

Beyond Transparency: Rethinking Election Reform from an Open Government Perspective

*Michael Halberstam**

ABSTRACT

During the past decade, “transparency” has become a focus of democratic governance. Open government and right-to-know regimes have been around at least since the 1970s. They include measures like open meeting laws, campaign finance disclosure, lobbying registration, and freedom of information laws. But the Open Government projects—variously referred to as e-democracy, Open Data, or Government 2.0—have evolved into something new and different. They view transparency not primarily as a right to know, but as a condition for a more efficient, intelligent, and cooperative form of democratic government. This Article considers how various election reform projects fit with the Open Government model and considers the new opportunities that such projects generate.

I. INTRODUCTION

Since the turn of the century, “transparency” has emerged as a focus of democratic governance.¹ Government transparency has become a

* J.D. Stanford, Ph.D. Yale University, Associate Professor, SUNY Buffalo Law School. The author wishes to thank Guyora Binder, Bruce Cain, Karin Mac Donald, Ulrich Sieberer, Kate Brown, David Becker, Jim Gardner, Matt Steilen, John Schlegel, Rick Su, Archon Fung, and Sue Mangold for their very helpful comments.

1. See, e.g., Ann Florini, *Introduction: The Battle Over Transparency*, in *THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD* 1, 7 (Ann Florini ed., 2007); MARGARET GRAHAM, *DEMOCRACY BY DISCLOSURE: THE RISE OF TECHNOPOPULISM* (2002); SHANNON E. MARTIN, *SOCIAL MEDIA AND PARTICIPATORY DEMOCRACY: PUBLIC NOTICE AND THE WORLD WIDE WEB* (2014); OPEN GOVERNMENT: COLLABORATION, TRANSPARENCY, AND PARTICIPATION IN PRACTICE (Daniel Lathrop & Laurel Ruma eds., 2010) [hereinafter LATHROP & RUMA, *OPEN GOVERNMENT*]; Joseph E. Stiglitz, *On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life*, in *GLOBALIZING RIGHTS: THE OXFORD AMNESTY LECTURES 1999* 115, 115 (Matthew J. Gibney ed., 2003) (“[T]here is, in democratic societies, a basic right to know, to be informed about what the government is doing and why.”); Archon Fung, *Infotopia: Unleashing The Democratic Power of Transparency*, 41 *POL. & SOC’Y* 183 (2013); James R. Hollyer, B. Peter Rosendorff

measure of democratization and a goal of good government reform. This is true of election law. Transparency in election administration,² voting rights,³ redistricting,⁴ and campaign finance⁵ are widely embraced as conditions of fair elections.

Traditionally, government transparency has been associated with right-to-know legislation, such as open records laws, open meeting laws, access to court records, legislative transparency, and disclosure policies.⁶ The principal purpose of such transparency regimes is thought to afford citizens the means to hold their elected and unelected government officials accountable.⁷

& James Raymond Vreeland, *Democracy and Transparency*, 73 J. POL. 1191 (2011); Michael F. DiMario, *Remarks Before the Conference on Government Information Issues in the 21st Century on the Foundations of Federal Public Access Policy*, 20 ADMINISTRATIVE NOTES: NEWSLETTER OF THE FEDERAL DEPOSITORY LIBRARY PROGRAM No. 17, at 20, 21 (Nov. 15, 1999) (“[T]he concept of providing public access to information by and about government . . . [w]e consider . . . absolutely basic to our form of government”), available at <http://www.fdlp.gov/file-repository/historical-publications/administrative-notes/1999-adnotes/997-administrative-notes-vol-20-no-17/file>; Angel Guria, *Openness and Transparency—Pillars for Democracy, Trust, and Progress*, ORG. FOR ECON. COOPERATION & DEV., <http://www.oecd.org/fr/etatsunis/opennessandtransparency-pillarsfordemocracystandprogress.htm> (last visited Mar. 1, 2015) (“Openness and transparency are key ingredients to build accountability and trust, which are necessary for the functioning of democracies and market economies.”).

2. See, e.g., HEATHER K. GERKEN, *THE DEMOCRACY INDEX* 115 (2009).

3. See generally Michael Halberstam, *The Myth of “Conquered Provinces”*: *Probing the Extent of the VRA’s Encroachment on State and Local Autonomy*, 62 HASTINGS L.J. 923 (2011) (arguing that § 5 of the Voting Rights Act functioned primarily as a disclosure and monitoring regime); Spencer Overton, *Voting Rights Disclosure*, 127 HARV. L. REV. F. 19 (2013) (advocating for more transparency in response to the U.S. Supreme Court’s decision in *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013), which rendered § 5 of the Voting Rights Act ineffective).

4. See generally, e.g., Michael Halberstam, *Process Failure and Transparency Reform in Local Redistricting*, 11 ELECTION L.J. 446 (2012) (advocating for data and process transparency in local redistricting).

5. See, e.g., *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 370 (2010) (affirming the importance of campaign finance disclosure); Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 273–76 (2011).

6. See generally RICHARD J. PELTZ-STEELE, *THE LAW OF ACCESS TO GOVERNMENT* (2012) (surveying the law of access to government and identifying it as “the law of transparency”). See also REPORTERS COMM. FOR FREEDOM OF THE PRESS, *FEDERAL OPEN GOVERNMENT GUIDE* (10th ed. 2009), available at <http://www.rcfp.org/rcfp/orders/docs/HOW2FOI.pdf> (covering the FOIA, the Privacy Act, the Federal Advisory Committee Act, and the Government in the Sunshine Act); *Open Government Guide*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://rcfp.org/open-government-guide> (last visited Mar. 17, 2015).

7. See, e.g., *Blakely v. Washington*, 542 U.S. 296, 316 (2004); *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772–73 (1989) (“[T]he basic purpose of the Freedom of Information Act [is] ‘to open agency action to the light of public scrutiny.’ . . . ‘[D]emocracy cannot function unless the people are permitted to know *what their government is up to*.’”).

Because transparency is assimilated to the right to know, it is not always understood that conceptions of government transparency have evolved into something new and different.⁸ I do not refer here to the kind of demands for “radical transparency” of a WikiLeaks, which fits within the traditional framework of safeguarding against the abuse of power by government and ruling elites.⁹ Rather, transparency reforms that are variously referred to as Open Government,¹⁰ e-democracy,¹¹ Open Data,¹² or Government 2.0¹³ view access to government information not primarily in terms of the right to know, but as a condition for deploying the information technologies that have revolutionized the private sector to create a more efficient, collaborative, and innovative form of democratic governance. In other words, they go “beyond transparency” in its conventional sense.¹⁴

The contemporary open government movement, “Open Government,” evolved out of the open data and open source movements in the

8. See, e.g., RICHARD W. OLIVER, WHAT IS TRANSPARENCY? 2 (2004) (transparency has come to mean “active disclosure”); Tim O’Reilly, *Government as a Platform*, in OPEN GOVERNMENT: COLLABORATION, TRANSPARENCY, AND PARTICIPATION IN PRACTICE 11, 12 (Daniel Lathrop & Laurel Ruma eds., 2010) (“Government 2.0, then, is the use of technology—especially the collaborative technologies at the heart of Web 2.0—to better solve collective problems at a city, state, national, and international level. The hope is that Internet technologies will allow us to rebuild the kind of participatory government envisioned by our nation’s founders, in which, as Thomas Jefferson wrote in a letter to Joseph Cabell, ‘every man . . . feels that he is a participator in the government of affairs, not merely at an election one day in the year, but every day.’”). The NYC Transparency Working Group and similar groups springing up in different cities across the country exemplify this development. See N.Y.C. TRANSPARENCY WORKING GRP., <http://nyctwg.org> (last visited Mar. 18, 2015). The legal literature recognizing this change is limited and largely confined to administrative law. *But see generally* Harlan Yu & David G. Robinson, *The New Ambiguity of “Open Government”*, 59 UCLA L. REV. DISCOURSE 178 (2012) (recognizing that “open government” has acquired a new meaning).

9. Alasdair Roberts, *Wikileaks: The Illusion of Transparency*, 78 INT’L REV. ADMIN. SCI. 116, 119 (2012) (“New technologies, applied to the old logic of disclosure, are predicted [by Wikileaks] to lead us to a new world of radical transparency: a world in which, as Assange has said, ‘strong powers [are] held to account, while the weak [are] protected.’”).

10. See LATHROP & RUMA, OPEN GOVERNMENT, *supra* note 1.

11. See, for example, STATE OF THE EU/UNION: GOVERNMENT 2.0 AND ONWARDS 203–256 (John Götze & Christian Bering Pedersen eds., 2009), and ORG. FOR ECON. COOPERATION & DEV., THE PROMISE AND PROBLEMS OF E-DEMOCRACY: CHALLENGE OF ONLINE CITIZEN ENGAGEMENT (2006), available at <http://www.oecd.org/governance/public-innovation/35176328.pdf>, for a more conservative development of the concept. For a more radical development of the concept, see the Wikipedia entry on e-democracy: *E-democracy*, WIKIPEDIA, <http://en.wikipedia.org/wiki/e-democracy> (last visited Mar. 1, 2015).

12. See, for example, The Open Data Institute, founded by Tim Berners-Lee and Nigel Shadbolt: *About the ODI*, OPEN DATA INST., <http://theodi.org/about-us> (last visited Mar. 18, 2015).

13. See, e.g., WILLIAM D. EGGERS, GOVERNMENT 2.0 (2005).

14. See *generally* BRETT GOLDSTEIN & LAUREN DYSON, BEYOND TRANSPARENCY: OPEN DATA AND THE FUTURE OF CIVIC INNOVATION (2013).

technology sector.¹⁵ It draws on information economics and the economics of networks, recognizing that the networked society has engendered new modes of social production based on the technology of an interactive Internet.¹⁶ It advocates active information sharing by government at all levels,¹⁷ civic/private sector participation in collective problem solving, and, in its more idealistic strain, the transformation of government into a kind of “platform” for convening and enabling collective action.¹⁸

The election law community largely still conceives of open government projects on the traditional model of transparency or openness.¹⁹ But we are beginning to make use of the Open Government model and its toolkit:

- Heather Gerken’s proposal to develop election administration data for purposes of performance measurement has helped to focus our attention on improving election operations to deliver on the promise of constitutionally guaranteed voting rights.²⁰ And the 2013–2014 Presidential Commission on Election Administration has pursued this data-driven approach to improve voter registration, reduce excessive lines at the polls, and help improve the certification process for new voting technology at the state level.²¹
- In voter registration, The Pew Charitable Trusts (Pew) facilitated a partnership between top election officials from several states, with support from IBM, to create a joint computing center called Electronic Registration Information Center (ERIC). ERIC helps states manage, scrub, and service their voter regis-

15. See, e.g., JARED DUVAL, NEXT GENERATION DEMOCRACY: WHAT THE OPEN-SOURCE REVOLUTION MEANS FOR POWER, POLITICS, AND CHANGE 58ff (2010).

16. YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 32 (2006).

17. See generally, e.g., PATRICIA E. SALKIN & JULIE A. TAPPENDORF, SOCIAL MEDIA AND LOCAL GOVERNMENTS: NAVIGATING THE NEW PUBLIC SQUARE (2013).

18. See generally O’Reilly, *supra* note 8 (setting forth this vision somewhat in the form of a manifesto).

19. See, e.g., BRUCE E. CAIN, DEMOCRACY MORE OR LESS: AMERICA’S POLITICAL REFORM QUANDARY 41–67 (2015) (discussing, *inter alia*, transparency as a tool in political process regulation).

20. See generally GERKEN, *supra* note 2.

21. See generally PRESIDENTIAL COMM’N ON ELECTION ADMIN., THE AMERICAN VOTING EXPERIENCE (2014), available at <https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf>.

tration data by sharing registration information previously locked up in separate state databases.²²

- In redistricting, a joint working group of the American Enterprise Institute and the Brookings Institution set forth basic principles of transparency and open data in the redistricting process. These principles were influenced by the “best practices” developed by California’s Statewide Database under the direction of Karin Mac Donald.²³ California’s Statewide Database has pioneered the collection, production, and dissemination of political and demographic data as a public service.²⁴ Mac Donald has also been instrumental in developing the institutional mechanisms to put this data to use in citizens redistricting, which replaced statewide legislative redistricting in California during this decennial redistricting cycle.²⁵ Separately, the Public Mapping Project, founded by Micah Altman and Michael MacDonald, developed an online, interactive, data visualization and political mapping system called DistrictBuilder™, which has given the general public free access to user-friendly redistricting software and encouraged public participation in the 2012 redistricting cycle.²⁶
- In the voting rights area, comprehensive election databases are critical to the enforcement of voting rights, especially in light of the U.S. Supreme Court’s recent 2013 decision in *Shelby v. Holder*, which disabled the information forcing “preclearance regime.”²⁷ But Voting Rights Act litigation, which now remains the principal vehicle to challenge violations, requires parties to analyze election data and district performance information for the past three election cycles.²⁸ Michael Halberstam,²⁹ Spencer

22. Erin Ferns Lee, *Pew Report Exemplifies Need to Bring Voter Registration to the 21st Century*, PROJECT VOTE BLOG (Feb. 14, 2012), <http://www.projectvote.org/blog/2012/02/pew-report-exemplifies-need-to-bring-voter-registration-to-the-21st-century/>.

23. Karin Mac Donald participated in the Brookings discussions.

24. See Halberstam, *supra* note 4 (describing SDWB function in comparison to New York State’s LATFOR); STATEWIDE DATABASE, <http://www.statewidedatabase.org> (last visited Mar. 1, 2015).

25. See generally Karin Mac Donald, *Adventures in Redistricting: A Look at the California Redistricting Commission*, 11 ELECTION L.J. 472 (2012) (describing her participation in the process).

26. See DISTRICTBUILDER, <http://www.publicmapping.org> (last visited Mar. 1, 2015).

27. *Shelby v. Holder*, 133 S. Ct. 2612 (2013).

28. *Gingles v. Edmisten*, 590 F. Supp. 345, 367 (E.D.N.C. 1984), *aff’d in part, rev’d in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986).

29. See generally Halberstam, *supra* note 4.

Overton,³⁰ and others have suggested that voting rights disclosure systems could satisfy at least some of the information requirements of civil rights advocates, make redistricting more open and transparent, but also save local governments considerable costs by making this information easily available during litigation, and by avoiding litigation in the first place.

In all these areas, however, the potential of the Open Government toolkit is not always recognized.

This Article explores how current election reform projects fit with the contemporary Open Government model, and how greater clarity about the goals of this model might inform these projects. It begins by distinguishing four types of government transparency or openness—(1) right-to-know transparency, (2) transparency as regulation, (3) transparency in regulation, and (4) transparency as Open Government—and relates this typology to competing conceptualizations in the literature. This analysis provides a clear statement of the features of Open Government, which is then applied to the examination of the different election reform projects described above.

Part II distinguishes between four different conceptions of government transparency and gives an account of the Open Government model. Part III examines the shift from a concern with voting rights to a concern with operations in the election law community. Part III.A considers Professor Gerken's demand that we focus on generating data about election administration. Part III.B describes the Pew's initiative to develop information sharing to solve voter registration problems. Part IV describes how Open Data in redistricting works and how it has provided opportunities for public participation. Part V describes how Open Government platforms may help address the Supreme Court's invalidation of Voting Rights Act preclearance. Part VI considers criticisms of the Open Government approach. Part VII concludes.

II. BEYOND TRANSPARENCY: FROM RIGHTS TO WELFARE

Concepts of transparency and open government have taken on increasing importance in connection with contemporary efforts at government reform and democratization. But in the legal literature, transparency and open government are often used ambiguously, and to make things worse, synonymously with other terms like "freedom of information" or

30. See generally Overton, *supra* note 3.

“sunshine laws.” The “opacity of transparency” has thus been remarked upon by more than one commentator.³¹

Professor Richard Peltz-Steele highlights this in his leading textbook on the law of access to government information. Defining the “law of access to government” as “freedom of information,” he writes: “Whether the mechanism of access is common law, administrative rule, sunshine statute, or constitutional doctrine, freedom of information in its broadest formulation is simply *transparency*. Transparency is a *sine qua non* of democracy, hand in hand with free speech and fair elections.”³² Peltz-Steele thus identifies transparency and freedom of information with the law of access to government information in the service of democracy. The law of access defines rights that can be vindicated in the courts, such as the right of access to government records under the federal Freedom of Information Act. Transparency or freedom of information law thus concerns the scope of such rights of access and the legal doctrines justifying them. At the same time, Peltz-Steele points out that freedom of information is also often used in a more limited sense to mean the right of access to information held by the executive.³³

The conventional use of transparency is thus both too narrow and too broad to account for transparency in the different senses in which it has become important. Consequently, Archon Fung and coauthors distinguish between “right to know” transparency—essentially Peltz-Steele’s law of access to government information—and “targeted transparency”—information-pushing regimes like securities disclosure or food labeling, in which government forces private entities, but also government entities,³⁴ to disclose specific information in standardized formats.³⁵ According to Fung and coauthors, right-to-know laws represent a first generation of transparency policies “that aim to generally inform public discourse,” whereas “targeted transparency aims to influence specific choices.”³⁶

31. See generally, e.g., Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885 (2006) [hereinafter Fenster, *Opacity*]; Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339 (2011); Yu & Robinson, *supra* note 8.

32. PELTZ-STEELE, *supra* note 6, at xv.

33. *Id.* at 125.

34. For example, Cass Sunstein argues for applying the same kind of behavior altering information regimes to government regulators as government regulators apply to the regulation of private entities. See CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* 35 (2013).

35. See ARCHON FUNG ET AL., *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* 39 (2007).

36. *Id.* at 39. Fung and coauthors then distinguish between second- and third-generation targeted transparency, where the latter describes contemporary Open Government policies.

A Congressional Research Service (CRS) report on transparency in the executive branch distinguishes two additional types of transparency.³⁷ Apart from right-to-know statutes, which provide the public presumed access to certain executive branch records and meetings, the CRS authors first distinguish public access to, and participation in, rulemaking as a form of government transparency.³⁸ Such transparency in the regulatory process was first established by the Administrative Procedure Act (APA) in 1947, which required executive branch agencies to publish proposed rules together with their rationale, allow for public comment, and take public comments into account in their final rulemaking.³⁹

Secondly, the CRS authors identify “initiatives in which transparency may not be the primary focus, but a component or byproduct of [its] effects.”⁴⁰ President Obama’s *Transparency and Open Government Directive* provides an important example, which, *inter alia*, requires that administrative agencies identify and publish “high-value datasets” to engage the energies of market forces and nongovernmental organizations in government problem solving.⁴¹ Such policies go beyond transparency in Peltz-Steele’s sense, but also beyond the use of disclosure regimes or public participation in rulemaking.

These and other discussions of transparency in the legal literature have contributed to our understanding of the concept. But the legal literature on transparency does not converge on a particular typology of “transparency.”⁴² In proposing what I believe to be a more complete and helpful set of distinctions, I draw on these contributions as follows.⁴³

37. WENDY GINSBERG ET AL., CONG. RESEARCH SERV., R42817, GOVERNMENT TRANSPARENCY AND SECRECY: AN EXAMINATION OF MEANING AND ITS USE IN THE EXECUTIVE BRANCH (2012), available at <https://www.fas.org/sgp/crs/secrecy/R42817.pdf>.

38. *See id.*

39. Administrative Procedure Act, ch. 324, § 60, Stat. 237 (1946) (codified at 5 U.S.C. §§ 551–559, 701–706 (2010)).

40. GINSBERG ET AL., *supra* note 37, at 9.

41. *See* U.S. GEN. SERV. ADMIN., GSA OPEN GOVERNMENT PLAN, VERSION 3.0, FISCAL YEARS 2014–2016 8, 9 (2014), available at http://www.gsa.gov/portal/mediaId/193259/fileName/GSA_Open_Government_Plan_v3.action; Memorandum from the Executive Office of the President, Office of Management and Budget to the Heads of Executive Departments and Agencies, at 2 (Dec. 8, 2009) [hereinafter Open Government Memorandum], available at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf.

42. For different treatments of transparency, see FUNG ET AL., *supra* note 35; LATHROP & RUMA, OPEN GOVERNMENT, *supra* note 1; Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924 (2009); Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351 (2011); Kenneth Feinberg, *Transparency and Civil Justice: The Internal and External Value of Sunlight*, 58 DEPAUL L. REV. 473 (2009); Mark Fenster, *Designing Transparency: The 9/11 Commission and Institutional Form*, 65 WASH. & LEE L. REV. 1239 (2008); Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 ADMIN. L. REV. 617 (2010) [hereinafter Fenster,

I distinguish between four different types of transparency:

1. Transparency as the Right to Know;
2. Transparency as Regulation/Mandated Disclosure;
3. Transparency in Rulemaking; and
4. Transparency as Open Government.

I discuss each of these further in the following sections. Whereas the first three are intended to be mainly descriptive, the latter is aspirational in that it includes a healthy dose of the kind of “transparency populism” that Mark Fenster and others have criticized.⁴⁴

A. Right-to-Know Transparency

The idea of government transparency is most frequently associated with a “right to know” or a “right to public information.” This right to know is reflected in twentieth century sunshine laws, which include open records and open meeting laws.⁴⁵ Collectively, such open records and open meetings laws are referred to as “open government” legislation.

At the federal level, the Freedom of Information Act of 1966 (FOIA), as amended, is the most important open records statute.⁴⁶ The FOIA replaced the APA’s public information section.⁴⁷ It effected two fundamental changes in the right of access to executive branch information. First, FOIA’s 1974 amendments shifted the traditional common law (and later statutory) burden of showing demonstrable need for a particular government document to the government by presumptively granting access, subject to nine specific exemptions on which the government

Seeing the State]; Eugene R. Fidell, *Transparency*, 61 HASTINGS L.J. 457 (2009); William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171 (2009); Jacob E. Gersen & Anne Joseph O’Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157 (2009); Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011 (2008); Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481 (2009); Michael R. Siebecker, *Trust & Transparency: Promoting Efficient Corporate Disclosure Through Fiduciary-Based Discourse*, 87 WASH. U. L. REV. 115 (2009); Lawrence B. Solum, *Legal Theory Lexicon: Transparency*, LEGAL THEORY BLOG (Oct. 3, 2010, 11:00 AM), <http://lsolum.typepad.com/legaltheory/2010/10/legal-theory-lexicon-transparency.html>.

43. See, e.g., FUNG ET AL., *supra* note 35; Mark Fenster, *Opacity*, *supra* note 31, at 910–14 (describing the balance between benefits and limitations in conceptions of transparency); Mark Fenster, *Seeing the State*, *supra* note 42; Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339 (2011).

44. See generally Fenster, *Seeing the State*, *supra* note 42.

45. See, e.g., FUNG ET AL., *supra* note 35, at 25–27.

46. 5 U.S.C. § 552 (2009).

47. See *U.S. Dep’t of Justice v. Reporters Comm. for the Freedom of the Press*, 489 U.S. 749, 754 (1989); PELTZ-STEELE, *supra* note 6, at 127.

has to base any denial of information.⁴⁸ Under FOIA, any person may request access to identifiable, existing government records without providing an explanation or a justification.⁴⁹ A second, related change was that access was no longer limited to individuals with a particular need.⁵⁰

The basic purpose of FOIA was “to ensure that the [g]overnment’s activities be opened to the sharp eye of public scrutiny.”⁵¹ Ruling on the disclosure of a criminal rap sheet in *U.S. Department of Justice v. Reporters Committee for the Freedom of the Press*, the U.S. Supreme Court described the purpose of the Act as follows:

Justice Douglas characterized the philosophy of the statute by quoting this comment by Henry Steele Commager: “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*.” This basic policy of “full agency disclosure unless information is exempted under clearly delineated statutory language” . . . indeed focuses on the citizens’ right to be informed about “what their government is up to.” Official information that sheds light on an agency’s performance of its statutory duties falls squarely within that statutory purpose.⁵²

Reflecting the Court’s interpretation of FOIA, right-to-know transparency is typically viewed as a condition of democratic accountability. To the extent that the people are sovereign, government must be accountable and responsive to the people. And the ability to hold government officials to account and to assess their responsiveness presupposes that the people know “what their government is up to.”⁵³

The right to know what government is up to might be said to reflect the theory of distrust that informs American democracy. Arguments for a constitutional basis for such a right point to the Founding Fathers’ intense concern about how to prevent the corruption of the Republic.⁵⁴ This

48. 5 U.S.C. § 552(b) (2009); PELTZ-STEELE, *supra* note 6, at 129.

49. *U.S. Dep’t of Justice v. Reporters Comm. for the Freedom of the Press*, 489 U.S. 749 (1989).

50. *Id.* at 770 (“The identity of the requesting party has no bearing on the merits of his or her FOIA request.”).

51. *Id.* at 774.

52. *Id.* at 772 (internal quotation marks and citations omitted).

53. *Id.* (“This basic policy of ‘full agency disclosure unless information is exempted under clearly delineated statutory language,’ indeed focuses on the citizens’ right to be informed about ‘what their government is up to.’” (quoting S. REP. NO. 89-813, at 3 (1965))).

54. GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 299 (1998).

concern is reflected in the constitutional structure, including not only in the separation and division of powers, but also in direct proscriptions of graft, such as the Gifts and Emoluments Clause.⁵⁵ The Publications Clause⁵⁶ reflects this same idea. According to Justice Story, “[t]he object of the whole clause is to ensure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents.”⁵⁷

This purpose can be understood in terms of agency law, which informs our constitutional structure.⁵⁸ Accountability entails both the act of an agent to provide information to his principal (about money spent, debts incurred, and actions taken), as well as the condition of being subject to the control of the principal.⁵⁹ We can think of the principal’s control over his agent as dependent upon the principal’s right to monitor the agent.⁶⁰

To this end, the federal government also passed certain open meeting laws. In 1976, Congress passed the Government in the Sunshine Act, which required that certain government meetings be open by default.⁶¹ Here too the legislative intent was to establish accountability:

The basic premise of the sunshine legislation is that, in the words of Federalist 49, “the people are the only legitimate foundation of power, and it is from them that the constitutional charter . . . is derived.” Government is and should be the servant of the people, and

55. “No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” U.S. CONST. art. I, § 9, cl. 8; See Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 443–73 (2009) (discussing constitutional provisions that reflect the anticorruption concern).

56. See, for example, U.S. CONST. art. I, § 5, cl. 31, which provides that “Each House shall keep a Journal of its Proceedings, and from time to time publish the same . . . and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.”

57. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 838 (1833), available at http://press-pubs.uchicago.edu/founders/documents/a1_5s21.html.

58. See generally Akheer Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

59. RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

60. Lloyd Mayer has raised problems with this view, noting that just as shareholders of a corporation do not ordinarily have the right to access information about a corporation’s operations and decisions—this is the job of the board—citizens in a representative government also do not have such an absolute right. Lloyd Hitoshi Mayer, *Politics and the Public’s Right to Know*, 13 ELECTION L.J. 138, 145–46 (2014).

61. 5 U.S.C. § 552(b) (2009). See also Federal Advisory Committee Act of 1972, 5 U.S.C. app. 2, §§ 1–16 (2014).

it should be fully accountable to them for the actions which it supposedly takes on their behalf.⁶²

Every state has adopted its own public records and open meetings laws.⁶³

Simplifying the different historical strands of such right-to-know transparency, I maintain that its principal purpose, as it emerged in the 1970s in the wake of the Vietnam War and Watergate, has been as a tool of *government accountability and anticorruption*.⁶⁴ To recall Peltz-Steele's observation, "[t]ransparency is a *sine qua non* of democracy, hand in hand with free speech and fair elections,"⁶⁵ in that it enables citizens to discuss and assess the performance of elected officials and hold them accountable at the ballot box.⁶⁶

Twentieth century open government laws that rely on right-to-know justifications have the following characteristics. Conventional open government, or right-to-know law, is characterized by passivity on the part of government.⁶⁷ Freedom of information laws require government to respond to specific inquiries for particular government records.⁶⁸ The communication is typically a one-to-one communication. The information comes from government and is produced to a single party. The communication is a one-way street. Government does not obtain any information by means of freedom of information requests. While records may be requested online this does not generate any network effects for government operations. Moreover, government typically does not change its procedures in response to such requests. The processing of freedom of

62. H.R. Rep. No. 94-880(I), at 2 (1976), as reprinted in 1976 U.S.C.C.A.N. 2183, 2186. See also the Federal Advisory Committee Act, 92 P.L. 463, 86 Stat. 770 (1972).

63. State open meeting / sunshine laws are generally much more sweeping than the limited federal open meeting laws. The Delaware FOI, for example, gives presumptive access to "information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced." DEL. CODE ANN. tit. 29, § 10002(l) (2014). New York's open meeting laws, for example, presumptively open all state and local government meetings to public scrutiny, subject to enumerated exceptions. N.Y. PUB. OFF. LAW § 84-90 (McKinney 1977).

64. Anthony Kronman, *The Privacy Exemption to the Freedom of Information Act*, 9 J. LEGAL STUD. 727, 733 (1980) ("The [A]ct's first and most obvious goal (reflected in its basic disclosure requirements) is to promote honesty and reduce waste in government by exposing official conduct to public scrutiny.").

65. See *supra* text accompanying note 32.

66. Right-to-know laws were supported by such discourse theory arguments. See Thomas L. Emerson, *Legal Foundations of the Right To Know*, 1976 WASH. U. L. Q. 1, 4 (discussing Alexander Meiklejohn's First Amendment theory).

67. FUNG ET AL., *supra* note 35, at 28 ("[R]ight-to-know policies required simply that existing government reports and other documents be made available to the public.").

68. See, e.g., 5 U.S.C. § 552(3)(A) (2009).

information requests is separate from government policymaking—a kind of service offered to citizens. The primary purpose of open records laws is to hold government officials accountable for their actions.⁶⁹ But they do not encourage participation in government decisionmaking in and of themselves, nor do open record or open meeting laws aim to change or improve government—at least not directly. However, publicity generated by the media or litigation as a result of a freedom of information request may ultimately affect government behavior. The same is true for open meeting laws. They are not aimed at changing or improving government or encouraging public participation, but at providing a window on government decisionmaking processes.⁷⁰ Additionally, like open records laws, open meeting laws provide access to existing information. Government generally does not produce additional information to those who attend meetings, except notices and minutes of what transpired. Right-to-know transparency is post hoc, in the sense that its principal purpose is the ability to assign responsibility for (undesirable) consequences of specific decisions to specific government actors.

Freedom of information laws naturally raise concerns about privileged information in the hands of government, including national security purposes, law enforcement, internal government decisionmaking, or the administration of programs affecting private individuals and firms. The traditional open government law is thus accompanied by exemptions and privacy protections that are both part of freedom of information and sunshine laws themselves, but also separately codified.

FOIA's practice has been geared towards the production of individual documents or limited quantities of documents, but not a routine production of data. The Privacy Act of 1974, codified at 5 U.S.C. § 552a, was passed out of concern over “the impact of computer data banks on

69. *Supra* notes 52–57.

70. Note that more recently, and in light of the changing conception of Open Government, courts have begun to include “participation” in government decisionmaking as a purpose of open meeting laws. Thus, in *Garlock v. Wake County Board of Education*, 712 S.E.2d 158 (N.C. Ct. App. 2011), the North Carolina Court of Appeals falsely cited *Gutierrez v. City of Albuquerque*, 631 P.2d 304 (N.M. 1981) for the proposition that open meeting laws, like North Carolina's, *inter alia*, “ensure that public bodies receive public input regarding the substance of the public body's actions.” *Garlock*, 712 S.E.2d at 173. Neither *Gutierrez*, nor the N.C. GEN. STAT. §§ 143-318.9–.18 (2013) warrant such an interpretation. See Cassandra B. Roeder, Note, *Transparency Trumps Technology: Reconciling Open Meeting Laws with Modern Technology*, 55 WM. & MARY L. REV. 2287, 2293–94 (2014) (recognizing that “although some states protect the public's right to speak at open meetings, many do not require that meeting attendees be given an opportunity to express opinions or ask questions,” but failing to distinguish between recent court decisions and older decisions on the purpose of open meeting laws).

individual privacy.”⁷¹ In *Reporters Committee*, the Supreme Court emphasizes a “level of federal concern over centralized data bases,”⁷² which suggests that open government as freedom of information does not naturally support open data projects. Right-to-know transparency is at best imagined as offering a window on government decisionmaking.

B. Transparency as Regulation / Mandatory Disclosure

The term “transparency as regulation” refers to the disclosure regimes imposed on private (and sometimes public)⁷³ actors by federal and state administrative agencies, like the Securities Exchange Commission (SEC), the Environmental Protection Agency, and the Food and Drug Administration, to obtain information they require to satisfy their regulatory missions.⁷⁴

The classic example of such regulations is the federal securities laws. They require that companies that offer securities for sale to the public register with the SEC and file a registration statement and a copy of their offering prospectus.⁷⁵ The SEC rules lay out in detail what financial, business, management, and other information must be disclosed in standardized SEC filings.⁷⁶ The filings are made available to the general public.⁷⁷ After the initial public offering, issuers are required to continue periodic and special disclosure of company information for as long as they exist as public companies. Securities issuers may be subject to civil or criminal enforcement if they violate their disclosure obligations.⁷⁸

Disclosure requirements are called “soft regulation” because they merely require the disclosure of conduct instead of regulating it in detail. Instead of prescribing a certain debt-equity ratio, for example, the SEC merely requires that a public company publish its debt-equity ratio accurately and in a timely fashion.⁷⁹ In securities disclosure, food labeling, home mortgage loan disclosure, auto safety ratings, and many other are-

71. U.S. Dep’t of Justice v. Reporters Comm. for the Freedom of the Press, 489 U.S. 749, 766 (1989).

72. *Id.*

73. See, e.g., SUNSTEIN, *supra* note 34 (describing how OIRA monitors federal government agencies by means of standardized information disclosure).

74. I borrow the term from Schauer, *supra* note 31.

75. See Securities Act of 1933, § 5, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77e–g (2012)).

76. SEC Regulation S-K, 17 C.F.R. § 229.10–1208 (2015).

77. See *EDGAR Search Tools*, U.S. SEC. AND EXCH. COMM’N, <http://www.sec.gov/edgar/searchedgar/webusers.htm#VNGJZUuxFpW> (last visited Feb. 26, 2015).

78. Sec. Exch. Comm’n v. Dessler, Inc., 628 F.2d 1368, 1377 (1980).

79. William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 171 (1933).

as, regulatory disclosure allows consumers to make their own choices. But it works to improve those choices by reducing information asymmetries among market participants.⁸⁰ Disclosure regimes are thus best understood as welfare enhancing, instead of rights enforcing. Shareholders do not have an independent right to such detailed information about a company in which they own only a small minority share. Rather, government here uses disclosure regimes to improve the efficiency of markets and avoid market failure.⁸¹

Basic information economics explains how information asymmetries affect the efficiency of markets. George Akerlof's *Market for Lemons* provides one explanation based on information asymmetry.⁸² To the extent that there is a substantial information asymmetry between sellers of used cars (who know from experience over time whether their vehicle is good) and buyers of used cars (who do not have such private information), buyers take the risk of getting a "lemon" that saddles them with ongoing costly repairs. Theoretically, the purchaser's risk associated with lack of information about the car, and the superior information of the seller or dealer, will be reflected in the used car dealer's anticipated price for such used cars—whether poorly or well-maintained. The purchaser will expect a discount for taking on the additional risk of buying in the used car market. And the seller of good cars will have a difficult time getting a fair price because buyers, who cannot distinguish good vehicles from bad ones, will only be willing to pay the average price. Sellers of good vehicles may thus refrain from selling their vehicles. This, in turn, means that more bad cars are sold in the market, which drives down the average price. This problem of "adverse selection," where the bad drives out the good, leads to fewer transactions and an inefficient market. Collective action by used car dealers to self-regulate, or by government to require used car dealers to standardize information disclosure in such a market, should increase social welfare, benefitting both the buyers and the sellers.

Government plays an important role in maintaining efficient markets by instituting such information pushing regimes. Securities disclosure, for example, makes securities markets more efficient by reducing information asymmetries between insiders and investors. This also lowers the transaction costs on the securities markets because buyers and

80. FUNG ET AL., *supra* note 35, at 30.

81. See generally John C. Coffee, *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717 (1984).

82. See George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970).

sellers save on the cost of searching for and generating this information. And it facilitates price finding because buyers and sellers have the same information. Overall, the more efficient the securities and financial markets are, the lower the cost of capital for entrepreneurs and corporations.

The market cannot supply this information without some form of collective action. Basic information economics holds that knowledge and information have public goods characteristics.⁸³ Pure public goods are characterized by nonrivalrous consumption, meaning “that the consumption of the good by one individual does not detract from the ability of others to enjoy its consumption.”⁸⁴ Second, pure public goods are nonexclusive, meaning that it is difficult to exclude an individual from enjoying the good. One consequence is that public goods, like information, tend to be underproduced in markets because producers have little incentive to invest unrecoverable resources in their production.⁸⁵ Information economics thus recognizes that government must step in to help generate this information. Our government, in fact, does so. But it does not necessarily “create” the information. Rather, disclosure regimes, like securities disclosure, leave the information production to the decentralized market actors.⁸⁶ Depending on the circumstances, government often merely compels it.⁸⁷

For these reasons, disclosure requirements are better understood as welfare-based, rather than rights-based. Archon Fung and coauthors describe mandatory disclosure regimes as a form of “targeted transparency.”⁸⁸ They write that “[i]nstead of aiming to generally improve public deliberation and officials’ accountability[,] . . . targeted transparency aims to reduce specific risks or performance problems through selective disclosure by corporations and organizations.”⁸⁹ Targeted transparency regimes all include “mandated public disclosure . . . by corporations or other private or public organizations . . . of standardized comparable, and

83. See Érica Gorga & Michael Halberstam, *Knowledge Inputs, Legal Institutions and Firm Structure: Towards a Knowledge-Based Theory of the Firm*, 101 NW. L. REV. 1123, 1168 (2007). See generally Joseph E. Stiglitz, *Knowledge as a Public Good*, in GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 308 (Inge Kaul, Isabelle Grunberg & Marc Stern eds., 1999).

84. Gorga & Halberstam, *supra* note 83, at 1168.

85. *Id.* For a succinct summary of these ideas, see FUNG ET AL., *supra* note 35, at 30–31.

86. See, e.g., Coffee, *supra* note 81 (addressing the role of analysts in rendering securities markets more efficient by disseminating the company disclosures that are publicized by the SEC).

87. An example is securities disclosure. See FUNG ET AL., *supra* note 35, at 12–13 for examples of such compelled disclosures.

88. FUNG ET AL., *supra* note 35, at 6.

89. *Id.* at 5.

disaggregated information . . . regarding specific products or practices . . . to further a defined public purpose.”⁹⁰

An important feature of disclosure regimes is that they work to alter the “chain reaction of new incentives” between producers and consumers of the information.⁹¹ Information users perceive and understand newly disclosed information and therefore choose safer, healthier, or better quality goods and services. Information disclosers perceive and understand users’ changed choices and therefore improve practices or products.⁹² That in turn reduces risks or improves services.

Fung and coauthors also suggest that targeted transparency regulation makes government more democratic:

[T]argeted transparency aims to reduce specific risks or performance problems through selective disclosure by corporations and other organizations. The ingeniousness of targeted transparency lies in its mobilization of individual choice, market forces, and participatory democracy through relatively light-handed government action.⁹³

But in doing so, Fung and coauthors assimilate disclosure regimes to what I call Open Government.⁹⁴ This leads them to overlook important differences. Characterizing mandatory disclosure as democratic is too strong. Mandatory disclosure regimes do not necessarily encourage participation in self-governance. Rather, they represent a technocratic solution to regulation, which does not depend on a theory of democratic accountability or participation in self-governance. Disclosure regimes serve as tools by which modern bureaucracies satisfy their information requirements, monitor private actors, regulate markets, enforce regulations, and inform consumers about their choices.

Mandated disclosure fulfills another critical purpose as well. Combined with statutes criminalizing intentional misrepresentation, mandatory disclosure regimes may provide a basis for prosecuting misconduct that would otherwise be much harder to target or that is not easily distinguished from legal conduct. Disclosure regimes thus serve as an enforcement tool. For example, security disclosure violations are proxies for defrauding investors. Reasonable campaign finance disclosure regula-

90. *Id.* at 6.

91. *Id.* at 2.

92. *Id.* at 6.

93. *Id.* at 5.

94. Fung and coauthors instead distinguish between second-generation targeted transparency (mandatory disclosure), and third-generation targeted transparency (which more closely resembles what I describe as Open Government). *Id.* at 151ff.

tions help distinguish legal contributions from contributions that are intended to corruptly influence elected officials. Below, we discuss how this type of *ex post* use of disclosure might serve as a basis enforcing voting rights,⁹⁵ as proposed by Professor Samuel Issacharoff.⁹⁶

Mandated disclosure regimes are also sometimes justified in terms of a right to know. In the area of environmental legislation, for example, advocates speak of a right to know what toxic substances workers⁹⁷ or their communities will be exposed to.⁹⁸ This characterization of mandated disclosure reflects the view that those negatively affected by the behavior of others—shareholders in the case of management misconduct or residents in the case of the EPA’s mandated toxic release disclosure—should have the information to press their interests.⁹⁹

In sum, disclosure regimes are information pushing regimes. Disclosure of this kind is self-executing in the sense that it is not dependent upon a specific request for information. Typically those subject to disclosure are non-governmental organizations or individuals. Disclosure regimes help address market failures, aid consumer choice, and satisfy the information requirements of government regulatory agencies. Regulation as disclosure is also used by government to force actors it cannot control—or does not wish to control directly—to disclose information related to performance measurement or regulatory compliance. The purpose of mandatory disclosure is often welfare enhancing. Contrary to the open records and open meeting laws, the purpose of mandatory disclosure regimes is not primarily to afford the public access to government information.¹⁰⁰ But mandatory disclosure regimes are similar to right-to-know transparency in that they can help individuals hold large (private) organizations accountable for their actions.

95. See *infra* notes 265–270 and accompanying text.

96. See generally Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013).

97. OSHA Hazard Communication, 29 C.F.R. § 1910.1200 (2015). FUNG ET AL., *supra* note 35, use this example.

98. See generally SUSAN G. HADDEN, A CITIZEN’S RIGHT TO KNOW: RISK COMMUNICATION AND PUBLIC POLICY (1989).

99. This makes sense, for example, on Ian Shapiro’s theory of democracy as the ability to participate in decisions that affect you. See generally IAN SHAPIRO, CONTEMPORARY DEMOCRATIC THEORY (2002).

100. For example, the general public had very limited access to securities disclosures until the SEC’s online EDGAR system was set up to publish mandatory disclosures on the internet. The SEC’s online system was adopted only after David Malamud created a third party website that published the SEC filings.

C. Transparency in Rulemaking

Transparency in rulemaking is separate from right to know and disclosure as regulation. Transparency in rulemaking does share with transparency as disclosure the general goal of satisfying the regulator's information requirements. In writing regulations that do not disrupt private orderings unduly or conflict with other duties on the part of private actors, the regulator must obtain detailed feedback from differently situated private actors with access to "local knowledge."¹⁰¹ Transparency in rulemaking also shares with targeted transparency the broader goal of increasing market efficiency. And the rules that are written ultimately may affect information disclosure by market participants. But given the important differences in function, practice, and the entity regulated (here, the regulator's procedures are to comply with the APA), it is helpful to separate transparency in rulemaking from mandatory disclosure.

Transparency in rulemaking is aimed at affording private actors the opportunity to influence the rulemaking process directly. Whereas legislators have no legal duty to hear or respond to constituents, the rulemaking and comment process set forth in the APA requires that regulatory agencies like the SEC publish proposed rules and allow the public (and in particular those who will be affected by the rules) to comment on them.¹⁰² The regulator may then publicly respond to these comments and explain how the comments have been taken into account in the final adopted rules.¹⁰³

Transparency in rulemaking thus allows for participation in government decisionmaking. It cannot be assimilated to the concept of the right to know because the right to know does not extend to a right to comment or to have one's feedback considered. It also is distinguishable from transparency as regulation because it does not require disclosures or

101. Michael Halberstam & Stuart Lazar, *Business Lobbying as an Informational Public Good: Can Tax Deductions for Lobbying Expenses Promote Transparency?*, 13 *ELECTION L.J.* 91, 97 (2014) ("Knowledge of markets, business conditions, and the effects of government action on thousands of different industries across the country (with customers and production facilities around the globe) are essential to the intelligent regulation of markets." (citing Joseph Stiglitz, *Information and the Change in Paradigm in Economics*, in *SELECTED WORKS OF JOSEPH STIGLITZ*, VOL. I 53, 62ff (2009) for the proposition that the standard, competitive, general equilibrium approach to market failure does not account for the "myriad of other information problems faced by consumers and firms every day.")).

102. 5 U.S.C. § 553(c) (2014).

103. *Id.* But the agencies are free to decide upon their own notice and comment procedure and are not required to respond to comments. See Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 *EMORY L.J.* 433, 454–55 (2004).

comments from private actors, nor is it primarily geared at monitoring, enforcement, or informing markets.¹⁰⁴

D. Transparency as Open Government

The Open Government movement grows out of the digital revolution of the twenty-first century, which has transformed markets, modes of production, work routines, organizational management, social networking, and leisure activities. Online services like Wikipedia, Facebook, Google, eBay, and Amazon have helped drive these changes, using so-called Web 2.0 technologies for harnessing the voluntary collaboration and creativity of users in cocreating their services.¹⁰⁵ Their commercialization has generated powerful new business models. The Open Government movement seeks to harness these new forms to “fundamentally redesign how government operates; how and what the public sector provides; and ultimately, how government interacts and engages with its citizens.”¹⁰⁶

This Open Government ideal has moved far beyond the standard paradigm of open records and open meeting laws. The purpose of Open Government is not primarily accountability or anticorruption, but public and private sector participation in government operations and problem solving.¹⁰⁷ The aims and methods, however, are not those of traditional

104. Transparency is an increasingly important topic in administrative law because simple, traditional rulemaking and comment transparency is being rethought and developed into something more expansive by applying Open Government tools and strategies, described in greater detail below. *Id.* See also Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 894 n.1 (2006) (citing literature). The Cornell eRulemaking Initiative (CeRI) is working on various projects, including a project called the “Regulation Room,” which it describes as an “experimental platform” that uses real-time rulemaking to experiment with online, technology-assisted, public participation in rulemaking “for effective Rulemaking 2.0 systems.” Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 395 (2011). For a discussion of this project, see generally Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382 (2011).

105. Web 2.0 primarily refers to new interactive capabilities of the World Wide Web, social media tools, open source codes, third-party app development, and the development of non-SQL databases developed by Google and Facebook that are capable of integrating vast amounts of different types of data. See Tim O’Reilly, *What is Web 2.0*, O’REILLY.COM (Sept. 20, 2005), <http://www.oreilly.com/pub/a/web2/archive/what-is-web-20.html>.

106. LATHROP & RUMA, OPEN GOVERNMENT, *supra* note 1, at 16.

107. In its notable 2009 Open Government Directive, the Obama White House described the principles of Open Government as follows:

The three principles of transparency, participation, and collaboration form the cornerstone of an open government. Transparency promotes accountability by providing the public with information about what the Government is doing. Participation allows members of the public to contribute ideas and expertise so that their government can make policies with the benefit of information that is widely dispersed in society. Collaboration improves the effectiveness of Government by encouraging partnerships and cooperation

privatization (although a Trojan Horse problem is admitted here). They are to benefit government operations, as well as markets, from what Yochai Benkler, for example, calls the “networked information economy.”¹⁰⁸

The networked information economy is characterized, *inter alia*, by: the “open by default” structure of information sharing on the Web (a mere click away); the dramatic decentralization of the means of information production (from big media to every networked computer); the voluntary (e.g., Wikipedia, Amazon ratings) and involuntary (e.g., data mining) cocreation of knowledge and information (the most important products in an information/knowledge economy); and the rapid innovation that this environment engenders (e.g., apps). The networked information economy generates a “new economic logic”¹⁰⁹ that changes the incentives of market and nonmarket actors.

Instead of opening a window on government operations, Open Government is envisioned as a “government without walls.”¹¹⁰ Rather than simple, passive transparency for the sake of accountability, or traditional disclosure regimes that enable consumer choice, the Open Government model requires that government agencies actively share internal government information with the public in digital formats that invite amplification by users and encourage collaboration in government problem solving.

From budget and spending data, to public health data and subway train arrival information,¹¹¹ governments are to share such data “by default” and in real-time where appropriate.¹¹² Governments are to enable

within the Federal Government, across levels of government, and between the Government and private institutions.

Open Government Memorandum, *supra* note 41, at 1.

108. BENKLER, *supra* note 16, at 32.

109. Don Tapscott and Anthony Williams have colloquially dubbed this “Wikinomics.” *See generally* DON TAPSCOTT & ANTHONY WILLIAMS, WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING (2006).

110. EGGERS, *supra* note 13, at 17.

111. *See, e.g.,* *Introducing MTA Subway Time® App*, METRO. TRANSP. AUTH., <http://web.mta.info/apps/subwaytimeapp.html> (last visited Feb. 26, 2015).

112. *See generally, e.g.,* SUNLIGHT FOUNDATION, GUIDELINES FOR OPEN DATA POLICIES (2014), available at http://assets.sunlightfoundation.com/policy/Open%20Data%20Policy%20Guidelines/OpenDataGuidelines_v3.pdf. The executive branches of New York City, St. Louis, and other cities have passed executive orders to institute such a policy. *See, for example,* the New York City DoITT statement of purpose: “In the past the practice for most institutions, government or otherwise, was keep information closed save for those few exceptions that were made public. The City is working to turn this idea on its head, believing that data and information should be open by default unless there is a compelling reason to keep it closed.” *Technology & Public Service Innovation*, NYC INFO., TECH. & TELECOMM., <http://www.nyc.gov/html/doitt/html/open/open.shtml> (last visited Feb. 26, 2015).

general audiences (i.e., citizens) or specialized audiences (i.e., public interest groups), and governmental actors, to interface directly with the operations of a particular governmental unit to promote innovation, knowledge sharing, and intergovernmental and public–private collaboration in social problem solving. In its most idealistic formulation, Open Government is intended to transform our current industrial age bureaucracy into a digital age “platform” for information sharing and collaboration in the solution of collective action problems.¹¹³

The general public is engaged, mostly at the local level, by means of civic technologies provided directly by government or by third-party developers.¹¹⁴ At the state and federal levels, more sophisticated intermediaries—NGOs, public interest groups, private sector businesses, academic researchers, software developers, and other government agencies—are expected to download government data in the form of standardized data sets, accessible without proprietary software, and to use the data to develop services.¹¹⁵ In either case, users are, in turn, expected to generate additional data valuable for the provision of public goods and services by means of crowdsourcing, user tracking, and data analytics.¹¹⁶

Finally, Open Government goes beyond the currently limited public participation in the regulatory process. It seeks to extend public participation across government operations. Open Government in regulation is already evidenced in online sharing of public comments, but it goes further to seek more comprehensive data sharing, and the application of online social media tools to the public notice and comment process.

Federal, state, and local governments are presently implementing Open Government projects across the country at considerable cost. The federal government and many state and local governments have already adopted “open by default” goals for various kinds of data.¹¹⁷ A few nota-

113. O’Reilly, *supra* note 8, at 12–13. *See also* EGGERS, *supra* note 13, at 32, 234.

114. *See generally* MAYUR PATEL ET AL., *THE EMERGENCE OF CIVIL TECH: INVESTMENTS IN A GROWING FIELD* (2013).

115. *See generally* U.S. GEN. SERV. ADMIN., *supra* note 41, at 4 (“Noting that open data has the potential to generate more than \$3 trillion a year in additional value in sectors including finance, consumer products, health, energy and education, Data.gov/impact lists some of the new and growing companies that leverage open government data.”).

116. William D. Eggers & Rob Hamill, *Five Ways Crowdsourcing Can Change the Public Sphere*, GOVERNING THE STATES AND LOCALITIES (May 23, 2012), <http://www.governing.com/columns/mgmt-insights/col-government-crowdsourcing-five-models.html>; O’Reilly, *supra* note 8, at 34–35.

117. *See, e.g., Digital Government: Building a 21st Century Platform to Better Serve the American People*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/sites/default/files/omb/egov/digital-government/digital-government.html> (last visited Feb. 26, 2015) (“To lay the foundation for opening data and content efficiently, effectively and accessibly, OMB will work with representatives from across government to develop and publish an open data, content, and web API policy for the Federal

ble developments are President Obama's ongoing Open Government Initiative,¹¹⁸ New York City's "open by default" policy,¹¹⁹ and the rapid emergence of a new civic technologies sector.¹²⁰

The Open Government movement combines ideas from (at least) three different fields.¹²¹ First, it seeks to improve government through twenty-first century information technologies.¹²² These technologies include the second-generation Internet, interactive websites, social media, application interfaces for app development, and data mining, which are sometimes referred to collectively as "Web 2.0."¹²³

Second, it draws on information economics, the economics of networks, and economic thinking about the "networked information economy."¹²⁴ In other words, it takes a welfarist approach to questions of government transparency, an approach that has a long tradition dating back to Jeremy Bentham's ideas about the importance of publicity in legislation and governance.¹²⁵

Third, Open Government advocates claim the mantle of "participatory democracy,"¹²⁶ a political philosophy that believes democracy and individual freedom require the active participation of citizens in self-

Government. . . . To establish a "new default," the policy will require that newly developed IT systems are architected for openness and expose high-value data and content as web APIs at a discrete and digestible level of granularity with metadata tags. Under a presumption of openness, agencies must evaluate the information contained within these systems for release to other agencies and the public, publish it in a timely manner, make it easily accessible for external use as applicable, and post it at agency.gov/developer in a machine-readable format.").

118. See, e.g., THE OBAMA ADMINISTRATION'S COMMITMENT TO OPEN GOVERNMENT: A STATUS REPORT (2011), available at http://www.whitehouse.gov/sites/default/files/opengov_report.pdf.

119. See N.Y.C., N.Y., Local Law 11 (2012) (amending the administrative code to mandate that qualifying City-managed digital data be made available to the public-at-large through a single web portal). See also NEW YORK CITY, OPEN DATA POLICY AND TECHNICAL STANDARDS MANUAL (2012), available at http://www.nyc.gov/html/doiit/downloads/pdf/nyc_open_data_tsm.pdf.

120. See Tom Steinberg, *Knight Foundation's Civic Technologies Report: Why it Matters*, KNIGHT BLOG (Dec. 9, 2013, 8:36 AM), <http://www.knightfoundation.org/blogs/knightblog/2013/12/9/knight-foundations-civic-tech-report-why-it-matters/>.

121. This conceptualization of Open Government is a helpful heuristic, but, like all such classification efforts, it is most certainly incomplete.

122. O'Reilly, *supra* note 8, at 11.

123. See generally PATRICIA E. SALKIN & JULIE A. TAPPENDORF, SOCIAL MEDIA AND LOCAL GOVERNMENTS: NAVIGATING THE NEW PUBLIC SQUARE (2013); ALAN R. SHARK, CIO LEADERSHIP FOR STATE GOVERNMENTS: EMERGING TRENDS AND PRACTICES (2011); ALAN R. SHARK, SEVEN TRENDS THAT WILL TRANSFORM LOCAL GOVERNMENT THROUGH TECHNOLOGY (2012).

124. See BENKLER, *supra* note 16, at 35–133 (setting forth principles of the networked information economy); FUNG ET AL., *supra* note 35, at 31–33; See generally TAPSCOTT & WILLIAMS, *supra* note 109 (describing principles of the networked information economy).

125. See Guyora Binder & Nicholas Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L. REV. 115, 200ff (2001).

126. See O'Reilly, *supra* note 8, at 12.

governance. The theory was revived in the 1960s in the wake of the civil rights movement and the Great Society programs of the 1960s,¹²⁷ and became a self-conscious practice of community organizers, grassroots activists, and public interest groups during the 1970s and 1980s.¹²⁸ The theory has deep roots in American pragmatism and in John Dewey's conception of democratic experimentalism.¹²⁹

Tim O'Reilly's 2010 essay, *Government as a Platform*, offers an idealistic account of this approach to democratic governance.¹³⁰ According to O'Reilly, government should be less like a vending machine for dispensing public goods and services, and more of a Facebook-like "platform" for involving citizens, social entrepreneurs, NGOs, and the private sector in collective problem solving.¹³¹ Government should be "stripped down" to its essential function as a mechanism for collective action.¹³² "Platform thinking" reconceives government as "a convener and an enabler rather than a first mover of civic action."¹³³ "Government 2.0, then, is the use of technology—especially the collaborative technologies at the heart of Web 2.0—to better solve collective problems at a city, state, national, and international level."¹³⁴

Characteristic features of transparency as Open Government are as follows:

1. A shift from passive, post-hoc government transparency to active, near real-time information sharing by government via the Internet.

127. See, e.g., HANNAH ARENDT, ON REVOLUTION (1960); CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 1-44 (1970); Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980). See also THE DEMOCRACY SOURCEBOOK (Robert A. Dahl & Ian Shapiro eds., 2003).

128. For example, see Ralph Nader's efforts to create Public Interest Research Groups.

129. John Dewey, *The Public and Its Problems*, in 2 JOHN DEWEY, THE LATER WORKS, 1925-1953, at 235, 327-28 (Jo Ann Boydston ed., 1984) ("From the standpoint of the individual, it consists in having a responsible share according to capacity in forming and directing the activities of the groups to which one belongs and in participating according to need in the values which the groups sustain. From the standpoint of the groups, it demands liberation of the potentialities of members of a group in harmony with the interests and goods which are common."). See Michael Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) for an attempt to adapt Dewey's approach to the design of contemporary problem-solving institutions.

130. 6 INNOVATIONS: TECHNOLOGY, GOVERNANCE, GLOBALIZATION 13 (Philip E. Auerswald ed., 2011).

131. O'Reilly, *supra* note 8, at 13.

132. *Id.* at 38.

133. *Id.* at 12.

134. *Id.*

2. A shift from a focus on rights and accountability to a focus on improving government operations and public welfare by means of Web 2.0 tools and dynamics.¹³⁵
3. A shift from one-to-one communication between a government and a private entity and one-to-many communications (like the posting of SEC filings), to many-to-many communications.
4. The creation of Open Data portals that allow users to download existing government data and extract value from it.
5. The creation of platforms for collaboration (like CeRi's Regulation Room) that incorporate social media.
6. The development of online civic technologies that serve as platforms for user-centered interactions with government and offer opportunities for involving citizens (either voluntarily or involuntarily) in government problem solving.

E. Summary

We have distinguished between four different types of transparency: (1) transparency as the right to know, (2) transparency as regulation, (3) transparency in rulemaking, and (4) transparency as Open Government.

The right to know addresses the republican concern about government accountability and corruption. The right to know has been implemented by twentieth-century Open Government laws—such as open records and open meeting laws—that offer a window on “what the government is up to.” It is distinct from the contemporary Open Government movement, which contemplates an open door policy—or even a “government without walls”—that shares information to enable public participation in government problem solving. The goal of contemporary Open Government is not primarily to curb government corruption or hold government accountable, but to increase social welfare.

Transparency as regulation refers to mandated disclosure regimes that target private (but also government) actors in order to obtain standardized information about their performance. The purpose is to satisfy the information requirements of public administrative agencies and markets, but also to serve as a basis for deterring misbehavior. To the extent that the goal of such disclosure is welfare enhancing, it is similar to the goals of contemporary Open Government. But the mechanism by which

135. Yu & Robinson, *supra* note 8, at 181–82 (recognizing that the “new open government” is not aimed primarily at “accountability”).

it does so, i.e., affecting *consumer* choice, is different from contemporary Open Government in that the latter is concerned with making government *production* more efficient and innovative through citizen and inter-governmental collaboration.

Transparency in rulemaking comes closest to the goals of contemporary Open Government, in that the notice and comment process seeks public participation in one aspect of government operations. In the area of rulemaking, contemporary Open Government efforts have indeed been introduced. But, in and of itself, such regulatory participation does not necessarily lead to broader information sharing by government, or to collaboration in improving the efficiency of government operations.¹³⁶ And the recent developments in information technology and social media that the eRulemaking movement wants government to take advantage of indeed represent a “revolution in rulemaking.”¹³⁷

In the election law context, the shift from *ex post* litigation to fixing election administration *ex ante* reflects a kind of shift from rights to welfare, to the extent that election administrators are helped to do more with less. But because there are no markets for the election services of government officials, it is better to speak of a shift from rights to a focus on improving election operations.

III. OPEN GOVERNMENT IN ELECTION ADMINISTRATION

Since the 2000 presidential election, the election law community has moved from a civil rights approach, centered around litigation in the courts, to a problem-solving approach, focused on improving operational aspects of election administration. Professor Gerken’s book, *The Democracy Index: Why Our Election System is Broken and How to Fix It*, marks this shift “away from traditional civil-rights rhetoric toward a results-oriented, data-driven approach” to election reform.¹³⁸ Gerken’s *Democracy Index* shares the turn towards operations and a data-driven approach with Open Government.¹³⁹ But ultimately her project is best characterized as a right to know or a regulatory transparency approach. In the following, I contrast the Democracy Index with the Pew Center for Democracy in the states’ voter registration project, which I describe as a new open data approach.

136. Beth Simone Noveck, *Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 434 (2002).

137. *Id.* at 434–35.

138. GERKEN, *supra* note 2, at 111.

139. *Id.* at 38ff, 111.

A. The Democracy Index

Professor Gerken's "institutionalist" approach proposes to generate information about the performance of election administration in every jurisdiction in the country.¹⁴⁰ This information is used to compose a "Democracy Index" (Index) that compares and ranks state and local jurisdictions based on their performance.¹⁴¹ By standardizing performance measurement across state and local jurisdictions, the Index is intended to expose problems, such as excessively long polling lines, malfunctions of electronic voting systems, inaccurate or incomplete voter registration rolls, untrained poll workers, or poll workers who fail to show up to work.¹⁴² It should also help identify best practices by identifying the most successful jurisdictions. Accordingly, the Index can lay the groundwork for reform by helping government decide how to allocate resources. The rankings, it is hoped, will also put pressure on government officials and politicians to direct their attention to fixing election systems.¹⁴³ "By providing the right information in the right form," as Professor Gerken puts it, there is "potential to create an environment that is receptive to change. It is a data-driven, information-forcing device designed to generate pressure for reform while helping us make more sensible choices about which reforms to pursue."¹⁴⁴

One of the main conclusions that emerges from Professor Gerken's work is that we lack data about election administration performance. The Index is a call for such data.¹⁴⁵ In part, the Index's function is to generate transparency about failures and make it possible for voters to hold jurisdictions accountable for them.¹⁴⁶ This function of the Index can be understood as traditional public information or a right to know project that can drive reforms by publicizing failures to voters and thus incentivizing politicians to change their behavior. If jurisdictions are forced to produce the performance data in standardized formats and disclose such data to the public, we might also conceive of the project as a transparency-as-regulation project, or to use Fung's term, as a targeted transparency project.

The Index is also a device to overcome institutional and political resistance to reform. The "hyper-decentralization" of election administra-

140. *Id.* at 34.

141. *Id.* at 25–36.

142. *Id.* at 13.

143. *Id.* at 25–26.

144. *Id.* at 5.

145. *Id.* at 43–44, 57.

146. Gerken notes that the Democracy Index could also be considered a kind of "Transparency Index." *Id.* at 113.

tion provides one of the main institutional obstacles. In response, the Index ties jurisdictions into a centralized system of measurement and feedback.¹⁴⁷ The lack of political incentives and rewards is another institutional obstacle. The shaming device (or positive publicity) of ranking jurisdictions is to help overcome the political obstacles by bringing election administration issues to the attention of the public in a way that the public can understand.¹⁴⁸ The hope is that politicians will be pressured to focus on the issue for fear of being punished at the ballot box.

Finally, the Index is also supposed to help us figure out “how to fix” the problems.¹⁴⁹ Measuring performance and figuring out what works and what is broken is the first step to identifying solutions. But performance measurement, which tells us about outputs, does not necessarily generate solutions, and innovative ones still less.¹⁵⁰ It does not necessarily offer access to internal operational data, but merely external performance measures or outputs. And it does not necessarily encourage public or third-party participation in problem solving. Instead of collecting data to hold election administrators accountable, an Open Government approach might first develop and offer services or other technologies that address specific operational problems and might generate performance data only in the process of providing services to local election administrators.

Thus while Gerken’s “data-driven” approach shifts the focus of election reformers away from rights to operations, it fits better with right-to-know transparency (accountability via the Index) or transparency as regulation (identification of problems and best practices by means of standardized disclosure targeted at state and local election officials) than with Open Government.

In 2013, the White House appointed a Presidential Commission on Election Administration,¹⁵¹ which took very much the same approach as Gerken to addressing the problems in the U.S. election system. The Commission pursued a data-driven approach to improving election oper-

147. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 271 (1998) for a full treatment of this kind of model.

148. GERKEN, *supra* note 2, at 75.

149. *Id.* at 59.

150. At best it might make us look more closely at what is being done by the top performers and suggest that such practices be considered as “best practices.” This can be helpful, but usually there is a problem of “too many variables” with this approach.

151. See U.S. GEN. SERV. ADMIN., THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION, FEDERAL ADVISORY COMMITTEE CHARTER (2013), available at http://www.supportthevoter.gov/files/2013/06/PCEA_Establishment_Charter.pdf.

ations while avoiding politically contentious voting rights issues.¹⁵² The Commission created a kind of online clearinghouse for studies and data about election administration, thus opening up the data on which its report was based.¹⁵³ It also called for data sharing to address previously intractable problems like maintaining accurate voter registration data, and fostering collaboration among election administrators to improve election administration.¹⁵⁴

What it did not do was encourage the creation of digital platforms by means of which government is one of many, not the only, active driver of innovation and improved operations. But it recognized that data sharing by states in the voter registration context have helped overcome previously intractable problems in the management of voter registration databases. We thus turn to the Pew Trust's use of something like a new Open Government approach to improve voter registration by means of such interstate data sharing. But first we must review the challenges to voter registration in greater detail to clarify how the Pew Trust's effort goes beyond the mere generation of performance data or mere data sharing.

B. The Electronic Registration Information Center (ERIC)

The election law community approached voter registration primarily as a problem of voting rights, because voter registration had been a principal tool for denying minorities (and others) the right to vote.¹⁵⁵ Gaining access to the polls by registering black voters was one of the defining issues of the civil rights movement.¹⁵⁶ But the important voter registration cases of the 1970s and 1980s also made it clear that voter registration represents a huge logistical challenge for local election officials who are responsible for maintaining their voter rolls.¹⁵⁷ These logis-

152. PRESIDENTIAL COMM'N ON ELECTION ADMIN., *supra* note 21, at 70 ("If the experience of individual voters is to improve, the availability and use of data by local jurisdictions must increase substantially.").

153. *Materials & Research Submissions*, THE PRESIDENTIAL COMM'N ON ELECTION ADMIN., <http://www.supportthevoter.gov/materials-research/> (last visited Feb. 20, 2015).

154. PRESIDENTIAL COMM'N ON ELECTION ADMIN., *supra* note 21, at 28–29.

155. *See generally* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (1998) (discussing tests, poll taxes, and the importance of the Voting Rights Act of 1965 for increasing the number of registered minorities, especially in the southern states).

156. J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* (1999).

157. *See generally* *Andersen v. Celebreze*, 460 U.S. 780 (1983) (describing how modern communication technologies have made the registration process more manageable, but still allowing a cut-off date of fifty days prior to an election for any new applications because of the work involved).

tical difficulties were used as defenses by election officials in voter registration cases.¹⁵⁸ As a result, the operational difficulties of voter registration may not have received the attention they should have from the election law community until recently.

In 1993, the Clinton Administration passed the so-called Motor Voter Law, which required states to offer voters the opportunity to register at their Department of Motor Vehicles (DMV) office when obtaining their driver's license.¹⁵⁹ The law also required states to accept a uniform national voter registration form.¹⁶⁰ This was a first step towards centralizing some aspects of administering voter registration at the state level. But only after the debacle in Florida during the 2000 presidential elections did Congress decide to tackle the dysfunctional system of voter registration at the federal level. Congress got it mainly right with the Help America Vote Act of 2002 (HAVA), when it focused on dysfunctional voter registration systems as a culprit for the many problems that occurred in the 2000 presidential elections.¹⁶¹

1. Why Voter Registration is Central

Voter registration is central to elections. Voter rolls provide a baseline for the accuracy of elections and are critical for election operations. Voter registration rolls “are used to assign precincts, send sample ballots, provide polling place information, identify and verify voters at polling places, and determine how resources, such as paper ballots and voting machines, are deployed on Election Day.”¹⁶² The accuracy of registration lists determines how long the lines are at polling places, whose votes are counted, who is turned away, and how many provisional ballots are

158. *See, e.g.,* *Diaz v. Hood*, 342 F. Supp. 2d 1111 (S.D. Fla. 2004) (dismissing claims that Florida's voter registration forms placed an unconstitutional burden on Florida voters and caused tens of thousands of voters to be denied their right to vote, ultimately making defendants victorious based on their logistical challenges argument).

159. National Voter Registration Act (NVRA) of 1993 (1993), 42 U.S.C. § 1973gg (current version at 52 U.S.C. §§ 20501–20511 (2005)).

160. *Id.*

161. *See* Help America Vote Act (HAVA) of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002). The HAVA is currently codified at 52 U.S.C. § 20901–20906 (2014). *See also* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000* (2001).

162. PEW CTR. ON THE STATES, *INACCURATE, COSTLY, AND INEFFICIENT: EVIDENCE THAT AMERICA'S VOTER REGISTRATION SYSTEM NEEDS AN UPGRADE 1* (2012), available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2012/PewUpgradingVoterRegistrationpdf.pdf.

cast.¹⁶³ In close elections, like the 2000 presidential race in Florida, inaccuracies and failures of the voter registration system can determine the outcome.

Maintaining voter registration rolls is not as simple as it sounds. Demographics, the institutional design of election administration, and the process of registration all create significant challenges for maintaining accurate lists. Voters come of voting age, register to vote for the first time (at all ages), get married and change their names, move, die, lose their right to vote because of a felony conviction, or become inactive because they fail to vote for several election cycles. Moreover, the underlying geography changes; for example, election districts, polling places, city limits, and street names all change frequently. Moreover, Americans are notorious for their mobility, and the numbers best reflect the challenges of maintaining accurate rolls. Every four years, almost half of all Americans move.¹⁶⁴ During the 2012 federal election cycle, states reported receiving over 62.5 million voter registration forms.¹⁶⁵

Beyond issues involving the sheer number of registrants and mobile voters, American election officials must also depend on the voters themselves, or third parties such as libraries, social services offices, churches, unions, and public interest groups like the Women's League of Voters, Common Cause, or the NAACP, to register or initiate a change of address in their voter registration records. Unlike most Europeans, Americans are not required to register their place of residence with local authorities. Since the enactment of the "Motor Voter Law" in 1993, states have been required to offer voter registration services to those obtaining driver's licenses at their local DMV,¹⁶⁶ which has become the primary venue for registration. But gaps within the system involving accurate registration and residency tracking are still evident.

In addition to the demographic problem of registering voters is the clerical challenge. Voter registration in most states is still largely paper-

163. PRESIDENTIAL COMM'N ON ELECTION ADMIN., *supra* note 21, at 1 ("Bloated and inaccurate voter registration lists [are] the source of many downstream election administration problems."); *id.* at 22 ("Accurate voter lists are essential to the management of elections.").

164. STEPHEN ANSOLABEHRE & CHARLES STEWART, EXECUTIVE SUMMARY: REPORT ON REGISTRATION SYSTEMS IN AMERICAN ELECTIONS 14 (2013), *available at* https://www.supportthevoter.gov/files/2013/08/Registration-Systems-in-American-Elections-White-Paper-Ansolabehere_Stewart.pdf.

165. U.S. ELECTION ASSISTANCE COMM'N, THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT OF 1993 ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE 2011–2012, A REPORT TO THE 113TH CONGRESS 6 (2013), *available at* http://www.eac.gov/assets/1/Documents/EAC_NVRA%20Report_lowres.pdf.

166. National Voter Registration Act (NVRA) of 1993 (1993), 42 U.S.C. § 1973gg (current version at 52 U.S.C. §§ 20501–20511 (2005)).

based, so any changes must be keyed into an electronic database. And because forms are largely filled out by hand, error rates are very high, with one estimate claiming that one in eight registration records are inaccurate.¹⁶⁷ But accuracy is critical in that a voter will not be permitted to cast a regular ballot at a polling place for which she is not registered, or if her identification does not match her voter registration record.

Added to these challenges is the fact that most voters become interested in voting close to election time. This means that voter registration takes place in a compressed time frame, rather than evenly spread out over the year. County voter registration offices with limited staff are overwhelmed with applications and inquiries just when their workload is at its peak in preparation for actual elections. Hiring temporary staff to process voter registration applications during this period does not solve the problem because temporary workers still need training, supervision, computer terminals, and a place to work, thereby stressing already limited resources.¹⁶⁸ In short, the U.S. voter registration system is seriously compromised, and as a result, so are elections themselves.

2. The Failure of HAVA Systems to Solve the Problem

By 2008, most states had built statewide voter registration databases that were mandated by HAVA. HAVA centralized voter registration record keeping at the state level, giving local election officials across the state access to all records. These databases cost each state tens of millions of dollars to build.¹⁶⁹ In some states, HAVA systems allow the DMV to key voter registration information directly into the system. HAVA systems also typically offer registrars some utilities for identifying records that should be purged from their systems.

HAVA systems identify voters by assigning them unique ID numbers. In order for a new voter to be registered in the HAVA system and a new ID number generated, each voter must provide one of three forms of authorized identification: their current driver's license, their birth certificate, or the last four digits of their social security number.¹⁷⁰ Only where

167. PEW CTR. ON THE STATES, *supra* note 162, at 3.

168. Additionally, temporary workers have less experience and increased error rates in data entry, which are already very high.

169. See NAT'L ASS'N OF SEC'YS OF STATE, HOW STATES ARE USING FEDERAL FUNDS TO CARRY OUT THE HELP AMERICA VOTE ACT (HAVA): NASS REPORT ON STATE HAVA SPENDING FOR THE IMPROVEMENT OF ELECTION ADMINISTRATION 10-17 (2010), available at http://www.nass.org/component/docman/?task=doc_download&gid=1023&Itemid=469.

170. 42 U.S.C. § 15483 (current version at 42 U.S.C. § 21083 (2014)).

a voter possesses none of these identifications can she be registered using an alternative procedure, such as an affidavit.¹⁷¹

HAVA databases were typically built by sophisticated contractors like IBM. But in spite of the millions in federal grants spent on these systems, research conducted by the Pew Center on the States between 2009 and 2011 showed that voter registration still remained the number one problem in election administration.¹⁷² Registration rolls are still inaccurate, are rife with errors, contain millions of duplicate records, and include millions of voters who are no longer eligible or alive.¹⁷³ Registrars still purge voters mistakenly.¹⁷⁴

Why, after millions of dollars in federal grants spent, is voter registration still dysfunctional? The answer to this question has several parts. First, the basic nature of the problem remains. Registering millions of voters and updating records under current conditions presents significant challenges. As outlined, these conditions include the rush of registration applications or changes just prior to elections; the high mobility of the U.S. population (including across state lines); the lack of a required national or state ID; and the fact that Americans are not required to report or register their residence with local authorities.

Second, the institutional structure of election administration and voter registration that has been established in the states is challenging. HAVA systems proved difficult to design because they had to provide solutions consistent with existing institutional structures and relevant state laws and regulations. Every state created its own separate statewide voter registration system under HAVA, and these separate systems do not communicate with other state systems.¹⁷⁵ But as discussed above, increasingly large numbers of voters move across state lines every year, which requires comparing voter registration records and other information, like driver's licenses, that can only be found in these separate state systems. Because the HAVA systems are accessible only to election officials of that state, such comparisons generally occur manually and by telephone, if they occur at all.

Furthermore, voter registration is highly decentralized, in spite of statewide databases. While the DMV and other state and federal agencies collect and provide important or relevant data, "[l]ocal jurisdictions continue to serve as middlemen between voters and the statewide list . . . and

171. *Id.*

172. See generally PEW CTR. ON THE STATES, *supra* note 162.

173. *Id.* at 1.

174. *Id.*

175. PRESIDENTIAL COMM'N ON ELECTION ADMIN., *supra* note 21, at 27.

Departments of Motor Vehicles . . . often fail to integrate the data they receive with the statewide list.”¹⁷⁶ Even as most registrations are now made in person at the local DMV office because of the Motor Voter Law, records are often still transferred to the relevant county, either electronically or on paper, for the information to be merged or manually typed into the system by the local registrar to become effective.¹⁷⁷

Third, voter ID requirements that have been passed have made the inaccuracies of the registration rolls much more consequential. Where previously, some discretion might be exercised at the polls where an obvious typo or mistake had clearly been made in the registration record, the new voter ID requirements tolerate no discrepancy between the ID presented at the polls and the voter registration record.¹⁷⁸ Therefore, the bar has been raised for the level of accuracy of voter registration records. In short, the traditional state-based, government contracting approach ultimately was, and has continued to be, unable to address the fundamental problem of creating and maintaining accurate voter rolls.

3. Pew’s Development of ERIC

The problem of maintaining accurate voter registration rolls cannot effectively be solved at the state level because a good deal of the information a state needs to maintain such lists is in the voter registration and DMV databases of other states.¹⁷⁹ States would, therefore, benefit from sharing voter registration data. For example, duplicate registrations in a state’s database could be identified by tracing them to a common past address, voters who moved from State A and registered or obtained a driver’s license in State B could be purged from the system in State A, and inaccuracies in a record due to input mistakes could be detected and, as a result, the rate of false negatives in the verification of social security numbers could be improved.¹⁸⁰ But barriers to such a system exist within state laws that prohibit state election officials from providing third par-

176. *Id.* at 23.

177. *Id.* at 22.

178. See, e.g., *Required Identification for Voting in Person*, VOTETEXAS.GOV, <http://votetexas.gov/register-to-vote/need-id/> (last visited Feb. 20, 2015) (“Election officials will now be required by State law to determine whether the voter’s name on the identification provided matches the name on the official list of registered voters (“OLRV”). After a voter presents their ID, the election worker will compare it to the OLRV. If the name on the ID matches the name on the list of registered voters, the voter will follow the regular procedures for voting.”).

179. PRESIDENTIAL COMM’N ON ELECTION ADMIN., *supra* note 21, at 28.

180. *Id.*

ties with access to all of the information in their voter registration databases.¹⁸¹

Recognizing that the problem of maintaining voter registration rolls could not be solved at the state level, the Pew Center for the States convened a working group of election officials from different states to explore possible joint solutions together with Jeff Jonas, a leader in data integration and data privacy at IBM.¹⁸² After several working group sessions, Jonas introduced an innovative solution based on methods previously applied in the private sector to solve similar problems.¹⁸³ He developed an algorithm that could extract information from one state's individual voter registration records and share that information with another state without compromising the privacy of an individual record or the separateness of the systems.¹⁸⁴ In 2012, Colorado, Delaware, Maryland, Nevada, Utah, Virginia, and Washington formed the Election Registration Information Center (ERIC), a data center owned, managed, and funded by state election officials for that purpose.¹⁸⁵

ERIC functions by allowing a third party to obtain information from separate state voter registration databases in a manner that was previously unavailable.¹⁸⁶ ERIC mines such data to extract value from the secure databases that comprise the voter registration system of participating states.¹⁸⁷ It also offers an "interface" between the operations of other states via ERIC, even as each state's secure data is only made partially available to "add context" or bits of information to what is already contained in the records of other, separate state voter registration databases.¹⁸⁸ The solution is ingenious because it allows all the benefits of open data without one of the major downsides: the danger of compromis-

181. *See, e.g.*, FLA. STAT. § 97.0585(1)(c) (2014) (exempting "[t]he social security number, driver license number, and Florida identification number of a voter registration applicant or voter" from disclosure under Florida's public records laws).

182. *Pew's David Becker Discusses the Electronic Registration Information Center*, PEW CHARITABLE TRUSTS (July 23, 2013), <http://www.pewtrusts.org/en/about/news-room/press-releases/2013/06/28/pews-david-becker-discusses-the-electronic-registration-information-center>. *See also* VA. STATE BD. OF ELECTIONS, ANNUAL REPORT ON VOTER REGISTRATION LIST MAINTENANCE ACTIVITIES: REPORT TO THE HOUSE AND SENATE COMMITTEES ON PRIVILEGES AND ELECTIONS 5–7 (2014), available at <http://elections.virginia.gov/Files/maintenance-reports/2013SBEListMaintenanceReport.pdf>.

183. *Pew's David Becker, supra* note 182.

184. *Id.*

185. ELECTRONIC REGISTRATION INFORMATION CENTER, <http://www.ericstates.org> (last visited Feb. 26, 2015).

186. ELEC. REGISTRATION INFO. CTR., ERIC: TECHNOLOGY AND SECURITY OVERVIEW (2014), available at http://www.ericstates.org/images/documents/ERIC_Tech_and_Security_Brief_v2.1.pdf.

187. *Id.*

188. *Id.*

ing either the government's own data security and integrity, or the privacy of individuals whose data is stored in the system.

ERIC reflects the kind of collective problem solving envisioned by Open Government enthusiasts. Pew's solution to the burdens placed on citizens' voting rights—insufficient polling places, hour-long waits, inaccurate voter registration information—was to approach these problems as operational. Pew recognized that value was currently locked up in the separate voter registration databases and that information sharing could improve the efficiency of each state's voter registration process. It took Pew's social entrepreneurship, private sector expertise, and collaboration between election officials from different states and the private sector to invent and implement a solution.

IV. OPEN GOVERNMENT IN THE REDISTRICTING CONTEXT

Drawing electoral districts is an essential administrative requirement for holding district-based elections. It is also a major building block of our democratic institutions. The shapes and sizes of legislative districts determine who gets elected to decide, *inter alia*, where roads are built, how schools are funded, and whether to build medical facilities in a community. The U.S. Supreme Court's 1960s "one-person, one-vote" decision requires that election districts be redrawn upon completion of each decennial census.¹⁸⁹ All congressional, state, and local legislatures are subject to this rule.¹⁹⁰ "One-person, one-vote," the Voting Rights Act of 1965 (as amended), state constitutions, state laws, and local charters all govern the redistricting process.¹⁹¹

The legitimacy of traditional redistricting has long been subject to question. Because there are many possible outcomes that are justifiable, even within the legal constraints listed above, procedural fairness matters.¹⁹² Of primary concern is the fact that redistricting is conducted by legislators who have a stake in their own reelection and can manipulate the outcome to protect their incumbency.¹⁹³ Redistricting has thus always been a highly politicized process in which political parties have typically sought to shore up their majorities by redrawing their district lines (as opposed to winning over a greater number of voters by persuasion). It

189. *Reynolds v. Sims*, 377 U.S. 533, 583 (1964).

190. *Bd. of Estimate of New York v. Morris*, 489 U.S. 688, 692–93 (1989) (holding that NYC Board of Estimate violates "one-person, one-vote" rulings).

191. *See generally* *Mohr v. Erie Cnty. Legislature*, No. 11-CV-559S, 2011 WL 3421326 (W.D.N.Y. Aug. 4, 2011).

192. Halberstam, *supra* note 4, at 448–49.

193. *See, e.g.*, D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 678 (2013).

has also resulted in collusion between legislators of different parties to protect their incumbents against challengers, regardless of party affiliation.¹⁹⁴

Ex post litigation claiming racial vote dilution and equal protection violations under the “one-person, one-vote” rule afford some relief under specific circumstances.¹⁹⁵ But many redistricting choices that are consequential have little to do with legal requirements such as voter discrimination, which can be litigated. Running roughshod across geographic boundaries, dividing communities of interest, and carving out a district for incumbent protection purposes, does not, in and of itself, amount to a legal violation in most jurisdictions.¹⁹⁶

As a result, reformers have focused on achieving transparency and public participation in the redistricting process. Transparency and public participation in redistricting has, in the past, generally meant open meetings, public hearings, meeting agendas, hearing transcripts, the distribution of informational materials, and maps.

But the high political stakes, the institutional context of the redistricting process, the technical and legal requirements for producing an authoritative map, and the compressed timeline in which it takes place make redistricting a tough candidate for real transparency or public participation.¹⁹⁷ But “[r]ecent technological innovations have enabled broader public participation” in redistricting.¹⁹⁸

Section A, below, briefly describes how redistricting has become a subject for Open Government efforts. The following sections discuss

194. See generally Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002). New York State has traditionally been subject to this kind of bipartisan gerrymander, where the parties agree to have Democrats redistrict the State Assembly and Republicans redistrict the State Senate. Collusion also occurs at the local levels. Halberstam, *supra* note 4, at 452. See also Cuomo to Sign Redistricting Lines, N.Y. DAILY NEWS, Mar. 15, 2012; Thomas Kaplan, *Albany Redrawing Political Map With Old Lines of Thought*, N.Y. TIMES, Mar. 12, 2012, at A1.

195. The Supreme Court’s “one-person, one-vote” cases require equipopulous districts, with some greater flexibility at the local level, thereby giving rise to equal protection claims. See, e.g., *Karcher v. Daggett*, 462 U.S. 725, 742 (1983); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). Section 2 of the Voting Rights Act authorizes federal civil rights actions to protect, *inter alia*, against racial vote dilution in redistricting. Voting Rights Act, 42 U.S.C. § 1973 (current version at 52 U.S.C. § 10301 (2014)). See also *Shaw v. Reno*, 509 U.S. 630 (1993).

196. See Steve Bickerstaff, *Making Local Redistricting Less Political: Independent Redistricting Commissions for U.S. Cities*, 13 ELECTION L.J. 419, 428 (2014) (describing local redistricting criteria and noting that Austin, Texas, for example, prohibits drawing lines to favor incumbents).

197. Halberstam, *supra* note 4, at 453.

198. Micah Altman & Michal P. McDonald, *Public Participation GIS: The Case of Redistricting 1* (Proceedings of the 47th Annual Hawaii International Conference on Systems Sciences, Sept. 6, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321870.

different ways in which Open Government projects have been implemented in the redistricting context.

A. The Use of GIS Technology in Redistricting

Since the 1990s, line drawing has been performed by means of increasingly sophisticated Geographic Information Systems (GIS) that rely on data sets built specifically for redistricting purposes. New datasets for every state, most counties and cities, and some other local political units must be constructed every ten years based on the U.S. census, state voter registration information, state and local election data, and political data. All of this information must be geo-coded, which means that it must be reported in common geographical units so as to be readable by geographic information systems. The one-time construction cost of a redistricting database for a city or county can be in the tens of thousands of dollars, and the cost of constructing a statewide redistricting database costs from hundreds of thousands of dollars per year¹⁹⁹ to over a million dollars per year for some states like New York.²⁰⁰ But the construction and assessment of districting plans is not possible without the kind of precision that GIS software provides. Challenges to existing or proposed plans, whether during the process of redistricting, or immediately thereafter in court, will depend on using the proper statistical and GIS tools that are now considered standard.

To the extent that public interest groups seek meaningful input in any changes to district boundaries, they must first gain access to the data on the basis of which redistricting decisions are made. Transparency and public participation in the age of computerized redistricting, thus, requires public access, especially by national, state, and local interest groups, to the government's redistricting datasets. Redistricting presents an exemplary Open Government problem, as was recognized during the last redistricting cycle by experts on both sides of the political aisle.

B. Open Data and Public Participation in Redistricting

In a joint proposed set of "Transparency Principles" for redistricting, experts from the American Enterprise Institute (AEI) and the Brook-

199. In 2012, California's budget allocated less than \$600,000 a year to California's Statewide Database. Email from Karin Mac Donald, Director of California's Statewide Database (Feb. 3, 2012) (on file with author).

200. New York State's budget allocated over \$1.8 million dollars to New York State's Legislative Task Force for Demographic Information and Redistricting (LATFOR) for the 2013 fiscal year. Rick Karlin, *Work Over \$1.9 Million Budget Survives*, TIMES UNION (Apr. 3, 2012), <http://www.timesunion.com/local/article/Work-over-1-9M-budget-survives-3457174.php>.

ings Institution (Brookings) expressly called for measures that went far beyond traditional open records and open meeting laws.²⁰¹ The AEI–Brookings principles demanded that redistricting plans and the underlying data be actively made available online in easily readable formats that could be read and analyzed with different types of GIS software.²⁰² They also demanded that software necessary to recreate and analyze redistricting plans and community boundaries be made publicly available.²⁰³ The AEI–Brookings principles thus called for the establishment of a platform for public participation in the development of redistricting plans.

The California’s Statewide Database (SWDB)²⁰⁴ can be said to provide such a platform. Although access to redistricting software itself is not provided online, it is available at various physical locations during periods of active redistricting.²⁰⁵ California’s SWDB is the most sophisticated provider of Open Data in the redistricting context and was itself influential in the development of the AEI–Brookings principles.

The SWDB publishes the very same data that it generates for official redistricting, which until recently was conducted by the legislature.²⁰⁶ And it does so as soon as the data becomes available. In other words, it does not generate one set of data for insiders and another, more limited set for online public disclosure. Moreover, it collects redistricting, electoral, and political data on an ongoing basis and makes this data available not only during the decennial redistricting cycle, but also between redistricting periods to candidates running for office, public interest groups, litigants, and others.

The SWDB makes all the data available online in verifiable, understandable, and useable formats. This dissemination means that SWDB additionally provides clear documentation on the original sources, chain of ownership, and all modifications made to the data. It also publishes a description of statistical methods used to disaggregate and extrapolate from datasets reported for different geographical units in the creation of election, voter registration, and political data reported at the census block

201. See Micah Altman et al., *Principles for Transparency and Public Participation in Redistricting*, BROOKINGS INST. (June 17, 2010), <http://www.brookings.edu/research/opinions/2010/06/17-redistricting-statement>.

202. *Id.*

203. *Id.*

204. STATEWIDE DATABASE, <http://statewidedatabase.org> (last visited Feb. 26, 2015).

205. Mac Donald, *supra* note 25, at 483.

206. See *Information About the Statewide Database*, STATEWIDE DATABASE, <http://statewidedatabase.org/about.html> (last visited Feb. 26, 2015) for a description of the SWDB’s mission.

level.²⁰⁷ In so doing, SWDB goes far beyond the *ex post* production of already existing government information that is required of governments in response to freedom of information requests.²⁰⁸

While the purpose of Open Data in redistricting is also accountability, the aim of the AEI–Brookings principles, and the SWDB’s implementation of these principles, is to enable public participation in the redistricting process, in spite of the complexity that redistricting by GIS has introduced, and building on recent developments in this technology.

The SWDB does much more than comparable redistricting databases with less. The New York State Legislative Task Force for Demographic Information and Redistricting (LATFOR) provides a good comparison.²⁰⁹ LATFOR generates redistricting data for New York’s statewide legislative redistricting. It is an arm of the legislature, it does not support local redistricting efforts in any way, nor does it have a public information mission. Appendix A includes a detailed comparison between the SWDB and LATFOR’s online publications.²¹⁰ It shows that LATFOR does none of what the AEI–Brookings principles require, except perhaps that it provides certain data in CSV files on its website that a highly specialized user can load into a GIS system.²¹¹ Otherwise,

207. See, e.g., KENNETH F. MCCUE, CREATING CALIFORNIA’S REDISTRICTING DATABASE (2011), available at <http://statewidedatabase.org/d10/Creating%20CA%20Official%20Redistricting%20Database.pdf>.

208. Large, unmanageable TIGER files—essentially the U.S. Census Bureau’s digital maps onto which data is geo-coded—are broken up and configured, so that less sophisticated users with more limited understanding and computing capacity can work with them. Each data file is produced in several different formats so that the file can be analyzed and used with different types of GIS software. For users without specialized software, the SWDB provides access to, and assistance with using, such software at specific locations. Moreover, it provides interactive data visualizations and other tools and information for the general public. See *infra* Appendix A: Comparing New York and California Online Redistricting Transparency in 2011–2012 Redistricting Cycle for a description and breakdown of data published by the SWDB.

209. See *supra* notes 199 and 200 comparing budgets for California and New York redistricting databases. Whereas LATFOR performs both database and redistricting functions during redistricting, it presumably reverts to its database management in off years.

210. The study was conducted by Andrew Dean and Michael Halberstam, relying on the material that LATFOR had posted in 2012 after completing the statewide legislative redistricting. But LATFOR posted its data very late and some public information materials, like videos of LATFOR hearings, were posted only after LATFOR had submitted its state legislative maps. The legislature failed to agree on a congressional map, which was drawn in federal court. Thomas Kaplan, *New Congressional Lines Imposed by Federal Court*, N.Y. TIMES, Mar. 19, 2012, at A23, available at <http://www.nytimes.com/2012/03/20/nyregion/judges-impose-new-congressional-map-for-new-york.html>.

211. Typically specialists in this small group have longstanding relationships with LATFOR, such that they obtain their information directly from the agency (based on conversations with GIS and redistricting specialists, who ask not to be identified). Moreover, LATFOR’s data belongs to the legislature. It sells certain data compilations to individual politicians and political parties.

LATFOR does not provide any meaningful documentation as to how the numbers in the data files were arrived at.²¹² The differences between the SWDB and LATFOR reflect a fundamental difference between California's new Open Government approach and New York's classic approach dating back to the 1980s. LATFOR seeks only to satisfy minimal disclosure requirements. In contrast, the SWDB is designed to offer open access to redistricting data in formats that enable public participation in decisionmaking.²¹³

C. Online Mapping

The SWDB provides so-called WebGIS or online data visualizations, mapping historical and existing election districts, lines of political subdivisions, and certain demographics. But it is unable to have users engage in online mapping.

For the 2010 redistricting cycle, the Public Mapping Project, led by Micah Altman and Michael MacDonald, set out to create an Internet-based redistricting tool that would allow nonspecialized users to engage in actual online mapping, the assessment of alternative redistricting plans, and the evaluation of the impact of redistricting—acting much as the specialized software does, except that the more difficult task of preparing and loading the redistricting data into the software would be taken care of by the system's administrators.²¹⁴ Users simply had to learn to manipulate the data through a relatively simple user interface that could readily be understood with minimal training.²¹⁵ The result, called DistrictBuilder, is an open-source, web-hosted redistricting application “designed to give the public transparent, accessible, and easy-to-use online mapping tools.”²¹⁶ The Public Mapping Project held redistricting competitions in different states and localities to involve the public in generating redistricting plans.²¹⁷

Making redistricting data and online mapping tools available to the public at no cost appears to have contributed to a dramatic increase in

212. See *infra* Appendix A: Comparing New York and California Online Redistricting Transparency in 2011–2012 Redistricting Cycle for a description of information that LATFOR made public on its website.

213. See *Information About the Statewide Database*, *supra* note 206.

214. Altman & MacDonald, *supra* note 198, at 1.

215. See PUBLIC MAPPING PROJECT, www.publicmapping.org (last visited Feb. 26, 2015).

216. *Id.* See also Altman & MacDonald, *supra* note 198, at 2. David Bradlee created the free, online tool, Dave's Redistricting App. Commercial vendors like ESRI and Maptitude created online proprietary applications. The Florida legislature also created such applications. *Id.*

217. See, e.g., Michael MacDonald, *Virginia Redistricting Competition Concludes*, PUBLIC MAPPING PROJECT (Mar. 23, 2011, 4:48 AM), <http://www.publicmapping.org/News/virginiaredistrictingcompetitionconcludes>. See also Altman & MacDonald, *supra* note 198, at 5.

public participation in redistricting in 2010. Public participation, measured by publicly submitted maps, increased by orders of magnitude in 2010 compared to 2000.²¹⁸ In some cases, public maps were influential. In Minneapolis, a citizens commission for city council districts incorporated ideas from community organizations developed using DistrictBuilder into its final maps.²¹⁹ Moreover, publicly drawn maps were occasionally influential in the courts, as in Pennsylvania, where the state supreme court found a plan drawn by a piano teacher with DistrictBuilder to be superior to the state legislature's plan.²²⁰ Online mapping enabled the public and the media to evaluate redistricting plans in more sophisticated ways "that demonstrated how deficiencies could be addressed."²²¹

D. Redistricting by Independent Commission

Citizens' redistricting in California built on the SWDB's Open Data to realize Open Government in California's 2011–2012 statewide redistricting round.²²² Prior to the latest decennial redistricting cycle, California's constitution relegated state legislative and congressional redistricting to the state legislature in Sacramento. In 2008 and 2010, California passed constitutional amendments that turned redistricting over to an independent Citizens Redistricting Commission (CRC).²²³

The goal of an independent redistricting commission is to take redistricting out of the hands of legislators.²²⁴ The CRC was designed to be independent, first, in the sense that the legislature does not engage in the actual line drawing (no conflict of interest), and second, in the sense that the legislature has no say in the enactment of the redistricting plan (autonomy).²²⁵ While a number of states have so-called advisory commis-

218. Altman & McDonald, *supra* note 198, at 2.

219. *Id.*

220. *Id.* at 8.

221. *Id.*

222. See *infra* Appendix A: Comparing New York and California Online Redistricting Transparency in 2011–2012 Redistricting Cycle for a description of the SWDB's online publication of redistricting information and services.

223. Mac Donald, *supra* note 25, at 474–77.

224. Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1817 (2012) ("Its distinguishing features are the separation of the commissioners from elected officials and the ability to put district lines in place without legislative approval. The independent citizen commission design is the culmination of a reform effort aimed at lessening legislators' ability to choose the district lines they run in (sometimes simplistically characterized as elected officials choosing voters rather than voters choosing their representatives)."). See CAL. CONST. art. XXI, § 2(c).

225. See Cain, *supra* note 224, at 1818–19.

sions, back-up commissions, or political commissions, which result in various degrees of separation between legislators and line drawing, typically an inverse relationship exists between independent line drawing and the autonomy of the commission because legislators are generally unwilling to give up control over the composition of their districts.

California's redistricting commission represents the most radical departure from the model of legislative control. Neither legislatures nor political parties have control over the pool of candidates from which commissioners are chosen, and the CRC has complete autonomy in that its redistricting plan is not subject to legislative approval.

One of the most radical features of the CRC is the selection process for commissioners. The selection of commissioners includes a process with several phases, intended "to squeeze every ounce of incumbent and legislative influence out of redistricting"²²⁶

The independence, neutrality, and outcome of the CRC's work have received some scholarly attention.²²⁷ Moreover, public debate has included criticism of the selection of the commission's redistricting consultant, the fairness and neutrality of the process, and the commission's respon-

226. *Id.* at 1824. Karin Mac Donald, the consultant to the CRC, summarizes the process as follows:

The application to become a commissioner consisted of two parts. The first was short and designed to weed out those that were ineligible or had conflicts of interest. Those that survived the first round were invited to submit a supplemental application that included four essays, extensive information about themselves and their families, along with letters of recommendation. Applicants were evaluated on three criteria outlined in Proposition 11: (1) relevant analytical skills, (2) the ability to be impartial, and (3) a demonstrated appreciation for California's diverse demographics and geography. These criteria were further explained in the regulations that the Auditor developed with help from outside experts.

The selection process called for three independent auditors (one from each major party, and one affiliated with a minor party or no party) to review all supplemental applications and select 120 final applicants (in three pools of 40 for each major party and independent/other strata). These 120 applicants were then invited to participate in in-person interviews, based on which the pools were reduced to 20 applicants for each pool. Once this process was completed, the legislative leadership had an opportunity to strike 24 of the 60 remaining individuals (six each for the minority leaders of each house and six each for the president pro tem of the State Senate and the Speaker of the Assembly). Then a random drawing by the state auditor, using bingo balls, established the first eight commissioners. These eight commissioners then selected an additional six commissioners from the remainder of the final pool. The first eight would later refer to themselves as "the lucky ones" while the final six were called "the chosen ones."

Mac Donald, *supra* note 25, at 478.

227. *See, e.g.,* Cain, *supra* note 224; Justin Levitt, *Essay: Weighing the Potential of Citizen Redistricting*, 44 LOY. L.A. L. REV. 513 (2011); Mac Donald, *supra* note 25. *See also* Angelo N. Ancheta, *Redistricting Reform and the California Citizens Redistricting Commission*, 8 HARV. L. & POL'Y REV. 109 (2014).

siveness to groups like MALDEF, who were nonetheless unhappy with the CRC's failure to maximize minority opportunity districts.²²⁸

The CRC's design, composition, and process of public line drawing represents an Open Government approach that does not necessarily follow from the principles of nonlegislative line drawing and autonomy that Cain identifies as central to independent commissions in his 2012 post-mortem of the CRC's work.²²⁹ In other words, the participants could have chosen a somewhat different approach. While Section 2 of the Voters First Act required that "the commission shall . . . conduct an open and transparent process enabling full public consideration of and comment on the drawing of district lines,"²³⁰ the interpretation of the provision was left to: California's state comptroller; the state auditor, who issued regulations governing the process of selecting commissioners; Karin Mac Donald, the Director of the SWDB, whose separate consulting firm, Q2, won the bid for the contract to serve as the CRC's consultant; and the commissioners themselves.

Following the principles of Open Government that informed the SWDB, Mac Donald worked with the commission to come up with the unusual procedure of drawing all lines in public meetings.²³¹ While the CRC operated under the state's Bagley-Keene Open Meeting Act,²³² Mac Donald could instead have suggested different procedures consistent with the Act; namely that the Q2 consultants would draw the lines and present the commission with options—common practice followed by private redistricting consultants—or that the commissioners would meet in smaller groups for line drawing. Instead, the commission chose a public process that would maximize public participation and input. Cain notes:

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 Founda-

228. See Cain, *supra* note 224, at 1828; Mac Donald, *supra* note 25, at 485 n.90.

229. In fact, Cain does not dwell on this aspect of the commission's work in his discussion of the commission's work, even as he advocated separately for transparency in redistricting at the state level in a short addendum to a report by the Irwin Foundation that he coauthored with Mac Donald. See BRUCE E. CAIN & KARIN MAC DONALD, TRANSPARENCY AND REDISTRICTING, *a supplemental report to* COMPETITION AND REDISTRICTING IN CALIFORNIA: LESSONS FOR REFORM (2006), available at http://statewidedatabase.org/resources/redistricting_research/Transparency_&_Redistricting.pdf.

230. CAL. CONST. art. XXI, § 2(b).

231. Mac Donald, *supra* note 25, at 482–83; Ancheta, *supra* note 227, at 128.

232. CAL. GOV'T CODE §§ 11120–11132 (West 2012).

tion established outreach centers around the state that made software and some computer assistance available to those who wanted to draw their own maps.²³³

Cain is too quick to attribute the commission's choices in this regard to the state's open meeting laws: "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."²³⁴ But as discussed in our treatment of the SWDB's implementation of Open Data principles, we note that simply allowing access to meetings or data passively, which is really most of what open meeting laws require, falls far short of establishing a platform for information sharing and public and intergovernmental participation in joint problem solving. After all, New York has very similar open meeting laws to those of California. And LATFOR held over two-dozen hearings.²³⁵ But LATFOR did not webcast its meetings, engage in public line drawing, or otherwise create a platform for broad-based public participation.²³⁶ The state legislative maps it drew (congressional redistricting ended up in federal court) were issued at the last minute.²³⁷ It was clear that the (legislative) commission's primary goal was to perpetuate the bipartisan gerrymander of the state legislature between Democrats and Republicans.²³⁸

V. OPEN DATA AND MINORITY VOTING RIGHTS

In *Shelby County v. Holder*, the U.S. Supreme Court effectively ended federal oversight of state and local elections for violations of minority voting rights.²³⁹ Under § 5 of the Voting Rights Act of 1965 (VRA), jurisdictions identified as having systematically violated minority voting rights (covered jurisdictions) were required to submit all changes to their election laws and administrative procedures to the U.S. Department of Justice's Civil Rights Division for "preclearance" before

233. Cain, *supra* note 224, at 1826–27.

234. *Id.* at 1827.

235. See LATFOR website, <http://www.latfor.state.ny.us/hearings/>, for a list of hearings and meetings.

236. See *infra* Appendix A: Comparing New York and California Online Redistricting Transparency in 2011–2012 Redistricting Cycle. See also Halberstam, *supra* note 4, at 463 & n.132, 468 & n.167, 471 & n.182.

237. See Jimmy Vielkind, *Judge Takes Over Redistricting*, TIMES UNION (Feb. 27, 2012), <http://www.timesunion.com/local/article/Judge-takes-over-redistricting-3364883.php>.

238. Gerald Benjamin, *Encore for New York's Redistricting Farce*, TIMES UNION (Feb. 26, 2012), <http://www.timesunion.com/opinion/article/Encore-for-N-Y-s-redistricting-farce-3362816.php#ixzz1ngqdv9ch>.

239. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

they could be enforced.²⁴⁰ The U.S. Attorney General then had sixty days to object to the changes or seek additional information.²⁴¹ In a 5–4 decision in *Shelby County v. Holder*, the majority struck down the coverage formula set forth in § 4(a) of the Act on the grounds that it was “based on decades-old data and eradicated practices.”²⁴² The result is that preclearance under § 5 of the Voting Rights Act can no longer be enforced without a case-specific judicial order.²⁴³ In addition, any recent Justice Department “objections” or bars to the implementation of racially discriminatory voting laws or procedures may now be void.

The focus of current legislative efforts is to restore the Justice Department’s power to review and object to proposed vote changes.²⁴⁴ But the success of § 5 of the Voting Rights Act, under the 1971 guidelines issued by the Justice Department,²⁴⁵ was, in part, the result of a type of Open Government approach—before this approach was articulated in its present form.²⁴⁶

A. *The Post-Shelby Information Black-Out*

A further consequence of *Shelby*, one which has not been given much attention in the current debate on what to do in the wake of the decision, is the resulting loss of transparency in both local election administration and redistricting efforts.

I have argued elsewhere that § 5 operated primarily as an information-pushing and learning-by-monitoring regime, given the very low rate of Justice Department objections to submissions.²⁴⁷ The detailed Justice Department guidelines for redistricting submissions, for example, required jurisdictions to submit proposed redistricting plans and, more recently, provide redistricting data in a standardized electronic format.²⁴⁸

240. See 42 U.S.C. § 1973c (2006) (current version at 52 U.S.C. § 10304 (2014)); 28 C.F.R. § 51.7 (2015).

241. See 42 U.S.C. § 1973c (2006) (current version at 52 U.S.C. § 10304 (2014)); 28 C.F.R. § 51.9 (2015).

242. *Shelby Cnty.*, 133 S. Ct. at 2617.

243. See 28 U.S.C. § 1973a(c) (2006) (current version at 52 U.S.C. § 10302 (2014)). The VRA “also authorizes a court to subject a noncovered jurisdiction to federal preclearance upon finding that violations of the Fourteenth and Fifteenth Amendments have occurred there.” *Shelby Cnty.*, 133 S. Ct. at 2644.

244. See, e.g., Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. (2013–2014).

245. See 28 C.F.R. pt. 51 (2011).

246. Halberstam, *supra* note 3, at 927–28.

247. *Id.* at 928, 955–57. For statistics on objections, see generally U.S. COMM’N ON CIVIL RIGHTS, VOTING RIGHTS ENFORCEMENT & REAUTHORIZATION: THE DEPARTMENT OF JUSTICE’S RECORD OF ENFORCING THE TEMPORARY VOTING RIGHTS ACT PROVISIONS (2006), available at <http://www.usccr.gov/pubs/051006VRAStatReport.pdf>.

248. 28 C.F.R. § 51.20 (2011).

The guidelines also required that this information be shared proactively with registered individuals and groups,²⁴⁹ including local minority representatives.²⁵⁰ Additionally, the local jurisdiction was required to obtain the Justice Department's feedback on the proposed plan.²⁵¹ Covered jurisdictions were also required to hold public hearings and include hearing notices and news coverage of the hearings in their submission.²⁵² National advocacy groups, like the NAACP and the ACLU Voting Rights Project, would routinely obtain the submissions from the Justice Department and weigh in while the preclearance decision was still pending.

While civil rights groups have always focused on the sanctions available to the Justice Department and civil rights plaintiffs under the Voting Rights Act, the process of generating Justice Department submissions, especially at the county and municipal levels, forced jurisdictions to consider the legal vote dilution standard *ex ante* as part of the redistricting negotiations and decisionmaking process.²⁵³ Additionally, it enabled advocacy groups, which could readily obtain this information in a timely fashion, to participate in the redistricting process by contacting the Justice Department and sharing their analyses and concerns. The Justice Department often asked for additional information before it would grant preclearance on submitted changes. Admittedly, all of this took place in the shadow of a potential Justice Department veto. The very low number of objections, even in the redistricting context, has been noted²⁵⁴ and adduced as evidence by opponents of § 5 that preclearance was not needed.²⁵⁵ However, this ignores the fact that preclearance changed the institutional environment of state and local redistricting in covered jurisdictions by requiring comprehensive disclosure.²⁵⁶ The Voting Section in the Justice Department's Civil Rights Division has maintained files on all

249. 28 C.F.R. §§ 51.32–33 (2015).

250. 28 C.F.R. § 50.7 (1971); 28 C.F.R. pt. 51, subpt. D (2010); Halberstam, *supra* note 3, at 963.

251. *See* 28 C.F.R. §§ 51.33–50 (2015).

252. 28 C.F.R. § 51.28(f) (2011).

253. *See generally* 28 C.F.R. §§ 50.62–50.64 (1973); 28 C.F.R. §§ 51.20–51.25 (2011). *See also* Halberstam, *supra* note 3, at 933–34, 958–59.

254. Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71, 80 (2014) (citing Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 57–60 (2006)).

255. *See, e.g.*, EDWARD BLUM, THE UNINTENDED CONSEQUENCES OF SECTION 5 OF THE VOTING RIGHTS ACT 44 (2007).

256. Thus, I disagree with Samuel Issacharoff, who characterizes § 5 as a top-down command and control structure and contrasts it with a “new administrative approach” based on disclosure. *See generally* Issacharoff, *supra* note 96.

preclearance submissions from the thousands of covered jurisdictions subject to the special provisions of the Act.²⁵⁷ Such submissions were made not just for redistricting purposes, but for any administrative changes, including the location of polling places, times and dates of special elections, voter ID requirements, and so forth.

In noncovered jurisdictions, however, the VRA did not require timely publication of state and local redistricting data.²⁵⁸ As a result, redistricting maps are often rushed through legislatures without much time for public consideration or participation. In New York, for example, the result is that certain local jurisdictions are most likely in violation of § 2 of the VRA without knowing it.²⁵⁹ Additionally, given the difficulties accessing redistricting information and data in noncovered local jurisdictions in a timely fashion, it is unusual for national interest and advocacy groups, who have participated in the redistricting process in covered jurisdictions, to get involved at the local level in noncovered jurisdictions.²⁶⁰

Through *Shelby County v. Holder*, the Supreme Court halted preclearance. As a consequence, covered jurisdictions no longer provide redistricting data and information to the Justice Department or, consequently, to the public. Covered jurisdiction states now “go dark” with regard to local redistricting, just as noncovered states already have. This results in a complete lack of oversight, as states generally do not get involved in local redistricting, nor do they attempt to ascertain whether a particular local jurisdiction has redrawn its lines as required by the “one-person, one-vote rule.” Furthermore, most states do not collect redistricting data, maps, or any other information pertaining to the local redistricting process,²⁶¹ which is why the direct submission to the Justice Department by every covered state and local jurisdiction was so valuable.

257. See 28 C.F.R. § 51.50 (2011).

258. “Coverage” extended to all or part of sixteen states: all of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, and Texas; most of Virginia; four counties in California; five counties in Florida; two townships in Michigan; ten towns in New Hampshire; three counties in New York; forty counties in North Carolina; and two counties in South Dakota. See Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as Amended, 28 C.F.R. pt. 51, app. (2011).

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

260. Halberstam, *supra* note 4, at 463.

261. Interestingly, Tennessee does maintain a statewide redistricting information center that includes all local redistrictings. Tennessee malapportionment was what finally focused the Supreme Court's attention on the problem in *Baker v. Carr*, 369 U.S. 186 (1962).

B. Open Data Platforms as Partial Solutions in a Post-Shelby World

One way to address the information blackout in a post-*Shelby* world is by creating statewide, centralized open data platforms for local election information, based on the model of California's SWDB. Centralized statewide redistricting clearinghouses for local redistricting could, at the very least, address the information blackout in a post-*Shelby* world, and change the institutional structure in noncovered jurisdictions where local redistricting is an opaque process.

Currently, the New York State Democracy Clearinghouse (NYSDC) at S.U.N.Y. Buffalo Law School is in the process of developing a Web-accessible platform to help reshape the institutional environment in which redistricting and local election administration takes place in the state of New York.²⁶² The platform is to include a database containing election results, maps, redistricting data, and other political and demographic information, thereby supporting state and local election officials throughout their redistricting process. At the same time, the platform will provide a centralized service to local jurisdictions, which will help them satisfy their public information needs surrounding redistricting—a process that presently occurs in an ad hoc and sporadic fashion.²⁶³ The goal is to make redistricting more accessible to general and specialized publics, and enable greater public participation in the process, while also satisfying the data requirements of legal challenges to minority vote dilution or attempts at vote suppression, such as the misallocation of polling places.²⁶⁴ These efforts can draw on the rapid changes in information technology. Information technology has changed dramatically since the 2000 redistricting cycle, making the 2010 redistricting cycle the first in which several cloud-based redistricting tools became available online.²⁶⁵ As a result, the NYSDC platform might integrate next-generation tools such as DistrictBuilder. By creating a centralized platform that serves election administrators, legislators, and the public, the institutional environment for redistricting can be changed.

Professor Samuel Issacharoff has argued that the § 5 preclearance regime should be replaced by a federal regime of standardized regulatory disclosure.²⁶⁶ Under his proposed system, Congress would pass a law that

262. See *New York State Democracy Clearinghouse*, SUNY BUFFALO L. SCH. JAECKLE CENTER FOR L., DEMOCRACY, & GOVERNANCE, <http://www.law.buffalo.edu/beyond/centers/jaeckle/nysdc.html> (last visited Feb. 15, 2015).

263. *Id.*

264. The Hagedorn Foundation was successful in obtaining a grant application for this purpose.

265. Altman & McDonald, *supra* note 198, at 2.

266. See generally Issacharoff, *supra* note 96.

would require election officials at all levels of state and local government to report all changes made to election practices, within a fixed period of any federal election, to a federal agency that would be charged with immediately posting the disclosures online upon their receipt.²⁶⁷ Each disclosure would have to identify the changed practice and the reason for the change, and would possibly include an impact statement of the likely anticipated effect on ballot access or on minority voters. Issacharoff envisions such a regime working very much the same as federal securities disclosure: “The disclosure would then set the template for either DOJ challenge or private party challenge, with the disclosure serving as the prima facie evidentiary basis. This result both facilitates prosecution and review, and forces transparency and accountability on administrative conduct prompted by partisan or other malevolent objectives.”²⁶⁸

Issacharoff characterizes his approach as a “smart disclosure” approach, which reflects Fung and coauthors’ insight that disclosure regimes do not work very well unless information users can actually respond to the information by doing something.²⁶⁹ In Issacharoff’s approach, this is satisfied by the prediction that information users can sue. It is “this critical approach to the use of after-the-fact-liability rules,”²⁷⁰ instead of ex ante fixed regulation that he presents as a post-*Shelby* alternative.²⁷¹

Issacharoff’s disclosure approach is not without merit, but he misses the fact that § 5 was very much a modern administrative approach and that the Justice Department and public interest groups, like the NAACP, relied heavily on such disclosure.²⁷² As already noted, the 1970s regulations went beyond standardized disclosure to require data sharing in the redistricting context, which is perhaps what Issacharoff intended by requiring an “impact statement” to accompany the disclosure.

267. *Id.* at 121–22.

268. *Id.* at 122.

269. *Id.* at 120–21 & n.130.

270. *Id.* at 120.

271. Criticizing Issacharoff’s federal disclosure approach, Professors Guy-Uriel Charles and Luis Fuentes-Rohwer have argued that voter protection in a post-*Shelby* world can count on nongovernmental institutional intermediaries (“private entities, non-judicial institutions, and organized interest groups of various stripes”) to mobilize and respond locally to voting rights violations or efforts at minority vote suppression. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Mapping a Post-Shelby County Contingency Strategy*, 123 YALE L.J. ONLINE 131, 132–33 (2013). The authors point to the information advantage of local intermediaries over a centralized government agency like the DOJ. *Id.* at 142. The authors criticize Issacharoff’s “new administrative approach” as too top-down, claiming that “[u]nlike centralized, top-down regulation, third-party institutionalism is both top-down and bottom-up.” *Id.* at 149.

272. Halberstam, *supra* note 3, at 957–59.

A new Open Government approach, however, does not merely impose *ex post* sanctions, but provides *ex ante* support to election officials. Instead of merely enabling *ex post* lawsuits based on standardized disclosure information, a redistricting clearinghouse, like the NYSDC platform, can offer local election officials more sophisticated and effective technology, for both information management and public communication, at a lower cost. Whereas the expectation is that local officials will make use of this opportunity, state requirements to participate in such information sharing certainly would not hurt. But in any case, the platform approach aspires to do more than impose yet another unfunded federal disclosure mandate onto jurisdictions. Instead, it offers jurisdictions innovative tools to address their own administrative needs, while at the same time channeling their activities in new ways that change the institutional environment at the local level. Under an Open Government approach, local jurisdictions don't just disclose and hope for the best (i.e., no lawsuit); rather, technology is used to transform operations, and to encourage information sharing, collaboration, and public participation in problem solving.

VI. QUESTIONS AND NORMATIVE IMPLICATIONS

In this Article, I have adopted primarily a descriptive approach. I here briefly identify some of the practical and normative problems that have been raised with regard to Open Government projects. I focus on three criticisms that are frequently heard.

First, policymakers have long been concerned with e-government initiatives from a distributional perspective.²⁷³ A “digital divide” between those with access to the Internet and those lacking access was identified as early as the mid-1990s by the federal government.²⁷⁴ The concern has been that the digital divide would increase the existing social and economic disadvantages faced by low-income populations and others similarly disadvantaged because of their age, race, ethnicity, or geography.²⁷⁵ Since then, access to the Internet has significantly increased,²⁷⁶ but other

273. See generally PIPPA NORRIS, *DIGITAL DIVIDE: CIVIC ENGAGEMENT, INFORMATION POVERTY, AND THE WORLDWIDE INTERNET* (2001).

274. See generally *Falling Through the Net: A Survey of the “Have Nots” in Rural and Urban America*, NAT'L TELECOMM. & INFO. ADMIN. (July 1995), available at <http://www.ntia.doc.gov/ntiahome/fallingthru.html>.

275. *Id.*

276. See KATHRYN ZICKUHR & AARON SMITH, PEW RESEARCH CENTER'S INTERNET & AMERICAN LIFE PROJECT, *DIGITAL DIFFERENCES* 4, 8 (2012), available at http://www.pewinternet.org/files/old-media/Files/Reports/2012/PIP_Digital_differences_041312.pdf (providing a comprehensive report on the digital divide based on survey research).

resource questions, such as access to broadband, or time and resources to participate in interactive uses of Web 2.0, have become the focus of policymakers concerned about barriers to e-democracy for the disadvantaged.²⁷⁷ To the extent that Open Government relies not just on Internet access, but active participation and collaboration in problem solving, this raises questions about whether Open Government will ultimately increase economic, social, and political inequities.

Second, to the extent that Open Government encourages public-private cooperation in government problem solving, it raises some of the same issues as other public-private partnerships. Outsourcing government operations may diminish accountability, increase agency costs, and generate new inefficiencies due to loss of control and information asymmetries.²⁷⁸ Moreover, access to government may be used to promote private interests. Thus, for example, IBM's initially free participation in ERIC turned into a source of revenue for IBM, which provided the new center with computing services. If government relies on private actors with superior knowledge sets and capacities to solve problems, can it properly assess the cost-effectiveness of the solutions offered and the results provided?

A third critique of Open Government projects has been the disjunction between the promises of Open Data and its results.²⁷⁹ One of the assumptions of Open Government is that there is enormous value locked up in inaccessible government datasets and information, and that data sharing by government will unlock that value. Accordingly, President Obama's Open Government initiative called on all executive agencies to release "high value" datasets.²⁸⁰ Similarly, New York City's Open Government website promised to afford ready access to high value datasets. But critics have noted that, upon examination, the data that has been made available through open data sites so far has been less than impressive.²⁸¹

277. See generally THE KNIGHT COMM'N ON THE INFO. NEEDS OF CMTYS. IN A DEMOCRACY, INFORMING COMMUNITIES: SUSTAINING DEMOCRACY IN THE DIGITAL AGE (2009), available at http://www.knightcomm.org/wp-content/uploads/2010/02/Informing_Communities_Sustaining_Democracy_in_the_Digital_Age.pdf.

278. See generally Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79 (2012).

279. See generally Clifford Winston, *The Efficacy of Information Policy: A Review of Archon Fung, Mary Graham, and David Weil's Full Disclosure: The Perils and Promise of Transparency*, 46 J. OF ECON. LIT. 704 (2008), available at http://www.brookings.edu/~media/research/files/papers/2008/9/information%20policy%20winston/09_information_policy_winston.pdf.

280. THE OBAMA ADMINISTRATION'S COMMITMENT TO OPEN GOVERNMENT, *supra* note 118, at 26.

281. Winston, *supra* note 279, at 706.

These and other questions about Open Government are important to recognize and address to the extent possible, but they go beyond the scope of this paper. What we can say is that Open Government is not a panacea and cannot solve all problems. Like all other public policy approaches, it has to contend with complex realities. While it is helpful to bring the idea of Open Data out sharply in its theoretical relief, there will be some regions of experience that the theory maps onto better than others.

The goal of this Article has been to try to clarify how the contemporary Open Government idea can be distinguished from other conceptions of transparency, and to provide some concrete applications of Open Government in the election law context. In the future, it is at this level of application that the challenges and criticisms of Open Government must be addressed.

VII. CONCLUSION

This Article accomplishes two things. First, it clarifies the meaning of transparency in the legal literature by identifying four different senses in which the term is used, and by describing how the Open Government movement goes beyond traditional concepts of transparency. Second, it introduces the election law community to contemporary Open Government ideas, shows how various election reform projects already draw on the Open Government toolkit, and explores further opportunities for the application of Open Government tools in the election reform context. Certain basic premises underlie the Open Government movement, not necessarily in the following order.

The first premise is that information is valuable as a public good and that information sharing by all levels of government unlocks the value of a large store of information that is sitting unused. Information is a public good; one that can be put to multiple uses not contemplated by the original producer of the information. Thus, in the voter registration context, no state had ever compiled its own voter registration list for the purpose of helping other states scrub theirs. But by sharing such information, states did just that, with the result being that all states benefitted from previously inaccessible information.

A second premise is that information technology has transformed our industrial economies and modes of production to facilitate “social production” as it takes place on such platforms as Google, Amazon, Facebook, eBay, and Apple iOS. The goal of Open Government is to help government entities harness this technology-dependent social production and enlist others—government units, public interest groups, think tanks, experts, and the general public—in collective problem solving, thereby

doing more with less. In the redistricting context, the California SWDB's Open Data project has worked with local election administrators to collect their data and supply them with data maintenance services, all while making complete redistricting data publicly accessible online. It thereby does far more with less when compared, for example, with such redistricting databases as New York's LATFOR.

A third premise of contemporary Open Government is that Internet-based social production allows us to realize certain ideals of participatory democracy. California's Citizens Redistricting Commission built on the SWDB's Open Data project not merely to take redistricting out of the hands of legislators, but to encourage broad public participation. Not only did the CRC make its process transparent by opening its meetings, but it actively enlisted public participation in line drawing, which the commission then integrated into its decisionmaking in public line drawing sessions. It thus created a platform for public participation mediated by the commissioners.²⁸²

In the area of voting rights, by sharing data and information about redistricting and election administration at the local level, public platforms could replace the federal government's administrative preclearance process, at least in part. By channeling redistricting and election administration through the use of shared technologies, such platforms could change institutional structures at the local level, not just in formerly covered jurisdictions, but nationwide.

282. It must be admitted that the CRC was very costly and thus may not have done more with less. But it did do more in the way of addressing the redistricting problem with procedural fairness. However, the cost of legislative redistricting was not zero, especially if one includes all the "off balance sheet" payments by individual legislators to the outside redistricting consultant to secure viable district demographics for themselves.

APPENDIX A: COMPARING NEW YORK AND CALIFORNIA ONLINE REDISTRICTING TRANSPARENCY IN 2011–2012 REDISTRICTING CYCLE

	DATA/ INFORMATION TYPE	NYS LATFOR	CAL SWDB (or CRC Website, as appropriate)
1.	Geographical Data & Information		
2.	<ul style="list-style-type: none"> Final Maps of 2012 State Legislative and Congressional Districts 	<ul style="list-style-type: none"> Yes (limited information) <ul style="list-style-type: none"> PDFs with street names for districts in major cities Limited or no geographical features 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> PDFs, with street names and geographical features Data-visualizations with address look-ups in WebGIS
3.	<ul style="list-style-type: none"> Reports and Documentation Explaining Final Results 	<ul style="list-style-type: none"> No <ul style="list-style-type: none"> No explanation, justification, or documentation of the final maps 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Extensive documentation, including district summaries (SWDB Website), data-visualizations, and separate full reports for all three statewide plans (CRC Website)
4.	<ul style="list-style-type: none"> Maps of Existing 2001 State Legislative and Congressional Districts 	<ul style="list-style-type: none"> Yes (limited information) <ul style="list-style-type: none"> PDFs of lines only for most districts No street names, except for New York City districts Limited or no geographical features 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> PDFs, with street names and geographical features Data-visualizations with address look-ups in WebGIS
5.	<ul style="list-style-type: none"> Shape Files for Election Districts 	<ul style="list-style-type: none"> No <ul style="list-style-type: none"> Provides links to U.S. Census website and documentation 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Shape files for three different GIS applications for 2011, 2001, 1991 state legislative and congressional districts Clear disclosure of specific geographic reference data used (e.g., NAD 27 & 83)
6.	<ul style="list-style-type: none"> TIGER Line/Boundary Files (Census Geography) 	<ul style="list-style-type: none"> No (limited) <ul style="list-style-type: none"> Raw data only Refers to U.S. Census website and documentation 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Census geography provided in multiple file formats 2010, 2000, and 1998 line vintages clearly distinguished Extensive metadata

7.	<ul style="list-style-type: none"> Interactive Visualizations and Data Mapping 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Data-visualizations in WebGIS
8.	<ul style="list-style-type: none"> Boundary Lines for Precincts/Vote Tabulation Districts 	<ul style="list-style-type: none"> Yes (limited) <ul style="list-style-type: none"> 2008 ED/2010 VTD equivalency tables only No documentation or metadata 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Shape files provided in multiple files formats Vintages clearly distinguished Extensive metadata and information
9.	<ul style="list-style-type: none"> VTD/Precinct to Block-Level Equivalency Files 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Documentation and metadata
10.	<ul style="list-style-type: none"> Historical Maps of State Legislative and Congressional Districts 	<ul style="list-style-type: none"> Yes (limited) <ul style="list-style-type: none"> 1992 <ul style="list-style-type: none"> PDFs of lines only No street names, except in NYC No geographical features No legislative information 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> 1990, 1980, 1970 <ul style="list-style-type: none"> PDFs, with street names and geographical features with links to legislative sources
11.	<ul style="list-style-type: none"> Proposed Maps 	<ul style="list-style-type: none"> Yes (limited) <ul style="list-style-type: none"> Final commission proposal in PDF format only No data supplied, no shape files, no documentation, no justification, no visualization 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Entire process of mapping publicized with full interim results and commentary (CRC Website)
12.	<ul style="list-style-type: none"> Public Proposals, Third Party Input 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> CRC Website
13.	<ul style="list-style-type: none"> Final Maps of 2012 All Local Election Districts (county, legislative, city council, town/village council) 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> No
14.	<ul style="list-style-type: none"> Current and Historical Maps of Local Election Districts (county legislative, city council, town/village council) 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> No

15.	<ul style="list-style-type: none"> Shape Files (current and historical) for Local Election District Boundaries 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> No
16.	Election & Political Data		
17.	<ul style="list-style-type: none"> Precinct Level Election Returns for Statewide Elections 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Available for 2010, 2009, 2008, 2006, 2000, and 1998 elections at state, county, minor civil division, and VTD level. Data not disaggregated at the block level. 2010 data was posted late. Data sources unclear, data processing methods unclear. 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Available for 2010, 2008, 2006, 2005 (special), 2004, 2003 (recall), 2002, 1998, 1996, 1994, and 1992 Disaggregated to the block-level Multiple file formats for ease of use with different kinds of GIS software Extensive metadata and information on methods of disaggregation
18.	<ul style="list-style-type: none"> Voter Registration Data, Separate Files 	<ul style="list-style-type: none"> No <ul style="list-style-type: none"> See Line 27 No official voter registration data No geo-coded voter registration data No block-level data Data sources unclear, data processing methods unclear 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Detailed official voter registration statements by county and local political subdivision from 1962–present Geo-coded voter registration data, disaggregated to the block level Extensive metadata and detailed explanation of statistical methods used
19.	<ul style="list-style-type: none"> Historic Election Returns Prior Decades 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Precinct level returns for 1998 elections No block-level data 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Various, including specialized reports
20.			
21.	<ul style="list-style-type: none"> Precinct-Level Election Returns for All Local Elections 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> No

22.	<ul style="list-style-type: none"> Data and Information on All Local Elections and Representation, Including Races, Candidates, Seats, and Type of Election (e.g. at-large v. district-based) 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> No
23.	Population and Ethnicity Data		
24.	<ul style="list-style-type: none"> Census Data File PL94-171 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Refers users to original, unassembled files intended for experienced GIS users only 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Repackaged census data for ease of use with all standard GIS applications
25.	<ul style="list-style-type: none"> Adjusted PL 94-171 (for prisoner repatriation) 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Extensive metadata and documentation explaining data processing and statistical methods 	<ul style="list-style-type: none"> N/A <ul style="list-style-type: none"> Not applicable to California
26.	Election & Population/Ethnicity Data Combined		
27.	<ul style="list-style-type: none"> Combined Election, Population, and Enrollment Data <p style="text-align: center;">See Also Line 3</p>	<ul style="list-style-type: none"> Yes (limited) <ul style="list-style-type: none"> Tabular data files combining demographic, ethnic, election, and voter registration data at the VTD level No block-level data. Usable with GIS software applications by experts only Data sources unclear, statistical methods unclear, geo-referencing unclear Very limited documentation No block-level data 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Election, voter registration, population, and ethnicity data all in separate files, disaggregated to the common block level All data in compatible file formats and assembled for ease of use with different GIS software Extensive documentation on data sources, statistics, data assembly, and use of data files with relevant software Data also combined in district summaries (SWDB Website), data-visualizations, and separate full reports for all three statewide plans (CRC Website)
28.	<ul style="list-style-type: none"> Prisoner Repatriation Adjustments 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Useful documentation and metadata 	<ul style="list-style-type: none"> N/A

29.	<ul style="list-style-type: none"> Election and Enrolment Data (disaggregated to the block level) 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> Yes
Functionality & Ease of Use			
31.	<ul style="list-style-type: none"> Navigation 	<ul style="list-style-type: none"> No <ul style="list-style-type: none"> No site map No search function No explanation No index 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Site map Search Function (Advanced) Extensive explanation for each data type and item.
32.	<ul style="list-style-type: none"> Accessibility of Data 	<ul style="list-style-type: none"> No <ul style="list-style-type: none"> Confusing website. Apart from PDFs, the information is inaccessible to operators with general GIS and database experience Explanations and documentation largely absent; documentation relevant to 2011 cycle filed under 2000 redistricting Census data provided in unassembled files Data cannot be pulled into standard GIS software without substantial additional processing Block level 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Data readily accessible to specialized and non-specialized GIS and database users Data visualizations for general public Every data file and type is explained and documented Census files assembled, processed, and separated into files that can easily be pulled into standard GIS software without substantial additional processing. Sampling and data disaggregation and aggregation methods documented in specialized summaries.
33.	<ul style="list-style-type: none"> Relational Search & User Generated Data Reports & Comparisons Between Jurisdictions 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> No
34.	<ul style="list-style-type: none"> User Tools 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Data-visualizations, Web-GIS Online Mapping Tool (CRC) Provides hands-on assistance in house to the public at the database (SWDB), and at various locations during redistricting (CRC)

35.	<ul style="list-style-type: none"> Open Data Portal 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> No <ul style="list-style-type: none"> Data currently gathered and posted by staff.
36.	<ul style="list-style-type: none"> Use of Open Source Platforms 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> No
37.	<ul style="list-style-type: none"> Application Programming Interface (API) 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> No
38.	Process & Transparency		
39.	<ul style="list-style-type: none"> Reports or Documentation Explaining Final Results 	<ul style="list-style-type: none"> No <ul style="list-style-type: none"> No explanation, justification, or documentation of the final maps 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Extensive documentation, including district summaries (SWDB Website), data-visualizations, and separate full reports for all three statewide plans (CRC Website) Resource identification information
40.	<ul style="list-style-type: none"> Laws Governing Statewide Redistricting 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> SWDB includes select key voting rights cases articulating VRA standards CRC includes full description of legal redistricting requirements
41.	<ul style="list-style-type: none"> Information Regarding Redistricting Litigation 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Key cases, including cases litigating California redistricting
42.	<ul style="list-style-type: none"> Laws Governing Local Redistricting in All Local Jurisdictions 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> Yes (limited) <ul style="list-style-type: none"> Includes federal and state laws governing local redistricting, but not additional local requirements/criteria
43.	<ul style="list-style-type: none"> Hearing Notices, Transcripts, Video, for Statewide Redistricting 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> But some with considerable delay and after the fact 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> (CRC Website)

44.	<ul style="list-style-type: none"> Hearing Notices, Transcripts, Video for all Local Redistricting 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> Yes (limited) <ul style="list-style-type: none"> Some limited information on local redistricting timelines posted
45.	<ul style="list-style-type: none"> Meeting Minutes Statewide Redistricting 	<ul style="list-style-type: none"> Yes 	<ul style="list-style-type: none"> Yes
46.	<ul style="list-style-type: none"> Meeting Minutes Local Redistricting 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> No
47.	<ul style="list-style-type: none"> Interactive Features for Users Regarding Local Redistricting 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> No
48.	<ul style="list-style-type: none"> News Reports on Statewide Redistricting 	<ul style="list-style-type: none"> No <ul style="list-style-type: none"> (only two articles announcing LATFOR plans) 	<ul style="list-style-type: none"> Yes <ul style="list-style-type: none"> Several hundred key news articles on substance and process of statewide redistricting (SWDB) Hundreds of news stories covering full process (CRC)
49.	<ul style="list-style-type: none"> News Reports on Local Redistricting 	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> No