Colleen Mathis.[96] The Senate subsequently did impeach Mathis by a two-thirds vote on November 1, 2011,[97] which Mathis successfully undid via an Arizona Supreme Court ruling a few weeks later on November 17, 2011.[98] These tussles presaged

89. MATHIS ET AL., *supra* note 82, at 5.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* Videos and transcripts of these meetings and hearings remain archived and accessible on the commission website at http://azredistricting.org. MATHIS ET AL., *supra* note 82, at 5.

94. *See* Jim Nintzel, *Court Ruling: Redistricting Commission Is Not Subject to Open Meeting Law*, TUCSON WKLY. (Dec. 9, 2011, 5:24 PM), https://www.tucsonweekly.com/TheRange/archives/2011/12/09/court-ruling-irc-is-not-subject-to-open-meeting-law.

95. *See* Frederic I. Solop & Ajang Salkhi, *Redistricting in Arizona: An Independent Process Challenged by Partisan Politics in* THE POLITICAL BATTLE OVER CONGRESSIONAL REDISTRICTING 215–16, 220 (William J. Miller, et al., eds. 2013).

96. *See* Marc Lacey, *Arizona Senate, at Governor's Urging, Ousts Chief of Redistricting Panel*, N.Y. TIMES (Nov. 2, 2011), https://www.nytimes.com/2011/11/03/us/arizona-republicans-oust-colleen-mathis-head-of-redistricting-panel.html.

97. Alex Isenstadt, *Arizona Redistricting Chief Impeached*, POLITICO (Nov. 1, 2011), https://www.politico.com/story/2011/11/arizona-redistricting-chief-impeached-067408.

98. *See* Ariz. Indep. Redistricting Comm'n v. Brewer, 275 P.3d 1267, 1268, 1278 (Ariz. 2012) (ordering that Mathis be reinstated as chair of the redistricting commission).

what ensued when the commission eventually did produce maps: lots more litigation.[99]

In the end, Arizona's open process was no match for the political maelstrom that swirled. Arizona's experience serves as a cautionary tale for other states engaged in redistricting reform: regardless of how fairly a process is designed, it may be impossible to stem the tide of litigation if politics are divided and a powerful enough bloc aims to stymie reform and its fruits—particularly when reform involves wresting power from that political faction. This phenomenon is playing out in states like Michigan where anti-reform groups have litigated every step of the way to try (unsuccessfully) to preserve the legislature's grip on line drawing.[100]

Do the experiences of Arizona and Florida suggest that redistricting reform inevitably breeds litigation? The answer is not necessarily. In the 2010 round, California's newly-installed redistricting commission drew maps that did not provoke endless litigation, a feat given the fierce court battles California saw in previous decades.[101] As it turns out, transparency was part of the secret sauce that tamped down litigation in the Golden State. The CPI awarded California's process a well-deserved A.[102]

In 2008, California voters passed Proposition 11 which created a fourteen-person, independent citizens' redistricting commission.[103] The commission featured broad transparency measures, including public

99. *See Arizona*, ALL ABOUT REDISTRICTING, LOYOLA L. SCH., https://redistricting.lls.edu/state/arizona/?cycle=2020&level=Congress&startdate= (last visited May 10, 2021).

100. For an overview of the litigation that has swirled in Michigan concerning voters' efforts to install an independent redistricting commission, see Michael Li et al., *The State of Redistricting Litigation: A Roundup of Where Key Redistricting Cases Across the Country Stand*, BRENNAN CTR. FOR JUST. N.Y.U. L. (Feb. 10, 2020), https://www.brennancenter.org/our-work/research-reports/state-redistricting-litigation.

101. *See* Angelo N. Ancheta, *Redistricting Reform and the California Citizens Redistricting Commission*, 8 HARV. L. & POL'Y REV. 109, 112 (2014) ("[T]he state's history of redistricting during the previous four decades has been complex, and it reflects both legislative and judicial participation in the line-drawing process, as well as the influence of direct democracy checks by the state's voters. This history is central to understanding the recent reforms in California because they reflect an interplay of the legislature, the courts, the major parties, and the voters that ultimately led to the Commission structure adopted in 2008."); *see also infra* App. B.

102. *See infra* App. B.

103. *See* Shull & Shull, *supra* note 62. Voters later passed Proposition 20, extending the commission's responsibilities from state legislative districts to include U.S. congressional districts as well. *Id.*; CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION TUESDAY, NOVEMBER 2, 2010: OFFICIAL VOTER INFORMATION GUIDE 96 (2010). Proposition 20 also revised the deadline to produce the final maps (advancing it by one month), and clarified redistricting criteria related to communities of interest. *See id.*

scrutiny and input to a degree the state had never seen before.[104] While many believed the approach to be a vast improvement over legislatively-drawn lines, plaintiffs nevertheless challenged the formation of the commission and the lines it drew, all unsuccessfully.[105]

Litigation over California lines revealed that transparency mattered very much to the courts hearing the cases. One of the best examples of judicial deference to the California commission's maps stemming from its high degree of transparency is *Vandermost v. Bowen*.[106] The case involved whether the commission's state senate maps should be used in a spring primary election in advance of a November general election vote on a popular referendum that would invalidate the commission's work.[107] In weighing this question, the California Supreme Court underscored process transparency as a key factor in ruling that the commission's state senate map be used on an interim basis pending the referendum vote.[108] In its opinion the court exhaustively detailed the commission's transparency measures.[109] Ultimately, the court concluded that the high

104. *See* Cain, *supra* note 34, at 1826–27 (describing the transparency features of California's redistricting commission (CRC): "The extent of the CRC's public outreach was staggering: thirty-four public meetings in thirty-two locations around the state, more than 2700 participants, and over 20,000 written comments. Moreover, the hearings were carried live by Internet and hearing transcripts made available on the commission's webpage. The Irvine Foundation established outreach centers around the state that made software and some computer assistance available to those who wanted to draw their own maps. Bound by the state's open meeting laws to make decisions in public (including many legal and personnel discussions that often are held in executive session), there was little that the CRC could say or do that was not open for public inspection. The first and all subsequent versions of the CRC's plans were posted on its web page.").

105. *See* Ancheta, *supra* note 101, at 110 ("Not unexpectedly, there were multiple lawsuits contesting the maps, and opponents qualified a referendum to require voter approval of the Commission's map for the state Senate. None of the challenges was successful.").

106. *See* 269 P.3d 446, 484 (2012).

107. *Id.* at 450–51.

108. *Id.* at 452 ("The membership of the Commission selected to create new districts in light of the 2010 census was finalized in late 2010, and in the first eight months of 2011 the Commission held more than 70 business meetings and 34 public hearings in 32 cities throughout the state. The Commission produced draft statewide maps on which it sought and responded to public comment, and finally, in mid-August 2011, it approved and certified all four required maps.").

109. *Id.* at 456–57 ("The constitutional provision requires the Commission to 'conduct an open and transparent process enabling full public consideration of and comment on the drawing of district lines.' Section 8253 implements that charge, and requires the Commission to 'establish and implement an open hearing process for public input and deliberation that shall be subject to public notice and promoted through a thorough outreach program to solicit broad public participation in the redistricting public review process. The hearing process shall include hearings to receive public input before the commission draws any maps and hearings following the drawing and display of any commission maps. In addition, hearings shall be supplemented with other activities as appropriate to further increase opportunities for the public to observe and participate in the review process. The commission shall display the

degree of process transparency supplied a key reason for using the commission's map:

> [U]nlike the proffered alternatives, not only do the Commission-certified Senate districts appear to comply with all of the constitutionally mandated criteria set forth in California Constitution, . . . the Commission-certified Senate districts *also are a product of what generally appears to have been an open, transparent and nonpartisan redistricting process* . . . . We believe these features may properly be viewed as an element favoring use of the Commission-certified map.[110]

No doubt California's redistricting reform operated in a less politically divisive atmosphere than Arizona or Florida; California has a firmly-established Democrat majority.[111] Still, when challenges did arise, the California commission's transparent process helped its maps survive.

Reform can be painful. States with new reforms in place should gird for litigation if the political headwinds against reform have enough force and partisan opponents in the state have enough to gain. Arizona and Florida's experience in the last round should not provide an argument against reform, but rather should serve as a dose of realism that even transparent processes (particularly those that are only superficially so) can still draw litigation.[112] Regardless, California's efforts to create an open and fair process demonstrate that transparency can help line drawers win the favor of courts.

IV. DO COURTS CARE ABOUT TRANSPARENCY? (YUP)

As in California, courts in other states routinely cited a lack of transparency or an abundance of it to support their rulings.[113] Gauging process fairness regardless of outcome is familiar territory for courts. In the criminal realm, for example, a defendant's guilt or innocence is not a basis to overturn a conviction.[114] The fairness of the process that led to

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maps for public comment in a manner designed to achieve the widest public access reasonably possible. Public comment shall be taken for at least 14 days from the date of public display of any map.'").

110. *Id.* at 484 (emphasis added).

111. *See 15 Day Report of Registration*, CAL. SEC'Y OF STATE, https://elections.cdn.sos.ca.gov/ror/ror-pages/15day-gen-10/hist-reg-stats.pdf (last visited May 10, 2021). In 2010, Democrats comprised forty-four percent of the California electorate, Republicans thirty-one percent, and Independents twenty percent. *Id.*

112. But note that scholars have pointed to less partisan processes leading to less litigation. *See, e.g.*, Issacharoff, *supra* note 9, at 644 ("Although the track record of . . . nonpartisan alternatives is uneven, the general trend so far is that plans drawn outside the partisan arena produce less litigation, less contortion, and less opportunity for insider manipulation than do partisan processes.").

113. *See, e.g.*, League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 416 (Fla. 2015).

114. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 400 (1993).

that conviction is the key consideration.[115] In redistricting litigation over the past decade's lines, courts routinely cited the fairness of the process that produced those maps either in support of their findings or to voice displeasure. Sometimes the level of transparency proved dispositive to the outcome.[116] Additionally, when legal standards required courts to weigh the intent of line drawers, a lack of transparency prompted courts to draw adverse inferences against line drawers who shrouded the process.[117] The discussion below parses when and why courts invoked transparency in their reasoning.

A. Courts Routinely Include Descriptions of Process Transparency (or Lack Thereof) in Their Opinions

The California Supreme Court in *Vandermost v. Bowen* was not an anomaly. Courts regularly included descriptions of the degree of transparency in the process when articulating their findings.[118] A first feature to note is the instrumental nature of courts' use of transparency. Sometimes courts—particularly lower courts—painted a picture of transparency that supported the desired outcome, in some cases giving line-drawers more credit for transparency than they deserved.[119] Appellate courts did not always abide this rosy view, as in Alabama and Maryland.[120]

Alabama received a CPI grade of F and experienced intense litigation over its lines.[121] Ultimately, the U.S. Supreme Court struck Alabama's lines as unconstitutional racial gerrymanders in *Alabama Legislative Black Caucus v. Alabama*.[122] While the U.S. Supreme Court opinion did not delve into process transparency in its opinion, the district court discussed transparency measures in Alabama's process to support its rejection of the plaintiffs' racial gerrymandering challenge.[123] At one point in its opinion, for example, the district court stressed that, "[a]t the

115. *See, e.g.*, *id.* ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.").

116. *See, e.g.*, *League of Women Voters of Fla.*, 172 So. 3d at 416; Vandermost v. Bowen, 269 P.3d 446, 484 (Cal. 2012).

117. *See, e.g.*, *League of Women Voters of Fla.*, 172 So. 3d at 392–93, 416.

118. *See, e.g.*, *id.* at 437–38.

119. *See, e.g.*, Common Cause v. Lewis, No. 18 CVS 014001, 2019 N.C. Super. LEXIS 200, at *9–10 (Sup. Ct. Wake Cnty. Oct. 28, 2019).

120. *See* Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 279 (2015); *see also In re* 2012 Legis. Districting, 80 A.3d 1073, 1086 (Ct. App. Md. 2013).

121. *See* App. C.

122. *See* 575 U.S. at 279.

123. Ala. Legis. Black Caucus v. Alabama, 989 F. Supp. 2d 1227, 1246 (M.D. Ala. 2013), *judgment entered*, No. 2:12-CV-1081, 2013 WL 6913115 (M.D. Ala. Dec. 20, 2013), *vacated and remanded*, 575 U.S. 254 (2015).

beginning of the reapportionment process, the Committee conducted public hearings at 21 locations throughout Alabama."[124] The court continued with a detailed discussion of where public meetings took place, which line drawers attended, and summarized the content of public input.[125] Presumably the district court detailed opportunities for public input in the mapmaking process as evidence that the final maps were the product of a legitimate process. This even despite the state receiving an F for its transparency efforts and in advance of a Supreme Court slap-down of maps the district court approved.[126]

Three different courts described the degree of transparency in Maryland's Democratic-led process very differently, demonstrating that courts may use perceptions of transparency instrumentally to suit an outcome preference.[127] In reality, the D-grade CPI awarded Maryland for

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124. *Id.*

125. *Id*. In addition to describing public meetings, the district court also noted the extent to which a consultant the Republican committee hired to make the maps took pains to incorporate comments from Democrats in the legislature (though the court acknowledged such outreach was limited). *See id*. at 1248. "Although during this phase Hinaman did not personally speak with the black members of the Legislature who represented those districts, he incorporated proposals that he received from Senator Dial and Representative McClendon after they met with the representatives from those districts." *Id*. "Hinaman continued to work on the district plans and incorporate feedback from the legislators. Hinaman traveled to Alabama to meet in person with many of the Republican legislators. Although he did not meet with Democratic legislators, he incorporated suggestions that Senator Dial and Representative McClendon received from Democratic legislators." *Ala. Legis. Black Caucus*, 989 F. Supp. 2d at 1248.

126. Data supporting Alabama's report cites negative views of the degree of transparency afforded during the process, for example including this description:

> The journalists and [a state senator who had described the process as transparent] saw the redistricting process very differently. They saw the process as occurring with little input from the public, with announcements of meetings not occurring far enough in advance for the public to respond, and the meetings just going through the motions to obtain federal clearance. This separation of the legislative process from public participation was borne out in interviews with [members of the press]. Essentially what the journalists . . . said is that while public meetings were held, they were late being announced, poorly publicized, had very low attendance, received little or no comment from the floor (usually about some personal concern, not redistricting), and the redistricting maps were available too late in the process to permit genuine citizen input. Moreover, . . . cloture was invoked in the Senate, killing further discussion on two competing proposals. [Observers said they] had no idea which proposal was to go forward until it was introduced on the Senate floor.

See 2012 CPI data (on file with author).

127. *See* Gorrell v. O'Malley, No. WDQ-11-2975, 2012 U.S. Dist. LEXIS 6178, at *2–3 (D. Md. Jan. 19, 2012); *In re* 2012 Legis. Districting, 80 A.3d 1073, 1076 (Ct. App. Md. 2013); Benisek v. Lamone, 266 F. Supp. 3d 799, 809–10 (D. Md. 2017), *aff'd*, 138 S. Ct. 1942 (2018).

transparency in its process undercuts the idealistic-sounding descriptions of two of the courts below.[128]

In *Gorrell v. O'Malley*, the district court judge describes a seemingly transparent and open process when granting the state's motion to dismiss:

> From July 23, 2011 to September 12, 2011, the [legislative redistricting committee] held 12 public hearings, receiving public comment as it drafted a redistricting plan for the Governor to present to the Maryland legislature. . . . The [committee] invited citizens to propose redistricting plans by September 19, 2011. . . . On October 9, 2011, a Maryland senator showed a group of citizens, including [plaintiff], a map of the [committee]-recommended boundaries with the population of each proposed district.[129]

In addition, the court detailed instances in which the plaintiff, Howard Lee Gorrell, had taken part in the public process himself.[130] The judge included a description of a transparent process and the plaintiff's ability to participate in it as support his finding for the state.[131]

Likewise, the Maryland Court of Appeals upheld Maryland's legislative districts against claims that they violated Maryland's constitution, the U.S. Constitution, and the VRA.[132] Despite Maryland's D-CPI grade,[133] at several points in the opinion the court highlighted the transparency features of Maryland's redistricting process:

> In March 2011, following the receipt of the 2010 census data for Maryland, the Governor convened a five member committee, the Governor's Redistricting Advisory Committee ("GRAC"), to draft and recommend, after holding public hearings and accepting public comment, a plan for the redistricting of the State's Congressional and Legislative Districts. The GRAC held 12 public hearings during the

128. *See Gorrell*, 2012 U.S. Dist. LEXIS 6178, at *2–3; *In re 2012 Legis. Districting*, 80 A.3d at 1073.

129. *Gorrell*, 2012 U.S. Dist. 6178, at *2–3.

130. *Id*. ("Gorrell, who is deaf, attended and testified at the hearings. The [redistricting committee] invited citizens to propose redistricting plans by September 19, 2011, a deadline established in its 'Guidelines for Third Party Plan Proposals'. . . . On September 19, 2011, Gorrell submitted a proposal, which the [the redistricting committee] posted on the Maryland Department of Planning website for public consideration.").

131. *See id.*

132. *In re 2012 Legislative Districting*, 80 A.3d at 1118.

133. CPI investigators discounted whether transparency measures were genuine, "While meetings [were] held in the redistricting process, only one held by a General Assembly joint committee addressed the final map itself and while opposition was expressed by minority interests, Republicans and NGO's, no change[s] were made to the plan produced by the Democratic governor's commission on the matter [i]n the heavily Democratic state." 2012 CPI Data (on file with author).

> summer of 2011 and, on December 16, 2011, published its plan for the apportionment of the State's 47 Legislative Districts.[134]

The court also quoted Maryland Democratic legislators on the degree of transparency throughout its opinion.[135] In one instance, for example, the court quoted the chair of Maryland's 2011 redistricting committee in her insistence that, "[t]hroughout this process, the [committee] made an extraordinary effort to take into account the many concerns and comments from experts and citizens from across Maryland."[136] The court went out of its way to characterize the process as transparent and fair in upholding the maps.

But descriptions of the degree of transparency in Maryland's process received very different treatment in *Benisek v. Lamone*.[137] The majority of the three-judge panel at the U.S. District Court for the District of Maryland denied the plaintiffs' motion for a preliminary injunction to strike Maryland's map as an unconstitutional partisan gerrymander.[138] Nevertheless, in its findings of fact, the majority called out legislators' lack of process transparency: "Maryland's 2011 redistricting process involved two parallel procedures: a public-facing procedure led by the Governor's Redistricting Advisory Committee and an internal procedure involving Maryland's congressional delegation and a consulting firm called NCEC Services, Inc."[139]

The dissenting judge who would have struck the map as an unconstitutional partisan gerrymander, picked up on this theme.[140] He upbraided the Maryland legislature for creating a veneer of transparency:

> While the Advisory Committee was holding public hearings across the State, the Democratic members of Maryland's U.S. House Delegation—led by Representative Hoyer, a self-described "serial gerrymanderer,"—had already begun to redraw the State's congressional map. Indeed, around the time that the results of the 2010 census became available in late February/early March 2011—months before the Advisory Committee was even created—Hoyer and the other Maryland Democrats in the House retained NCEC Services, Inc., a political consulting firm that provides "electoral analysis, campaign strategy, political targeting, and GIS [geographic information system] services" to Democratic organizations.[141]

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134. *In re 2012 Legislative Districting*, 80 A.3d at 1076.
135. *See id.*
136. *Id.* at 175 n.33.
137. *See* 266 F. Supp. 3d 799, 809 (D. Md. 2017), *aff'd*, 138 S. Ct. 1942 (2018).
138. *See id.* at 839.
139. *Id.* at 809.
140. *See id.* at 823 (Niemeyer J., dissenting)
141. *Id.* at 823 (Niemeyer J., dissenting) (alteration in original) (citations omitted).

While the shadow process described did not ultimately persuade two out of the three judges to rule in the plaintiffs' favor, all three judges made a clear point of calling out the lack of transparency in Maryland's process.[142]

A second observation is that, in some cases, courts appeared to believe their hands were tied by required legal standards, yet nevertheless reprimanded states for failing to adequately incorporate transparency measures. *Georgia State Conference of the NAACP v. Georgia* is a good example.[143] That case involved a mid-decade redistricting the state enacted following *Shelby County v. Holder*'s removal of the requirement that Georgia seek federal preclearance for changes to its maps.[144] As the court describes, the Republican-dominated legislature undertook the re-redistrict in an overt effort to save two Republican legislators from changing demographics in their districts.[145] Clearly irritated to be hamstrung by the racial gerrymandering standard requiring proof that racial considerations predominated the line drawing process, the court upheld the maps.[146] But that did not stop the court from detailing the mischiefs lawmakers undertook to make the two districts whiter.[147] The court stressed that, "African-American legislators were excluded from the process of drawing and negotiating the redistricting in [the state's maps], and minority residents of Georgia were denied any opportunity for public comment on the measure."[148] The court further underscored that while legislators were consulted, the public was not.[149] Though the court ultimately upheld the maps, it explicitly chided line drawers for the lack of transparency.[150]

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142. *See Benisek*, 266 F. Supp. 3d at 809. Litigation over Maryland's maps continued through the *Rucho* decision which put an end to federal partisan gerrymandering claims. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019).

143. *See* Ga. State Conf. of NAACP v. Georgia, 312 F. Supp. 3d 1357, 1363 (N.D. Ga. 2018).

144. *See id.* at 1359 (citing Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013)).

145. *See id.* at 1359, 1363.

146. *See id.* at 1359.

147. *See id.* at 1363 ("No one disputes the new maps gave Districts 105 and 111 more white voters and fewer black voters.").

148. Ga. State Conf. of NAACP v. Georgia, 269 F. Supp. 3d 1266, 1271 (2017).

149. Ga. State Conf. of NAACP v. Georgia, 312 F. Supp. 3d 1357, 1362 (N.D. Ga. 2018) ("While Representative Nix made much of the fact that no changes were made to districts unless all affected legislators agreed, nothing in this record suggests the affected communities had any input. Neither does the legislative process suggest transparency or public engagement.").

150. *See id.* at 1369. The court denied the plaintiffs' motion begrudgingly because of the standard foisted upon it for racial gerrymandering (i.e., that racial considerations must predominate in line drawing decisions). *See id.* at 1368–69. Because the state was able to point to race neutral reasons for each line drawing decision, and because the shapes of the districts were not "extreme and bizarre," the court held for the state but not without revealing

Litigation in Pennsylvania (which received a CPI grade of F) likewise highlights courts' concern for transparency.[151] Pennsylvania citizens tried multiple attacks on the 2011 legislative maps before finally scoring a partisan gerrymandering win based on a provision in the Pennsylvania constitution.[152] In an earlier compactness and contiguity challenge, the Pennsylvania Supreme Court found itself wrestling with a lack of evidentiary record on the question of whether line drawers split political subdivisions for purely partisan gain.[153] Wrote the court,

> The difficulty . . . resides in attempting to identify with any level of precision where and how, if at all, . . . political factors cross the line, and can be said to have caused subdivision splits that were not absolutely necessary. There is no relevant record of the reasons why particular splits were made, pointing in either direction.[154]

The court then lamented that the Pennsylvania constitution does not require more transparency to enable citizens to unpack what happened:

> We are not unsympathetic to the plight of citizen challengers who have no way of going behind the plans that were produced, or assessing generalized responsive justifications. And, there is nothing inherent in the redistricting process to preclude the [committee] from being more transparent in its intentions. But, on the other hand, the commission process is the process the Constitution has provided, the Constitution does not require that level of explication.[155]

Plaintiffs at this stage of litigation were unable to surmount transparency hurdles to prove their case.[156] The maps ultimately did go down, but not until 2018 after many more expensive and fraught months of litigation.[157] Had the process been more transparent, perhaps litigants and Pennsylvania courts could have been spared years of run-around.

Michigan, which also received a CPI grade of F, experienced a similar phenomenon.[158] Litigation over Michigan's maps in the 2010 round raged throughout the decade, culminating in a temporary victory for plaintiffs on partisan gerrymandering grounds in 2019.[159] In *League*

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deep concern and skepticism about the process. *Id*. at 1366 (quoting Bush v. Vera, 517 U.S. 952, 971 (1996)).

151. *See infra* App. C.

152. *See* League of Women Voters v. Commonwealth, 178 A.3d 737, 741 (Pa. 2018) (citing PA. CONST. art. I, § 5).

153. *See* Holt v. 2011 Legis. Reapportionment Comm'n, 67 A.3d 1211, 1239 (Pa. 2013).

154. *Id.*

155. *Id*. at 1239–40.

156. *See id.* at 1242–43.

157. *See League of Women Voters*, 178 A.3d at 741.

158. *See infra* App. C.

159. League of Women Voters of Mich. v. Benson, 373 F. Supp. 3d 867, 886–87, 960 (E.D. Mich. 2019), *vacated sub nom.*, Chatfield v. League of Women Voters of Michigan, 140 S.

of Women Voters of Michigan v. Benson, the United States District Court for the Eastern District of Michigan noted with displeasure the degree to which legislators drew their maps in secret:

> During the spring of 2011, Michigan's Republican leadership held weekly meetings on Thursday mornings at the Dickinson Wright law firm to discuss their redistricting efforts. . . . The Republican leadership took several steps to ensure that these weekly redistricting meetings remained secret. Members of the Republican leadership and their staffs often used personal—rather than governmental—email addresses to communicate about the redistricting meetings.[160]

The U.S. Supreme Court ruled that partisan gerrymandering claims were not justiciable later that same year in *Rucho*, wiping away the Michigan plaintiff's victory. [161] But the egregious nature of the secretive line drawing effort, as in other states, prompted sympathy from the lower courts—and served as an argument for reformers seeking to adopt an independent commission to draw lines.[162]

Wisconsin (CPI grade of F) also spent the decade enmeshed in litigation and also saw its process transparency failures highlighted in court.[163] The Wisconsin legislature's maps prevailed against a partisan gerrymandering challenge, but only after years of court battles until the Supreme Court ended the litigation in 2019.[164] Along the way, court after court called out line drawers for the lack of transparency in the process.[165] In one early case challenging the maps on equipopulation and VRA grounds (unsuccessfully), the United States District Court for the Eastern District of Wisconsin took time to scold the mapmakers:

> . . . [Al]though the drafting of [the maps] was needlessly secret, regrettably excluding input from the overwhelming majority of Wisconsin citizens . . . the resulting population deviations are not large enough to permit judicial intervention under the Supreme Court's precedents.[166]

In the groundbreaking 2016 case *Whitford v. Gill*, which marked the first time a federal court struck state maps as unconstitutional partisan

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Ct. 429 (2019) (briefly striking Michigan's map until Supreme Court declared partisan gerrymandering suits nonjusticiable later that same year).

160. *Id*. at 886–87.

161. *Chatfield*, 140 S. Ct. at 429–30 (mem.) (remanded in light of Rucho v. Common Cause, 139 S. Ct. 2484 (2019)).

162. *Rucho*, 139 S. Ct. at 2525 (Kagan, J., dissenting) (citing Marbury v. Madison, 5 U.S. 137 (1803)).

163. *See infra* App. C.

164. *See Rucho*, 139 S. Ct. at 2487.

165. *See id.* at 2525 (Kagan, J., dissenting).

166. Baldus v. Members of Wis. Gov't Accountability Bd., 849 F. Supp. 2d 840, 860 (E.D. Wis. 2012).

gerrymander, the district court did not belabor the lack of transparency in the process even though it had been egregious by all accounts.[167] It did discuss how partisan line drawers consulted Republican legislators only; the court dryly recites the accelerated schedule once the maps were introduced to the public and quickly passed:

> On July 11, 2011, the redistricting plan was introduced by the Committee on Senate Organization. On July 13, 2011, a public hearing was held, during which [political consultants] presented the plan and fielded questions. The Senate and Assembly passed the bill on July 19, 2011, and July 20, 2011, respectively. The Governor signed the bill, and it was published as Wisconsin Act 43 on August 23, 2011.[168]

But there is little question that Wisconsin's secretive process—complete with Republican lawmakers signing nondisclosure agreements—fueled intense scrutiny of the maps rather than perhaps the hoped-for effect of ". . . nothing to see here."[169]

Many of the cases described above in which courts called out a lack of transparency in the line drawing process involved partisan gerrymandering claims. By their very nature, partisan gerrymandering efforts are at their core about shutting one party—and by extension the public—out of the process.[170] It should therefore come as no surprise that many lower court decisions evaluating partisan gerrymandering claims detail the lack of transparency with the same frustration that motivated plaintiffs to file suit.

The above examples indicate that courts take note of redistricting transparency measures when deciding redistricting cases. Sometimes positive or negative transparency assessments prove critical to the

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167. *See* 218 F. Supp. 3d 837, 965 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (2018).

168. *Id.* at 853; *see also* Whitford v. Nichol, 151 F. Supp. 3d 918, 928 (W.D. Wis. 2015) ("The plan was drafted in secret and without any input from Democrats.").

169. *See, e.g.*, Associated Press, *Report: GOP Lawmakers Signed Redistricting Secrecy Deals*, WIS. STATE J. (Feb. 7, 2012), https://madison.com/wsj/news/local/govt-and-politics/report-gop-lawmakers-signed-redistricting-secrecy-deals/article_2867657e-51a8-11e1-b647-001871e3ce6c.html ("Nearly all of Wisconsin's Republican state lawmakers took the unusual step of signing a legal agreement in which they promised to not comment publicly about redistricting discussions while new GOP-friendly maps were being drafted, a newspaper reported. The agreement was included in newly released documents in a federal lawsuit challenging the new district lines. Also included in the documents was a GOP memo outlining talking points that stressed anyone who discussed the maps could be called as a witness in the case. The memo also warned Republicans to ignore public comments about the maps and focus instead on what was being said in private strategy meetings.").

170. *See* Alex Tausanovitch, *The Impact of Partisan Gerrymandering*, CTR. FOR AM. PROGRESS (Oct. 1, 2019), https://www.americanprogress.org/issues/democracy/news/2019/10/01/475166/impact-partisan-gerrymandering/.

outcome. Other times courts took liberties in framing transparency to suit a chosen outcome. And other times courts take pains to highlight egregious transparency shortcomings even when those observations were ultimately irrelevant to the legal standard applied. In each instance, judges in the last decade called line drawers out for transparency successes and failings. The implication? Greater transparency reduces courts' ire and provides maps legitimizing force.

B. Transparency & the Intent Analysis

In the decade that followed the 2011 redistricting round, legal standards often required courts to examine whether line drawers proceeded with unlawful intent or purpose. This analysis often included an examination of the degree of process transparency. When courts were unable to determine intent because line drawers shrouded the process, courts drew adverse inferences against them. The most compelling examples of this phenomenon comes in redistricting opinions from Florida and Texas.

Returning to the Sunshine State, Florida's constitutional provision prohibiting political influence in line drawing requires courts to examine legislative intent. The only way a court can determine whether line drawing intentionally favored or disfavored a political party or incumbent is to engage in an analysis of the legislative motive.[171]

During the contentious discovery process, this reality proved pivotal. Plaintiffs sought redistricting materials from the legislature and third parties relevant to the reapportionment process.[172] The Legislature filed a motion to prevent discovery citing legislative privilege.[173] After a fight in the lower courts,[174] the Supreme Court of Florida held that legislative privilege applies to and protects documents revealing "thoughts or impressions," but does not apply to or protect "information or communications pertaining to the 2012 reapportionment process."[175] The court held that legislative privilege is not absolute particularly when other compelling, competing interests are at stake.[176] The court held that

171. *See* discussion *supra* Part II (discussing Florida's state constitutional amendment prohibiting partisanship in legislative line drawing).

172. *See* League of Women Voters of Fla. v. Fla. House of Representatives, 132 So. 3d 135, 141 (Fla. 2013).

173. *Id.* Third party consultants also tried to shield documents from discovery, ultimately unsuccessfully. *See* Bainter v. League of Women Voters of Fla., 150 So. 3d 1115, 1118–19 (Fla. 2014) (quoting Barron v. Fla. Freedom Newspapers, Inc., 531 So. 2d 113, 114 (Fla. 1988)).

174. *See League of Women Voters of Fla*., 132 So. 3d at 141–42.

175. *Id.* at 154.

176. *Id.* at 145–46 (first quoting Chiles v. Children A, 589 So. 2d 260, 264 (Fla. 1991); and then quoting United States v. Nixon, 418 U.S. 683, 705 (1974)).

compliance with section 20(a) of the Florida constitution satisfied the "compelling, competing" interest test.[177] Florida's constitutional prohibition of improper partisan intent in redistricting, the court held, could not be enforced without access to discovery necessary to determine whether the Legislature engaged in improper actions.[178]

But peeling back legislative privilege giving access in discovery to third-party consultant documents only got plaintiffs so far. Plaintiffs found no smoking gun and were able to map out only skeletal evidence pointing to the existence of a shadow process.[179] It turned out that those working on the maps destroyed quite a bit of evidence that might have been relevant to determining legislative intent.[180] Faced with these obfuscations, the court determined the only fair way to proceed would be draw an adverse inference against the line drawers.[181]

The Florida Supreme Court affirmed the adverse inference approach.[182] Reviewing the trial court's determination that legislators had violated Florida's constitution and chastising line drawers for their lack of transparency and overt destruction of evidence, the Florida Supreme Court noted that,

> [T]he spoliation of evidence results in an adverse inference against the party that discarded or destroyed the evidence. . . . The trial court was, therefore, justified in drawing an adverse inference against the Legislature in adjudicating the challengers' claim of unconstitutional partisan intent. And we too must consider the Legislature's "systematic[] delet[ion]" of redistricting records in evaluating whether the trial court's finding is supported by competent, substantial evidence.[183]

Had Florida line drawers pursued a more transparent (and less devious) line drawing strategy, they may have avoided this adverse inference (depending of course on what more sunlight might have revealed!) The U.S. Supreme Court previously ruled that absent evidence,

177. *See id.* at 147.
178. *See id.* at 149.
179. *See* Romo v. Detzner, No. 2012-CA-000412, 2014 WL 3797315, at *11 (Fla. Cir. Ct. July 10, 2014).
180. *See id.* at *6 ("The legislature had, in fact, destroyed e-mails and other evidence of communication regarding the non-party political consultants.").
181. *See id.* at *9.
182. League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 416 (Fla. 2015).
183. *Id.* at 391.

legislatures should be given the benefit of the doubt.[184] Line drawers beware: a lack of transparency may overcome that presumption.[185]

Other legal triggers requiring courts to examine legislative motive plunge courts into examining the reasons line drawers made the choices they did. One good example are VRA section 2 claims brought against line drawers for diluting minority voting strength.[186] Precedent in deciding section 2 claims specifically releases plaintiffs from the often impossible task of uncovering a smoking gun of overt racial discrimination in line drawing.[187] Instead, part of the section 2 analysis, as it has developed in the redistricting realm, borrows from the *Arlington Heights* equal protection frame asking plaintiffs to provide evidence that discriminatory purpose was a motivating factor.[188]

As courts review complex evidence of what motivated line drawing decisions, a lack of transparency can work against line drawers. This happened in Texas, which earned an abysmal CPI grade of F[189] and endured years and years of litigation over its legislative lines.[190]

Texas' tale of redistricting litigation woe in the last round began immediately after it drew ill-fated lines following the 2010 Census.[191] Plaintiffs brought VRA and U.S. constitutional challenges against state senate and house lines.[192] Separately, the legislature sought preclearance at the District Court for the District of Columbia.[193] While the maps wound their way through the courts, a three-judge panel in Texas drew

184. Miller v. Johnson, 515 U.S. 900, 915 (1995) (holding that "the good faith of a state legislature must be presumed") (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318–19 (1978)).

185. *See Miller*, 515 U.S. at 916.

186. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 34 (1986).

187. *See, e.g.*, Hunt v. Cromartie, 526 U.S. 541, 553 (1999) (noting that "outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence").

188. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977) ("[R]acial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified.").

189. Texas' CPI grade covered only its original map drawing process following the 2010 Census, not subsequent efforts in the twisted tale as the decade unfolded. *See* discussion, *supra* note 30.

190. *See infra* App. C.

191. Texas received a CPI grade of F and endured and excruciating decade of litigation over its lines. *See infra* App. C.

192. Abbott v. Perez, 138 S. Ct. 2305, 2310 (2018) (describing the litigation that unfolded immediately after the Texas legislature passed its maps).

193. Texas v. Holder, 888 F. Supp. 2d 113, 114 (D.D.C. 2012), *vacated*, 570 U.S. 928 (2013).

up interim maps for use in the 2012 primaries.[194] The state of Texas challenged the court's interim maps arguing that the judge-made interim maps had failed to show proper deference to the original legislative maps.[195] The U.S. Supreme Court agreed, ordering the district court to start with the legislature's maps as the basis for its remediation.[196] Meanwhile, the district court for the District of Columbia denied the 2011 maps preclearance.[197] As a result, Texas used the revised interim map for the 2012 general election.[198] Then came *Shelby County v. Holder* in 2013 which removed the preclearance requirement.[199] The Texas legislature quickly repealed its 2011 plans and adopted the court's revised interim map with some modification.[200] In the litigation challenging those 2013 lines, the Texas legislature's continued lack of transparency displeased the federal district court.[201]

In *Perez v. Abbott* in 2017 the Western District of Texas assessed a variety of factors to determine whether discriminatory purpose was a motivating factor behind the 2013 congressional lines.[202] The plaintiffs pointed to the lack of transparency in the line drawing process, noting that it was unnecessarily exclusionary, secretive, and rushed.[203] The defendants brought forward an expert who testified that he did not believe the process was particularly rushed, but the court rejected the claim.[204] "The timeline," the court concluded, "speaks for itself."[205] Throughout the court's examination of legislative intent in *Perez v. Abbott* are discussions of the lack of transparency—describing proposals being drawn "in secret,"[206] noting that "[e]ven Senate redistricting committee lawyers were not shown the plan before it was released"[207] and pointing out that "[m]inority members of the house and senate redistricting *committees* were generally shut out of the mapdrawing process."[208]

194. *See generally* Perez v. Perry, 835 F. Supp. 2d 209 (W.D. Tex. 2011), *vacated and remanded*, 565 U.S. 388 (2012) (ordering a court-drawn interim map).
195. *See* Perry v. Perez, 565 U.S. 388, 392 (2012) (per curiam).
196. *See id.* at 399.
197. *See* Texas v. United States, 887 F. Supp. 2d 133, 178 (D.D.C. 2012).
198. *See id.* at 139.
199. *See* 570 U.S. 529, 557 (2013).
200. *See generally Redistricting History*, TEX. REDISTRICTING, https://redistricting.capitol.texas.gov/history (last visited May 10, 2021) (describing the very twisted tale of Texas redistricting in the 2010s).
201. *See* Perez v. Abbott, 253 F. Supp. 3d 864, 961 (W.D. Tex. 2017).
202. *See id.* at 945.
203. *Id.* at 960.
204. *See id.*
205. *Id.*
206. 253 F. Supp. 3d at 960.
207. *Id.*
208. *Id.*

These transparency shortfalls supported the ruling against the defendant line drawers, which ultimately found discriminatory intent:

> [W]e examine the process to glean insight into whether there was discriminatory purpose, and the inquiry is not limited solely to comparing this process to prior processes for deviations. In this case, the rushed and secretive process suggests that Defendants did want to avoid scrutiny of whether their efforts in fact complied with the VRA or were intended to do so, or whether they were only creating a facade of compliance.[209]

A lack of process transparency thus proved fatal to Texas' U.S. congressional district lines.

In litigation over whether the state *house* districts violated the VRA, the court likewise pointed to the lack of process transparency in support of its finding that the legislature had unlawful discriminatory intent:

> Although delegations worked on their respective areas, the overall map was drawn in secret, with no one seeing the statewide map until [the plan] was released on Wednesday, April 13. . . . After . . . April 13, the process was extremely rushed, with public hearings on Friday, April 15 and Sunday, April 17, and the plan voted out after the [redistricting committee] meeting on Tuesday, April 19 . . . .[210]

Texas' long and tortured years of litigation following the original 2011 maps provide a cautionary tale of how *not* to avoid litigation. The legislature's secretive approach in 2011 and 2013 drew ire from reviewing courts contributing to negative judgments. As described above, the hurried nature and lack of public input led to lower courts' adverse inferences regarding legislative intent.[211]

By the time the U.S. Supreme Court got involved in *Abbott v. Perez* in 2018, the five–four majority overturned the lower courts' findings of discriminatory intent.[212] A key reason: the Supreme Court majority took a different position on process fairness.[213] Rather than crediting the plaintiffs' characterization, the Court declined to designate legislative actions in 2013 as "rushed."[214] Instead, the Court endorsed the state's rationale that it pushed through the modified interim maps quickly only as a means of staving off more litigation—not in an attempt to obfuscate

209. *Id*. at 961.

210. Perez v. Abbott, 250 F. Supp. 3d 123, 178, 179 (W.D. Tex. 2017) ("The Task Force Plaintiffs further note the rushed process with limited opportunity for public input . . . .").

211. *See supra* text accompanying notes 172–79.

212. *See* 138 S. Ct. 2305, 2313 (2018).

213. *See id.*

214. *See generally id*. (failing to call the process "rushed").

the process.[215] Importantly for present purposes, the majority could not rule as it did without first explaining away the lower courts' and the dissent's transparency criticisms.[216] The Supreme Court did not upend the adverse inference approach, rather it found a way around it by justifying the rush.[217]

Florida and Texas' experiences reveal that when legal standards require courts to evaluate legislative motive or intent—as they often do—courts faced with non-transparent processes are likely to adopt adverse inferences against line drawers. A lack of transparency in the process works against line drawers' efforts to defend their maps in court.[218] Conducting business in secret and without meaningful public input leads courts to suspect wrongdoing.[219] The easy solution? Make the process more transparent—and not as a matter of lip service. Supplying provable instances of an open and fair process, allowing public access to meetings and data, seeking and absorbing public input, and setting reasonable timelines can go a long way to insulate line drawers from courts' wrath.

V. WILL *RUCHO V. COMMON CAUSE* SAVE STATES WITH UNFAIR MAPS FROM REDISTRICTING LITIGATION? (UNLIKELY)

Partisan gerrymandering claims filled dockets around the country.[220] As noted above, the U.S. Supreme Court held partisan gerrymandering claims nonjusticiable in 2019 in *Rucho v. Common Cause*.[221] Can we expect a marked reduction in partisan gerrymandering litigation in the coming decade as a result of the Supreme Court's erasure of this federal claim?[222] Indeed, the argument that declaring partisan gerrymandering

215. *Id.* at 2328–29 ("[W]e do not see how the brevity of the legislative process can give rise to an inference of bad faith—and certainly not an inference that is strong enough to overcome the presumption of legislative good faith . . . . The 'special session' was necessary because the regular session had ended. . . . [T]he Legislature had good reason to believe that the interim plans were sound, and the adoption of those already-completed plans did not require a prolonged process. After all, part of the reason for adopting those plans was to avoid the time and expense of starting from scratch and leaving the electoral process in limbo while that occurred.").

216. *See id*. at 2348 ("[The legislature] avoided the 'full public notice and hearing' that would have allowed '"meaningful input"' from all Texans, including the minority community.'").

217. *See Abbott,* 138 S. Ct. at 2328–29.

218. *See* Perez v. Abbott, 253 F. Supp. 3d 864, 961 (W.D. Tex. 2017) (noting the "rushed and secretive process" in evaluating whether there was discriminatory purpose).

219. *See* Perez v. Abbott, 250 F. Supp. 3d 123, 172 (W.D. Tex. 2017) ("The Court finds that mapdrawers acted with racially discriminatory intent to dilute Latino voting strength in Tarrant County.").

220. *See infra* App. C.

221. Rucho v. Common Cause, 139 S.Ct. at 2506–07.

222. *See* Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) ("Eighteen years of essentially pointless litigation have persuaded us that [precedent provides no discernable standard to

nonjusticiable would reduce litigation supplied a big part of the Court's reasoning.[223] Does the Court's holding in *Rucho* free state legislatures to engage in secretive line drawing processes without fear of litigation now that partisan gerrymandering claims can no longer be brought in federal court?

At least two factors support the likelihood that *Common Cause v. Rucho* will not stem the tide of redistricting litigation in the coming decade. First, creative litigants are already finding success claiming partisan gerrymandering violations under state law.[224] Second, in past decades, the lack of a direct path to challenging unfair maps on federal partisan gerrymandering grounds fueled complex and time-intensive *indirect* lawsuits that spill more litigation ink than a more direct path would have provided.[225] These two trends are very likely to continue.

A. State-Level Partisan Gerrymandering Claims

Even before the dramatic culmination of decades of partisan gerrymandering claims under the U.S. Constitution in *Rucho v. Common Cause*, plaintiffs had already been experimenting with partisan gerrymandering claims under state constitutions—and successfully. In both Pennsylvania and North Carolina, egregious process unfairness (both states received a CPI grade of F) that produced classically lopsided maps, prompted plaintiffs to get creative. Litigants in both states brought a variety of what might be termed indirect lawsuits challenging maps on racial gerrymandering, one person one vote, VRA, and other grounds to varying degrees of success. But, in both states, partisan gerrymandering suits based on state constitutional protections hit the nail on the unfair maps' coffin.

State level partisan gerrymandering claims might emanate from a variety of provisions in state statutory and constitutional protections. State constitutions all contain provisions protecting freedom of speech, forty-seven state constitutions protect the freedom of association, and twenty-four guarantee the equal protection of the laws.[226] Even when

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adjudicate partisan gerrymandering claims]. We would therefore overrule that case, and decline to adjudicate these political gerrymandering claims.").

223. *See Rucho*, 139 S. Ct. at 2507 ("The expansion of judicial authority [into partisan gerrymandering] would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives.").

224. *See, e.g.*, Common Cause v. Lewis, No. 18 CVS 014001, 2019 N.C. Super. Ct. LEXIS 56, at *10 (Wake Cnty. Sept. 3, 2019); *see also* League of Women Voters v. Commonwealth, 178 A.3d 737, 741 (Pa. 2018), *cert. denied sub nom.*, Turzai v. Brandt, 139 S. Ct. 445 (2018).

225. *See infra* App. C.

226. *See* Samuel S.-H. Wang, Richard F. Ober, & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST.

such language mirrors federal constitutional provisions, state courts commonly interpret state constitutions more broadly.[227] Virtually all state constitutions include protections for the right to vote.[228] Twenty-six state constitutions include an explicit protection that the federal constitution does not contain: the right to a free and fair election.[229] Litigants have already shown that state founding documents are fertile grounds in the quest to slay gerrymandering.

Pennsylvania and North Carolina litigation demonstrates the willingness of state courts to extend state constitutional protections against gerrymandering that federal courts post-*Rucho* cannot. As the Pennsylvania Supreme Court aptly articulated, "While federal courts have, to date, been unable to settle on a workable standard by which to assess such claims under the federal Constitution, we find no such barriers under our great Pennsylvania charter."[230] The *Rucho* majority effectively blessed Pennsylvania's muscular use of state constitutional provisions to police gerrymandering by summarily denying certiorari in the Pennsylvania case.[231]

In North Carolina, the state superior court in Wake County likewise struck legislative maps as partisan gerrymanders in violation of the state constitution.[232] North Carolina's redistricting committee partisan gerrymandered with abandon, and did so explicitly.[233] Republican legislator David Lewis famously admitted that the map had been drawn to guarantee as many Republican seats as possible.[234] Despite the near even split between Democrats and Republicans in the North Carolina electorate in 2012,[235] Representative Lewis explained that he drew a U.S. congressional map that would elect ten Republicans and three

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L. 203, 231–32 (2019); *see also* James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L. J. 881, 887–89 (2006) (discussing state constitutions and how courts have historically applied them to partisan gerrymanders).

227. *See id.*

228. Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 91 (2014) ("Virtually every state constitution confers the right to vote to its citizens in explicit terms.").

229. *Id.* at 103 (providing a valuable assessment of protections for voting in state constitutions).

230. League of Women Voters v. Commonwealth, 178 A.3d 737, 741 (Pa. 2018).

231. *See generally* Turzai v. Brandt, 139 S. Ct. 445 (2018) (denying cert.).

232. *See* Common Cause v. Lewis, No. 18 CVS 014001, 2019 N.C. Super. Ct. LEXIS 56, at *413 (Wake Cnty. Sept. 3, 2019).

233. *See id.* at *372.

234. Rucho v. Common Cause, 139 S. Ct. at 2491.

235. *Lewis*, 2019 N.C. Super. LEXIS 56, at *17 ("In the 2012 elections, the parties' vote shares for the House were nearly evenly split across the state, with Democrats receiving 48.4% of the two-party statewide vote.").

Democrats.[236] Why? Because he did "not believe it's possible to draw a map with [eleven] Republicans and two Democrats."[237] Lewis clarified that he pushed for a lopsided map because he believed electing Republicans was better for the country than electing Democrats.[238]

In striking the map on state constitutional grounds, the North Carolina court called out the closed-door nature of the process:

> [Defendants' redistricting expert] Dr. [Thomas] Hofeller drew the 2017 Plans under the direction of Legislative Defendants and without consultation with any Democratic members. Representative Lewis claimed that he "primarily . . . directed how the [House] map was produced," and that he, Dr. Hofeller, and Republican Representative Nelson Dollar were the only "three people" who had even "seen it prior to its public publication." None of Legislative Defendants' meetings with Dr. Hofeller about the 2017 redistricting were public.[239]

In both the Pennsylvania and North Carolina opinions, reviewing courts carefully detailed the egregious lack of process fairness that shut political opponents and members of the public out of meaningfully participating in the line drawing process.[240]

As these two examples demonstrate, state courts interpreting state laws are likely to be far more creative and expansive in applying state constitutional protections to police maps that are the product of an unfair process. In short, courts are likely to carefully examine process fairness in state law-driven partisan gerrymandering lawsuits in the coming decade.

B. Indirect Avenues to Attack Unfair Maps Likely to Proliferate

The Supreme Court's removal of partisan gerrymandering claims from the hands of federal courts will no doubt hamper plaintiffs' ability to police unfairness in the process. But if the past is any guide, plaintiffs

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236. *Rucho*, 139 S. Ct. at 2491 (quoting Common Cause v. Rucho, 318 F. Supp. 3d 777, 809 (M.D.N.C. 2018)).

237. *See id.* (quoting *Common Cause*, 318 F. Supp. 3d at 808); Ralph Hise & David Lewis, *We Drew Congressional Maps for Partisan Advantage. That Was the Point*., ATLANTIC (Mar. 25, 2019), https://www.theatlantic.com/ideas/archive/2019/03/ralph-hise-and-david-lewis-nc-gerrymandering/585619/.

238. *Rucho*, 139 S. Ct. at 2491 (quoting *Common Cause*, 318 F. Supp. 3d at 809) ("I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country.").

239. *Lewis*, 2019 N.C. Super. LEXIS 56, at *27–28 (omission in original) (internal citations omitted).

240. *Id*. at *29–30. The court described in detail the tight timeline between when the maps were revealed to the public (August 22, 2017) and passed (August 31, 2017), and despite public commentary, "overwhelmingly they were saying that they wanted districts drawn that were not partisan in nature." *Id*. at *30.

will continue to challenge egregious maps. Unable to bring partisan gerrymandering claims in federal court, scholars predict that plaintiffs will continue to pursue other ways to attack the lines—whether through state constitutional claims described above or through federal law hooks.[241]

In an amicus brief submitted during the Wisconsin partisan gerrymandering litigation, Professor Pam Karlan and other academic signatories[242] argued that "[t]he absence of a straightforward mechanism for adjudicating claims of unconstitutional partisan gerrymandering ha[d] led to troubling distortions" in redistricting litigation.[243] Without a straightforward mechanism to police hyper-partisanship in line drawing, Karlan argued, plaintiffs find other legal hooks to challenge fundamental unfairness.[244] The U.S. Supreme Court chose to bypass this reasoning,[245] but this does not diminish the likelihood that Professor Karlan is right.

As discussed above, plaintiffs routinely levy one person one vote, racial gerrymandering, and VRA claims to challenge maps that result from unfair redistricting processes.[246] Without a direct route via federal partisan gerrymandering to address partisan unfairness in districting, plaintiffs have at their disposal no shortage of vehicles to challenge the lines under state and federal law.[247] If the past several decades are any indication, such "indirect" suits will be complicated, messy, and prolonged. Line drawers can avoid riling would-be plaintiffs and win the favor of reviewing courts by taking pains to ensure the process is transparent and fair and includes public buy-in at every stage.

The nonjusticiability of partisan gerrymandering claims is unlikely, as some may have hoped, to reduce the amount of redistricting litigation in the coming decade. As the Karlan brief succinctly put it, "In some areas of law, litigation would largely dry up if this Court were to hold a particular claim nonjusticiable. Redistricting is not one of them."[248]

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241. *See generally, e.g.*, Douglas, *supra* note 230 (discussing state constitutional claims against gerrymandering).

242. Including this Article's author.

243. Brief of Amici Curiae Law Professors in Support of Appellees at 20, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161).

244. *See id.* at 6.

245. *See generally Gill*, 138 S. Ct. 1916 (vacating and remanding judgment for the plaintiffs).

246. *See* discussion *supra* pp. 2016–18.

247. *See infra* App. C.

248. Brief of Amici Curiae Law Professors in Support of Appellees at 6, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161) (alteration in original).

CONCLUSION

Line drawers aiming to stave off litigation would be wise to heed the lessons of the 2011 round of redistricting litigation. A meaningfully transparent redistricting process in which line drawers hold public meetings, make redistricting data open and accessible, facilitate public input and buy-in, and release maps in a timely manner allowing the public ample time to weigh the costs and benefits of proposals, are less likely to draw litigant ire. Line drawers that hide behind lip-service transparency may well be found out, particularly if their machinations produce unfair maps.

We learned in the last decade that reform efforts around the country did not necessarily reduce the amount of litigation that states experienced.[249] Sometimes political headwinds blow too hard. And yet, even in those states, courts reviewing maps clearly cared about transparency. Despite the legal complexities of redistricting litigation and the somersaults that legal standards often require courts to perform, the narrative of whether or not the process was fair is very often the subtext that animates courts' treatment of maps. Winning the narrative battle by establishing a genuinely fair and transparent process builds goodwill that can help convince both would-be plaintiffs and courts to bless the maps.

Line drawers drawing maps in 2021 face challenges, not the least of which involved navigating U.S. Census delays and involving the public in the process despite pandemic conditions.[250] Another challenge is drawing lines in an environment unlike any their predecessors faced. The 2020 round featured important advances in redistricting drawing and assessment tools freely available to the public and an abundance of influential and sophisticated organizations dedicated to using technology to inform the public about whether maps are fair.[251]

Relatedly, line drawers going forward face a public that cares.[252] Redistricting used to be a sleepy topic that only the most wonky knew or cared about. No more. Gerrymandering has become a front-page issue as

249. *See infra* App. C.

250. *See Census Bureau Statement on Redistricting Data Timeline*, U.S. CENSUS BUREAU (Feb. 12, 2021), https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html.

251. Great examples of new organizations established in the last decade to help the public police the lines include the Metric Geometry and Gerrymandering Group at Tufts, MGGG REDISTRICTING LAB, https://mggg.org (last visited May 10, 2021); THE PRINCETON GERRYMANDERING PROJECT, http://gerrymander.princeton.edu (last visited May 10, 2021); REPRESENTABLE, https://representable.org (last visited May 10, 2021); and PLANSCORE, https://planscore.org (last visited May 10, 2021) (providing tools for policymakers and litigators and members of the public to transparently score new plans and assess their fairness).

252. *See* Green, supra note 5, at 1790–91.

communities around the country have woken up to the harms line drawing trickery can unleash.[253] Technological tools at the disposal of this newly-awakened public should translate to line drawers being able to get away with far less.

What can we learn from the last decade of redistricting litigation? States that see and accept new realities of redistricting and react by ensuring a transparent and fair redistricting process have real hope of staving off litigation. Conversely, line drawers that think they can pull a fast one behind closed doors should gird for irritated litigants and judges alike.

253. *See id.*

APPENDIX A

CPI 2012 Redistricting Process Transparency Metrics

The Center for Public Integrity (CPI) used the following list of questions as its basis for state CPI grades to answer the general question "Is the state redistricting process open and transparent?"

326. In practice, for the latest redistricting round, public meetings were or are being held on the redistricting process.

327. In practice, for the latest redistricting round, public hearings were or are being held to solicit input on new district maps.

328. In practice, for the latest redistricting round, schedules of these meeting and/or hearings were or are available to the public.

329. In practice, for the latest redistricting round, the state government accepted or is accepting redistricting plans submitted by the public.

330. In practice, for the latest redistricting round, the government made or is making a redistricting website or online source of redistricting information available to the public.

APPENDIX B

State CPI Grade Detail

State	326. Public Meetings?	327. Meetings Solicit Input?	328. Meeting Schedules Publicly Available?	329. Accepting Plans from Public?	330. Online Source for Public?	Score	Grade (CPI)
Alabama	50	50	50	25	25	40	F
Alaska	50	50	50	50	50	50	F
Arizona	100	100	75	100	100	95	A
Arkansas	75	75	75	0	100	65	D
California	100	100	100	100	100	100	A
Colorado	75	75	100	50	50	70	C-
Connecticut	100	100	100	100	100	100	A
Delaware	75	75	100	50	100	80	B-
Florida	100	100	100	100	100	100	A
Georgia	50	25	75	0	75	45	F
Hawaii	100	75	100	75	100	90	A-
Idaho	100	100	100	100	100	100	A
Illinois	75	50	25	50	50	50	F
Indiana	50	50	75	50	25	50	F
Iowa	100	100	100	100	100	100	A
Kansas	75	100	100	75	100	90	A-

State	326. Public Meetings?	327. Meetings Solicit Input?	328. Meeting Schedules Publicly Available?	329. Accepting Plans from Public?	330. Online Source for Public?	Score	Grade (CPI)
Louisiana	75	75	75	25	100	70	C-
Maine	50	50	50	100	0	50	F
Maryland	50	25	100	25	100	60	D-
Massachusetts	100	100	100	50	100	90	A-
Mississippi	100	100	100	100	100	100	A
Montana	100	100	100	75	100	95	A
Michigan	25	25	25	25	75	35	F
Minnesota	50	0	75	25	50	40	F
Missouri	75	75	50	50	100	70	C-
Nebraska	100	100	100	75	100	95	A
Nevada	50	50	75	50	100	65	D
New Jersey	100	100	100	75	75	90	A-
New Hampshire	25	0	0	0	25	10	F
New Mexico	100	75	100	25	100	80	B-
New York	50	50	75	25	50	50	F
North Carolina	0	25	75	25	100	45	F
North Dakota	25	25	50	25	0	25	F
Ohio	25	25	0	50	50	30	F

State	326. Public Meetings?	327. Meetings Solicit Input?	328. Meeting Schedules Publicly Available?	329. Accepting Plans from Public?	330. Online Source for Public?	Score	Grade (CPI)
Oregon	100	100	100	75	100	95	A
Pennsylvania	75	25	100	0	50	50	F
Rhode Island	75	75	100	100	100	90	A-
South Carolina	75	75	100	50	100	80	B-
South Dakota	100	100	75	75	50	80	B-
Texas	100	25	25	0	100	50	F
Tennessee	25	25	25	50	100	45	F
Utah	25	50	100	0	100	55	F
Vermont	100	100	100	100	100	100	A
Virginia	100	75	100	0	100	75	C
Washington	100	100	100	100	100	100	A
West Virginia	75	25	50	50	50	50	F
Wisconsin	0	0	0	0	75	15	F
Wyoming	100	100	100	100	100	100	A

APPENDIX C

State Redistricting Litigation Following 2010 Census

The following lists redistricting cases by state, organized by descending CPI grade. Cases are drawn from the *All About Redistricting* website, which collects and organized state redistricting litigation documents.[254] In an effort to capture only instances in which plaintiffs brought claims challenging the work of line drawers, this listing excludes Department of Justice preclearance actions[255] and litigation involving ballot initiative efforts to change a state's redistricting process.

CPI Grade	**State**	**Citation**	**Date Filed/Date Resolved**	**Federal/ State**
A	AZ	*State ex rel. Montgomery v. Mathis*, 231 Ariz. 103 (Ct. App. 2012).	9/7/2011-12/11/2012	State
		Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787 (2015).	6/7/2012-6/29/2015	Federal
		Harris v. Ariz. Indep. Redistricting Comm'n, 136 S.Ct. 1301 (2016).	4/27/2012-4/20/2016	Federal
		Leach v. Ariz. Indep. Redistricting Comm'n	4/27/2012-3/16/2016	State
A	CA	*Connerly v. California*, 229 Cal. App. 4th 457 (2014).	3/20/2012-9/3/2014	State
		Vandermost v. Bowen, 53 Cal. 4th 421 (2012).	9/15/2011-1/27/2012	State
		Radanovich v. Bowen, 2012 U.S. Dist. LEXIS 199349 (C.D.	9/29/2011-2/9/2012	Federal

254. *See* ALL ABOUT REDISTRICTING, https://redistricting.lls.edu (May 10, 2021).

255. I.e., prior to the demise of section 5 of the VRA in 2013, *see* Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013).

		Ca. 2012).		
A	CT	*NAACP v. Merrill*, 939 F.3d 470 (2d Cir. 2019).	6/28/2018-9/24/2019	Federal
		In re Petition of Reapportionment Comm'n, 303 Conn. 798 (2012).	12/2/2011-2/10/2012	State
A	FL	*Brown v. Detzner*, No. 4:15-cv-00398 (N.D. Fla. Apr. 18, 2016)	8/12/2015-4/18/2016	State
		Warinner v. Detzner, No. 6:13-cv-01860 (M.D. Fla. Mar. 27, 2014).	12/2/2013-3/27/2014	Federal
		Calvin v. Jefferson Cnty. Bd. of Comm'rs, 172 F.Supp.3d 1292 (N.D. Fla. 2016).	3/9/2015-4/18/2016	Federal
		Romo v. Detzner, No. 2012CA000412 (Cir. Ct. Fla. Aug. 14, 2015).	2/9/2012-8/14/2015	State
		League of Women Voters v. Detzner, 172 So.3d 363, 404-06 (Fla. 2015).	9/5/2012-7/10/2015	State
A	HI	*Kostick v. Nago*, 960 F. Supp. 2d 1074 (D. Haw. 2013).	4/6/12-1/21/2014	Federal
		Solomon v. Abercrombie, 270 P.3d 1013 (Haw. 2012).	10/10/2011 - 1/6/2012	State
		Matsukawa v. Haw. 2011 Reapportionment Comm'n, 2012 WL 57152 (Haw. 2012).	11/8/2011-1/4/2012	State
A	ID	*Denney v. Ysursa*, No. 39570-2012 (Idaho Jan. 25, 2012).	1/20/2012-1/25/2012	State
		Frasure v. Idaho Redistricting Comm'n, No. 39127-2011	9/7/2011-9/9/2011	State

		(Idaho Sept. 9, 2011).		
		Twin Falls Cnty. v. Idaho Comm'n on Redistricting, 271 P.3d 1202 (Idaho 2012).	11/16/2011 - 1/18/2012	State
		Benewah County v. Idaho Comm'n on Redistricting, No. 38373-2011 (Idaho Jan. 28, 2012).	12/7/2011-1/28/2012	State
A	IA			
A	KS	*Essex v. Kobach*, 874 F. Supp. 2d 1069 (D. Kan. 2012).	5/3/2012-6/7/2012	Federal
A	MA			
A	MS	*Thomas v. Reeves*, 961 F.3d 800 (5th Cir. 2020).	7/25/2018-6/18/2020	Federal
		NAACP v. Barbour, No. 3:11-cv-00159, 2011 WL 1870222 (S.D. Miss. May 16, 2011), aff'd, 132 S. Ct. 542 (2011).	3/17/2011-5/20/2013	Federal
		Smith v. Hosemann, 852 F. Supp. 2d 757 (S.D. Miss. 2011).	9/12/2011-12/30/2011	Federal
		Buck v. Barbour, No. 3:11-cv-00717 (S.D. Miss. 2011).	10/2011-12/2011	Federal
A	MT	*Willems v. Montana*, 325 P.3d 1204 (Mont. 2014).	3/14/2013-3/26/2014	State
A	NE			
A	NJ	*LaVergne v. Bryson*, 497 Fed.Appx. 219 (3d Cir. 2012).	12/6/2011-9/20/2012	Federal
		Gonzalez v. McManus, No. A-	4/20/2011-	State

		0747-11T4 (N.J. Super. Ct. App. Div. Sept. 10, 2012).	9/10/2012	
A	OR	*Meeker v. Kitzhaber*, No. 110197 (Cir. Ct. Or., Yamhill June 10, 2011).	5/17/2011-6/10/2011	State
A	RI	*Puyana v. Rhode Island*, C.A. No. PC12-1272 (R.I. Super. Ct., Providence May 30, 2013).	5/8/2012-5/29/2013	State
A	VT			
A	WA	*In re 2012 Wash. State Redistricting Plan*, No. 86976-6 (Wash. S. Ct. Nov. 2, 2012).	2/8/2018-11/2/2012	State
A	WY	*Hunzie v. Maxfield*, No. 179-562 (Wyo. Dist. Ct., Laramie Cnty. Nov. 30, 2015).	4/5/2012-11/30/2015	State
B-	DE			
B-	NM	*Chavez-Hankins v. Duran*, No. 1:12-cv-00140 (D. N.M. Apr. 13, 2012).	2/13/2012-4/13/2012	Federal
		Maestas v. Hall, 274 P.3d 66 (N.M. 2012).	1/27/2012 (opening brief filed) - 2/21/2012	State
B-	SC	*Backus v. South Carolina*, 857 F. Supp. 2d 553 (D.S.C. 2012), *aff'd*, 133 S. Ct. 156 (2012).	11/11/2011 - 3/9/2012	Federal
B-	SD			
C	CO	*In re Reapportionment of Colo. General Assembly*, 332 P.3d 108 (Colo. 2011).	10/3/2011-11/15/2011	State

		Moreno v. Gessler, No. 11CV3461 (Denver Dist. Ct. Dec. 5, 2011).	5/10/2011-12/5/2011	State
C	LA	*Johnson v. Ardoin*, 2019 WL 4318487 (M.D. La. 2019).	6/13/2018-10/13/2020	Federal
		Buckley v. Schedler, No. 3:13-cv-00763 (M.D. La. 2013).	11/25/2013 - 12/16/2013	Federal
		Ceasar v. Jindal, No. 6:12-cv-02198 (W.D. La. 2013); renumbered No. 13-30521 (5th Cir. 2013)	8/16/2012-6/19/2013	Federal
C	MO	*Ehlen v. Carnahan*, No. 6:12-cv-03122 (W.D. Mo. 2012).	3/2/2012-3/13/2012	Federal
		Pearson v. Koster, 367 S.W.3d 36 (Mo. 2012).	9/2011-5/25/2012	State
		State ex rel. Teichman v. Carnahan, 357 S.W.3d 601 (Mo. 2012).	12/9/2011-1/17/2012	
		Johnson v. State, 366 S.W.3d 11 (Mo. 2012)	1/27/2012-5/25/2012	State
C	VA	*Bethune-Hill v. Va. State Bd. of Elections*, 368 F. Supp. 3d 872 (E.D. Va. 2019).	12/22/2014 - 2/14/2019	Federal
		Personhuballah v. Alcorn, 155 F. Supp. 3d 552 (E.D. Va. 2016).	10/2/2013-1/7/2016	Federal
		Vesilind v. Va. State Bd. of Elections, 813 S.E.2d 739 (Va. 2018).	9/14/2015-5/31/2018	State
D	AR	*Larry v. Arkansas*, No. 4:18-cv-00116, 2018 WL 4858956 (E.D. Ark. Aug. 3, 2018)	2/9/2018-1/11/2019	Federal

		Jeffers v. Beebe, 895 F. Supp. 2d 920 (E.D. Ark. 2012).	1/23/2012-9/17/2012	Federal
D	NV	*Guy v. Miller*, No. 11 OC 00042 1B (Nev. Dist. Ct., Carson City Oct. 27, 2011)	2/24/2011-10/27/2011	State
		Teijeiro v. Schneider, No. 3:11-cv-00330 (D. Nev. 2011).	5/9/2011-12/2/2011	Federal
D-	MD	*Gorrell v. O'Malley*, 1:11-cv-02975, 2012 WL 226919 (D. Md. Jan. 19, 2012).	10/27/2011 - 1/19/2012	Federal
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		Olson v. O'Malley, Misc. No. 13 (Md. Ct. Appeals Jan. 10, 2012).	11/22/2011 - 1/10/2012	State
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F	AL	*Sexton v. Bentley*, No. CV-2012-503-TSM, 2012 WL 1749015 (Cir. Ct. Montgomery May 16, 2012.)	5/16/2012-8/15/2012	State
		Chestnut v. Merrill, 446 F. Supp. 3d 908 (2020).	6/13/2018-3/17/2020	Federal
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F	AK	*In re 2011 Redistricting Cases*, 294 P.3d 1032, 1037-38 (Alaska 2012).	7/12/2011-11/18/2013	State
F	GA	*Dwight v. Kemp*, No. 118CV02869 (N.D. Ga. 2020).	6/13/2018, 4/14/2020	Federal
		Ga. State Conf. of NAACP v. Georgia, 312 F. Supp. 3d 1357 (N.D. Ga. 2018).	4/24/2017-6/1/2018	Federal
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F	IN			
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F	ME	*Turcotte v. LePage*, No. 1:11-cv-00312, 2011 WL 6057844 (D. Me. Nov. 30, 2011).	8/17/2011-11/30/2011	Federal
		Desena v. Maine, 793 F. Supp. 2d 456 (D. Me. 2011).	3/28/2011-7/21/2011	Federal
F	MI	*League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich. 2019), *rev'd sub nom. Chatfield v. League of Women Voters of Mich.*, 140 S. Ct. 429 (2019).	12/22/2017 - 10/21/2019	Federal
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F	MN	*Hippert v. Ritchie*, 813 N.W.2d 391 (Minn. 2012).	1/25/2011-2/21/2012	State
		Hippert v. Ritchie, 813 N.W.2d 374 (Minn. 2012).	1/25/2011-2/21/2012	State
F	NH	*Manchester v. Sec'y of State*, 48 A.3d 864 (N.H. 2012)	4/23/2012-6/19/2012	State
F	NY	*Favors v. Cuomo*, No. 1:11-cv-05632, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012).	11/17/2011 - 3/19/2012	Federal

		Cohen v. NY LATFOR, No. 101026/12 (NY Mar. 9, 2012).	1/31/2012-3/9/2012	State
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		Little v. NY LATFOR, No. 2310-2011 (N.Y. Feb. 14, 2012).	4/4/11-2/14/2012	State
F	NC	*Common Cause v. Lewis*, No. 18-CVS-014001, 2019 WL 4569584 (N.C. Super. Ct., Wake Cnty. Sept. 3, 2019), *aff'd*, 956 F.3d 246 (4th Cir. 2020).	12/14/2018 - 4/16/2020	State
		Rucho v. Common Cause, 139 S. Ct. 2484 (2019).	8/5/2016-6/27/2019	Federal
		N.C. State Conference of NAACP Branches v. Lewis, No. 18-CVS-002322 (N.C. Super. Ct., Wake Cnty. Nov. 2, 2018)	2/21/18-11/2/2018	State
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		Covington v. North Carolina, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017), 137 S. Ct. 1624 (2017)	5/19/2015-6/5/2017	Federal
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	OK	*Duffee v. State Question 748*, No. O-109127 (Okla. Feb. 28, 2011).	1/24/2011-2/28/2011	State
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		Pileggi v. Aichele, 843 F. Supp.	1/30/2012-	Federal

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		League of Women Voters of Pa. v. Pennsylvania, 178 A.3d 737 (Pa. 2018).	6/15/2017-10/29/2018	State
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F	WI	*Gill v. Whitford*, 138 S. Ct. 1916 (2018), *dismissed on remand sub nom. Whitford v. Gill*, No. 3:15-cv-00421 (W.D. Wis. July 2, 2019)	7/8/2015-6/18/2018	Federal
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